

Reading Municipal Light Board of Commissioners

Regular Session

230 Ash Street

Reading, MA 01867

April 22, 2003

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Start Time of Regular Session: 7:37 p.m.

End Time of Regular Session: 9:25 p.m.

Attendees:

Commissioners: Hughes, Pacino, Soli, Herlihy and Ensminger

RMLD Staff: Mr. Cameron, General Manager
Mr. Blomley

CAB: Mr. Stevenin

Guest: Ms. Diedre Lawrence, Rubin and Rudman
Mr. Brown

This meeting of the Reading Municipal Light Department (RMLD) Board of Commissioners April 22, 2003 is being broadcast live at the RMLD's office at 230 Ash Street, Reading, MA. Live broadcasts are available only in Reading due to technology constraints.

This meeting is being video taped for distribution to the community television stations in North Reading, Wilmington and Lynnfield.

Chairman Pacino called the meeting to order at 7:37 p.m.

Action Item(s)

Mr. Pacino moved Agenda 4A to the beginning of the agenda.

Mr. Cameron stated at the meeting last Thursday night the Board took up the issue whether to accept the recommendations of the Citizen's Advisory Board. The recommendations the CAB made at its meeting held on Tuesday, April 1, 2003 approved the following motion relative to Charter Amendments: Move to recommend to the RMLD Board of Commissioners that the changes proposed under the Town of Reading's Charter Amendments be pursued by Special Legislation instead. The CAB passed this motion: 4:1:0. They also made a recommendation that Move that the CAB hereby recommends to the RMLD Board of Commissioners not adopting that portion of the proposed Charter Amendments regarding adoption of Chapter 30B for the RMLD purchasing procedures. The CAB passed this motion: 4:1:0.

Mr. Cameron noted the Board tabled these issues until the next meeting so they could get more information especially the second issue that has to do with 30B purchasing decisions under Massachusetts General Laws. One thing that is very important to Mr. Cameron and is important to the customers in the service territory for the last eighteen months is discretionary spending, outside services, legal services and consultants. Mr. Cameron has tried to the best of his ability to keep that spending in check. Concerning 30B he did not have Chapter 164 counsel consulted because he did not think it was necessary but after the Board asked questions on this last week he thought counsel should look into this because there were certain items which were not clear. Mr. Cameron stated last Friday he called Diedre Lawrence from Rubin and Rudman and explained what issues needed to be looked at. Mr. Cameron noted Ms. Lawrence would go over the memo, which was distributed to you this evening as it was finished this afternoon. Mr. Cameron further pointed out there are issues outside of his argument which have to do with "control". The big issue is who the Chief Procurement Officer and who has actual charge of procurement if the RMLD went under 30B. Mr. Cameron added he may have made the mistake by not having counsel look at this but it was done at a later date with the appropriate information for the Board to make a decision. The decision is not whether the RMLD goes under 30B. The decision is whether or not to support the recommendation of the CAB.

Ms. Lawrence introduced herself from the law firm of Rubin and Rudman in Boston, Chapter 164 counsel. Ms. Lawrence stated that late last week the General Manager, Mr. Cameron asked her to look at three specific questions regarding Article 7 and Chapter 30B as it applies to the Light Department.

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Ms. Lawrence stated the first question she looked at, whether if that Article is adopted, could Chapter 30B apply to the Light Department. The short answer is that question is as currently drafted it cannot. It is because it simply states that the Board shall approve all contracts made in accordance with Chapter 30B. It does purport to make Chapter 30B apply to the Light Department. Ms. Lawrence does not think it could specifically apply because Chapter 30B has a specific exemption for municipal light plants and provides that if you wanted it to apply to you it can be accomplished in one way only which is by a vote of the Municipal Light Board to accept the provisions of that statute.

Mr. Hughes asked of Ms. Lawrence what percentage of Board vote does this require?

Ms. Lawrence replied a majority vote. Ms. Lawrence continued that the Board would have to take a vote in order for it to apply. It does not appear that a Town Charter Amendment could make an end run around that statutory provision. Ms. Lawrence added Rubin and Rudman rendered an opinion on February 28, 2003 in connection with Article 4 for the March Special Town Meeting. Article 7 is almost identical to the former Article 4. Ms. Lawrence added all of the problems, which existed with Article 4, still exist in the new version. Ms. Lawrence wanted to make that clear. Ms. Lawrence noted nothing substantially has been changed in the language therefore all the other issues regarding the way it interferes with Chapter 164 is still there and it has not been removed. Ms. Lawrence explained the next question they looked at was: hypothetically, if a majority vote of the Board were to accept 30B, would the Board retain the ability to appoint a Chief Procurement Officer to act on behalf of the Light Department? Currently, the Town of Reading's Home Rule Charter designates the Town Manager as the Chief Procurement Officer. There was a question as to whether or not if the Department had to use the Town's Procurement Officer for the procurement of goods, supplies and services. The short answer to that is no for a couple of reasons. The statute as it currently exists is a comprehensive statewide scheme designed to implement a uniform system of procurement for governmental entities. It specifically recognizes that municipal light plants are separate from cities and towns. Ms. Lawrence noted there is a clear recognition that you are separate and you have your own governing body. There is a specific provision in the statute that says a governing body of a governmental entity can appoint by however process it chooses a Chief Procurement Officer. Ms. Lawrence added this is consistent with appointing for instance the General Manager as the Chief Procurement Officer. It is consistent with the provisions in Chapter 164 Section 56, which gives the General Manager the authority over all purchases of supplies and the hiring of consultants and agents. Another thing to point out is Article 7, as it is currently drafted, does not purport to make the Chief Procurement of the Town, the Chief Procurement Officer for the RMLD. The final question she looked at is whether or not there could be some kind of exclusion of power supply contracts of the RMLD from the coverage of Chapter 30B. If the Board voted to accept the provision of Chapter 30B, it is Counsel's conclusion that the RMLD's power supply would be subject to the sealed, competitive bidding procedures of Chapter 30B. Basically, the RMLD could no longer acquire power on the market due to the structuring of the competitive power market today. Decisions have to be made on a daily even hourly basis as to the purchase and sales of power. You would not get anyone to respond to a request if by the time you have to advertise you would have already engaged in hundreds of transactions. There are two specific exemptions in Chapter 30B for different kinds of power contracts but those aren't the kinds of contracts that the RMLD enters into. The exemptions are for energy aggregation contracts, and for contracts that are put out by cities and towns purchasing electricity for their own use not to resell to their inhabitants or businesses. The RMLD would be utterly crippled in its power supply by Chapter 30B as it currently exists.

As an example of this, Mr. Cameron described what the RMLD went through when the Department acquired its last long term contract which is through 2007. It happened in the summer/fall 2001. Mr. Cameron noted the Department targeted ten to twelve potential suppliers of power supply. This was for a large amount of power supply for the long term. Mr. Cameron noted they pared it down based on performance to six suppliers. The Department then negotiated contracts with each one of those suppliers. It took about two months to negotiate these contracts. It had to do with time periods, delivery points, risk management and performance. The Department had all five contracts in place but did not have a price. The Department instructed these companies that, on a day certain, they were to submit a bid -- the Department gave them a monthly Excel spreadsheet for off peak, on peak and installed capability (ICAP) and they were to fill in and submit their own prices. Mr. Cameron added they were directed to send their prices electronically at ten o'clock and the Department would make its decision before twelve o'clock. All parties were in agreement however, one minute passed twelve and that price is no good. It was a two-hour window for the prices the Department acquired. The Department took the prices and put them through a net present value calculation and came out with the winner.

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Mr. Cameron added that fax signatures were done to confirm the prices and wet signatures were done via Fedex. Mr. Cameron pointed out that is the process that has to be used. Mr. Cameron stated there is no way you can do competitive sealed bids for power supply. If you told a company to hold the price for two months you might as well double the price. It is a two-hour market at best on the power supply side.

Mr. Ensminger asked Counsel if the language in Article 7 which states that the Municipal Light Board shall approve warrants for payments of all bills, payroll of the Municipal Light Department; and approve all contracts made in accordance with M.G.L. c. 30B, except contracts for purchasing of power, gives the kind of protection the General Manager was talking about by exempting those power contracts in general. Mr. Ensminger further inquired whether Counsel's opinion means that 30B's narrowly drawn meaning of "contracts for purchasing power," could not be superseded by the language in the Town Meeting article exempting power contracts?

Ms. Lawrence replied correct. This would conflict with what is already at Chapter 30B and that the argument is you do not have the power to pick and choose what would be covered and what would not be covered by 30B. The whole point of the statute is to have something that is the same for everyone. Ms. Lawrence added this would directly conflict with the provisions that exists exempting certain kinds of contracts. They are just attempting to create a new exemption. Ms. Lawrence is pretty confident that it has to apply and has to apply in its entirety. That exempting certain kinds of contracts cannot be done by a Home Rule Charter Amendment. Maybe there is a way to do that, as she was not asked to look into this to see whether or not that could be accomplished through special legislation. Ms. Lawrence doubts that the A.G. wants cities and towns cherry picking the kinds of things they do not want covered. Ms. Lawrence suggested that to bring agreements like our computer contracts under 30B would be unworkable.

Mr. Ensminger had a question for the General Manager. Under the procurement table he showed the Department at the last meeting where sealed bids are reviewed, are any of those ever voted on by the Board of Commissioners as opposed to the Department?

Mr. Cameron replied every purchase over \$25,000 currently and over \$10,000 previous prior to February 22, 2001 is noted by to the Board.

Mr. Pacino added when there is an action item presented to this Board and it contains the detail of who bid, what the bid was and what the budget amount is for this item.

Mr. Ensminger questioned this is subject to ratification?

Mr. Pacino replied it is subject to majority vote of the Board.

Mr. Pacino asked for clarification from Ms. Lawrence. Basically, it would be this Commission that would need to vote to go under 30B not whatever happens in Town Meeting or whatever mechanism. It would be this Commission and we would have to put everything under 30B.

Ms. Lawrence replied yes.

Mr. Pacino reiterated there would be no carving out.

Ms. Lawrence answered no, it does not work that way.

Mr. Pacino stated all-inclusive. Mr. Pacino noted this casts a different light on the whole issue.

Mr. Soli took a look at the motion and wondered if it is what the Commission wants to do. It would be bettered phrased what the motion said the Board wants to forward the recommendations of the Citizen's Advisory Board to the Town Meeting. Mr. Soli thinks it would be better served if the Commission added it to the motion and forwarded them to the Town Meeting.

Mr. Pacino replied what he was thinking in terms of a motion, when it gets made is to make a positive motion.

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Mr. Pacino recommends the recommendations of the Ad Hoc Committee with the possible exception of 30B so there is a positive motion on the table. This is the motion to make to go forward. Mr. Pacino added to address the first item the Charter changes he personally thinks it should be legislation he disagrees with the Town Special Counsel on this. If the Town wants to make this through a Charter Amendment let them go. Mr. Pacino would like to see a positive motion to have Town Meeting adopt the changes as recommended by the Ad Hoc Committee with exception of 30B. Mr. Hughes had a question of legal counsel. He would like Ms. Lawrence's recommendation on the motion that would be forthcoming.

Ms. Lawrence replied there are two ways of looking at it and two approaches. Ms. Lawrence replied you could do nothing or take some kind of neutral stance on it and it might have the same result as opposing it or supporting it. That is because regardless of what this Board says its position on this Article is there are only so many things that Home Rule Amendment can accomplish. There is a possibility that the Attorney General's office may not accept these amendments as written for all the reasons, which were stated in Rubin and Rudman's February 28 opinion and the most recent more narrow opinion on Chapter 30B. Chapter 30B would be a disaster for the RMLD. Ms. Lawrence's advice is to take an active role in making sure that isn't something attempted to be forced upon the Light Department. The bottom line is even if it was voted on in the past you couldn't make Chapter 30B apply to the Department. It is going to lead to more problems and more legal bills down the road. You cannot buy power with 30B. It is something that is going to come to a head. Ms. Lawrence understands what has been said about the other provisions and a lot of that is politics. As a lawyer she is going to be conservative and say anything that tends to infringe on your autonomy fiscally, politically and operationally, under Chapter 164 is to be avoided. Ms. Lawrence understands there are a lot of other considerations. She suggested taking the advice under the context the Commission is working in as you have a better sense of this.

Mr. Hughes inquired what is the opinion of the Department on this?

Mr. Cameron replied one of the recommendations from the CAB is that Special Legislation should pursue the Charter Amendments. Mr. Cameron added if you look at the opinion of counsel that this should be done by Special Legislation and that is a positive thing to say to Town Meeting. Mr. Cameron noted if the Amendment is voted by Town Meeting and this goes to the Attorney General's office there is a possibility this will not go through for reasons stated in previous meetings, given the fact that some of the points made in Article 7 now are diametrically opposed to MGL Ch. 164. It is positive to say you do support the CAB's recommendations because the CAB supports going to Special Legislation. Mr. Cameron recommended that the Board simply forward them to Town Meeting as Mr. Soli suggested; you can accept the recommendations as they are and there is no need go farther than that. Mr. Cameron suggested to let the process go forward if the Town wants to pursue the Charter Amendment Town Meeting.

Mr. Ensminger stated this Board should not get into the specifics of the implementation. They should only be discussing the subject matter leaving the implementation to those who are making the proposals. It is the best course of action. Mr. Ensminger noted he tried to pin the CAB members down at last week's meeting as to whether their motion was to be implied as meaning endorsement of the proposal by Special Legislation and he did not get that answer. What it says specifically is they recommend that it be pursued. They did not state that they were in support of such Special Legislation. It is incorrect to state that. The second point Mr. Ensminger made is that when the Ad Hoc Committee was reviewing 30B there was a strong belief that contracts for purchasing of power should be exempted and could be exempted. What we are hearing from counsel is that is not possible. If that information had been made available to the Ad Hoc Committee, he is unsure as to whether or not that would of changed their recommendation. It has given him something to think about as Commissioner.

Mr. Hughes suggested making a motion.

Mr. Ensminger made a motion seconded by Mr. Herlihy that the Board of Commissioners vote to recommend the subject matter of Article 7 before Annual Town Meeting, with the condition that the phrase "approval of contracts made in accordance with M.G.L. Chapter 30B except contracts for purchasing of power " be struck from the motion.

Motion carried 3:2:0. Messrs. Hughes and Soli voted against this motion.

Mr. Pacino polled the Board to see if they wanted to address the Special Legislation.

There was no response.

Mr. Herlihy asked about protocol as the Citizen's Advisory Board is going through the bother of making formal recommendations to the Board we have not taken any action on these.

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Mr. Pacino added it would be appropriate at this point, as Mr. Soli has recommended forwarding these on to Town Meeting. It would be an appropriate thing to do and this can be accomplished via formal motion or instruction for the Chair to forward this.

Mr. Herlihy stated that he would make the motion on the basis that this would allow the CAB's voice to be heard by Town Meeting.

Mr. Herlihy made a motion seconded by Mr. Hughes to forward the CAB recommendations to Town Meeting.

Motion carried 5:0:0.

Mr. Ensminger added that although they have the right to speak, they might not have the right to be heard at Town Meeting.

Mr. Pacino added the CAB information should be forwarded to Town Meeting.

General Manager's Report

Mr. Cameron wanted to mention the next meeting dates of May 7. The Financials the Audited Financial Statements and the DTE Report will be available if they are approved by the Subcommittee on May 5. Mr. Cameron added Chairman Pacino and Commissioner Soli are on this Sub-committee.

Ms. Lawrence exited the meeting and Mr. Cameron thanked her for her assistance.

Mr. Cameron stated the May 5 Subcommittee meeting is scheduled for 6:30 p.m.

Mr. Pacino added this might have to be changed if Town Meeting goes into this night. The Board cannot meet the same night and time as Town Meeting.

The meeting will be changed to 6:00 p.m. in order to accommodate the possibility of Town Meeting lasting until this date.

Board Discussion

Mr. Hughes stated he would like under Board Discussion that the Sub-committee readdress the General Manager's working agreement.

Mr. Pacino replied he and Mr. Soli would arrange meetings with the Manager.

Mr. Ensminger questioned is this fait accompli now, i.e., agreed to or still in work?

Mr. Pacino replied they have not come forward with a formal agreement with the Manager at this point. Other pressing issues came up.

Mr. Ensminger asked if this would come back to the Board for a formal vote?

Mr. Pacino replied it would come before the Board for a formal vote.

Mr. Hughes noted the second item that he is a strict advocate of complying with policies not so much a numbered policy but an agreed upon policy. Mr. Hughes added any items to be discussed would be brought before the Chairman of the Board and the General Manager prior to the Board meeting so they can discuss it and so they are not blindsided. Mr. Hughes requested an item on agenda concerning the conduct at the last Board meeting after the reorganization. Mr. Hughes received four phone calls from citizens. Mr. Hughes asserted that there was a state of disarray in the manner the Board meeting was allowed to run amuck and in front of the ratepayers. Mr. Hughes will address this at the next meeting.

Mr. Ensminger replied he did not follow what Mr. Hughes was saying.

Mr. Hughes answered he is simply updating the Board as he will bring this up at the next meeting conduct while at Board meeting.

Board Discussion

Mr. Ensminger inquired conduct on the behalf of Commissioners or participants?

Mr. Hughes replied it is just conduct overall and it encompasses a lot of people.

Mr. Ensminger added when going through the packet with the Pension Trust Agreement and looking at the duties of what the Trustees were he read in Policy 22 that the Treasurer and RMLD General Manager are generally responsible for the investments. However, when you passed Policy 19 you turned that responsibility over to the Commissioners. Those two policies are at odds with each other. Mr. Ensminger is concerned about personal liability on the part of all Commissioners who may have signed on as Trustees. Mr. Ensminger asked that the Policy Subcommittee re-examine and amend Policy 19 to correct the language in Policy 22 unless there was some overriding reason that directed that to change.

Mr. Pacino replied no there was no reason for this and they will have the Policy Sub-Committee address this.

Mr. Ensminger stated a thorough read could be done but he would like the language to go back to Policy 22.

Mr. Pacino pointed out the use of the projector will have a time limit of ten minutes. If possible, copies of the presentation should be given out in advance so there are no surprises or that people are blindsided. Mr. Pacino wants this to be the policy and he will restrict the presentation to ten-minute adherence and one presentation per night.

Next Meeting Dates

Monday, April 28, Annual Town Meeting

Wednesday, May 7

Executive Session

Mr. Herlihy made a motion seconded by Mr. Hughes that the Board go into Executive Session to discuss strategy with respect to litigation, and to return to Regular Session for the sole purpose of adjournment.

Motion carried by a show of hands 5:0:0.

Mr. Pacino called for a poll of the vote:

Mr. Soli Aye; Mr. Herlihy Aye; Mr. Pacino Aye and Mr. Hughes Aye; and Mr. Ensminger Aye.

Motion to Adjourn

At 9:25 p.m. Mr. Ensminger made a motion seconded by Mr. Soli to adjourn the Regular Session.

Motion carried by show of hands. Motion carried 5:0:0.

A true copy of the RMLD Board of Commissioners minutes as approved by a majority of the Commission.

Daniel A. Ensminger, Secretary
RMLD Board of Commissioners