

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998, S.O. 1998, c. 15, (Schedule B) (the "Act")*;

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269).

**WRITTEN SUBMISSIONS OF
PLANET ENERGY (ONTARIO) CORP.**

July 7, 2017

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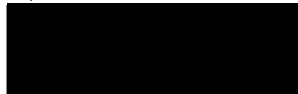
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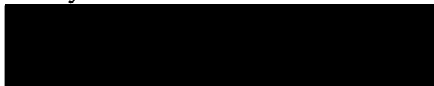
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AND TO: **James MacArthur**



AND TO: **Kayvan Nahid**



AND TO: **Roobinet Andrassin**



AND TO: **Robert Hawkins**



PART I - OVERVIEW

1. The Ontario Energy Board (the “**Board**” or “**OEB**”) has charged Planet Energy (Ontario) Corp. (“**Planet Energy**”) with breaching certain provisions of the *Energy Consumer Protection Act, 2010* and related codes and regulations. The Board’s case centres on alleged conduct by James MacArthur (“**MacArthur**”) and Kayvan Nahid (“**Nahid**”) in their interactions with Planet Energy consumers and in training they received from Planet Energy. Planet Energy denies the allegations.
2. Planet Energy seeks production of relevant documents from MacArthur and Nahid as well as from two related consumers, Robert Hawkins (“**Hawkins**”) and Roobinet Andrassin (“**Andrassin**”) all of whom will be witnesses for at the hearing of this matter (together, the “**OEB Expected Witnesses**”).
3. There is good reason to believe that the OEB Expected Witnesses possess relevant documents which they have not disclosed and which cannot be obtained from any other source. Planet Energy’s counsel identified relevant documents in their possession and requested disclosure of these documents from Ontario Energy Board Enforcement Team’s (“**OEB Enforcement Team**”) counsel; yet despite requests by OEB Enforcement Team’s counsel, the OEB Expected Witnesses have refused to produce these or any other relevant documents in their possession. In addition, both MacArthur and Nahid have referenced other potential witnesses in their witness statements, which they have also refused to identify.
4. In order to understand and meet the case against it, Planet Energy is entitled to disclosure of relevant documents in the power, possession and control of the OEB Expected Witnesses as well as the names and contact information of witnesses referenced by MacArthur and Nahid.
5. Lastly, while this is formally a motion for production of documents from third parties, the OEB Expected Witnesses are not true “strangers” to the proceeding. Rather, they have each volunteered witness statements and will appear as witnesses the OEB Enforcement Team at the hearing. In the circumstances, there is no prejudice to the OEB

Expected Witnesses in ordering disclosure and, indeed, it would be manifestly unfair to Planet Energy not to do so.

PART II - FACTS

6. Planet Energy is a licenced electricity and natural gas retailer and marketer. Planet Energy has operated in Ontario since 2006.

7. On February 9, 2017, the Board issued a Notice of Intention to Make an Order for Compliance, Restitution and Payment of an Administrative Penalty against Planet Energy under sections 112.3 and 112.5 of the *Ontario Energy Board Act, 1998*.

Notice of Intention to Make an Order for Compliance, Restitution and Payment of an Administrative Penalty against Planet Energy under sections 112.3 and 112.5 of the *Ontario Energy Board Act, 1998* dated February 9, 2017 ("**Notice of Intention**"), Affidavit of Sofia Casinha sworn June 7, 2017, Motion Record of Planet Energy dated June 7, 2017 ("**Planet MR**") at Tab 2A.

8. Sections 112.3 and 112.5 provide:

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision.

...

112.5 (1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues.

...

9. In its Notice of Intention, the Board alleges that Planet Energy:

- (a) provided false, misleading or incomplete information to consumers;¹
- (b) failed to provide adequate training for its salespersons, including MacArthur and Nahid;²
- (c) failed to meet the requirements for door-to-door sales;³
- (d) failed to meet the requirements for contracts and disclosure statements;⁴ and
- (e) sought to impose an improper cancellation fee with respect to a contract with Andrassin.⁵

10. Planet Energy does not engage in door-to-door sales. Until November 2016, it offered electricity and natural gas products through a multi-level marketing company, All Communications Network of Canada (“ACN”), under which ACN independent business owners (“IBOs”) offered Planet Energy products (as well as non-energy products and services of other companies) to their network of friends and family. If potential customers were interested in enrolling with Planet Energy, they were required to do so on their own via an online enrolment portal.

11. The Board’s allegations against Planet Energy arise from the alleged conduct of MacArthur and Nahid, each of whom were formerly IBOs. The Board contends that Planet Energy is liable for all acts, conduct and omissions of MacArthur and Nahid relating in any way to Planet Energy contracts. The Board’s allegations with respect to the adequacy of Planet Energy’s training and supervision arise from information provided to the Board by MacArthur and Nahid and summarized in the witness statements provided by MacArthur and Nahid in this proceeding.

¹ In alleged breach of: section 10 of the *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8 (“ECPA”), sections 5(1)(i), 5(1)(v), 5(1)(viii), 5(4), 5(5), and 5(14) of the Ontario Regulation 389/10 (“Regulation”), and sections 1.1(d), (f) and (h) of the *Electricity Retailer Code of Conduct* and the *Code of Conduct for Gas Marketers, Part B* (“Codes”).

² In alleged breach of: section 7 of Ontario Regulation 90/99, and breached section 10 of the ECPA, section 5(14) of the Regulation and sections 5.1 to 5.4 and 5.6(a) and (e) of the Codes.

³ In alleged breach of: sections 5 and 6 of Ontario Regulation 90/99, and breached sections 10, 11, 12(1)(a) and 15 of the ECPA, sections 5(6), 5(7) and 10 of the Regulation, and section 2 of the Codes.

⁴ In alleged breach of: sections 11 and 12(2) of the ECPA, and sections 7(1)17, 7(1)18, 8(1)(d), 8(3)(d), 9(c), 9(e), 9(f), and 9(h) of the Regulation.

⁵ In alleged breach of: section 19(4) of the ECPA and sections 5(1)(xi) and 21(d) of the Regulation.

Notice of Intention, Planet MR, Tab 2A.

First Witness Statement of James MacArthur (“**MacArthur Statement 1**”), Planet MR at Tab 2G, pp. 45-46.

Second Witness Statement of James MacArthur (“**MacArthur Statement 2**”), Planet MR at Tab 2G, pp. 47-50.

Witness Statements of Kayvan Nahid (“**Nahid Statement**”), Planet MR at Tab 2H, pp. 51-57.

12. According to the Board:

Salesperson J.M.

From approximately 2012-2015, J.M. was an “independent business operator” (IBO) at a multi-level marketing company called ACN. During the relevant period, Planet Energy had an agreement with ACN, whereby ACN’s IBOs would sell energy contracts on behalf of Planet Energy. Accordingly all acts, conduct and omissions of ACN and its IBOs, relating in any way to Planet Energy contracts (including the marketing, sale and ability to sell those contracts) are acts, conduct and omissions attributable to Planet Energy.

While an ACN IBO, J.M. sold energy contracts to consumers as a salesperson on behalf of, and made representations to consumers on behalf of, Planet Energy.

J.M. met with consumers in person. If consumers agreed to be enrolled into contracts with Planet Energy, J.M. enrolled consumers into contracts with Planet Energy himself, using a computer, without the consumers being present. J.M. did not provide consumers with copies of the contract before enrollment.

J.M. completed his online course and testing to become an energy salesperson with another, more experienced ACN IBO assisting him throughout the process, including telling him the correct answers for test questions.

J.M. received no training from Planet Energy or ACN on how the electricity and gas market operates, or the rules and regulations governing the sale of energy contracts.

J.M. was advised by other ACN IBOs that the energy contracts he would sell on behalf of Planet Energy would save consumers money on their energy bills, and that in his discussions with consumers, he should focus on the savings they would receive. While selling energy contracts on

behalf of Planet Energy, J.M. made a representation on behalf of Planet Energy that consumers would save money by switching to Planet Energy.

J.M. was not provided accurate information about the impact of the global adjustment. J.M. normally did not provide consumers with any information on charges such as global adjustment, and if the subject did come up, he relayed false information that he was told by other ACN IBOs about the minimal impact of the global adjustment (and which J.M. believed at the time to be true).

J.M. did not wear ID badges or provide consumers with business cards during his meetings with consumers.

...

Salesperson K.N.

For several months in 2015, K.N. was an IBO at ACN who sold energy contracts to consumers as a salesperson on behalf of, and made representations to consumers on behalf of, Planet Energy.

K.N. met with consumers in person. If consumers agreed to be enrolled into contracts with Planet Energy, K.N. entered consumers into contracts with Planet Energy himself, using a computer, without the consumer being present. K.N. did not provide consumers with copies of the contract before enrollment.

K.N. completed his online course and testing to become an energy salesperson with another ACN IBO by his side, assisting him in understanding questions on the test.

K.N. received no training from Planet Energy or ACN on how the electricity and gas market operates, or on energy contracts.

K.N. was advised by other ACN IBOs that the energy contracts he would sell on behalf of Planet Energy would save consumers money on their energy bills, and that in his discussions with consumers, he should focus on the savings they would receive. While selling energy contracts on behalf of Planet Energy, K.N. followed this advice and made representations on behalf of Planet Energy that consumers would save money by switching to Planet Energy.

K.N. did not provide consumers with information on charges such as global adjustment beyond telling them it would not go over 9.99 cents per kWh (which he was told by other ACN IBOs, but was not accurate.)

K.N. did not wear ID badges or provide consumers with business cards during his meetings with consumers.

Notice of Intention, Planet MR, Tab 2A at pp. 15-17.

13. Planet Energy contests the allegations made against it by the Board and the description of MacArthur and Nahid's conduct above. Contrary to the allegations contained in the witness statements of MacArthur and Nahid, all ACN IBOs were required to undergo training and testing before they were permitted to introduce Planet Energy products to potential customers.

MacArthur Statements 1 and 2, Planet MR, Tab 2G at pp. 45-50.

Nahid Statement, Planet MR, Tab 2H at pp. 52-54 and 56-57.

Documents Held by OEB Expected Witnesses

14. Based on information contained in the witness statements and the disclosure obtained from the OEB Enforcement Team to date, there is good reason to believe that the OEB Expected Witnesses possess documents relevant to the issues in the proceeding.

15. In his witness statements, MacArthur indicates, *inter alia*, that:

- (a) "Another ACN IBO provided me with a type of 'script' that set out a sales approach to take when approaching consumers, which I largely followed".

MacArthur Statement 2 at para. 10, Planet MR, Tab 2G at p. 48.

- (b) "I was provided with some materials and documents about various ACN products and referred to the website for additional information".

MacArthur Witness Statement 2 at para. 2, Planet MR, Tab 2G at p. 47.

16. Further, notes taken by OEB Staff noted during a November 4, 2016 interview with MacArthur refer to a file of hard copy documents kept by MacArthur and also suggest that MacArthur may have copies of relevant emails.

OEB Staff Interview Notes re: MacArthur, Affidavit of Sofia Casinha sworn July 7, 2017 at Exhibit A, Supplementary Motion Record at Tab 1A, pp. 9 and 11.

17. Similarly, interview notes disclosed by the OEB Enforcement Team indicate that Nahid kept a folder containing documents about ACN and Planet Energy on his computer. The interview notes also indicate “client to send info on training material.”

OEB Staff Interview Notes re: Nahid, Planet MR at Tab 2I, pp. 59 and 61.

18. None of the documents referenced by MacArthur or Nahid in their witness statements were included in the disclosure provided by the OEB Enforcement Team to date.

19. Hawkins and Andrassin both enrolled in Planet Energy contracts at issue in this proceeding and both have provided witness statements to the OEB Enforcement Team.

20. In his witness statement, Hawkins refers to multiple communications about his contract between himself, MacArthur and Planet Energy, a collection agency and Board Staff. He also refers to receiving collection and penalty notices. None of these documents were included in the disclosure provided by the OEB Enforcement Team to date.

Witness Statements of Robert Hawkins, Planet MR at Tab 2K, pp. 72-73.

21. In an audio file provided by counsel for the OEB Enforcement Team containing a recording of a call between Hawkins and the OEB, Hawkins refers to an email that he sent to the OEB in or around January 2016 – this email has not been disclosed to Planet Energy.

Transcript of Audio File Produced by OEB Enforcement Team, Planet MR at Tab 2L, pp. 76.

22. Andrassin’s witness statement refers to communications she had with Nahid, Planet Energy and Board Staff. Andrassin has provided some documents in response to a request made by the OEB Enforcement Team at Planet Energy’s request. It is not clear whether all relevant documents were included.

Contact Information for Potential Witnesses

23. MacArthur makes reference in his witness statements to various unnamed individuals with whom he communicated in regards to the matters at issue in this proceeding, including “my ACN trainer”, a “more experienced ACN IBO... who had signed

me up for ACN”, “another more experienced IBO (but not the same person who signed me up for ACN)”, a “senior Vice-President at ACN”, “[a]nother ACN IBO [who] provided me with a type of script”, “other ACN IBO’s”, “someone else at ACN” and “other ACN IBOs.”

MacArthur Statement 1 at para. 4, Planet MR, Tab 2G at pp. 45.

MacArthur Statement 2 at paras. 5, 6, 8, 10, 12, 14, Planet MR, Tab 2G at pp. 47-49.

24. Nahid also makes reference in his witness statements to various unnamed individuals with whom he communicated in regards to the matters in issue, including ACN trainers/personnel.

Nahid Statement, Planet MR, Tab 2H at pp. 52 and 56.

Request for Third Party Production

25. Planet Energy requested that the OEB Enforcement Team (i) request and disclose all relevant documents in the possession, power and control of any of the OEB Expected Witnesses (“**Documents**”) and (ii) provide the identities and contact information for the unnamed individuals referenced in MacArthur’s and Nahid’s witness statements.

Letter from Stikeman Elliott LLP to Stockwoods dated April 17, 2017 (“**April 17th Letter**”), Planet MR at Tab 2M, pp. 81-83.

Letter from Stikeman Elliott LLP to Stockwoods dated May 19, 2017 (“**May 19th Letter**”), Planet MR at Tab 2N, pp. 85-88.

26. Counsel for the OEB Enforcement Team advised that it made requests for disclosure of the Documents to each of the OEB Expected Witnesses, but to date, only Andrassin has provided any Documents in response the OEB Enforcement Team’s request.

Letter from Stockwoods to Stikeman Elliott LLP dated May 9, 2017 (“**May 9th Letter**”), Planet MR at Tab 2E, pp. 39.

27. As at June 2, 2017, the OEB Enforcement Team, despite its requests, had not received any Documents from MacArthur, Nahid or Hawkins and it is not clear that any of them have even responded to the production request.

Letter from Stockwoods to Stikeman Elliott LLP dated June 2, 2017 (“**June 2nd Letter**”), Affidavit of Sofia Casinha sworn June 7, 2017 at Exhibit F, Planet MR at Tab 2F, pp. 42.

28. For its part, the OEB Enforcement Team counsel stated that it has “no power to compel [the OEB Expected Witnesses] to produce the documents”.

May 9th Letter, Planet MR at Tab 2E, pp. 39.

29. Likewise, the OEB Enforcement Team has not provided the identities and contact details for the individuals referenced in MacArthur’s and Nahid’s witness statements. The OEB Enforcement Team counsel has advised that they are “not in a position to compel Mr. MacArthur and Mr. Nahid to divulge [the information]”.

June 2nd Letter, Planet MR at Tab 2F, pp. 43.

PART III- ISSUES

30. The issues for determination by the Board are:

- (a) Should the Board require production and disclosure of the Documents from the OEB Expected Witnesses?
- (b) Should the Board require disclosure of the names and contact information for the IBO uplines referenced in the MacArthur and Nahid Witness Statements?

PART IV - LAW AND ANALYSIS

The Board’s Power to Compel Disclosure from Third Parties

31. Planet Energy is entitled to know the case against it and to be provided with the opportunity to make full answer and defence.

Re Summitt Energy Management Inc (2 April 2012), EB-2011-0316 at pp. 3, Planet Energy Book of Authorities (“BOA”) at Tab 1.

32. As a matter of fairness, Planet Energy is “entitled to frame its defence as it sees fit and to obtain documents necessary to argue that defence”.

Re Toronto Hydro-Electric System Limited (23 October 2009), EB-2009-0308 at para. 24 BOA at Tab 2.

33. The Board has broad powers to obtain relevant information, including the authority to order production of relevant documents from third parties. Rule 21.01A of the *OEB Rules of Practice and Procedure for Enforcement Proceedings* provides:

A party seeking the production of documents from third parties in connection with an enforcement proceeding shall bring a motion, on notice to the person from whom production is sought, returnable before the panel of the Board that is seized with hearing the proceeding, and shall not require the production of any documents prior to the commencement of the hearing unless the Panel orders otherwise.

Ontario Energy Board, Rules of Practice and Procedure for Enforcement Proceedings, r 21.01A.

34. Production from third parties is appropriate where, as here, the documents identified are clearly relevant and no prejudice or undue burden on third parties results from the disclosure.

Re Toronto Hydro-Electric System Limited (23 October 2009), EB-2009-0308 at para. 29, BOA at Tab 2.

35. The Ontario Court of Appeal commented upon the power of statutory tribunals to order pre-hearing production from third parties in *Ontario (Human Rights Commission) v. Dofasco Inc.* According to Morden J.A.,

It is generally agreed that if documents under the control of non-parties are important to the fair and accurate resolution of issues it is preferable that they be produced before the hearing to avoid almost inevitable adjournments if they are produced for the first time at the hearing (see s. 39(4) of the *Human Rights Code*) and to enable each side to prepare its case more effectively. In this regard s. 2 of the *Statutory Powers Procedure Act* (which provides that the Act and rules made under it "shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits") may be of assistance in interpreting s. 5.4(1)(e) in a way that would support pre-hearing disclosure from third parties. This point was not argued and I express no final opinion on it.

Ontario (Human Rights Commission) v. Dofasco Inc., 2001, 151 O.A.C. 201, BOA at Tab 3.

36. The Board has the authority to order third parties to produce relevant documents at a hearing and efficiency and fairness dictate that the Board should order pre-hearing

production from third parties where, as here, there is good reason to believe that they possess documents relevant to the matters in the proceeding and there is no prejudice.

Production Needed for Full Answer and Defence

37. In this case, the allegations against Planet Energy are based largely on the conduct of MacArthur and Nahid and on information that they provided with respect to Planet Energy training and supervision. Planet Energy disputes the allegations - including the information in MacArthur and Nahid's witness statements about the training they were provided and the manner in which they promoted Planet Energy products.

38. The information disclosed by the OEB Enforcement Team to date indicate that both MacArthur and Nahid kept Planet Energy files and emails - all of which are relevant to the allegations against Planet Energy in this proceeding. MacArthur's witness statement itself refers to a sales "script" that he purportedly used in promoting Planet Energy products. This document is clearly relevant to allegations about his conduct with potential Planet Energy customers. MacArthur and Nahid may well have other relevant documents in their possession relating to their work as IBOs.

39. Given that MacArthur and Nahid's conduct is at issue, it would be manifestly unfair to deny Planet Energy access to the documents and files that form the basis of their allegations.

40. Similarly, there is good reason to believe that Hawkins and Andrassin have documents relevant to the allegations against Planet Energy, including communications between Hawkins and MacArthur as well as between Andrassin and Nahid. Such communications relating to MacArthur and Nahid's promotion of Planet Energy products go to the core of the allegations against Planet Energy and it is unfair to force Planet Energy to proceed without them.

41. All of the OEB Expected Witnesses are voluntary participants in this proceeding who have provided witness statements and will appear as witnesses at the hearing. In the circumstances, there is no prejudice to any of them in being ordered to produce relevant

documents in their possession; and it would be unfair to Planet Energy to permit them to participate as witnesses on behalf of the OEB Enforcement Team without making disclosure.

42. The Documents requested are unlikely to be voluminous and no undue burden will be placed upon these voluntary participants should they be ordered to produce such Documents.

43. Finally, MacArthur and Nahid have each referred to other ACN IBOs in their witness statements and have included allegations about what these individuals told them - including suggestions that these unnamed individuals acted improperly. Despite Planet Energy's requests to counsel for the OEB Enforcement Team, these individuals have not been identified and no contact information has been provided. In the circumstances, it is clear that the OEB Enforcement Team made no effort to identify, let alone contact, these individuals. Planet Energy should not be denied the opportunity to at least attempt to contact these individuals just because the OEB Enforcement Team failed to do so.

44. In the case of MacArthur and Nahid, no prejudice or undue burden will result from an order requiring them to provide information about the individuals referred to in their own witness statements.

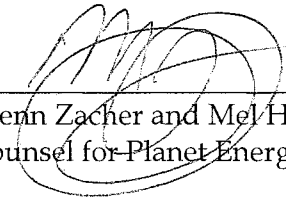
45. Planet Energy is entitled to know the case against it. All of the Documents and information sought from the OEB Expected Witnesses are necessary for Planet Energy to defend itself against the Board's allegations and ought to be disclosed.

PART VI - ORDER REQUESTED

46. In the circumstances, Planet Energy respectfully requests that the Board:

- (a) Order that each of the OEB Expected Witnesses produce to Planet Energy, without delay, all documents in their respective power, possession or control relevant to the issues in the subject enforcement proceeding, including the specific documents referenced herein; and
- (b) Order that MacArthur and Nahid provide to Planet Energy, without delay, the identities and contact information for individuals referenced in witness statements provided by MacArthur and Nahid to the OEB Enforcement Team.

All of which is respectfully submitted this 7th day of July, 2017.



Glenn Zacher and Mel Hogg,
Counsel for Planet Energy

TAB A

SCHEDULE "A"

STATUTORY AND REGULATORY PROVISIONS

Ontario Energy Board Act

1998, S.O. 1998, c. 15

Action required to comply, etc.

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

- (a) remedy a contravention that has occurred; or
- (b) prevent a contravention or further contravention of the enforceable provision. 2003, c. 3, s. 76.

...

Administrative Penalties

112.5 (1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues. 2003, c. 3, s. 76.

...

Ontario Energy Board

Rules of Practice and Procedure for Enforcement Proceedings

21.01 A A party seeking the production of documents from third parties in connection with an enforcement proceeding shall bring a motion, on notice to the person from whom production is sought, returnable before the panel of the Board that is seized with hearing the proceeding, and shall not require the production of any documents prior to the commencement of the hearing unless the Panel orders otherwise.

TAB B

SCHEDULE "B"

AUTHORITIES

Ontario (Human Rights Commission) v. Dofasco Inc., 2001, 151 O.A.C. 201.

Re Summitt Energy Management Inc (2 April 2012), EB-2011-0316.

Re Toronto Hydro-Electric System Limited (23 October 2009), EB-2009-0308.

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B) (the "Act");

EB-2017-0007

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