

MUNICIPAL YEAR 2018/2019 REPORT NO. 143

MEETING TITLE AND DATE:

Shareholder Board
29 January 2019

REPORT OF:

Commercial Director

Agenda – Part: 1

Item: 7

Subject: Energetik – dissolving HoldCo and implementing governance changes
Wards: All

Cabinet Member consulted: N/A

Contact officer and telephone number:

Nicky Fiedler Ex 2016

E mail : nicky.fiedler@enfield.gov.uk

1. EXECUTIVE SUMMARY

This Report sets out how the Lee Valley Heat Network Operating Company Limited (trading as 'Energetik') will implement the governance changes needed to reflect the requirements of the Council as shareholder.

As the Shareholder Board is now in place to exercise strategic oversight over the Council's companies, the role of Energetik's holding company, Lee Valley Heat Network Limited ('HoldCo') is obsolete.

The main changes to be implemented are as follows:

- HoldCo to be dissolved;
- Changes to the Board of Energetik to reflect the requirement for one Councillor director on each company board, and to reflect the removal of HoldCo from the company structure;
- Changes to Energetik's Articles of Association to reflect the requirement for one Councillor director on each company board, and to reflect the removal of HoldCo from the company structure.

2. RECOMMENDATIONS

That the Shareholder Board:

2.1 Approve the updated Articles for Energetik and all steps needed to implement;

2.2 Approve the new board structure for Energetik and all steps needed to implement;

2.3 Approve the dissolution of HoldCo and all steps needed to implement (including seeking relevant consent from Amber LEEF 2 LLP);

2.4 Delegate authority to the Director Commercial, Finance, Resources and Customer Services, acting in consultation with the Director of Law and Governance, to take all action on behalf of the Council as shareholder to implement the above, including signing company filings.

2.5 Note the intention to adopt a list of shareholder reserved matters for each company; and

2.6 until such list is in place for Energetik, agree that the Delegations Matrix currently in force continues to operate after HoldCo has been dissolved, with Energetik able to take any decision currently within the remit of HoldCo and with references to 'Business Plan' changed to 'Operating Plan' where appropriate.

3. BACKGROUND

3.1 Governance Review

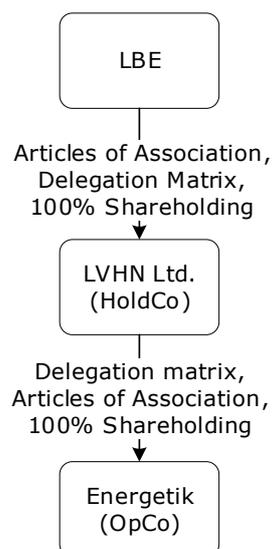
It is the intention of the Council as shareholder to align all the Council's trading companies so that the governance framework is consistent. This includes the appointment of one councillor director to each company board, an update to the Articles of Association and the creation of a list of shareholder reserved matters limiting certain actions the company directors may take on corporate matters of strategic significance. Due to Energetik's two-tier corporate governance structure, the amendments Energetik must make are more procedurally complex than the other Council owned trading companies and will entail dissolving HoldCo.

Energetik requires the amendments to take place as soon as possible to ensure that the new structure is in place ahead of the application for its second tranche of investment, due early in 2019.

The terms of reference for the Shareholder Board include matters such as *'the disposal / dissolution of companies, the varying of Articles of Association, change of ownership, structure and share rights'*, all of which are the subject of the recommendations within this Report.

3.2 Dissolving HoldCo and transfer of share ownership

Energetik currently has a two-tier structure in place, with senior council officers and members making up the board of HoldCo, and senior industry experts making up the board of Energetik. LBE is the sole shareholder of HoldCo, which in turn is the sole shareholder of Energetik:



The Member-led HoldCo board was established in order to represent the interests of the Council, providing strategic oversight of Energetik/OpCo's activities. Following the establishment of this Shareholder Board, there is no longer a need for HoldCo, which can now be dissolved.

There will need to be a transfer of the share in Energetik from HoldCo to the Council before HoldCo can be dissolved. This will result in the Council holding 100% of the shares in Energetik directly, as in the case of the other wholly owned trading companies.

A number of administrative steps will need to be taken in order to dissolve HoldCo, including the following:

- VAT: Splitting up the existing VAT group and applying for a new VAT number for Energetik.
- Share transfer: Resolutions to be passed and filings made at Companies House: Tax advice to be obtained prior to the transfer to ensure that it is undertaken in the most tax-efficient way.
- Asset transfer – any assets and cash balances left within HoldCo at the time of dissolving the company must be transferred to Energetik.

Before being dissolved, HoldCo must take all actions required as shareholder to enable the governance changes within Energetik to be implemented (such as passing resolutions to amend the company's Articles).

The final action will be for a majority of HoldCo directors to sign the appropriate paperwork to apply to have the company struck from the register at Companies House.

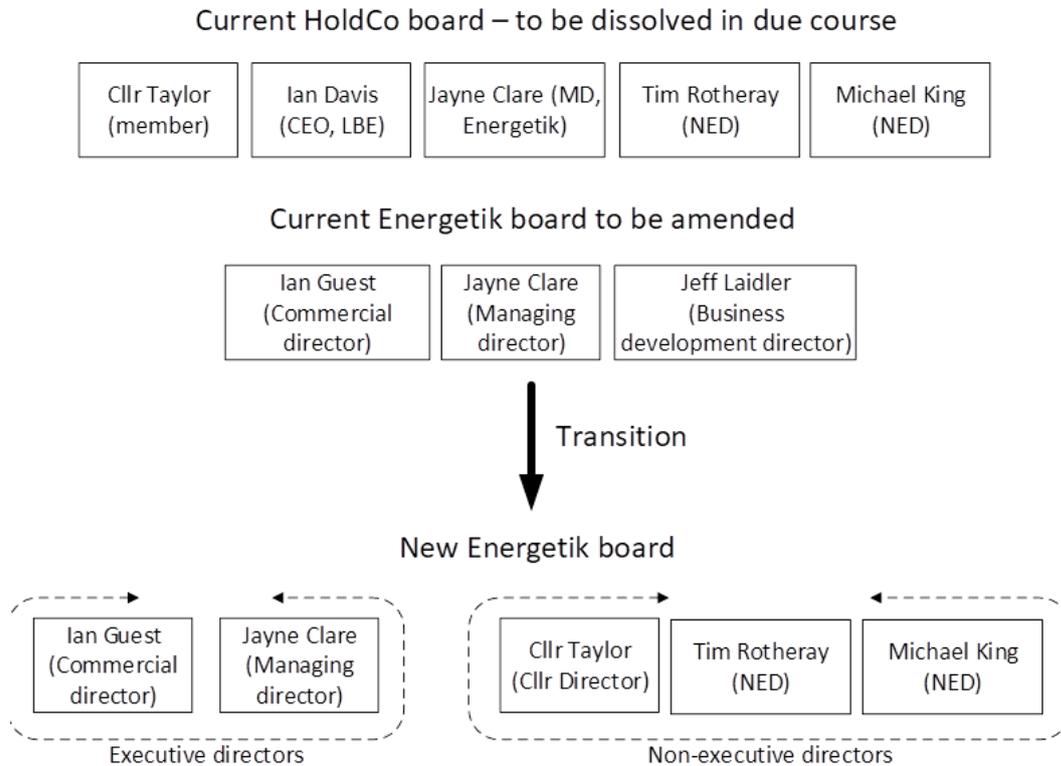
3.3 Board of Directors

Energetik's management board is currently made up of 3 directors – Managing Director, Technical/commercial Director and Business Development Director. The HoldCo board comprises senior councillors and officers.

Cabinet (14 February 2018) took the decision to appoint one Councillor to each company board, and Full Council subsequently approved the nomination of Cllr Doug Taylor to the board of Energetik.

In addition to appointing Cllr Taylor to the Energetik board, Energetik intends to transfer the existing two non-executive Directors of HoldCo to the board of Energetik as independent directors on the same terms as their current appointment with HoldCo. These appointments will ensure independent, industry knowledge is in place to challenge the executive directors.

The chart below shows the current board structure, and the post-transition structure once updated:



3.4 Delegations Matrix and Shareholder Reserved Matters

3.4.1 Current arrangements

There is currently a 'Delegations Matrix' ('DM') agreed between HoldCo, Energetik/OpCo and the Council as shareholder which was put in place in 2015 to ensure the right balance between operational efficiency and suitable governance controls. The DM was designed to maximise operational efficiency, by ensuring that operational decisions can be made swiftly by either HoldCo or Energetik, whilst key decisions that may involve financial or reputational risk, or which may touch on Council policies, are referred back to the Council.

3.4.2 Future arrangements

As HoldCo is to be dissolved, the current DM is no longer fit for purpose. Instead, a list of shareholder reserved matters ('Reserved Matters List') will be produced, building upon those approved by Cabinet on 17 June 2015 ('Mobilisation & Operation of Lee Valley Heat Network'). This is intended to be broadly aligned with shareholder reserved matters across the Council's trading companies (in the interests of a consistent governance framework) and will replace the DM currently in force for Energetik.

3.4.3 Proposed interim arrangement

Until such time as the Reserved Matters List has been implemented, the current DM will continue to apply. To address the removal of HoldCo from the company structure, it is proposed that all decisions currently within the remit of either HoldCo or Energetik can be taken by Energetik. It is also proposed that references to the Business Plan are (in the relevant context) amended to refer to the Operating Plan.

This means that there will be certain decisions which can be taken by Energetik which previously could only be taken by HoldCo, with stronger Council representation on the Board. However, the Council retains control over decision-making as follows:

- Those decisions which need to be referred back to the Council as shareholder under the DM will remain unchanged.
- The underlying principle remains that material decisions falling outside the company's Business Plan/Operating Plan are to be referred to the Council for approval.
- The Council as shareholder has an overriding right under the Articles (current version and proposed version) to direct the Board to take or refrain from taking specified action.

The DM with the amendments proposed within this Report is attached at Appendix 1.

3.5 Articles of Association

Energetik's current Articles (adopted in 2015) must be updated to ensure that they are legally compliant and fit for purpose when HoldCo is dissolved, to ensure the company can operate effectively, whilst providing the appropriate protections for the Council as Shareholder.

The Articles that have been produced (attached at Appendix 2) are a combination of the existing Energetik Articles, with provisions lifted from the HoldCo Articles as needed to ensure they remain legally compliant and robust. Further amendments have been made to reflect the new operating structure that will be put in place and to ensure that the company can continue to operate effectively. Key amendments include:

- Clause 8: Standing Committees: Threshold now introduced determining when the existing committees should be established (when annual turnover exceeds £10 million or when the company employs/engages 25 or more staff). It is considered that whilst the company is small with limited turnover and works closely with the Council, these committees are not yet required and are a resource burden to deliver.
- Clause 13: Quorum for Board meetings. Previously 3 directors. Now either 3 directors including the Councillor director, or just the Managing Director and the Councillor director (2 directors). This reflects the

requirement in the HoldCo Articles that a Councillor director needs to be present for the Board to be quorate.

- Clause 20: Number of Directors. Previously, 3-6 directors. Now, one Councillor director, up to two non-executive (independent) directors, and up to two executive directors. This reflects the Council's requirement for a Councillor director on all company boards, whilst retaining the non-executive, independent directors of HoldCo to provide industry knowledge.
- Clause 26: New clause giving the Council the right to appoint observers to the Board should it wish to do so.

4. ALTERNATIVE OPTIONS CONSIDERED

Do Nothing. Energetik continues to operate with HoldCo in the company structure and outdated governance documents in place. This option will not remove the potential conflict of interest posed by officers/members remaining on the board of HoldCo and will not improve governance and strategic alignment with the Council's objectives.

5. REASONS FOR RECOMMENDATIONS

These governance changes are required to align the company with the Council's strategic objectives.

6. COMMENTS FROM OTHER DEPARTMENTS

6.1 Financial Implications

There are no financial implications arising from this report but please note as set out in the legal implications below that the appropriate steps need to be followed in dealing with the LEEF loan.

6.2 Legal Implications

6.2.1 The recommendations within this report are within the Council's powers and duties. The Council has a general competence powers in s1 Localism Act 2011 which empower it to undertake the actions recommended in this report.

6.2.2 The Council must be mindful of its obligations as shareholder under company law, and seek advice from Legal Services when taking action/steps as shareholder.

6.2.3 The winding-up process must be carried out in accordance with the Companies Act 2006, and any tax implications for both the Council and Energetik as a result of dissolving HoldCo should be considered, with specialist advice being obtained.

6.2.4 Under the terms of the LEEF loan between the Council and Amber Green LEEF 2 LLP (as amended and restated on 31 March 2017), the Council will need to seek consent and waiver from LEEF before taking action to dissolve HoldCo (to avoid triggering an event of default under the loan).

6.3 Property Implications

None

7. KEY RISKS

If Energetik continues to operate with HoldCo in the company structure and outdated governance documents in place there is a risk of improper governance and of a conflict of interest. This report proposes new arrangements to mitigate the risks.

8. IMPACT ON COUNCIL PRIORITIES – CREATING A LIFETIME OF OPPORTUNITIES IN ENFIELD

8.1 Good homes in well-connected neighbourhoods

The change in governance will help streamline the decision making and ensure the company delivers on the Councils objectives for the company which include providing low carbon heating for homes in Enfield.

8.2 Sustain strong and healthy communities

The change in governance will provide the opportunity for the council to ensure the company is efficient and effective and can contribute to delivering strong and healthy communities.

8.3 Build our local economy to create a thriving place

These proposals will mean the company is more effective allowing them to provide clean sustainable fairly priced energy thus helping build sustainable communities with a strong local economy.

9. EQUALITIES IMPACT IMPLICATIONS

No equalities impact assessment has been conducted as this is just a change of governance arrangement.

10. PERFORMANCE AND DATA IMPLICATIONS

None as this is a new governance arrangement.

11. PUBLIC HEALTH IMPLICATIONS

There are no public Health Implications arising from this report as it proposed a change of governance.

Background Papers

None.

Appendix 1 – Existing Delegations Matrix (adopted in 2015) with proposed amendments.

Appendix 2 – Updated Articles of Association

Appendix 3 – Current Delegations Matrix approved in 2015