IN THE MATTER OF THE *SECURITIES ACT*
R.S.N.S. 1989, C. 418, S. 135, AS AMENDED
(the **"Act")**

- and -

IN THE MATTER OF
EVANGELINE WIND FIELD INC.
(the **"Respondent")**

DECISION AND REASONS FOR DECISION

Hearing

This proceeding was heard at the offices of the Nova Scotia Securities Commission (the "**Commission**") at Halifax, Nova Scotia on the 19th day of March, 2003 for the Commission to consider whether it is in the public interest to make an order for the Respondent to pay an administrative penalty and to order the payment of costs of the investigation and conduct of the proceedings.

The hearing was heard by Commissioner R. Daren Baxter (Chair of the hearing) and Commissioner Darren S. Nantes.

Staff of the Commission ("**Staff**") was represented at the hearing by Mr. R. Scott Peacock, Deputy Director, Compliance and Enforcement, Nova Scotia Securities Commission.

The Respondent was represented at the hearing by Mr. Erik Twohig, a shareholder of the Respondent.

Staff and the Respondent submitted to the Commission a Settlement Agreement dated the 28th day of February, 2003 wherein the parties agreed that the Respondent has contravened regulations to the Act. Notwithstanding that by terms of the Settlement Agreement the Respondent further agreed to pay an administrative penalty in the amount of Two Thousand Five Hundred Dollars ($2,500) and costs in the amount of Five Hundred Dollars ($500), the Respondent made certain representations and requested that an administrative penalty and costs be ordered in a much lower amount.

Decision

The decision of the Nova Scotia Securities Commission (the "**Commission**") is to order:

(A) the Settlement Agreement is approved;

(B) pursuant to section 135(b) of the Act, that the Respondent pay an administrative penalty in the amount of Two Thousand and Five Hundred Dollars ($2,500); and

(C) pursuant to section 135(A) of the Act, that the Respondent pay costs in the investigation and conduct of the proceeding in respect of which the Order has been made pursuant to section 135 of the Act in the amount of Five Hundred Dollars ($500).

Background

By the terms of the Settlement Agreement dated February 28th, 2003, Staff and the Respondent agreed with the following facts and conclusions:

1. The Respondent submitted to the Commission on the 20th day of April 2001 in Form 1 an Offering Document ("the offering document") pursuant to the *Community Economic-Development Corporation Regulations* which provided in clause 22(b) a description of the project specifically designating the fund as a "blind pool".

2. The closing date for the offering document was set by the Respondent for the 30th day of June 2001, the shares being offered at the price of one dollar ($1.00) per share, the maximum number of shares offered being three million (3,000,000) and the minimum number of shares offered being one hundred thousand (100,000).

3. Upon the closing of the offering the Respondent had raised one hundred eleven thousand six hundred dollars ($111,600.00) in equity as the proceeds of the offering.

4. On the 12th day of April 2002 the Respondent provided financing by means of a loan guarantee to Renewable Energy Services Limited ("Renewable Energy") of Windsor in the amount of seventy five thousand dollars ($75,000.00); thereby providing collateral security to the C.I.B.C. on Renewable Energy's loan; this loan constituted 67.2 % of the proceeds raised under the offering document.

5. The offering document specified the investment as a "blind pool", therefore no information describing the specific investments to be made in Renewable Energy was provided to the investors to provide sufficient detail to permit the security holders to form a reasoned judgement concerning the investment.

6. Prior to making the investment in Renewable Energy, the Respondent did not provide to its security holders an information circular describing the specific investments to be made with the proceeds.

7. Prior to making the investment in Renewable Energy, the Respondent did not call a meeting of security holders and obtain the approval of at least fifty percent plus one (50 % + 1) of votes cast by security holders who would have attended the required meeting.

8. The Respondent contravened the provisions of the *Community Economic-Development Corporations Regulations*, s. 20(b)(i) by failing to provide to its security holders an information circular in respect to the investments in Renewable Energy which exceeded forty percent (40%) of the proceeds of the offering.

9. The Respondent contravened the provisions of the *Community Economic - Development Corporations Regulations*, s. 20(b)(ii) by failing to call a meeting and obtain the approval of at least fifty percent plus one (50% + 1) of the security holders in attendance at the required meeting.

Reasons

The Respondent argued that the quantum requested by Staff, representing approximately 3% of the total capitalization of the Respondent, is excessive for an inadvertent technical violation that was not detrimental to the security holders of the Respondent. The Respondent represented that the proceeds of the Offering were placed in bona fide investments that have yielded the expected returns to the Respondent and that all investments were made with the approval of all the directors of the Respondent.

While the term "technical violation" is not a defined legal term, it means a violation that is one of form rather than substance. See *Re Ontario Securities Commission and Electra Investments (Canada) Ltd.* (1984), 45 O.R. (2d) 246 (S.C.). The failure to provide its security holders with an information circular in respect of an investment exceeding forty percent (40%) of the proceeds of a blind pool public offering as required by s. 20(b)(i) of the *Community Economic-Development Corporation Regulations*, and the further failure to call a meeting to obtain the sanction of the security holders for the investment as required by s. 20(b)(ii) of the *Community Economic-Development Corporation Regulations*, are not technical. These violations are not form over substance, but substantive.

We further disagree that the violations of the *Community Economic-Development Corporation Regulations* were not detrimental to the security holders of the Respondent. The Community Economic Development Investment Fund program was created to provide a cost effective means of obtaining investment management services and diversified investments. The main purpose of s. 20(b)(i) and 20(b)(ii) *Community Economic-Development Corporation Regulations* is to

ensure that security holders in a Community Economic-Development Investment Fund have full disclosure and the prior opportunity to debate the merits of any single investment exceeding forty percent (40%) of the proceeds of a blind pool public offering. The higher the concentration of capital in any single investment, the greater the risk to the security holder. If security holders do not receive the disclosure they are entitled to nor afforded their rightful opportunity to debate the merits of such a significant investment, there is harm to the security holders.

Even if the directors of the Respondent approved the investment and the investment resulted in the desired return to the Respondent, the fact remains that the Respondent violated the very regulations which must be observed to protect the security holders. When making the investment decision, the public relies upon the security issuer to comply with the securities laws.

The Respondent further argued that the administration of the Community Economic Development Investment Fund Program is partially to blame for the non-compliance with the Regulations. It was suggested that the requirement and responsibilities on the part of participants has been understated. We do not accept this as a valid limiting factor in determination of the quantum of administrative penalty. As Staff pointed out to the Commission, in Form 1 (the Offering Document) submitted by the Respondent, immediately below paragraph 22(c), which reference the "blind pool" rather than specific investments, it was very clearly stated that the Respondent "must make such investments in compliance with Section 20 of the *Community Economic-Development Corporations Regulations*." It is the not the responsibility of the Commission to ensure that securities issuers are aware of all applicable laws. It is incumbent upon those who access public capital markets to familiarize themselves with all applicable securities laws.

Staff agreed that the violation of *Community Economic-Development Corporation Regulations* occurred because the Officers and Directors of the Respondent did not familiarize themselves with the regulations, and was not done with malice or the intent of personal profit on the part of any individual. Staff represented to the Commission that the Respondent was responsive and cooperative throughout the investigation leading to this hearing. While these are limited factors with respect to the determination of the quantum, they do not lesson the gravity of the violation of substantive provisions of the *Community Economic-Development Corporation Regulations*. The Community Economic Development program utilized by the Respondent in making the subject public offer is an abbreviated public offering process designed to provide the Respondent with a cost effective means of accessing a community based capital market. Therefore, there is an onus on the Respondent to ensure that its security holders have full and proper disclosure of the investment risks and to not unilaterally expose their investment to greater risks.

Under section 135(b) of the Act, the Commission has the discretion to order the Respondent to pay an administrative penalty in an amount up to One Hundred Thousand Dollars ($100,000) if it considers it to be in the public interest. The Commission accepts that in this matter there is no need to impose a specific deterrent as we are satisfied that the Respondent has implemented checks and procedures to ensure that any prospective investment considerations will be in

accordance with the securities laws of Nova Scotia. However, the Commission has determined that it is in the public interest to impose an administrative penalty in an amount that will serve as a general deterrent to violations of the *Community Economic-Development Corporation Regulations* and other securities laws of Nova Scotia. We agree with Staff that the administrative penalty sought herein is on the lower end of the range of quantum for an administrative penalty of a substantive nature affecting the risk to public security holders.

Under section 135(A) of the Act the Commission has the discretion to order a person, against whom an order has been made pursuant to section 135 of the Act, to pay costs in connection with the investigation and conduct of the proceeding in respect of which the order was made. Such costs are not to exceed those prescribed in the regulations to the Act. Schedule 2 to the regulations to the Act (Prescribed fees and tariff of costs), prescribe the sum of Fifty Dollars ($50) for each hour during which the Director, or any Deputy Director or any lawyer, investigator or accountant employed by the Commission is engaged, including time spent in preparing for and attending a hearing. The Commission is satisfied that the Deputy Director, Compliance and Enforcement expended well in excess of Ten (10) hours in the investigation of this matter and the preparation for and attendance at the hearing.

DATED at Halifax, in the Province of Nova Scotia, this 8th day of April, 2003.

NOVA SCOTIA SECURITIES COMMISSION

"R. Daren Baxter"
R. Daren Baxter (Chair of hearing)

"Darren S. Nantes"
Darren S. Nantes

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