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File No. 17129.26

September 15, 2025

BY EMAIL & RESS

Mr. Ritchie Murray
Ontario Energy Board
2300 Yonge Street, 27th floor
P.O. Box 2319
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)
Motion to Review**

Further to the notice filed by WCUL on August 27, 2025, please find enclosed the Motion to Review the Ontario Energy Board's *Decision on Confidentiality and Procedural Order No. 2* dated August 25, 2025 in EB-2025-0172.

Please contact the undersigned with any questions.

Yours truly,

BORDEN LADNER GERVAIS LLP

A handwritten signature in black ink, appearing to read 'Colm Boyle', is written over a horizontal line.

Colm Boyle

CB/JV

ONTARIO ENERGY BOARD

IN THE MATTER OF an application made by Windsor Canada Utilities Ltd. for leave to acquire 100% of the issued and outstanding shares of E.L.K. Energy Inc. from The Corporation of the Town of Essex, made pursuant to section 86(2)(a) of the *Ontario Energy Board Act, 1998*.

AND IN THE MATTER OF a Notice of Proposal made by Windsor Canada Utilities Ltd. under sections 80 and 81 of the *Ontario Energy Board Act, 1998*.

NOTICE OF MOTION

Windsor Canada Utilities Ltd. (“**WCUL**”) will make a Motion to the Ontario Energy Board (“**OEB**”) on a date and at a time to be determined by the OEB.

PROPOSED METHOD OF HEARING: WCUL proposes that the Motion be heard by way of an oral hearing.

THE MOTION IS FOR:

1. A review and variance of those portions of the Decision on Confidentiality and Procedural Order No. 2 in EB-2025-0172 dated August 25, 2025 (referred to herein as the “**Decision**”) in which the OEB determined the following issue (referred to in this Motion as the “**Review Issue**”):
 - i. The OEB was not convinced that certain information (the “**Subject Information**”) in “Appendix E – Resolutions by Parties Approving the Proposed Transaction” (“**Resolution**”) filed by WCUL as part of the application in EB-2025-0172 contains commercially sensitive information and thus found that it should be placed on the public record.¹

¹ The OEB noted one exception, where the signatures on the document should neither be placed on the public record nor provided to intervenors that sign a Declaration and Undertaking.

2. An Order that the Motion raises issues material enough to warrant a review of the Decision on the merits thus satisfying the “threshold test” in Rule 43.01 of the OEB’s *Rules of Practice and Procedure* in relation to the Review Issue.
3. Variation of the Decision in relation to the Review Issue to determine that the Subject Information in the Resolution is commercially sensitive and should be afforded confidential treatment in accordance with the OEB’s *Practice Direction on Confidential Filings*.
4. Such further and other Orders as WCUL may request and the OEB approves.
5. Should the OEB find it necessary to consider the threshold question, WCUL requests the opportunity to make further written and oral submissions.

THE GROUNDS FOR THE MOTION ARE:

The proceeding

6. On May 13, 2025, WCUL filed a Merger, Acquisition, Amalgamation and Divestitures (“**MAADs**”) application (the “**Application**”) with the OEB, under section 86(2)(a) of the *Ontario Energy Board Act, 1998* (“**OEB Act**”) to purchase all of the issued and outstanding shares in E.L.K. Energy Inc. (“**E.L.K. Energy**”) from The Corporation of the Town of Essex (the “**Seller**”) (the “**Transaction**”). WCUL also submitted a Notice of Proposal under sections 80 and 81 of the OEB Act. The Transaction contemplated in this OEB Application is the first of two phases.
7. On May 27, 2025, the OEB issued a letter acknowledging receipt of the Notice of Proposal under sections 80 and 81 of the OEB Act and separately assigned file number EB-2025-0173 to this matter. On July 10, 2025, the OEB issued a letter indicating it did not intend to issue a notice of review of the proposal. Thus, the Notice of Proposal no longer forms part of the present proceeding.
8. WCUL filed a confidentiality request for certain information in the Application, which included the Subject Information contained in the Resolution. WCUL argued that as the

successful bidder in a confidential competitive bidding process, strategic bidding direction in the Resolution from its shareholder, which preceded the finalization of the Transaction, must be redacted to ensure that its competitive position and bidding strategies are protected for future negotiations or if the Transaction does not ultimately close. Records concerning the substance of in-camera deliberations of a meeting by municipal councillors that result in a draft of a by-law, resolution or legislation establishing the framework for a competitive bid should never be subject to disclosure by the OEB. Doing so would undermine the proper functioning of municipal bodies. The Resolution was created and circulated within a confidential municipal process and included parameters around bidding strategies and valuations that would be very harmful if disclosed.

9. The OEB's *Handbook to Electricity Distributor and Transmitter Consolidations* ("**MAADs Handbook**") also states that deliberations, activities, and documents leading up to the final transaction agreement are not relevant in assessing whether the transaction is in the public interest, and thus the OEB will not require applicants to file evidence on such matters as part of a MAADs application.
10. On August 25, 2025, the OEB issued the Decision and provided the following brief reasons in respect of WCUL's confidentiality request for the Subject Information contained in the Resolution:

The OEB Filing Requirements require an applicant to provide a copy of appropriate resolutions for approving the transaction. The OEB is not convinced the information filed by the applicant contains commercially sensitive information and notes that similar information [has] been filed on the public record in similar proceedings. The OEB finds that the resolution should be placed on the public record without redactions, with one exception: the signatures should neither be placed on the public record nor provided to intervenors that sign a Declaration and Undertaking. The rationale being that signatures can be easily copied to execute fraudulent documents.

11. For the reasons that follow, WCUL submits that the OEB made material and clearly identifiable errors of jurisdiction, law and/or fact. The Motion raises a question as to the correctness of the Decision.

The Review Motion standard

12. Rule 40.01 of the OEB's Rules of Practice and Procedure allows any person to bring a motion requesting the OEB to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.
13. Rule 42.01(a) of the OEB's Rules of Practice and Procedure requires that a notice of motion set out the grounds for the motion, which may include:
 - i. the OEB made a material and clearly identifiable error of fact, law and/or jurisdiction;
 - ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or
 - iii. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.
14. The OEB has confirmed that this list of grounds is "not an exhaustive list". What is required is that the motion to review must raise a question as to the correctness of the order or decision.² The moving party must demonstrate that the findings are contrary to the evidence before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings or something of a similar nature.³
15. The moving party must also demonstrate that the alleged error is material and would vary the outcome of the decision.⁴

² EB-2016-0005 Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016, page 4.

³ NGEIR (EB-2006-0322, EB-2006-0338, EB-2006-0340) Motions to Review, the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, pages. 17-18.

⁴ Rules 42.01(a) and 43.01(d); see also EB-2006-0322/0338/0340 Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, pages 17-18.

Important Context of the Decision – The Transaction has not closed

16. In preparation for the negotiations for E.L.K. Energy, WCUL management required approval from its shareholder to delineate the negotiating boundaries around bidding strategies, valuations, offer prices, and payment terms for the acquisition of E.L.K. Energy.
17. The City of Windsor is the sole shareholder of WCUL. Certain activities of WCUL require that The City of Windsor issue a formal resolution to grant approval to conduct such activities. In this case, The City of Windsor issued the Resolution during an in-camera meeting on October 28, 2024 authorizing WCUL, within certain negotiating boundaries, to finalize a purchase transaction to acquire the shares and assets of E.L.K. Energy.
18. For clarity, the negotiating boundaries within the Resolution, which constitute deliberations and activities leading up to completion of the final Purchase and Sale Agreement, are the sole focus of this Motion.
19. WCUL was ultimately selected by the Seller as the successful proponent in a confidential competitive procurement process for the acquisition of E.L.K. Energy, a process that involved participation by other competing prospective bidders. WCUL and the Seller then entered into a Purchase and Sale Agreement for the acquisition of E.L.K. Energy. WCUL and the Seller have struck a deal, but the deal has not yet been finalized and closed.
20. Under section 8 of the Purchase and Sale Agreement WCUL and the Seller have several conditions that must be satisfied to their benefit prior to closing. One of those conditions pertains to section 86(2) of the OEB Act whereby WCUL cannot close the Transaction for E.L.K. Energy without OEB approval of the MAADs Application.
21. Public disclosure of the Subject Information in the Resolution compromises the integrity of the competitive bidding process. There are other discretionary conditions precedent that could be exercised to terminate the Purchase and Sale Agreement and force the parties to renegotiate. Moreover, disclosure of the Subject Information to competitors and the Seller would reveal the potential parameters of the Transaction that were acceptable to WCUL and cause significant prejudice.

The Errors in the Decision

22. As discussed below, the Decision commits four material and clearly identifiable errors of fact, law and/or jurisdiction:
- i. The Decision conflates the obligation to file appropriate resolutions with whether those resolutions should be made publicly available;
 - ii. The Decision fails to articulate a justification for the conclusion that the resolution is not commercially sensitive and improperly concludes that the information is not commercially sensitive;
 - iii. The Decision undermines municipal processes under the *Municipal Act, 2001*; and
 - iv. The Decision fails to consider the OEB's obligations under section 17 of the *Freedom of Information and Protection of Privacy Act* to withhold disclosure of the Resolution.
23. WCUL acknowledges that the Decision addressed a range of confidentiality requests. However, when focusing discretely on the single paragraph of the Decision addressing the Resolution, the OEB's reasoning is sparse, insufficient to permit meaningful review and provides very little insight into why "[t]he OEB is not convinced the information filed by the applicant contains commercially sensitive information..."
24. While the OEB found that the OEB MAADs Handbook requires an applicant to provide a copy of appropriate resolutions for approving the transaction, it does not follow that all information within such resolutions must be publicly disclosed. Where circumstances warrant, the *Practice Direction on Confidential Filings* permits confidential treatment, and the OEB routinely grants such protection for information filed to satisfy its requirements.
25. Indeed, the Decision itself grants confidential protection for certain information filed in accordance with the MAADs Handbook requirements. For example, WCUL was required by the MAADs Handbook to "Provide all final legal documents to be used to implement the proposed transaction." WCUL filed the Purchase and Sale Agreement to satisfy the

OEB's filing requirements. The OEB granted confidential treatment for several terms within the Purchase and Sale Agreement, recognizing that certain commercial information warrants protection from public disclosure to preserve commercial sensitivity and prevent prejudice.⁵

26. While WCUL acknowledges OEB Staff's position that certain information in the Resolution may be relevant to demonstrating that the Transaction was approved by the City of Windsor and concedes this point to maintain the proceeding schedule, the MAADs Handbook states that Subject Information may not be relevant:

The OEB will not consider issues relating to the overall merits or rationale for applicants' consolidation plans **nor the negotiating strategies or positions of the parties to the transaction.** [...]

Applicants and stakeholders should not file any of the following types of information as they are not considered relevant to the proceeding:

- Draft share purchase agreements and **other draft confidential agreements and documents** utilized in the course of the negotiation process
- **Negotiating strategies or conduct of the parties involved in the transaction** [...]

27. Relevance alone does not constitute a sufficient basis for compelling public disclosure of the Resolution's confidential content. The unredacted Resolution has been filed to satisfy this requirement and provided to OEB Staff and parties who have signed a Declaration and Undertaking in this proceeding. The Decision does not set out a clear rationale for why the Subject Information in the Resolution should not be treated as confidential, nor does it directly address the concerns raised by WCUL in its submissions.
28. The OEB's misuse of the MAADs Handbook to assess the merits of a confidentiality claim over the Resolution is a material and clearly identifiable error of law and/or fact.

⁵ Decision at page 16.

29. WCUL is particularly concerned that the OEB's Decision appears to disregard the City of Windsor's lawful exercise of its authority under section 239 of the *Municipal Act, 2001*, to conduct its discussion regarding the negotiation parameters for the acquisition of E.L.K. Energy in-camera and to issue a Resolution expressly designated as "**CONFIDENTIAL**". The OEB's Decision undermines municipal processes expressly designed to safeguard the confidentiality of certain municipal information and business. This is a material and clearly identifiable error in law, fact and/or jurisdiction.
30. It is also unclear what proceedings are being referenced in the Decision when the OEB "...notes that similar information been filed on the public record in similar proceedings." It is not clear to WCUL that any other applicants have disclosed, or have been required to disclose, negotiating boundaries around bidding strategies, valuations, offer prices, and payment terms. The redactions in the Resolution that were filed with the OEB were limited in scope to the commercially sensitive information.
31. WCUL submits that a party's negotiating position in connection with a commercial transaction constitutes one of the most sensitive pieces of commercial information that should never be publicly disclosed. Non-disclosure of this information is recognized in section 11 of the *Municipal Freedom of Information and Protection of Privacy Act* where:⁶

11 A head may refuse to disclose a record that contains [...]

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

⁶ See also section 17 and 18 of the *Freedom of Information and Protection of Privacy Act*.

(g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person; [...]

32. The OEB may, in fact, be obligated under section 17 of the *Freedom of Information and Protection of Privacy Act* to withhold disclosure of the Resolution as it is a record that reveals commercial information that was supplied in confidence to the OEB and could prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of WCUL. This mandatory exemption protects confidential information supplied to institutions by a third party. The Resolution meets the three-part test set out in the *Freedom of Information and Protection of Privacy Manual*:⁷
- i. Part 1: The Resolution contains a trade secret, commercial and/or financial information about the negotiating terms of the Transaction. The terms upon which WCUL was willing to pay for E.L.K. Energy is highly confidential. The *Freedom of Information and Protection of Privacy Manual* lists business proposals, tenders, marketing strategies, price, pricing practices, bid information, and algorithms as meeting this requirement.
 - ii. Part 2a: WCUL is required by the MAADs Handbook to supply the Resolution to the OEB, as stated in the Decision “The OEB Filing Requirements require an applicant to provide a copy of appropriate resolutions for approving the transaction.”⁸
 - iii. Part 2b: WCUL filed the Resolution through the OEB’s confidential process set out in the *Practice Direction on Confidential Filings*. The Resolution was also marked “**CONFIDENTIAL**”. WCUL had an expectation of confidentiality at the time the Resolution was supplied to the OEB.

⁷ *Freedom of Information and Protection of Privacy Manual* at pages 62-68, online: <<https://files.ontario.ca/books/mgcs-foi-privacy-manual-en-2021-09-02.pdf>>

⁸ Decision at page 18.

- iv. Part 3: WCUL submits that the Resolution meets the following requirements of the *Freedom of Information and Protection of Privacy Manual* for this part of the test: (i) commercial negotiations have not been finalized; (ii) all of the factors listed to interfere with WCUL's competitive position apply here; (iii) a third party, faced with the prospect that their information will be disclosed under the legislation, may no longer voluntarily supply similar information in the future to the OEB; and (iv) an undue loss will occur to WCUL and an undue gain to competitive third parties and the Seller.
33. Thus, this is another material and clearly identifiable error in law and/or fact.
34. Public disclosure of the Resolution inclusive of bidding strategies, valuations, offer prices, and payment terms creates numerous undesirable risks, such as:
- i. Since the Transaction has not closed, disclosure of this information publicly could unnecessarily imperil the Transaction closing on the terms that have been agreed to.
 - ii. If the Transaction does not close, WCUL would be significantly prejudiced as its negotiating boundaries (not solely the agreed upon final purchase price) for the acquisition of E.L.K. Energy would be in the public domain, however no other bidder in the competitive process would be compelled to disclose their negotiating limits. WCUL's bidding and negotiation strategies, valuations, offer prices and payment terms would become publicly known, while others would rightfully keep this information safeguarded to preserve their commercial interests.
 - iii. Should the Transaction fail to close, WCUL would suffer significant prejudice if the Seller were to initiate a new competitive bidding process for E.L.K. Energy, as all other bidders would have knowledge of WCUL's confidential negotiating parameters, while WCUL would remain unaware of the positions of competing bidders. The Seller would also have direct access to this information and be significantly advantaged in any future negotiations, as they would know the bounds

upon which its counterparty was permitted to negotiate, in addition to being able to contrast this against the original Transaction parameters.

35. Utilities are routinely up for sale and this Transaction is not the only potential deal in the industry now. Disclosure of the Subject Information in the Resolution could influence these other potential deals too, such as reducing the number of participating bidders and/or impacting the potential purchase price of those utilities. In particular, disclosure of the Subject Information could be a real deterrent to utility consolidation for municipally owned utilities.
36. There is a strong basis to determine that the OEB made material and clearly identifiable errors in the Decision with respect to the Review Issue.

Stay

37. Under section 5.1.15 of the *Practice Direction on Confidential Filings*, WCUL understands that the OEB will not place the document on the public record until the appeal or review has been concluded or the time for filing an appeal or review has expired without an appeal or review having been commenced. WCUL is of the view this provision operates as a stay of the Decision until a court appeal or OEB review has been concluded, but only in respect of the Resolution.
38. Thus, a request for a stay of the Decision under section 40.04 of the OEB's *Rules of Practice and Procedure* is not necessary in the circumstances. WCUL also intends to file a notice of appeal with the Court and WCUL understands that section 5.1.15 of the *Practice Direction on Confidential Filings* applies for the duration of that proceeding as well.
39. However, should WCUL's understanding be incorrect that a request for a stay is not needed, in the alternative, a stay under section 40.04 of the OEB's *Rules of Practice and Procedure* is appropriate in the circumstances as each of the errors described above have a material and irreparable impact on WCUL if the Subject Information in the Resolution is disclosed. Specifically, WCUL will:

- i. Be at a competitive disadvantage as competitors will gain insight into the bidding and negotiation strategies, valuations, offer prices and payment terms. This cannot be undone.
- ii. Lose its bargaining power and may never regain this leverage in future negotiations.
- iii. Damage its trust and reputation with The City of Windsor, such that it may be less willing to share sensitive information in the future and undermine operational effectiveness of WCUL and its subsidiary utilities.
- iv. Incur non-compensable strategic harm. Internal methodologies and strategies cannot be put back in the box once publicly disclosed.

Confidentiality is in the public interest

- 40. Absent a determination by either the Court or OEB that the Subject Information in the Resolution is commercially sensitive and should be afforded confidential treatment in accordance with the OEB's *Practice Direction on Confidential Filings*, WCUL is left in a position where it would need to consider its next steps, each of which would cause significant commercial harm: (1) WCUL would be required to disclose the Subject Information and expose itself to the risks and perils outlined above; or (2) WCUL would be required to work with the City of Windsor to issue a new authorizing resolution that does not contain the Subject Information, potentially significantly delaying the completion the Transaction, which would perpetuate the current untenable financial and operating situation of E.L.K. Energy. This poses a significant risk for E.L.K. Energy customers. Each of these undesirable outcomes are easily avoided by granting the Subject Information confidential treatment.
- 41. Ultimately, it is unclear why the full Resolution must be disclosed. The issue before the OEB is, at its core, a binary determination. Either the OEB is satisfied the Resolution evidences that the Transaction was approved by the WCUL shareholder and meets the MAADs Handbook filing requirement, or it does not. Public disclosure of the Subject Information is not necessary.

42. Disclosure of the Subject Information in the Resolution may also have a chilling impact on other municipalities participating in the MAADs process or bidding on utilities in the future. Requiring the disclosure of negotiating bounds leading up the final agreement would constitute new OEB precedent, as it is signaling that the bounds of hypothetical transactions, rather than the finalized transaction before the OEB, are also relevant to the OEB's assessment of a MAADs application.
43. Further, the OEB would be signalling that there are additional requirements outside those listed in the MAADs Handbook, specifically that the OEB needs to see negotiation parameters of parties in addition to the impact of the agreed upon purchase price on the financial viability of the acquirer. WCUL does not believe it was the OEB's intention to establish additional filing requirements with this Decision, and as such, a clearly identifiable error has been made. Altering these established tests could result in uncertainty and less pursuit of MAADs transactions for the benefit of ratepayers.
44. None of the above outcomes are in the public interest and do not promote further utility consolidation.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

45. The record of documents filed in EB-2025-0172; and
46. Such further and other materials as WCUL may provide and the OEB may permit.

September 15, 2025

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AND TO: ALL INTERVENORS IN EB-2025-0172