



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND ORDER ON MOTION

EB-2017-0007

Planet Energy (Ontario) Corp.

Motion for Third Party Production

BEFORE: Christine Long
Vice-Chair and Presiding Member

Michael Janigan
Member

Cathy Spoel
Member

August 28, 2017

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1 BACKGROUND AND INTRODUCTION

On February 9, 2017, the Ontario Energy Board (OEB), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the Act), issued a Notice of Intention (Notice) to make a compliance order under sections 112.3 and 112.5 of the Act against Planet Energy (Ontario) Corp. (Planet Energy), a licensed electricity retailer and gas marketer. The Notice indicates that the order would require Planet Energy to take immediate and appropriate measures to ensure its salespersons comply with enforceable provisions, to refund monies to affected consumers, and to pay an administrative penalty in the amount of \$450,000.

On June 9, 2017, Planet Energy filed a Notice of Motion seeking the production of certain documents and other information by four individuals described in the Notice of Motion as “the OEB Expected Witnesses”: James MacArthur, Kayvan Nahid, Roobinet Andrassin and Robert Hawkins. Messrs. MacArthur and Nahid are alleged to have been salespeople acting on behalf of Planet Energy; Ms. Andrassin and Mr. Hawkins are alleged to have been customers who entered into energy contracts with Planet Energy. The Notice of Motion was served on the OEB Enforcement Team (Enforcement Team) and the OEB Expected Witnesses. Planet Energy later withdrew its request for an order against Ms. Andrassin.

Pursuant to Amended Procedural Order No. 2, the OEB advised that it would hold an oral hearing on the motion, and provided the parties to the motion, including the OEB Expected Witnesses, with the opportunity to file written submissions and materials in advance of the oral hearing.

The oral hearing was held on August 14, 2017.

For the reasons that follow, the OEB will grant Planet Energy’s request for an order requiring the three remaining OEB Expected Witnesses to provide relevant documents to Planet Energy. The OEB will not grant Planet Energy’s request for an order requiring the production of information that is not in documentary form.

2 PLANET ENERGY'S MOTION

In its Notice of Motion, Planet Energy sought: (a) an order requiring each of the OEB Expected Witnesses to produce all documents in their power, possession or control relevant to the enforcement proceeding, and (b) an order requiring Messrs. MacArthur and Nahid to provide the names and contact information for individuals referenced in witness statements that had previously been disclosed.

At the outset of the oral hearing, Planet Energy explained that the scope of its request had been narrowed since it filed the Notice of Motion. First, it had withdrawn its request for an order against Ms. Andrassin. Second, it conceded that, as submitted by the Enforcement Team, there is no authority in the *Statutory Powers Procedure Act* (SPPA) or the OEB's *Rules of Practice and Procedure for Enforcement Proceedings* (Rules) to order pre-hearing discovery of third parties. By contrast, Rule 21.01A of the Rules expressly authorizes the OEB to make an order compelling the production of third party documents. The draft order prepared by Planet Energy therefore did not include the disclosure of the names and contact information for individuals referenced in the previously disclosed witness statements.

Planet Energy urged the OEB to apply the same test as the courts apply when considering requests for third party production: the applicant must show the documents are likely to be relevant, and that there would be no undue prejudice to the third parties from whom the documents are sought.

Planet Energy argued that Messrs. MacArthur and Nahid should be required to produce documents that would allow it to respond to the Enforcement Team's allegations that they received inadequate training and testing by Planet Energy. Planet Energy further argued that Mr. Hawkins should be required to produce documents that would allow it to respond to the assertions in his witness statement that he was misled about Planet Energy's products by a Planet Energy salesperson.

Planet Energy relied on evidence filed to support its claim that all three individuals in fact have in their possession relevant documents that have not yet been produced, despite Planet Energy's previous requests to the Enforcement Team. For example, Planet Energy pointed to references to certain e-mails and other documents in the witness statements. Planet Energy argued that none of the individuals would suffer any prejudice by being compelled to produce the relevant documents in their possession. In particular, Planet Energy explained that the individuals were not true "strangers" to the

proceeding: as witnesses upon whose testimony the Enforcement Team is expected to rely, they are already deeply involved.

In its written response to the Motion, the Enforcement Team opposed Planet Energy's request for an order against Mr. Hawkins, on the grounds that he had already turned over any relevant documents to Mr. MacArthur. The Enforcement Team took no position on Planet Energy's request for an order requiring the production of documents by Messrs. MacArthur and Nahid.

The Enforcement Team argued that there was no jurisdiction to order the pre-hearing disclosure of names or other non-documentary information. The Enforcement Team suggested that, if the OEB was satisfied that there were documents that were likely relevant that had not already been produced, the OEB should then review those documents before ordering any of them to be produced, taking into account the interests of justice including any privacy concerns.¹ At the oral hearing, the Enforcement Team acknowledged that the second step would not be necessary where the third party does not object to the production on the basis of privacy or other grounds. Planet Energy argued that the second step is not necessary in this case because there is no special sensitivity in the documents sought, which Planet Energy characterized as standard business records.

At the oral hearing, Planet Energy and the Enforcement Team both noted that since the written motion materials were exchanged, there had been some further information provided to Planet Energy. Planet Energy contended that these responses were not sufficient, and that an order was still warranted – if an individual has already produced everything, the order could be addressed with a simple letter to that effect.

None of the OEB Expected Witnesses responded in writing to the Notice of Motion. However, Messrs. MacArthur and Hawkins attended the oral hearing of the motion. Mr. MacArthur explained that he had provided all relevant documents, including those he had received from Mr. Hawkins, to the Enforcement Team, although a technological issue had prevented some of the documents from being printed and shared with Planet Energy. Mr. MacArthur advised that he would ensure that those documents were printed and provided to Planet Energy. Mr. MacArthur further stated that the delay in providing the documents by him was a result of his experiencing some health issues. Counsel for

¹ The Enforcement Team pointed to the Supreme Court of Canada's decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411.

Planet Energy advised that they were unaware that health issues was the cause of any delay. Mr. Hawkins said he had provided materials to Mr. MacArthur which were turned over to Planet Energy. Mr. Hawkins agreed to check his files to see if there were any other documents, and to provide them to Planet Energy: “Whatever I have, it’s more than welcome to have.”²

Mr. Nahid did not attend the oral hearing, although the Enforcement Team confirmed that he was aware of it. The OEB panel is satisfied that service of the Notice of Motion was properly effected on Mr. Nahid. In response to the motion, Mr. Nahid did send an e-mail to Planet Energy’s lawyers after the motion was filed to advise that he did not have any contracts, but Planet Energy took the position that the e-mail was not responsive to the relief sought in the motion.

The OEB invited OEB counsel to comment on the relevant law.³ OEB counsel suggested that, even though Planet Energy and the Enforcement Team appeared to agree that the OEB has no jurisdiction to order the pre-hearing disclosure of non-documentary information, the OEB should leave any findings on that question to another case, where the question was fully argued. OEB counsel also recommended that if the OEB were to issue an order for production, the order should be carefully crafted in such a way as to avoid being too broadly worded. OEB counsel suggested that the two-step approach suggested by the Enforcement Team, whereby the OEB would inspect the documents before they were produced, was one way to balance the interests of the third parties against Planet Energy’s interests, but not the only way.

² Hearing Transcript, page 31, lines 12-13.

³ OEB counsel acts separately from the Enforcement Team, which is represented by outside counsel.

3 FINDINGS

Planet Energy is entitled to know the case against it. Based on the evidence, it is not clear that it has received all relevant documents in the possession of the OEB Expected Witnesses. As described above, although Mr. Hawkins stated at the oral hearing that he had provided documents to Mr. MacArthur, which were then turned over to the Enforcement Team, he volunteered to review his computer again to ensure that he had provided all relevant documents. Mr. MacArthur stated that he would print out the documents which he had provided to the Enforcement Team on a computer stick, but which the Enforcement Team had been unable to print. Mr. Nahid did not make written submissions or attend the hearing of the motion. Although Mr. Nahid e-mailed the office of Planet Energy's lawyers after the motion was filed to advise that he did not have any contracts, it is not obvious from the record that all relevant documents in his possession have been provided.

The OEB finds that an order for production against the three individuals is appropriate, to ensure all relevant documents are produced. As Planet Energy suggested, if any of the individuals has in fact produced everything, a simple letter advising Planet Energy of that fact would suffice to comply with the order.

Planet Energy provided a draft order. The OEB has revised the order to more narrowly define the scope of materials relevant to the allegations in the Notice of Intention.

The OEB considers that the two-step process suggested by the Enforcement Team, whereby documents would be provided first to the OEB for screening before being released to Planet Energy, is unnecessary in this case. Neither of the OEB Expected Witnesses who participated in the motion suggested that they would be harmed in any way by producing documents directly to Planet Energy. There is nothing to suggest that the documents are particularly sensitive or personal – they are, as Planet Energy argued, standard business records.

Planet Energy agreed with the Enforcement Team that there is no express power in the SPPA or the OEB's Rules to order the pre-hearing disclosure of names from third party witnesses. Planet Energy therefore did not include such relief in its draft order, and indicated that it would pursue the names in cross-examination or otherwise at the hearing on the merits. In the circumstances, the OEB will not order the disclosure of the names. In doing so, the OEB makes no finding on whether it has jurisdiction to make such an order under the SPPA, the Rules, or any other source.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. James MacArthur shall produce to Planet Energy, without delay and by not later than **September 7, 2017**, all documents (in paper, electronic or other form) in his power, possession or control relevant to the matters in issue in this proceeding, including any and all:
 - a. Training, testing, marketing, promotional or sales documentation relating to Planet Energy products or services that were available at the time the contracts in issue in this proceeding were entered into;
 - b. Communications and recording of communications, including e-mails, text messages, facsimile transmissions, letters, notes and other recordings; (collectively, “communications”) with Planet Energy or All Communications Network of Canada (ACN);
 - c. Communications with Robert Hawkins or any other persons to whom Mr. MacArthur marketed Planet Energy products or services; and
 - d. Communications with the OEB or any other regulatory agency pertaining to the allegations in the Notice of Intention.

2. Kayvan Nahid shall produce to Planet Energy, without delay and by not later than **September 7, 2017**, all documents (in paper, electronic or other form) in his power, possession or control relevant to the matters in issue in this proceeding, including any and all:
 - a. Training, testing, marketing, promotional or sales documentation relating to Planet Energy products or services that were available at the time the contracts in issue in this proceeding were entered into;
 - b. Communications and recording of communications, including e-mails, text messages, facsimile transmissions, letters, notes and other recordings (collectively, “communications”) with Planet Energy or All Communications Network of Canada (ACN);
 - c. Communications with Roobinet Andrassin or any other persons to whom Mr. Nahid marketed Planet Energy products or services; and
 - d. Communications with the OEB or any other regulatory agency pertaining to the allegations in the Notice of Intention.

3. Robert Hawkins shall produce to Planet Energy, without delay and by not later than **September 7, 2017**, all documents (in paper, electronic or other form) in his

power, possession or control relevant to the matters in issue in this proceeding, including any and all:

- a. Documents relating to Planet Energy products or services;
- b. Communications and recording of communications, including e-mails, text messages, facsimile transmissions, letters, notes and other recordings (collectively, “communications”) with Planet Energy or All Communications Network of Canada (ACN);
- c. Communications with Mr. MacArthur; and
- d. Communications with the OEB or any other regulatory agency pertaining to the allegations in the Notice of Intention.

DATED at Toronto August 28, 2017

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary