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**By EMAIL and RESS**

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Our File: 20250172

Ontario Energy Board
2300 Yonge Street
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**Attn: Ritchie Murray, Registrar**

Dear Mr. Murray:

**Re: EB-2025-0172 – WCUL Acquisition of ELK – SEC Submissions**

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order #2 in this matter, this letter constitutes SEC's Final Argument.

**Summary**

SEC submits that the acquisition of the shares of E.L.K. Energy Inc. ("ELK") by Windsor Canada Utilities Ltd. ("WCUL") should be approved by the OEB.

SEC further submits that the proposal of the Applicant WCUL for a multi-stage process to complete a merger, increase rates, and defer rebasing, in respect of which no specific approval has been requested, should not be approved at this time. Instead, the OEB should make clear that any further approvals, and any direct or indirect amendments to the MAADs policy or its underlying rationale, are not the subject of this proceeding and will be considered by the OEB only if and when future applications relating to those approvals are filed.

**Background**

It has been an open secret in the electricity industry for years that ELK was thought by some to be a "problem utility". Many other LDCs allegedly looked at acquiring the company, kicking the tires and then walking away. The view of many in the industry seemed to be that ELK was "harvesting the assets", and as a result its infrastructure was in such poor shape that no-one wanted the challenge of turning it around.

Of course, none of that is in the evidence before the OEB in this proceeding, and certainly no weight can be given to SEC so stating. Whether or not the talk around the industry is or was true, it is not evidence.

We can, however, look at hard evidence to see the condition of ELK. From the Electricity Yearbook in 2019 (i.e. pre-COVID) and the Open Data information for 2024 (most current information), it is possible to see ELK in comparison to other LDCs of similar size. The result looks like this[1]:

***Utility Data 2019***

| ***Utility*** | ***Customers*** | ***NBV PP&E*** | ***PP&E/Cust.*** | ***CapAds*** | ***CapAds/Cust*** |
|---|---|---|---|---|---|
| E.L.K. | 12,478 | 9,395,934 | $753 | 1,094,569 | $87.72 |
| Grimsby | 11,631 | 29,158,917 | $2,507 | 2,337,779 | $201.00 |
| Lakefront | 10,546 | 19,341,364 | $1,834 | 1,394,845 | $132.26 |
| Lakeland | 13,762 | 35,863,772 | $2,606 | 3,473,540 | $252.40 |
| Orangeville | 12,652 | 20,939,060 | $1,655 | 1,368,228 | $108.14 |
| Ottawa River | 11,320 | 12,304,840 | $1,087 | 1,487,372 | $131.39 |
| Wasaga | 14,003 | 13,806,958 | $986 | 3,530,236 | $252.11 |
| Average | 12,342 | 20,115,835 | $1,633 | 2,098,081 | $166.43 |
| ELK % of Avg. | 101% | 47% | 46% | 52% | 53% |

***Utility Data 2024***

| ***Utility*** | ***Customers*** | ***NBV PP&E*** | ***PP&E/Cust.*** | ***CapAds*** | ***CapAds/Cust*** |
|---|---|---|---|---|---|
| E.L.K. | 12,742 | 15,956,030 | $1,252 | 3,134,321 | $245.98 |
| Grimsby | 11,945 | 29,258,260 | $2,449 | 2,506,390 | $209.83 |
| Lakefront | 11,371 | 26,736,247 | $2,351 | 2,222,203 | $195.43 |
| Lakeland | 14,773 | 31,664,491 | $2,143 | 2,828,074 | $191.44 |
| Orangeville | 13,021 | 24,617,448 | $1,891 | 2,412,510 | $185.28 |
| Ottawa River | 11,775 | 16,415,805 | $1,394 | 2,075,239 | $176.24 |
| Wasaga | 15,675 | 23,778,709 | $1,517 | 3,449,059 | $220.04 |
| Average | 13,043 | 24,060,999 | $1,857 | 2,661,114 | $203.46 |
| ELK % of Avg. | 98% | 66% | 67% | 118% | 121% |

As can be seen, historically ELK had a very low PP&E and PP&E per customer, among the lowest in the province. It also spent at less than half the level of its peers on capital additions.

That appears to have changed, perhaps in part because of the OEB-approved settlement in ELK's last rebasing case, EB-2021-0016. In that case, ELK made a number of commitments with respect to asset condition, inspections, and performance targets for reliability. As can be seen, ELK has moved its PP&E per customer from below 50% of its peers up to almost two-thirds of the level of its peers. Further, it is adding more capital each year, step by step, to get to a more sustainable level.

A review of the years before 2019, and in the interim between 2020 and 2024, shows a clear trend.

This has created a different problem, however. ELK is losing money, largely because its General and Administrative costs skyrocketed in 2023. Part of this is the fact that substantial work was

[1] It is somewhat surprising that the Applicants did not provide this data, or something like it, to the OEB in the Application.

outsourced to Entegrus and to a third party billing company (the latter was reversed in 2024)[2]. The loss does not appear to be as bad in 2024[3], but it is still a loss.

The real reason, however, appears to be that ELK has the lowest distribution revenue per customer of all LDCs in the province, $22 per customer[4]. The distribution revenue per customer of ELK's peers listed above averages almost twice that.

Clearly something has to change, and acquisition of ELK by a larger LDC with more resources would be one of those possible changes.

In short, ELK is an LDC that probably should be acquired, and in the course of that consolidation the rates for its customers probably have to increase. While SEC (and other ratepayers) strongly support keeping rates down, we recognize that an LDC has to invest – in people and in infrastructure – to provide good distribution service to its customers.

**<u>"Unique" Structure</u>**

The Applicants refer to this as a two-phase transaction[5], but it is in fact three phases. The first is the acquisition of a controlling interest in ELK by WCUL, which is the holding company for ENWIN Utilities Ltd. ("ENWIN"). The second is rebasing COS applications by both ELK and ENWIN for May 1, 2027 and January 1, 2028 rates respectively. The third is a further MAADs application to merge ELK and ENWIN. The Applicants have committed that any deferred rebasing period sought at the third step will not exceed ten years from approval of this current Application[6].

The Applicants say "independent rebasing applications are an integral and non-severable component of the overall Transaction structure"[7]. However, the approvals being sought in this Application do not include approval of any multi-stage transaction, nor any permission to file subsequent applications as planned.

This structure has been referred to by the Applicants as "unique"[8], but in fact this is not the first time this structure has been used. The same utility counsel proposed this structure in EB-2019-0015, the acquisition by North Bay Hydro of the shares of Espanola Hydro. The two utilities ultimately amalgamated in EB-2021-0312 after both had been rebased, with a five year rebasing deferral period and an ESM starting five years after the first transaction.

This Application appears to be the start of something similar, i.e. a smaller utility, facing some challenges, being acquired by a larger local utility with more resources.

SEC is concerned, however, that this "unique" structure not become a standard in all MAADs transactions, without regard to the impact on ratepayers.

The basic "bargain" in the OEB's MAADs policy, in our submission, is that the consolidating entities get a period of time in which the benefits of the consolidation flow to the shareholders. In that interim period, there is either a rate freeze or a price cap adjustment, so the rates for the customers are kept under control. At the time of rebasing, any surviving benefits of the consolidation are baked

[2] SEC-10
[3] SEC-9
[4] Open Data Archive.
[5] Application p. 17-18.
[6] Application p. 7 and SEC-3.
[7] Argument in Chief, p. 4. See also SEC-2 and VECC-5, where it is noted that the ELK rebasing is necessary "given their recent financial performance and the need for rates to be reset to encompass the ongoing operational costs of the utility". No justification of any need for ENWIN to rebase is provided.
[8] Application p. 24/5.

into rates and flow to the customers. The justification for not reviewing the costs of the consolidated entity sooner is that the rates are kept at or below inflation in the meantime, and the customers get longer term benefits.

This structure proposes to alter that. One of the benefits the customers get in a consolidation is that their rates are not increased more than inflation for five to ten years. The Applicants in this case (as in North Bay) seek to remove that benefit from the customers, but to keep all of the benefits the MAADs policy provides to the shareholders.

The reason why this may be possible[9] is a technical reading of the OEB's policies.

In Step 1, there is no reason why two independent LDCs cannot have common ownership, and there have been many examples of this. They can even share resources, thus reducing overall costs. In Step 2, independent LDCs can separately apply for rebasing on a regular schedule. Common ownership is not a barrier to that. In Step 3, utilities with common ownership can amalgamate (with OEB permission), and the MAADs policies supporting LDC consolidation will apply[10].

The OEB recognized this in the Decision in EB-2019-0015, saying[11]:

> *"The OEB finds that it is consistent with the OEB's policies for one utility to acquire another utility and operate it on a stand-alone basis…*
>
> *Remaining as stand-alone utilities would mean keeping separate licences, filing and maintaining separate reporting and record-keeping requirements, keeping separate scorecards and filing separate rate applications. On this basis, the OEB finds the Applicant's proposal to file separate cost of service rate applications for 2021 rates for North Bay Hydro and New Espanola Hydro reasonable.*
>
> *It is a separate matter to determine now what costs should be considered in these future rate applications. This OEB panel cannot bind the future OEB panel that would hear those rate applications. As noted by SEC, there may be some near term efficiencies and improvements that the future OEB panel may want to explore. This OEB panel cannot preclude the future OEB panel from considering these efficiencies in a rate application. The Applicant acknowledged that it is a natural component of any cost of service rate application for the OEB or the parties to explore the evidence of actual costs or efficiencies."*

The OEB in that case also did not order an ESM, saying that would be for a later panel to decide.

SEC agreed then, and submits now, that the transaction before the OEB in this case is the acquisition of shares of ELK by WCUL. This panel of Commissioners is not being asked to make any binding approval of future steps in the multi-stage transaction and, on the evidence currently filed, probably is not in a position to do so anyway.

SEC therefore submits that the approval by the OEB of the current Application should be carefully restricted to the acquisition of the shares, and should not deal in any way with subsequent steps in the process. Those steps are properly the purview of future panels of Commissioners, and the application in the future of OEB policies – as in existence from time to time - relating to rate-setting and consolidations.

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[9] And was, in EB-2019-0015.

[10] The merger of Union Gas and Enbridge Gas Distribution is another example of this, and one more example where the 10 year deferred rebasing period was not allowed.

[11] EB-2019-0015, Decision with Reasons, p. 25.

**No Harm Test**

SEC has the following comments with respect to the "no harm" test as it relates to the acquisition of control of ELK by WCUL.

***Price, Economic Efficiency, and Cost Effectiveness.*** This Application does not propose to alter rates for either ELK or ENWIN. Any future alteration of rates will be the subject of future COS applications, which will be determined by future panels of Commissioners on the evidence presented at that time.

SEC notes that the Application does contain some cost comparisons on preliminary basis[12]. However, those comparisons assume a rate increase of exactly 35% in 2027 and 20% in 2032 for ELK. When asked about those unusually precise numbers[13], the Applicants did not have a response, but referred to another IR which does not have the answer requested. It appears clear to us that these numbers are not a forecast, but just a plugged figure for illustrative purposes[14].

While it is likely true that costs for ELK will have to increase (see earlier discussion), that will be offset in part by merger synergies, and all of that is the subject of future applications. It is particularly difficult to forecast the rate impacts associated with this given that ENWIN is already substantially overearning[15], and has deferred its rebasing already for a further four years.

Therefore, SEC submits that, for the limited approval sought in this Application, there is nothing in the acquisition of shares by WCUL that will harm the ratepayers with respect to price, economic efficiency, or cost effectiveness.

***Adequacy, Reliability and Quality of Electricity Service.*** SEC agrees substantially with the discussion in the Argument-in-Chief[16] with respect to this category.

The story, however, is deeper than that. ELK is already playing catch up with respect to the state of its distribution infrastructure, as seen in our earlier discussion. If that does not continue, it is reasonable to think that performance metrics will eventually deteriorate without a transaction such as the ones contemplated herein. The settlement in EB-2021-0016 foreshadowed exactly that issue, and the acquisition by WCUL is a solution rather than a problem.

***Financial Viability.*** Despite ELK's recent financial performance, both utilities appear to be in solid financial condition. WCUL and ENWIN can finance the transaction out of existing available credit lines. ELK, even after losses, is still in good shape, with a shareholders' equity in excess of $10 million[17]. Further, despite its losses the December 31, 2024 financial statements of ELK, audited by KPMG, do not have any doubt expressed about the "going concern" assumption.

There is therefore no reason to believe that the acquisition of ELK by WCUL will undermine the financial viability of WCUL, ENWIN, or ELK.

**Conclusion**

SEC therefore submits that the OEB should approve the acquisition of the shares of ELK by WCUL. The OEB should also approve the exemption from sections 2.25 to 2.28 of the MAADs Handbook

[12] Application, p. 24/5.
[13] SEC-5.
[14] The same table has COS increases for ENWIN of exactly 3% for 2028 and 2033.
[15] SEC-1.
[16] AIC p. 8/9.
[17] SEC-9.

due to the fact that ELK and ENWIN are proposed to operate separately, under common ownership, for the time being.

SEC further submits that the issues relating to future rebasing applications, and a future amalgamation transaction, are not currently before the OEB, and insufficient evidence has been filed in that regard for this panel of Commissioners to form any conclusions relating to those applications. If and when those applications are filed, one or more future panels of Commissioners will be tasked with reviewing the evidence supporting them, and the appropriate application of OEB policies based on those applications and that evidence.

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)