

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

REPLY SUBMISSIONS OF COMPLIANCE COUNSEL

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A. Energhx’s “voluntary suspension of marketing activities” is irrelevant

1. The thrust of Energhx’s submissions is this: if a licensee voluntarily stops seeking new customers, it is *exempt* from revocation for failure to meet the conditions of its licences and for failure to follow this Board’s orders. In particular, such a licensee is at liberty to (1) not pay administrative penalties, (2) not pay its licence fees, and (3) not provide information that the Board has ordered it to provide, without fear that revocation will result.

2. This submission cannot be accepted. This Board must reject it in the strongest possible terms. *All licensees* must abide by this Board’s orders, meet the conditions of their licences, and demonstrate financial viability – not just those that are actively seeking new customers. The obligations flow from holding the licence, not from what one does with it. Energhx’s submissions are simply an attempt to avoid responsibility under the licensing regime:

(a) Energhx suggests that the Board’s order of March 26, 2012, which ordered Energhx to pay the \$10,000 administrative penalty, was not truly applicable to Energhx. Rather, it suggests that the order was “more general to all market participants who participated in the compliance audit of 2011, and less specific to Energhx’s consideration”.¹ This submission is patently ridiculous and must be rejected.

(b) Energhx suggests that the Board has no power to oversee its financial viability where it has suspended marketing activities.² In fact, the Board must ensure that all licensees are financially viable.

(c) Energhx suggests that it was under no obligation to provide the four categories of information pursuant to the Board’s order of April 30, 2012, and the special conditions in its licences.³ Energhx’s suggestions that it was confused about the obligation, or that it thought it had “indirectly” fulfilled it, are not credible. The orders of the Board are clear; and Energhx never asked about how they applied: the record is

¹ Written submissions of Energhx, paragraph 9.

² Written submissions of Energhx, paragraph 13.

³ Written submissions of Energhx, paragraphs 15-16.

clear that Energhx *never responded in any way* to the obligation to provide the information.⁴

(d) Finally, Energhx suggests that it does not have to pay its licence fees while it is seeking investment. This submission, too, should be rejected: applying for a licence indicates that an entity is ready to perform all obligations that flow from it, including the obligation to pay fees. If an entity is not ready to do so, it should not have a licence.

3. In any event, it is false to say, as Energhx does, that it has “suspended all activities involving the retailing of electricity”. Energhx has electricity retail customers, as its filings with the Board show⁵ and as Dr Ogedengbe admitted at the hearing⁶ and in Energhx’s written submissions.⁷

4. Finally, Energhx seeks to rely on s. 4.1 of its licences, which provides that “

The Licensee shall comply with all applicable provisions of the Act, the Electricity Act and regulations under these Acts, except where the Licensee has been exempted from such compliance by regulation. (Electricity retailer licence, Exhibit K1.1, tab 11)

The Licensee shall comply with all applicable provisions of the Act and regulations under the Act except where the Licensee has been exempted from such compliance by regulation. (Gas marketer licence, Exhibit K1.1, tab 12)

5. No exemption “by regulation” has occurred. Energhx cannot rely on s. 4.1 as a free-floating exemption.

⁴ See primary written submissions of compliance counsel at paragraphs 17-19.

⁵ Transcript from hearing on November 28, 2013, testimony of L. Mustillo, page 10 lines 4-18 (“**Transcript** 10/4-18”).

⁶ **Transcript** 63/15-17.

⁷ Written submissions of Energhx, paragraph 6.

B. Energhx's specific activities are irrelevant

6. This Board should uphold the Board's decision on March 26, 2012, that Energhx's "smart grid", "demand-side monitoring", or "green energy" activities are irrelevant to enforcement orders.⁸

7. In particular, Energhx's reliance on a Board policy to encourage "grid-enhancing and performance-based monitoring system" is mistaken. The Board policy in question relates only to distributors, not to retailers. (Energhx's submission that the policy applies to retailers because "retailers are loosely referred to as distributors by consumers"⁹ is far-fetched, to say the least.) In any event, a Board policy that applies to the whole electricity distribution system is not relevant to the compliance order to be made in respect of a single entity and a single situation of non-compliance.

8. Energhx claims that it is using its licences for research, investment in smart grid systems, and demand-side monitoring, but there is no evidence that Energhx actually *requires* its licences for those activities. It certainly does not appear that Energhx is a *bona fide* electricity retailer or gas marketer. Rather it appears that it may desire to use its licences for other collateral purposes, such as using the data its customers generate in order to conduct research.¹⁰ Collateral use of a licence is not a reason to refrain from revoking it.

9. In conclusion, Energhx is not a stable, trustworthy, or governable licensee. It has failed to comply with this Board's orders and its licence conditions, including those aimed at allowing the Board to assess its financial viability and commitment to compliance. It appears to even now have no *bona fide* intention of doing so in the future. It is in breach of multiple prerequisites for licensing under s. 2 of the relevant regulation.¹¹ Its licences should be revoked.

⁸ **Decision and Order**, March 26, 2012, Exhibit K1.1, tab 1, at p. 19: "Compliance counsel submits 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. The Board agrees."

⁹ Written submissions of Energhx at paragraph 29.

¹⁰ Written submissions of Energhx at paragraphs 32-34.

¹¹ *Licence Requirements - Electricity Retailers and Gas Marketers*, O Reg 90/99, s. 2.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of December, 2013.



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File No. EB-2013-0318

Ontario Energy Board

Re Energhx Green Energy Corporation

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

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