

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, SO
1998, c 15, Sch B;

AND IN THE MATTER OF a Notice of Intention to Make an
Order for Revocation of a Licence against Energhx Green Energy
Corporation, Licence Numbers ER-2010-0236 and GM-2010-0237

WRITTEN SUBMISSIONS OF COMPLIANCE COUNSEL

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PART I - STATEMENT OF THE CASE

1. When deciding whether to revoke a licence, it is appropriate for this Board to consider the conditions set out in s. 2 of *Licence Requirements - Electricity Retailers and Gas Marketers*¹ for the issuance or renewal of a licence. Section 2 provides that “An applicant for the issuance or renewal of a licence that allows for the retailing of electricity or the marketing of gas to low-volume consumers must meet all of the following requirements.” (emphasis added) If an entity could not meet those conditions because of the misconduct for which revocation is being sought, then revocation would be appropriate. The requirements set out in section 2 are:

1. Having regard to the financial position of the applicant, the applicant can reasonably be expected to be financially responsible in the conduct of business.
2. The past conduct of the applicant affords reasonable grounds for belief that the applicant will carry on business in accordance with law and with integrity and honesty.
3. If the applicant is a corporation, the past conduct of its officers and directors affords reasonable grounds for belief that its business will be carried on in accordance with law and with integrity and honesty.
4. The applicant is not carrying on activities that are, or will be, if the applicant is licensed, in contravention of the Act or the regulations or the codes, orders or rules issued or made by the Board. (emphasis added)

2. Energhx is in breach of more than one of those criteria:

(a) **“Reasonably be expected to be financially responsible”**: Energhx does not appear to have the requisite financial resources or stability to meet this threshold. It cannot pay its two \$800 licence fees that have been overdue since May 2013, let alone the administrative penalty that this Board imposed more than a year earlier, in March 2012.

(b) **“Reasonable grounds to believe that [Energhx] will carry on business in accordance with law and with integrity and honesty”**: If it is allowed to retain its licences, Energhx will continue to carry on activities that are not in accordance with

¹ O Reg 90/99.

the law, namely failing to pay the administrative penalty, failing to pay the licence fees, and failing to file the information required by the Board-ordered licence conditions.

(c) **“Not carrying on activities that are ... in contravention of the Act or the regulations or the codes, orders or rules issued or made by the Board”**: By the same token, Energhx is violating enforceable provisions under the Act and orders issued by the Board by failing to pay the administrative penalty, failing to pay the licence fees, and failing to file the information required by the Board-ordered licence conditions.

3. Compliance with Board-ordered conditions, and especially with penalties imposed by the Board arising out of findings of non-compliance, is a foundational principle of operating in a regulated environment. An entity that fails to abide by Board-ordered requirements is ungovernable and should not be permitted to participate in the activities regulated by that scheme.

4. Failing to file the four categories of information is particularly significant. This appears to have occurred because Energhx does not even have audited financial statements or any of the other compliance-related information required.² The Board imposed these conditions on Energhx’s licences because of concerns about its financial viability and past non-compliance. Failing to file the information is a breach of the Board’s order, a breach of Energhx’s licences, and it deprives the Board of the information it needs to assess Energhx’s suitability as a licensee.

5. Dr Ogedengbe, Energhx’s principal, admitted that Energhx was in breach of Board orders and its licences. He admitted that, at the time, he understood what the orders and licences required. Although his testimony was somewhat vague on this point, he appears to have attempted to excuse Energhx’s conduct on two grounds: first, he claimed that Energhx simply could not comply, and, second, at times he argued that the requirements were not or

² Transcript from the hearing, November 28, 2013 (“**Transcript**”): “DR. OGEDENGBE: ... I think maybe 2011 we file, you know. We went through the auditing as required by the Board, and that was since then, you know, so the annual filing of the financial statement, we don't have it.” (page 39, lines 4-7) (emphasis added).

should not be applicable to Energhx because it was not involved in what he saw as true “business activities”, or because it was involved in “green energy”, “demand-side monitoring”, or “smart grid” activities. Neither of these are eligible, let alone sufficient, to persuade the Board not to revoke licences where the licensee is in clear breach of the criteria in the Licensing Regulation. Accordingly, Energhx’s licences should be revoked.

PART II - SUMMARY OF THE FACTS

A. Energhx has failed to pay the administrative penalty, despite having two extensions and more than eighteen months to pay

6. On March 26, 2012, this Board ordered Energhx to pay a \$10,000 administrative penalty. The penalty was imposed because Energhx had contravened several applicable rules relating to training, ID badges, contracts, and other materials. The Board found that these contraventions were “major deviations from the requirements”.³ The Board ordered Energhx to pay the penalty by December 31, 2012.⁴

7. It was only on December 20, 2012 that Energhx sought an extension of the deadline to pay the administrative penalty. Energhx wrote that it had voluntarily suspended trying to obtain new electricity retail and gas marketing customers since September 2011. It wrote that it was still trying to design its website and train its management team. It did not mention any ongoing research activities as reasons for the failure to pay.⁵

8. By letter, the Board granted a six-month extension, from December 31, 2012 to June 28, 2013.⁶

9. This time Energhx waited until the new deadline had actually *passed* – and compliance staff had notified it that non-payment was a breach of an enforceable provision⁷ –

³ **Decision and Order of the Ontario Energy Board**, March 26, 2012, Documents Intended to be Produced or Entered into Evidence by the Enforcement Team (“Enforcement Documents”), being Exhibit K1.1, tab 1 at p. 28.

⁴ *Ibid.*

⁵ **Letter from Energhx**, December 20, 2012, Enforcement Documents, tab 3.

⁶ **Letter from Board Secretary**, December 27, 2012, Enforcement Documents, tab 4.

⁷ **Letter from K. Karsan**, July 2, 2013, Enforcement Documents, tab 5.

to request another extension. It wrote on July 2, 2013 and asked for yet another six months – to December 31, 2013, to pay..⁸

10. This Board rejected Energhx’s request for a six-month extension and granted it until August 29, 2013 to pay. The Board’s decision warned Energhx that it “did not intend to grant further extensions” and that, if Energhx failed to pay this time, “the Board intends to initiate steps to suspend or revoke Energhx’s electricity retailer and gas marketer licences.”⁹

11. Again, Energhx waited *until after the deadline passed* – until August 30, 2013 – to request an extension. Energhx indicated that its voluntary marketing suspension was still in effect and that it was engaged in an “ongoing struggle to secure a financial bail-out”.¹⁰

12. At the hearing, Dr Ogedengbe admitted that he understood that Energhx was required to pay the administrative penalty by the original deadline¹¹ and that the August 29, 2013 deadline was its “last chance”.¹² He understood that this constituted a condition of Energhx’s licences.¹³

B. Energhx failed to provide the information required by an order of this Board and by its own licences

13. Energhx’s electricity retailer and gas marketing licences were renewed by the Board on April 30, 2012, each for a two-year term. In renewing the licences, the Board wrote that:

[T]he issues raised by staff with respect to the financial performance of the applicant have not, in my view been fully answered, and the financial viability of the entity remains a concern.

I find that the licences will be granted for a two year terms to enable Energhx to improve its financial position and demonstrate its continued compliance with legislative and regulatory requirements. I further find that the following reporting conditions should be imposed in the licence to allow the Board to

⁸ **Letter from Energhx**, July 2, 2013, Enforcement Documents, tab 6.

⁹ **Decision and Order of the Ontario Energy Board**, July 18, 2013, Enforcement Documents, tab 7.

¹⁰ **Letter from Energhx**, August 30, 2013, Enforcement Documents, tab 10.

¹¹ **Transcript** 45/22-24

¹² **Transcript** 48/25-27.

¹³ **Transcript** 57/2-5.

monitor Energhx's financial progress and compliance with the licences.¹⁴
(emphasis added)

14. Accordingly, the Board ordered Energhx to file the following information with the Board by June 28, 2013:

1. Audited financial statements for the 2012 fiscal year;
2. A description of Energhx's compliance monitoring and quality assurance program, including a description of the specific protocols for testing the performance of all salespersons and verification representatives in relation to compliance with applicable statutes, regulations and regulatory requirements;
3. A summary of the results of the testing program conducted within the reporting period ending on April 30, 2013; and
4. A description of Energhx's strategy for any further improvement needed to achieve continuing legislative and regulatory compliance, demonstrating the link between the results of the program to date and measures to be implemented in the future.¹⁵

15. The obligation to file this information was made a condition of Energhx's two licences.¹⁶ Despite this, Energhx has failed to provide any of the required information.

16. At the hearing, Dr Ogedengbe testified that he understood at the time that Energhx was required to provide the four categories of information in Schedule 2 to its licences.¹⁷ He admitted that Energhx was required, as a licence-holder, regardless of what business activities it was engaged in, to file the information in Schedule 2.¹⁸ He understood that the Board was concerned with Energhx's financial viability and that it had ordered Energhx to provide the information in Schedule 2 so that Energhx could demonstrate its financial viability.¹⁹

¹⁴ **Decision and Order of the Ontario Energy Board**, April 30, 2012, Enforcement Documents, tab 2 at pp. 3-4.

¹⁵ *Ibid* at p. 4.

¹⁶ **Licence ER-2010-0236**, Schedule 2, and **Licence GM-2010-0237**, Schedule 2, Enforcement Documents, tabs 11 and 12 respectively.

¹⁷ **Transcript** 33/22-24. He later suggested that Energhx was *not* required to file the information because Energhx didn't have the information and did not have "business activities": **Transcript** 39/4-10.

¹⁸ **Transcript** 40/15 – 41/1.

¹⁹ **Transcript** 35/18 – 36/20.

17. On July 22, 2013, compliance staff wrote to Energhx, notifying it that it had not provided the required information by the deadline and stating that, if the information was not filed forthwith, “compliance staff will take steps to seek a suspension or revocation of the Licences.” Energhx never responded.²⁰

18. Dr Ogedengbe claimed that he *had* replied to compliance staff’s letter of July 22, 2013, and specifically to the failure to provide the required information:

MR. SCHUMANN: But you didn't send compliance staff a letter saying that Energhx wasn't engaged in business activities and so it didn't have to file items 1 through 4, did you?

DR. OGEDENGBE: I did.

MR. SCHUMANN: Oh, you did.

DR. OGEDENGBE: Yes.

...

MR. SCHUMANN: Sir, did you reply to this letter and the point that you had not filed items 1 through 4 with the Board?

DR. OGEDENGBE: I replied -- what I said is that -- we replied to the Board, this letter, but the content of our reply is not, you know -- is not here with me to be read. But I replied to this letter.

...

MR. SCHUMANN: I just want to be very clear. It is your evidence that Energhx replied about items 1 through 4, and that the OEB would have a copy of that letter?

DR. OGEDENGBE: Yes.²¹

19. However, neither the Board nor Dr Ogedengbe could find a letter after July 22, 2013 addressing the failure to provide the information required by Schedule 2.²² Dr Ogedengbe

²⁰ See correspondence from to Board Secretary from Energhx and from compliance counsel, December 2, 2013. Both sides agreed that there was no response from Energhx to the July 22, 2013 letter.

²¹ **Transcript** 50/28 – 52/17.

²² Correspondence and enclosure from Energhx and compliance counsel, December 2, 2012.

admitted that “Energhx do not respond directly to Board’s request of July 22 for the 4-point information”.²³

C. Energhx has failed to pay its licence fees

20. Energhx’s licences each required it to pay “all fees charged and amounts assessed by the Board”.²⁴ For the year 2013-2014, the fee for each licence was \$800.00. The fees were due on May 1, 2013. Energhx was invoiced for these amounts on April 1, 2013.²⁵ The invoices contained the following warning:

IMPORTANT: It is a condition of your Ontario Energy Board licence that the amount(s) noted in this invoice be paid within the prescribed time. Your licence conditions are each an “enforceable provision” of the *Ontario Energy Act, 1998*, and sanctions for non-compliance may include financial penalties, licence suspension, and revocation.²⁶ (emphasis added)

21. On August 12, 2013, Board staff wrote an email to Energhx notifying it that the licence fees were overdue by more than 90 days.²⁷ Energhx did not respond. Then on September 9, 2013, the Board wrote formal letters to Energhx (one for each licence) stating that, if Energhx did not pay the fees by September 27, 2013, the Board may proceed to issue a notice of intention to revoke the licences.²⁸

22. Finally, Energhx responded, asking for an exemption from the licence fee for 2013-2014. It also stated that it had “exhausted all the financial resources of its first directors”.²⁹ Board staff did not respond and this constituted an implicit refusal of the request for an exemption.

²³ *Ibid.*

²⁴ Electricity retailer licence, clause 10.1; gas marketer licence, clause 11.1, Enforcement Documents, tabs 11 and 12 respectively. See also **Examination of Lou Mustillo**, November 28, 2013, transcript page 14 line 24 to page 15 line 1 (“**Mustillo** 14/24 – 15/1”).

²⁵ **Invoices**, Enforcement Documents, tabs 13 and 14.

²⁶ *Ibid.*

²⁷ **Email from R. Gjinali**, August 12, 2013, Enforcement Documents, tab 15.

²⁸ **Letter from J. Pickernell**, September 9, 2013, Enforcement Documents, tabs 16 and 17.

²⁹ **Letter from Energhx**, September 12, 2013, filed with Board by correspondence on December 2, 2013.

23. At the hearing, Dr Ogedengbe admitted that he understood that Energhx was required to pay the licence fees as a condition of its licences.³⁰ He understood that, if Energhx did not pay them, its licences could be revoked.³¹

PART III - ISSUES AND THE LAW

A. Energhx has violated Orders of this Board and conditions of its licences, and appears unable to comply with them

24. Energhx has not paid the administrative penalty.³² It has not provided the four categories of information.³³ And it has not paid its licence fees.³⁴

25. The reason that Energhx has not paid the amounts due appears to be that it has run out of money. This Board should conclude that Energhx has no or virtually no financial resources or revenue, from the following evidence:

(a) Energhx has failed to pay its two licence fees, in the relatively modest amount of \$800 each.

(b) On August 30, 2013, Energhx stated that it was engaged in an “ongoing struggle to secure a financial bail-out”.³⁵ At the hearing, Dr Ogedengbe admitted that this was a fair description of Energhx’s financial situation at the time, and that it has not secured a financial “bail-out”.³⁶

(c) Energhx’s only financial resources appear to have been contributions from its founders or their family and friends. In a letter, Dr Ogedengbe stated that Energhx had “exhausted all the financial resources of its first directors”.³⁷

³⁰ **Transcript** 57/6-9.

³¹ **Transcript** 58/5-25.

³² **Mustillo** 9/19-21.

³³ **Mustillo** 9/16-18.

³⁴ **Mustillo** 19/8-12.

³⁵ **Letter from Energhx**, August 30, 2013, Enforcement Documents, tab 10.

³⁶ **Transcript** 56/5-14.

³⁷ **Letter from Energhx**, September 12, 2013, filed with Board by correspondence on December 2, 2013.

26. Most notably, Energhx appears to have completely ignored its obligation to provide the four categories of information. This contravention is particularly serious because it deprives the Board of the very information it decided it needed in order to assess Energhx's continued suitability as a licensee.

B. Responses to Energhx's arguments

(i) The fact that Energhx is not significantly using its licences weighs in favour of, not against, revocation

27. Energhx's Board filings indicate that it has six low-volume electricity retail customers and zero gas marketing customers.³⁸ Dr Ogedengbe admitted at the hearing that Energhx is not retailing electricity (except for, presumably, the six existing customers) and it is not marketing gas.³⁹ This is not a significant level of licence use.

28. It has been recognised that a licensee's not using a licence weighs in favour of revocation, since it indicates that the licensee would not suffer significant hardship from revocation:

The appellant testified that he did not conduct any insurance business during the eleven months that he was licensed, but uninsured – that is, between January 16 and December 1, 2010. The hearing took place in March of 2011, more than three months after the decision of the Superintendent to immediately revoke his licence. Accordingly, at the time of the hearing, the appellant had not sold or solicited life insurance for approximately fourteen months. However, in his testimony and submissions, the appellant made no reference whatsoever to the impact that the Superintendent's decision had had on him, or the impact that would be felt in the future. Thus, one can reasonably infer that the appellant's licence was not his principal source of income. Although the Superintendent's delegate did not have access to this information, in December of 2010, it clearly supports the correctness and reasonableness of his decision.⁴⁰ (emphasis added)

29. In any event, there was absolutely no clear evidence before the Board of how electricity retailing (let alone gas marketing) relates to "smart-grid" research or "demand-side

³⁸ Mustillo 10/4-18.

³⁹ Transcript 37/23-27.

⁴⁰ *Gardner v Ontario (Financial Services Tribunal)*, 2011 ONFST 6 at page 10.

monitoring”. There was accordingly no evidence of whether and how revocation would impact any development or research activities in those areas.

(ii) Green energy activities should not entitle a licensee to disobey Board orders and licence conditions without fear of revocation as a consequence

30. Energhx testified that its activities consisted of “demand-side monitoring”, “smart grid”, and “investment activities”, not “conventional” electricity retailing and gas marketing. Although Dr Ogedengbe’s testimony on this point was somewhat vague, he seemed to suggest that, as a result, Energhx should be accorded more leniency than “conventional” licensees.⁴¹

31. A version of this argument was rejected by the Board when it imposed the administrative penalty on March 26, 2012. There, it agreed with compliance counsel that “any purported benefit Energhx presents to the market in terms of advancing competition or green energy technology as a start up business is irrelevant for the purposes of setting an administrative penalty.”⁴² Dr Ogedengbe himself admitted on November 28, 2013 that he understood that the Board was rejecting his argument that green energy participants should receive lenient treatment, and that the same rules should apply to all licensees.⁴³

32. This panel should affirm that conclusion and hold that the same applies to decisions about whether to revoke a licence for failure to comply with Board orders and licence conditions. In other words, all licensees, including those engaged in “green energy” or “smart-grid” activities, must comply with this Board’s orders and their licence conditions. The consequences for non-compliance should be applied in a fair and uniform way.

(iii) The Board’s policies towards electricity distributors are irrelevant in this proceeding

33. Along the same lines, the document entitled “Report of the Board: Renewed Regulatory Framework for Electricity Distribution”⁴⁴ is irrelevant. As Mr Mustillo and Board

⁴¹ **Transcript**, 27/16-21; 28/5-11; 34/14-16.

⁴² **Decision and Order**, March 26, 2012, Enforcement Documents, tab 1, at p. 19.

⁴³ **Mustillo** 22/20-22, 23/16-20, and 25/12-18; **Transcript**, 32/17-26.

⁴⁴ Marked as **Exhibit K1.3** at the hearing.

counsel said at the hearing,⁴⁵ it pertains to electricity distribution and, less directly, transmission. It does not pertain to electricity retailing or gas marketing. More so, it does not pertain to the appropriate response by the Board when a licensee violates Board orders or the conditions of its licences. The document expressly states:

With the exception of regional infrastructure planning and smart grid, which apply to both distributors and transmitters, the policies set out in this Report apply to distributors only at this time. In due course, the Board will provide further guidance regarding how the policies in this Report may be applied to transmitters.⁴⁶ (emphasis added)

(iv) *Any desire of Energhx to continue to extract data from its existing customers or to use its licences as a credential to attract investment is not legitimate*

34. Dr Ogedengbe, in his testimony, sometimes seemed to suggest that Energhx either desired to continue to use its licences to extract data from its six existing electricity retailer customers, or that it wanted to keep its licences simply to attract investor interest. Neither is an appropriate use of the licences. The fact of being licensed sends a message to the public that the entity has met certain standards required under a regulatory scheme. This licensee has not only not met those conditions but, in holding the licence and carrying on a different type of business than that permitted under the licence, is misleading the public to the effect that the Board has approved this business carrying on the different line of work.⁴⁷

C. In all the circumstances, revocation is the appropriate order

35. By its defaults, and in the evidence of its representative at the hearing, Energhx has demonstrated that it is unwilling or unable to abide by this Board's orders and the conditions of its licences. There is no indication of when, or whether, that situation will change. Revocation of the licences is the only appropriate response by the Board.

36. As submitted above at paragraph 1, this Board should consider the criteria in s. 2 of *Licence Requirements - Electricity Retailers and Gas Marketers*.⁴⁸ Revocation is appropriate

⁴⁵ **Transcript**, page 26.

⁴⁶ Item 21 in Energhx's Book of Documents, marked as **Exhibit K1.3** at the hearing, at page 5.

⁴⁷ **Transcript** 43/24 – 45/12.

⁴⁸ O Reg 90/99.

where a licence could not properly be issued or renewed. For ease of reference, the conditions are:

2. (1) An applicant for the issuance or renewal of a licence that allows for the retailing of electricity or the marketing of gas to low-volume consumers must meet all of the following requirements:

1. Having regard to the financial position of the applicant, the applicant can reasonably be expected to be financially responsible in the conduct of business.

2. The past conduct of the applicant affords reasonable grounds for belief that the applicant will carry on business in accordance with law and with integrity and honesty.

3. If the applicant is a corporation, the past conduct of its officers and directors affords reasonable grounds for belief that its business will be carried on in accordance with law and with integrity and honesty.

4. The applicant is not carrying on activities that are, or will be, if the applicant is licensed, in contravention of the Act or the regulations or the codes, orders or rules issued or made by the Board. (emphasis added)

37. Energhx's failure to pay the administrative penalty and its licence fees, and its admissions at this hearing and in correspondence about its "struggle to secure a bailout" and having "exhausted" its resources, mean that it does not meet condition 1. Its failure to abide by orders of this Board and conditions of its licences mean that there are reasonable grounds to believe that it will not carry on business in accordance with law (condition 2) in that it will continue to fail to comply with those requirements. (They constitute "law" because they have the status of "enforceable provisions" under the Act.⁴⁹) By the same token, Energhx is contravening the Act in that it is contravening enforceable provisions under that Act, namely, conditions of its licences and orders of the Board. Since Energhx is in breach of multiple prerequisites for licensing, it strongly indicates that revocation of those licences is the appropriate order in this case.

38. Even in regulated professions, suspension and then revocation is the standard response to a failure to pay amounts due to the regulator. In *Lewis v Canadian Society of Immigration*

⁴⁹ See *Ontario Energy Board Act, 1998*, s. 3: "'enforceable provision' means, ... (f) a condition of a licence issued under Part IV, V or V.1, ... (h) a provision of an order of the Board...".

Consultants,⁵⁰ the member's licence had been suspended because he had failed to pay licence fees and failed to complete mandatory continuing professional development courses. This occurred less than three weeks after his fees were due.⁵¹ He was warned that a continuing failure to pay could mean that his licence would be revoked, and it was revoked in due course. His application for judicial review was dismissed: the Federal Court held that:

The decision to suspend a member for failure to pay membership fees is administrative in nature. It therefore commands a low duty in terms of procedural fairness. In the present case, there was no necessity for a hearing contrary to Mr. Lewis' submission. The CSIC's regulations are clear: Mr. Lewis received prior notice in writing and was forewarned of the consequences of his failure.⁵²

39. This case is significantly more serious. Here, Energhx has had almost eighteen months to pay the administrative penalty, with two extensions, and the final deadline passed more than three months ago (August 29, 2013). There is absolutely no indication that Energhx will ever be able to pay it. Likewise, Energhx's licence fees have been overdue since May 1, 2013 – for over seven months. There is absolutely no indication as to when Energhx will be able to pay them. Finally the information required by Schedule 2 of its licences has been overdue for five months – since June 28, 2013. There is absolutely no indication that Energhx will ever be able to provide it. Like the licensee in *Lewis*, Energhx has had clear multiple warnings of that revocation was an available sanction if non-compliance continued.

40. Energhx is not only failing to comply with enforceable provisions, it has failed to address those instances of non-compliance in a timely and transparent manner. Energhx's pattern is to delay responding to a deadline until just before, or after, the deadline. Often communication from Energhx will only come after compliance staff writes to Energhx with a warning:

(a) Energhx only requested an extension of the December 31, 2012 deadline to pay the administrative penalty on December 20, 2012.

⁵⁰ 2012 FC 817.

⁵¹ See *ibid* at paras 9-13.

⁵² *Ibid* at para 31.

(b) Energhx only addressed its failure to pay the penalty by June 28, 2013 *after the deadline passed* (on July 2, 2013), on the same day as it received a letter from compliance staff notifying it of the default.

(c) Energhx only addressed its further failure to pay the penalty by August 29, 2013 *after the deadline passed* (on August 30, 2013).

(d) Energhx *never* addressed its failure to provide the information required by Schedule 2 of its licences.

(e) Energhx asked for a licence fee exemption not when it received the two invoices, not when their due date passed, not after receiving an email stating that the invoices were more than 90 days overdue, but only when the Board wrote and warned that failing to pay could lead to revocation.

The resulting picture is one of a company that is unable or unwilling to communicate promptly about compliance, let alone actually comply.

41. Revocation is also the default sanction in the insurance agent context where an agent fails to maintain proper errors and omissions insurance. E&O insurance (for an insurance agent) and the ability to pay amounts due to the Board (for Energhx) are similar in that they are both minimum indicia of the entity's financial soundness.⁵³ In *Gardner v Ontario (Financial Services Tribunal)*,⁵⁴ the agent's licence had been revoked for failure to maintain E&O insurance. He argued that suspension would have been more appropriate. The Financial Services Tribunal upheld the revocation. It noted that Gardner had also failed to provide information to the Board – just as Energhx has here.⁵⁵ He had also breached a condition of his licence – just as Energhx has here.⁵⁶

⁵³ The relevant legislation is similar: s. 393(8) of the *Insurance Act* provides that “The Superintendent may revoke or suspend a licence issued under this section if the agent has failed to comply with this Act or the regulations” and s. 112.4(1) of the *Ontario Energy Board Act, 1998* provides that “If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence.”

⁵⁴ *Supra* note 40.

⁵⁵ *Ibid* at page 8.

⁵⁶ *Ibid*.

42. The inability to provide the required information is especially concerning because the Board ordered Energhx to provide it *precisely because* of concerns about Energhx's financial stability and ability to comply with the regulatory scheme. Since Energhx has not and appears to not be able to provide it, there is no way for the Board to assess Energhx's status in these two critical areas. In other words, Energhx is not just breaching the Board's orders and its licence conditions, but it is depriving the Board of the very information that it needs to be able to assess Energhx's suitability as an energy market participant. The Tribunal in the Gardner case made some observations about the nature of licensing conditions that apply to this case:

The licensing process that applies to insurance agents under section 393 of the Act and Regulation 347/04 serves to protect the public and to enhance their confidence in the insurance industry. In particular, the requirement that every insurance agent operating in Ontario must have a valid licence allows the Superintendent and FSCO to perform a gate-keeping function in the public interest. This requirement ensures that only certain individuals, partnerships and corporations are allowed to sell or solicit insurance products as agents; those applicants that meet the licensing requirements established by the Act and Regulation. In addition, the continuous nature of the licensing process allows the Superintendent and FSCO to perform a supervisory role in the public interest. When an insurance agent breaches a condition of his or her licence, or contravenes a requirement, duty or prohibition recognised by the Act or Regulation, the Superintendent has the discretion to refuse to renew, to suspend or even to revoke this agent's licence and, in some cases, the Superintendent may even initiate proceedings under the *Provincial Offences Act*, RSO 1990, c P33. The ability to conduct business as an insurance agent is a privilege and not a right. This privilege is subject to a number of terms and conditions that must be met on an ongoing basis.⁵⁷ (emphasis added)

43. Here we have a licensee that will not or cannot abide by this Board's orders and the very conditions of its licences. To say that its financial condition is precarious is a severe understatement. It does not appear to be using its licences in any significant way. Energhx is not a fit or ready participant in the licensed areas. Revocation is not just the only appropriate response to the facts of this case, but it is also the only response that will send the right message to the broader industry about the importance of this Board's orders and of licence conditions.

⁵⁷ *Ibid.*

44. This is an appropriate case in which the licensee should pay the costs of prosecuting this matter: for one thing, Energhx's conduct has unnecessarily lengthened and increased the costs of the Board's enforcement proceedings. Notwithstanding the foregoing, and without prejudicing its position that Energhx should pay the costs of the enforcement proceeding, the enforcement team has decided not to seek costs against Energhx in the particular circumstances of this case.

PART IV - ORDER REQUESTED

45. Based on the above, compliance counsel respectfully requests that this Board make an order as follows:

- (a) Revoking Energhx's gas marketer and electricity retailer licences, effective immediately;
- (b) In the alternative, suspending Energhx's gas marketer and electricity retailer licences, effective immediately, and ordering Energhx to, by December 31, 2013, pay all outstanding amounts and provide the information required by Schedule 2 of its licences, failing which Energhx's gas marketer and electricity retailer licences shall be revoked automatically and without further action by or notice from the Board.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2013.


Fredrick Schumann

Compliance counsel

**SCHEDULE “A”
AUTHORITIES CITED**

	Cited at factum paragraph
<i>Gardner v Ontario (Financial Services Tribunal)</i> , 2011 ONFST 6	26, 37, 40
<i>Lewis v Canadian Society of Immigration Consultants</i> , 2012 FC 817	36, 37

**SCHEDULE “B”
RELEVANT LEGISLATIVE PROVISIONS**

Ontario Energy Board Act, 1998, SO 1998, c 15, Sch B

Procedure for orders under ss. 112.3 to 112.5

112.2 (1) An order under section 112.3, 112.4 or 112.5 may only be made on the Board’s own motion. 2003, c. 3, s. 76.

Notice

(2) The Board shall give written notice to a person that it intends to make an order under section 112.3, 112.4 or 112.5. 2003, c. 3, s. 76.

Contents of notice

(3) Notice under subsection (2) shall set out the reasons for the proposed order and shall advise the person that, within 15 days after receiving the notice, the person may give notice requiring the Board to hold a hearing. 2003, c. 3, s. 76.

...

Hearing

(4) A person to whom notice is given under subsection (2) may, within 15 days after receiving the notice, give notice to the Board requiring the Board to hold a hearing. 2003, c. 3, s. 76.

...

Suspension or revocation of licences

112.4 (1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence. 2003, c. 3, s. 76.

Licence Requirements - Electricity Retailers and Gas Marketers, O Reg 90/99 (as amended)

2. (1) An applicant for the issuance or renewal of a licence that allows for the retailing of electricity or the marketing of gas to low-volume consumers must meet all of the following requirements:

1. Having regard to the financial position of the applicant, the applicant can reasonably be expected to be financially responsible in the conduct of business.

2. The past conduct of the applicant affords reasonable grounds for belief that the applicant will carry on business in accordance with law and with integrity and honesty.
3. If the applicant is a corporation, the past conduct of its officers and directors affords reasonable grounds for belief that its business will be carried on in accordance with law and with integrity and honesty.
4. The applicant is not carrying on activities that are, or will be, if the applicant is licensed, in contravention of the Act or the regulations or the codes, orders or rules issued or made by the Board.

File No. EB-2013-0318

Ontario Energy Board

Re Energhx Green Energy Corporation

**WRITTEN SUBMISSIONS OF
COMPLIANCE STAFF
(in relation to the hearing held on November
28, 2013)**

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