Shepherd Rubenstein

By EMAIL and Pivotal

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Our File: 20250172

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Ritchie Murray, Acting Registrar

Dear Mr. Murray:

Re: EB-2025-0172 – ELK/ENWIN MAADs – Confidentiality Claims

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order #1, this letter constitutes SEC's submissions on the confidentiality claims of the Applicant. We have endeavoured to ensure that these submissions do not themselves contain any confidential information.

The references below are to sections of the Agreement and its Schedules and Exhibits.

Blacked Out Sections

The following parts of the Agreement have not been disclosed to SEC:

Sections 4.26 (f), (h), (i), (j), and (n)

Section 9.4

Schedule 4.10 (vi) Increases in Compensation and (viii) Termination/Hiring of Senior Staff

Schedule 4.12 (viii) Material Contracts with Staff

Schedule 4.26(a) Employee Listing

Schedule 4.27(a) Attachment Benefit Plans

Schedule 6.1(b) (x) Termination/Hiring of Senior Staff

With respect to Sections 4.26 and 9.4, we have insufficient information to make submissions.

With respect to the remaining sections that are blacked out, to the extent that they relate solely to the arrangements between the company and specific personnel, we do not object to them being confidential, and we are not seeking disclosure in confidence.

Confidentiality Claims Re Unregulated Business Activities

There appear to be three claims of confidentiality that are unrelated to the regulated business:

Section 4.36

Schedule 4.6

Schedule 4.36(b) and Attachment

SEC does not object to those provisions remaining confidential.

Confidentiality Claims re Banking and Insurance Arrangements

There appear to be three claims of confidentiality that include details of banking arrangements:

Schedule 4.25 Policy Numbers

Schedule 4.29

Escrow Agent Wire Instructions

Approved Banks

SEC does not object to those provisions remaining confidential.

Matters Disclosable in Rate Cases

There are quite a number of provisions that, if not already publicly known, would normally be disclosed publicly in a rate case, and therefore would not appear to be appropriate for confidentiality in this proceeding either:

Section 8.1 (m) and (n) Collective Agreements

Schedule 1.1 (a) Security granted to the utility's banks

Schedule 4.11(b) Indebtedness

Schedule 4.12 Material Contracts (other than 4.12(viii))

Schedule 4.13 First two listed items

Schedule 4.23(e) Intellectual Property

Schedule 4.26(b) Independent Contractors - First two items

Schedule 4.35 Prudential Support

We have not verified that this was all disclosed in the current ELK rate case, but if it wasn't it should have been.

Confidentiality Claims re Indemnity Arrangements

Section 10 of the Agreement contains a standard set of arrangements in which the parties and others indemnify each other with respect to both representations and warranties and other matters. For most of this the Applicant has claimed confidentiality, despite the fact that virtually all of these provisions are standard boilerplate in an Agreement of this type. Any experienced counsel will know the substance of these provisions in some detail without even seeing them, so there does not appear to be a reason for them to be confidential.

SEC is not concerned whether these particular provisions are disclosed publicly or not, but asks that the Commissioners refrain from tagging them as confidential, since that could set a precedent for many other standard provisions to be hidden from public view as well in the future.

Pre-Closing Limitations

Section 6.1(b) and the related Schedule 6.1(B) comprise a standard set of limitations on how the company is run in the period before closing. All buyers of companies include these provisions, to prevent major changes in the asset they are buying without their consent. None of this should be confidential.

SEC is specifically concerned with subsections 6.1(b)(xvi) and (xix) of the Agreement, which appear to limit the ability of the target company to interact in the normal course with the OEB. These are not provisions that we would normally expect to see in an acquisition agreement where a target company has an active rate case.

SEC notes that Section 4.10 and related Schedule 4.10 subs (ix) to (xxxii) are of similar intent to Section 6.1, but relate to the period before the signing of the Agreement. For that reason, except for (vi) and (viii), dealt with elsewhere in these submissions, these items should not be confidential.

Confidentiality Claims re Purchase Price

The Applicant seeks to prevent members of the public from seeing the purchase price being paid, and how it is calculated. The following provisions relate to that claim:

Definitions of Deposit and Target Working Capital

Section 2.2

Section 2.3

Section 2.6

Schedule C

Exhibit C Sample Closing Statement

This claim is particularly surprising in light of the statement by the Applicant at page 7 of their updated submissions that "…*only the impact of the total purchase price on the financial viability of the acquirer is to be considered by the Board*."

At a more fundamental level, though, the claim is that the ratepayers of the regulated utility should not be allowed to find out the price at which the shareholder sold the utility to another

regulated utility. SEC does not believe this is appropriate, and believes this information should be public.

Information That is Immaterial

Confidentiality is claimed on the following items that appear to be immaterial:

Schedule 3.4

Schedule 4.13 – last three items

Schedule 4.25 Insurance Claims

Schedule 4.26 – last three items

Boilerplate

Three sections of the agreement, and related Exhibits, appear to be standard commercial terms and not subject to any claims of confidentiality:

Section 6.6 Standard Releases

Section 6.9 Termination of Related Party Contracts

Section 6.15 Collective Agreements

Exhibit D Resignation and Release form

Exhibit E Shareholder Release form

Relationship Between Utility and Town Post-Closing

When a municipality sells its utility, it normally requires, in its capacity as a municipal body rather than as a shareholder, that it have some special relationship with the utility after closing. Buyers usually offer this up front.

There are several items that relate to this, and do not appear to SEC to be confidential:

Section 9.5 Advisory Committee

Exhibit B Governance Nomination Agreement

Exhibit H Local Community Commitment Agreement

Exhibit I Contribution Agreement

SEC notes that, in the case of the last two items, the attachments to the Exhibits, with the actual form of the agreements, may have been inadvertently switched between the two.

SEC also notes that the Contribution Agreement may properly be considered part of the Purchase Price, although not treated as such.

Conclusion

SEC believes that, absent compelling reasons to the contrary, the entire agreement in which a utility is sold should be public information, so that ratepayers can see what is happening to their

distributor and understand how they may be affected. The onus should be on the Applicant to demonstrate that harm would follow if certain items are disclosed to the public. This is consistent with the OEB's longstanding principles.

In this case, it is submitted that the Applicant has not met this onus with respect to most of the confidentiality claims made.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein Professional Corporation

Jay Shepherd

cc: Brian McKay, SEC (by email)
Interested Parties (by email)