

Colm Boyle
T: 416-367-7273
cboyle@blg.com

John Vellone
T: 416-367-6730
jvellone@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Canada
T 416-367-6000
F 416-367-6749
blg.com



File No. 17129.26

July 14, 2025

BY EMAIL & RESS

Mr. Ritchie Murray
Ontario Energy Board
2300 Yonge Street, 27th floor
Toronto, ON M4P 1E4

Dear Mr. Murray:

Re: Windsor Canada Utilities Ltd. ("WCUL") Phase 1 MAADs Application to Acquire E.L.K. Energy Inc. ("E.L.K. Energy") and Related Approvals ("Application") (EB-2025-0172) Confidentiality Reply Submission

On July 7, 2025, Ontario Energy Board ("OEB") Staff and the School Energy Coalition ("SEC") filed submissions in response to the Applicants' confidentiality request for the Application. This letter constitutes the Applicants' reply submissions to OEB Staff and SEC. The Applicants continue to rely upon their earlier detailed submissions and have not repeated them here, however, the absence of specifically addressing each aspect of SEC and OEB Staff's submission should not be construed as agreement with said submission.

At the outset, the Applicants wish to address OEB Staff's repeated suggestions that the Applicants "have failed to follow the OEB's directions", are making "bald assertions" and "have not provided any sort of compelling explanation".¹ In fact, the Applicants have provided an unprecedented level of detail (24 pages) on the grounds of their confidentiality request, have attentively responded to several rounds of OEB Staff's requests for supplemental rationale, provided OEB Staff entirely unredacted documents, and went to great lengths to maximize the level of public disclosure and justification without disclosing the redacted information itself.

Furthermore, the proposed redactions are limited to discrete aspects of appendices to the Application with an aim to focus the non-relevance and confidentiality requests to those key sections of the Application that are commercially sensitive, contain personal information and/or contain confidential information.

¹ OEB Staff submission at pgs. 6-7.

The Applicants object to the positions advanced by OEB Staff and SEC, which call for the public disclosure of virtually all aspects of the Application without due regard for the significant commercial prejudice and harm that such disclosure could inevitably cause, which is further discussed below. While OEB Staff cites discrete sections of the *Practice Direction on Confidential Filings* to support its position to limit the number of redactions, the Applicants note there are other sections in the *Practice Direction on Confidential Filings* that "... recognizes that some of that information may be of a confidential nature and should be protected as such."² The *Practice Direction on Confidential Filings* seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential.³

The Applicants are required to take a broad and multi-faceted perspective on these matters, noting that while the present OEB Application is a critical step in the transaction, its outcome is not certain and there is a harm that could be caused by publicly disclosing certain materials at this stage of the process. The Applicants undertook significant efforts to minimize redactions while fulfilling their obligation to exercise prudence in light of the commercial nature of the transaction, and to prevent potential harm to themselves and the Seller that could result from the broad disclosure seemingly sought by SEC and OEB Staff.

1. Areas of Agreement

In their submission, SEC and/or OEB Staff agreed with, or did not object to, certain confidentiality requests made by the Applicants. These are summarized in Appendix A. The Applicants therefore submit that these requests should be approved by the OEB.

2. Relevance

OEB Staff argues that relevance is determined based on the filing requirements set out in the MAADs Handbook and appears to concede that "...it may be that certain isolated segments in those documents are unlikely to be the focus of this application..."⁴ However, OEB Staff argues that redactions for non-relevance in this case would set a problematic precedent in allowing for dozens of redactions in a document that is part of the OEB's Filing Requirements. The only instance where OEB Staff agrees that a redaction for non-relevance is appropriate is in relation to Schedule A, sub-schedule 4.27(a).⁵ SEC did not make any submissions in respect of relevance.

Respectfully, OEB Staff and SEC appear to have looked past a meaningful assessment of relevance before proceeding to their detailed submission on the grounds for confidentiality. Simply because a particular document is required by the Filing Requirements, does not by default mean that all contents, appendices and attachments to said document are relevant and probative to the proceeding. Purchase and Sale Agreements and Shareholder Resolutions are non-standard, and can take many forms and include vast types of information. The Applicants submit it is therefore extremely important to assess

² OEB Practice Direction on Confidential Filings at pg 1.

³ *Ibid.*

⁴ OEB Staff submission at pg 7.

⁵ OEB Staff submission at pg 14.

the content of the documents, not simply the form, before asserting that a document is relevant or not to the proceeding.

Further, Section 5.1.10 of the *Practice Direction on Confidential Filings* clearly states that "...the OEB may, as a **preliminary matter, determine whether the information is relevant to the proceeding**. Where the OEB determines that the information is not relevant to the proceeding, **it may issue a decision accepting the redactions without assessing the grounds for confidentiality**". Therefore, this is the threshold test, before resorting to further assessment of the specific grounds for confidentiality. While it is important to recognize that no requests for confidentiality in this proceeding have been made solely on the grounds of non-relevance, the Applicants assert that meaningfully conducting this threshold test may absolve the need to further consider many of the remaining apparent disputes on the grounds for confidentiality in this proceeding.

As a tribunal to which the *Statutory Powers Procedure Act* applies,⁶ the OEB is given the authority to make rulings that certain evidence is irrelevant.⁷ The requirement of relevance is basic and necessary for any evidence to be admitted – either a proposed redaction is: (a) relevant and admissible; or (b) irrelevant and not admissible. The *Practice Direction on Confidential Filings* states that "[...] it is particularly important that all parties remain mindful that only materials that are **clearly relevant** to the proceeding should be filed." In response to OEB Staff, admitting evidence that is not clearly relevant will set a problematic precedent for future applications (including assessing costs awards for intervenors reviewing evidence, conducting discovery and writing submissions in those applications) as flooding a proceeding with irrelevant filings will result in regulatory inefficiency and is contrary to Rule 2.01 of the *Rules of Practice and Procedure*. No assessment of confidentiality is required if the redactions are not admissible as such information would be of no assistance to the OEB.⁸

The OEB has previously found that relevance is determined in relation to the issues in a proceeding,⁹ not the Filing Requirements as asserted by OEB Staff. The OEB expects that only relevant information will be filed in a proceeding as indicated in the *Practice Direction on Confidential Filings*.¹⁰ While the OEB has not established an issues list for this proceeding, the OEB's "Decision on the Issues" in North Bay (Espanola) Acquisition Inc. is very similar to the issues that arise here. The OEB assessed and approved that transaction based on the "no harm" test, which includes an assessment of the cumulative effect of the transaction on the attainment of certain statutory objectives in section 1(1) of the *Ontario Energy Board Act, 1998*:¹¹

⁶ *Statutory Powers Procedure Act*, RSO 1990, c S.22, s.15.

⁷ *Kawartha Lakes (City) v. Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2708 (Ont. Div. Ct.), at para 56.

⁸ *Practice Direction on Confidential Filings*, s.5.1.10. See also section 11.1.1 which contemplates the situation where a document contains some information that is relevant and other information that is not relevant to a particular proceeding.

⁹ EB-2020-0091, Decision on Confidentiality and Procedural Order No. 8, Enbridge Gas Inc. Integrated Resource Planning Proposal, February 11, 2021, at pg 2.

¹⁰ EB-2023-0013, Decision on Confidentiality, E.L.K. Energy Inc. Application for electricity distribution rates beginning May 1, 2024, February 27, 2024, at pg 3.

¹¹ EB-2019-0015, Decision and Order, North Bay (Espanola) Acquisition Inc., August 22, 2019, at section 4.2. Note that the issues in section 4.3 of this decision are not applicable here.

1. **Test #1 Price:** Applicants must show that there is a reasonable expectation based on underlying cost structures that the costs to serve acquired customers following a consolidation will be no higher than they otherwise would have been.
2. **Test #2 Adequacy, Reliability and Quality of Electricity Service:** The OEB will be informed by the metrics provided by the distributor in its annual reporting to the OEB and published in its annual scorecard to demonstrate continuous improvement.
3. **Test #3: Economic Efficiency, Cost Effectiveness and Financial Viability:** The impact of a proposed transaction on the acquiring utility's financial viability for an acquisition, or on the financial viability of the consolidated entity in the case of a merger, will be assessed. The OEB's primary considerations in this regard are: (i) The effect of the purchase price, including any premium paid above the historic (book) value of the assets involved; and (ii) The financing of incremental costs (transaction and transition costs) to implement the consolidation transaction.
 - a. The selling price of a utility is relevant only if the price paid is so high as to create a financial burden on the acquiring company. Only the effect of the purchase price on the underlying cost structures and financial viability of the **regulated utilities** will be reviewed.

The MAADs handbook states the following aspects of a consolidation transaction are not relevant in assessing whether a transaction is in the public interest:

1. Deliberations, activities, and documents leading up to the final transaction agreement. This includes:
 - a. Draft share purchase agreements and other draft confidential agreements and documents utilized in the course of the negotiation process;
 - b. Negotiating strategies or conduct of the parties involved in the transaction; and
 - c. Details of public consultation prior to the filing of the application
2. Implementing public policy requirements for promoting conservation, facilitating innovation.
3. Prices not related to a utility's own costs. The OEB's review is limited to the components of the distribution business and the costs and services directly under a distributor's control.

The Applicants tabulated instances in the confidentiality request where certain redactions are not relevant to the "no-harm" test since the information does not relate to the attainment of the certain statutory objectives in section 1(1) of the *Ontario Energy Board Act, 1998* discussed above. Importantly, neither OEB Staff nor SEC have provided any reasoning what probative value the non-relevant information has to the Application. The Applicants' claims of non-relevance were not meaningfully addressed by either OEB Staff or SEC, except with regards to Appendix E by OEB Staff.

In specific response to OEB Staff's submissions on Appendix E, as discussed above, relevance is not determined in relation to the OEB's Filing Requirements. OEB Staff has not properly characterized the nature of the redacted information. Appendix E was created during an **in-camera** meeting of city council. The redacted information in Appendix E relates to deliberations of the City of Windsor in contemplation of and documents prepared leading up to the final transaction agreement. The

information includes negotiating strategies, parameters of conduct and positions of WCUL in negotiating the final transaction agreement. The MAADs Handbook explicitly states that this type of information is not relevant and will not be considered by the OEB.¹² Nor is this information relevant to the “no-harm” test as the OEB MAADs Handbook states the OEB will not consider alternative transactions.¹³ This information would be particularly damaging to the Applicants if disclosed, publicly revealing its negotiating positions which have absolutely no bearing on the present proceeding.

(a) Forms of Contracts

OEB Staff and SEC take issue with redaction of forms of agreements that have not yet been executed or used to implement the proposed transaction in the Application. In addition to the reasons already provided, these forms of contract are not relevant to either the no-harm test or the MAADs filing requirements.

3. Confidentiality

One of the key aspects of the Applicants' confidentiality request is that the transaction cannot close until OEB approval is obtained under section 86 of the *Ontario Energy Board Act, 1998*. Should the Application not be approved by the OEB and the transaction not close, the redacted information sought to be publicly disclosed by OEB Staff and SEC will be highly prejudicial to The Corporation of the Town of Essex, E.L.K. Energy and WCUL. The highly prejudicial effect of disclosing the redacted information does not outweigh the probative value, especially since OEB Staff or SEC have not addressed why the information is expected to have any bearing on the present proceeding.¹⁴

Should the OEB not approve this Application, for example, third parties will gain access to the specific terms of the Purchase and Sale Agreement, enabling them to modify and tailor their bids accordingly in any subsequent competitive process. Moreover, while all third-party bidders will be granted access to WCUL's successful bid and terms of negotiation, WCUL will be unfairly denied reciprocal access to the unsuccessful bids submitted by other participants. This outcome has the potential to significantly impair the competitive market for a future MAADs transaction involving E.L.K. Energy. Indeed, when the Ontario Superior Court of Justice was assessing whether to approve the sale of certain assets by a receiver, commercially sensitive information (including an "offer summary") was sealed since disclosure could detrimentally affect the price that could be obtained on a subsequent sale of an asset should a transaction not close.¹⁵

The Applicants provide the following submissions in response to the overarching themes identified in the submissions of OEB Staff and SEC, rather than addressing each point on a line-by-line basis. The OEB already has the Applicants' position on a line-by-line basis in earlier submissions.

¹² MAADs Handbook at pgs 14-15.

¹³ *Ibid.*

¹⁴ OEB Staff Submission at pg 7.

¹⁵ *Urbancorp*, 2020 ONSC 7920, at para 56.

(a) No Relevance of OEB Staff's Cited Cases

OEB Staff makes several references to, *inter alia*, materials filed by applicants in the North Bay / Espanola MAADs application (EB-2019-0015), Whitby Hydro / Veridian MAADs application (EB-2018-0236) and Energy+ / Brantford Power MAADs application (EB-2021-0280) to argue that the Applicants should be publicly disclosing similar provisions in their Application. This is the primary basis upon which OEB Staff asserts the Applicants' confidentiality claim should not be granted. What OEB Staff does not cite are any confidentiality decisions of the OEB to support these assertions.

What other applicants have elected to disclose publicly in prior MAADs applications has very limited relevance. Confidentiality belongs to the "owner" of the confidential information. Confidentiality can be waived by the owner of the confidential information, as may have been done by prior MAADs applicants when publicly disclosing certain provisions in purchase agreements (for example, section 9.1 of the agreement filed in the North Bay / Espanola MAADs application (EB-2019-0015) expressly contemplates confidentiality). A waiver of confidentiality by different parties to different transactions has no bearing on the confidentiality request submitted by the Applicants here.

Further, not all MAADs applications are created equal. In a transaction involving a non-cash merger between parties, they may be much more willing to disclose certain commercial terms of the agreements, given they are voluntarily entering into the agreement to merge and work together going forward – there are no other potential suitors or counterparties to the transaction. This is much different than the transaction contemplated in this proceeding, that arose from the result of a competitive bidding process, where one party is buying and the other is selling. Indeed, other counterparties may be available where disclosure of certain information could confer an undue benefit to them. Thus, the type of transaction, and the circumstances under which they arose, and currently sit, are relevant considerations when the parties are deciding which information they may be willing to voluntarily place on the record at a given time.

(b) Purchase Price

OEB Staff argues that disclosure of the purchase price by other MAADs applicants means that the Applicants must also disclose this information in the present proceeding. This argument has been addressed already in prior submissions, in that it is only the purchase price's impact on the financial viability of the acquirer that is meaningful to the no harm test. This has already been assessed in the original application and evidence (Section 4.2 iii).

SEC argues that ratepayers of the regulated utility should be allowed to find out the price at which the shareholder sold the utility to another regulated utility. However, it is the financial viability of the acquirer that is permitted to be assessed per the MAADs Handbook, not consideration "whether a purchasing selling, or amalgamating utility could have achieved a better transaction than that being put forward for approval in the application".¹⁶ It is not clear to the Applicants what probative value is attained by disclosing the value, and more importantly, the derivation of that value, of a transaction between two parties not regulated by the OEB. In any event, ratepayers are represented by SEC and the Vulnerable Energy Consumers Coalition in this proceeding and ratepayers have access to this valuation information once a Confidentiality Declaration and Undertaking is signed. There is no need

¹⁶ MAADs Handbook at pgs 14-15

for confidential bidding strategies, commercial negotiations, valuation and bid structuring to be placed in the public domain, especially when the transaction has not yet closed.

(c) Employee Matters / Collective Bargaining

OEB Staff asserts that certain provisions relating to employee matters and collective bargaining have already been disclosed by prior MAADs applicants and therefore should also be disclosed by the Applicants here. This argument was addressed above.

OEB Staff fails to appreciate that disclosure of this type of information publicly has the potential to adversely affect ongoing employee-employer relationships, which could result in negative impacts to ratepayer customer service. For example, OEB Staff takes issue with the Applicants' redaction to section 9.4 regarding employee retention. While it is not at all clear why this information is necessary to place on the public record and how the outcomes of this proceeding will turn on it, if this section is disclosed publicly, E.L.K. Energy employees would be able to review terms relating to their own employment, which could create unnecessary complications pertaining to a matter unrelated to the proceeding.

(d) Areas of Agreement with OEB Staff

The Applicants agree with a portion of the submissions made by OEB Staff and support the proposed revisions to the confidentiality request for the following sections:

- Schedule A, Sub Schedule 4.13 "Proceedings"
 - The information pertaining to OEB proceedings should not be redacted.
- Schedule A, Sub Schedule 4.23(a) "Intellectual Property"
 - Disclosure of the description of the Applicants' "intellectual property" could be permitted.
- Schedule A, Sub Schedule 4.26(b) "Independent Contractors"
 - Only the information related to third party unit pricing should be redacted.

4. Conclusion

As outlined above, the Applicants have went to great lengths to balance its redaction requests in this proceeding while complying with the Filing Requirements outlined in the MAADs Handbook. The Applicants understand the OEB's philosophy that the majority of application materials should be placed on the public record, and how confidentiality requests place additional procedural burden on parties to the proceeding and the application administration process.

However, special care and attention must be given to OEB applications that are precipitated by, and concurrent with, ongoing commercial matters. There must be a balance struck between the level of public disclosure required in the OEB process to conduct open and transparent proceedings and evaluate whether the OEB's "no harm" test will be satisfied by the proposed transaction, and the

potential real harm that could be caused by mandating disclosure of virtually all materials contained within or leading up to a pending commercial agreement, including strategic information, approach to bid structures and potential alternative transactions. The Applicants urge that due weight and consideration be given to the second consideration above, particularly given the current marketplace and stated government objectives to encourage utilities to engage in transactions exactly such as this for the benefit of all ratepayers. If it becomes a requirement to disclose commercial terms that are not relevant for a transaction that has not closed, this could have a cooling affect on these transactions and the structure of how these agreements may be constituted going forward.

The Applicants appreciate the OEB's attention to these matters.

Please contact the undersigned with any questions.

Yours truly,

BORDEN LADNER GERVAIS LLP

A handwritten signature in black ink, appearing to read "Colm Boyle". The signature is written in a cursive, flowing style.

Colm Boyle

CB/JV

APPENDIX A

SUMMARY OF SUBMISSIONS

Sections	OEB Agree Relevant?	Staff Not	OEB Staff Agree Confidential?	SEC Agree Confidential?	Dispute Between Applicants, OEB, SEC?
Purchase Price Information					
Article 1, Section 1.1, "Deposit"			No	No	Yes
Article 1, Section 1.1, "Target Working Capital"			No	No	Yes
Article 2, Section 2.2, "Purchase Price"			No	No	Yes
Article 2, Section 2.3 "Delivery of Estimated Statement and Payout Letters"			No	No	Yes
Article 2.6(a), "Closing Statement"			No	No	Yes
Schedule A, Sub Schedule 4.11(b), "Undisclosed Indebtedness"			No	No	Yes
Schedule A, Sub Schedule 4.35, "Prudential Support"			No	No	Yes
Schedule C, "Purchase Price Allocation"			No	No	Yes
Exhibit C, "Sample Statement"			No	No	Yes
Company Structure, Shareholders and Governance Information					
Article 1, Section 1.1, "Governance Representation Agreement"			No	No	Yes
Article 6, Section 6.6 "Shareholder and Directors; Release"			No	No	Yes
Article 9, Section 9.5 "Advisory Committee"			No	No	Yes
Exhibit B "Form of Governance Representation"			No	No	Yes
Exhibit D "Form of Director and Officer Release"			No	No	Yes
Exhibit E "Form of Shareholder Release"			No	No	Yes
Labour and Employment Information					
Article 4, Section 4.26 (f), (h), (i), (j), (n) "Employment and Labour Matters"			No	Not disclosed	Yes
Article 6, Section 6.15 "Collective Agreements"			No	No	Yes
Article 8, Section 8.1(m) "Conditions for the Benefit of the Buyer"			No	No	Yes
Article 9, Section 9.4 "Employee Retention"			No	Not disclosed	Yes
Schedule A, Sub Schedule 4.10 (vi) & (viii) "Conduct of Business"			Yes	Not disclosed	No
Schedule A, Sub Schedule 4.10 other than (vi) & (viii) "Conduct of Business"			No	No	Yes
Schedule A, Sub Schedule 4.26(a) "Employee Listing"			Yes	Not disclosed	No
Schedule A, Sub Schedule 4.27(a) "Benefits Plans"	Yes		Yes	Not disclosed	No
Non-Regulated Business and Third-Party Information					
Article 4, Section 4.36 "Water Heater Rental Contracts"			No	Yes	Partial
Schedule A, Sub Schedule 1.1(a) "Permitted Liens"			No	No	Yes
Schedule A, Sub Schedule 3.4 "Third Party Consents"			No	No – immaterial	Yes

Sections	OEB Agree Relevant?	Staff Not	OEB Staff Agree Confidential?	SEC Agree Confidential?	Dispute Between Applicants, OEB, SEC?
Schedule A, Sub Schedule 4.6 "Authorizations"			No	Yes	Partial
Schedule A, Sub Schedule 4.12 (viii) "Material Contracts"			Yes	Not disclosed	No
Schedule A, Sub Schedule 4.12 other than (viii) "Material Contracts"			No	No	Yes
Schedule A, Sub Schedule 4.26(b) "Independent Contractors"			Yes – billing / unit rates only	First two items – no Last three items – no – immaterial	Partial
Schedule A, Sub Schedule 4.36(a) "Water Heater Contract"			No	Yes	Partial
Exhibit H "Form of Local Community Agreement"			No	No	Yes
Exhibit I "Form of Contribution Agreement"			No	No	Yes
Settlement and Indemnification					
Article 2, Section 2.6(d) "Settlement of Dispute"			No	No	Yes
Article 10, Section 10.3(b), (c), (d), (e) "Time Limitations"			Yes	Yes – immaterial	No
Article 10, Section 10.4 "Other Limitations on Recourse and Indemnification Obligations"			Yes	Yes – immaterial	No
Article 10, Section 10.6 "Notification"			No	Yes – immaterial	Partial
Article 10, Section 10.7 "Direct Claims"			No	Yes – immaterial	Partial
Article 10, Section 10.8 "Third Party Claims"			No	Yes – immaterial	Partial
Article 10, Section 10.10 "Payment of Indemnification"			No	Yes – immaterial	Partial
Transaction Conditions and Disclosures					
Article 1, Section 1.1 "Termination Date"			No	Not addressed	Yes
Article 6, Section 6.1(b) "Conduct of Business Prior to Closing"			No	No	Yes
Article 6, Section 6.9 "Termination of Related Party Transactions"			No	No	Yes
Article 8, Section 8.1(n) "Conditions for the Benefit of the Buyer"			No	No	Yes

Sections	OEB Agree Relevant?	Staff Not	OEB Staff Agree Confidential?	SEC Agree Confidential?	Dispute Between Applicants, OEB, SEC?
Schedule A, Sub Schedule 4.13 (first two lines) "Proceedings"			No	No	Yes
Schedule A, Sub Schedule 4.13 (other than first two lines) "Proceedings"			Yes	No – immaterial	Partial
Schedule A, Sub Schedule 4.23(a) "Intellectual Property"			No	No	Yes
Schedule A, Sub Schedule 4.25 (Policy Numbers) "Insurance Policies"			Yes	Yes	No
Schedule A, Sub Schedule 4.25 (Insurance Claims) "Insurance Policies"			Yes	No – immaterial	Partial
Schedule A, Sub Schedule 6.1(b)(x) "Future Obligations"			Yes	Not disclosed	No
Schedule A, Sub Schedule 6.1(b) (other than x) "Future Obligations"			No	No	Yes
Bank Account Information					
Schedule A, Sub Schedule 4.29 "Bank Accounts"			Yes	Yes	No
Exhibit A, Schedule C "Escrow Agent Wire Instructions"			Yes	Yes	No
Exhibit A, Schedule D "Approved Banks"			No	Yes	Partial
Municipal Resolutions					
Appendix E: Resolution by Parties Approving the Proposed Transaction			No	Not disclosed	Yes