



ONTARIO ENERGY BOARD

FILE NO.: EB-2017-0007

Planet Energy (Ontario) Corp.

VOLUME: Motion Hearing

DATE: August 14, 2017

BEFORE:	Christine Long	Presiding Member
	Cathy Spoel	Member
	Michael Janigan	Member

THE ONTARIO ENERGY BOARD

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

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).

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Monday, August 14, 2017,
commencing at 10:09 a.m.

MOTION HEARING

BEFORE:

CHRISTINE LONG	Presiding Member
CATHY SPOEL	Member
MICHAEL JANIGAN	Member

A P P E A R A N C E S

IAN RICHLER Board Counsel

MICHAEL BELL Board Staff

ANDREA GONSALVES Compliance Counsel
BIRGIT ARMSTRONG

GLENN ZACHER Planet Energy (Ontario) Limited

ALSO PRESENT:

ROBERT HAWKINS
JAMES MacARTHUR

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Description

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NO UNDERTAKINGS WERE FILED DURING THIS
PROCEEDING.

1 Monday, August 14, 2017

2 --- On commencing at 10:09 a.m.

3 MS. LONG: Please be seated.

4 Good morning, everyone. My name is Christine Long,
5 and I will be presiding today. Along with me are my co-
6 panelists, Mr. Michael Janigan and Ms. Cathy Spoel. The
7 Board is sitting today in EB-2017-007, which is an
8 enforcement proceeding brought by the Ontario Energy Board
9 against Planet Energy (Ontario) Corporation.

10 We are here today to hear the motion brought by Planet
11 Energy which was filed on June 9th, 2017 to require the
12 production of certain documents and information from
13 certain individuals who are expected to be witnesses for
14 the OEB enforcement team.

15 Before we proceed may I have appearances, please.

16 **APPEARANCES:**

17 MR. ZACHER: Madam Chair, fellow Panel members, Glenn
18 Zacher, appearing as counsel on behalf of Planet Energy.

19 MS. LONG: Thank you, Mr. Zacher.

20 MS. GONSALVES: Good morning. I'm Andrea Gonsalves.
21 I'm counsel for enforcement staff. With me today is Ms.
22 Birgit Armstrong, and in the row behind us we have two of
23 the third parties who are the subject of this motion, Mr.
24 Robert Hawkins and to his right Mr. James MacArthur.

25 I can advise the Panel that Mr. Kayvan Nahid, the
26 third third party who is the subject of this motion had
27 been -- has been served. He is aware of this motion. He
28 has had notice of it. Ms. Armstrong has had some

1 communication with him. We understood that he had wanted
2 to attend today. I did make efforts to reach out to him by
3 phone this morning. I left him a message. But I have not
4 spoken with him, and I expect at this stage that he is not
5 intending to appear today.

6 MS. LONG: Okay. Thank you, Ms. Gonsalves.

7 Mr. Hawkins, Mr. MacArthur, thank you. We are
8 satisfied. We have reviewed the affidavit of service, so
9 thank you for that.

10 MR. RICHLER: Good morning. Ian Richler, OEB counsel.
11 With me is Michael Bell, who is the case manager. And if I
12 might just say very quickly at the outset, our role here is
13 to assist the Panel in any way we can. In particular if
14 you have any questions as to the law that applies on this
15 motion I am happy to assist, but we are non-partisan and we
16 have -- just to be clear, we have nothing to do with the
17 staff enforcement team.

18 MS. LONG: Thank you, Mr. Richler.

19 Mr. Zacher, I understand there were some further
20 materials this morning?

21 MR. ZACHER: That's correct. So you will have -- just
22 to go over, you will have a motion record from us along
23 with written submissions and brief of authorities, the same
24 for my friend. But since the motion was filed there were
25 -- there was an email that my office received from Mr.
26 Nahid, and I also received a couple of letters or e-mails
27 from my friend on behalf of Mr. MacArthur. And so I
28 thought that simply for completeness it would be helpful to

1 assemble that in a supplementary motion record.

2 And I apologize, I thought it might just be one Panel
3 member presiding today and so I didn't make enough copies,
4 but I but I understand Mr. Richler is getting additional
5 copies made. I don't intend to reference any of the
6 documents in that additional motion record this morning. I
7 just wanted to make sure that the Panel had it, and the
8 only thing I would add is that late in the day on Friday
9 after four o'clock I received another letter from my friend
10 delivering additional documents on behalf of Mr. MacArthur.

11 I didn't have time -- I wasn't in the office at the
12 time. I didn't have time to include that in this
13 additional motion record, but you should know that I did
14 receive some additional documents. My friend can speak to
15 that.

16 The cover letter did indicate that it wasn't
17 everything. There was a computer stick with some
18 additional e-mails. My friend's office had been unable to
19 have those printed, and so I wasn't provided with those,
20 but I just want to be clear that since the motion was filed
21 we've received one e-mail from Mr. Nahid and three
22 communications from my friend on behalf of Mr. MacArthur.

23 MR. RICHLER: Pardon me, Madam Chair, if I may, we do
24 have copies available now which Mr. Bell can provide to
25 you. And perhaps we could mark this as an exhibit. This
26 is the second supplementary motion record of Planet
27 Energy --

28 MS. LONG: Thank you.

1 MR. RICHLER: -- and we can mark that as Exhibit
2 KM1.1.

3 EXHIBIT NO. KM1.1: SECOND SUPPLEMENTARY MOTION RECORD
4 OF PLANET ENERGY.

5 MS. LONG: Thank you. Mr. Zacher, I just want to be
6 clear. So we have a motion record dated June 7th, we have
7 a supplementary motion record dated July 7th, and now we
8 have KM1.1.

9 MR. ZACHER: Correct.

10 MS. LONG: Okay. Thank you. Ms. Gonsalves, have you
11 had an opportunity to take a look at these materials?

12 MS. GONSALVES: Are you referring to the second
13 supplementary?

14 MS. LONG: KM1.1?

15 MS. GONSALVES: Yes, I have, and I have no objection
16 to that being filed. As Mr. Zacher indicated, these were
17 additional documents that my office or enforcement staff
18 received from Mr. MacArthur after he was made aware of this
19 motion. He produced them voluntarily. And there is that
20 additional bundle that was served on my friend on Friday.

21 And so apart from sorting out the technological issue
22 with the computer stick, I've spoken to Mr. MacArthur.
23 We're going to try and produce those documents in a
24 different format, and I understand he is willing do that.
25 There is no objection to that.

26 I expect the Panel may want to hear from him, but my
27 understanding is that insofar as Mr. MacArthur is concerned
28 there wouldn't be anything additional that he would have to

1 produce as a result of what was delivered on Friday and
2 these additional e-mails.

3 MS. LONG: Okay. Thank you. Mr. Zacher?

4 **SUBMISSIONS BY MR. ZACHER:**

5 MR. ZACHER: Thank you. So this is a motion for
6 production of documents and information by Planet Energy.
7 The persons from whom the information documents are sought,
8 as you indicated, proposed witnesses on behalf of Board
9 Staff. Two of those people are alleged salespeople on
10 behalf of Planet: Mr. MacArthur and Mr. Nahid. And two
11 are customers or persons to whom they marketed Planet
12 Energy products and services.

13 And let me just say by way of introduction that since
14 the motion was filed it has been significantly narrowed,
15 which is helpful, because I think I'll be able to
16 abbreviate my submissions. I expect my friend will as
17 well.

18 Initially documents were sought from Ms. Andrassin,
19 who was a -- someone to whom Planet products and services
20 had been marketed by Mr. Nahid. She responded to some
21 initial requests that enforcement staff made on our behalf.

22 Since the motion was filed she also responded directly
23 to us and indicated and provided documents and said, These
24 are the same documents I provided to the enforcement team.
25 This is all I have.

26 So we are content with that, and we filed a letter
27 with the Board some -- a couple of weeks ago indicating
28 that we weren't pursuing an order with regards to Ms.

1 Andrassin, so that's, just to be clear, off the table.

2 As well, in addition to documents, we also sought
3 disclosure of the identities and contact information for
4 individuals that were referenced in witness statements of
5 Mr. MacArthur and Nahid, principally Mr. MacArthur.

6 And since the motion has been filed Mr. MacArthur has
7 communicated through the enforcement team that he
8 absolutely refuses to identify those individuals or provide
9 contact information.

10 My friend's position is that, while Mr. MacArthur is a
11 proposed witness of the enforcement team, he is simply a
12 witness and can't be compelled to provide that information.
13 It's been asked of him. He hasn't provided it. And that
14 in any event the Board doesn't have any jurisdiction under
15 the rules governing enforcement proceedings or under the
16 Statutory Powers Procedures Act to provide for effectively
17 pre-hearing discovery by non-parties.

18 Madam Chair, my position on that is that Mr. MacArthur
19 ought to be making full disclosure and not partial
20 disclosure as someone who is going to be a witness on
21 behalf of the enforcement team, but I also acknowledge my
22 friend's position that there is no express authority under
23 either the rules or the SPPA. And so I simply -- I don't
24 propose to make any further submissions on this point, and
25 I expect this is something we will have to deal with, as my
26 friend has suggested, at the enforcement hearing as we
27 determine appropriate.

28 So that leaves, in terms of the issue before you this

1 morning, the order that we seek for production of documents
2 from Mr. MacArthur, Mr. Nahid and Mr. Hawkins. And to some
3 extent this -- even this remaining relief has been narrowed
4 somewhat with regards to Mr. MacArthur and Mr. Hawkins. I
5 appreciate both of them are here. Neither of them
6 responded to the motion in the time prescribed by the
7 Board. They have not indicated that they oppose it. The
8 enforcement team does not oppose an order for production
9 from Mr. Nahid and Mr. MacArthur. They do not suggest that
10 they don't have relevant documents that ought to be
11 produced. And so I'm not sure that there is a significant
12 issue there, although I do intend to briefly walk through
13 what I say is the law governing production from third
14 parties, and at least satisfy the panel as to why
15 information -- why these documents ought to be produced.

16 With regards to Mr. Hawkins, again he did not file any
17 materials opposing the motion. But my friend's position
18 with regard to Mr. Hawkins is that an order is unnecessary,
19 because he has indicated that he has provided all of his
20 documents to Mr. MacArthur. Mr. MacArthur -- to the extent
21 an order is made with regards to Mr. MacArthur, it ought to
22 there by capture any relevant documents in the hands of Mr.
23 Hawkins. And for the reasons that I'll articulate, I
24 disagree with that and we would like an order for
25 production from Mr. Hawkins as well.

26 So let me just very briefly outline the law. I don't
27 think it's -- this is articulated at paragraphs 31 to 36 of
28 our written submissions. I don't believe there's much

1 disagreement between myself and my friend on this.

2 As a matter of principle, Planet Energy is entitled to
3 know the case against it. My position is that that clearly
4 includes disclosure of relevant documents from third
5 parties, in particular third parties who are going to be
6 witnesses against Planet Energy in this hearing. And the
7 Board's rules clearly do authorize disclosure by third
8 parties; it's Rule 21.01A of the enforcement rules. And
9 this provision has been considered by the Board in previous
10 enforcement proceedings.

11 The case that we've made reference to in our
12 submissions and brief of authorities is the Toronto Hydro
13 case, and the test that the Board has articulated is not
14 much different than the test that governs production in
15 court proceedings or other tribunal proceedings, which is
16 that the applicant needs to demonstrate that the third
17 parties have documents in their possession, power and
18 control that are likely relevant, and that there is no
19 significant or undue prejudice to the third parties from
20 whom the documents are sought.

21 I'll just comment briefly on my friend's position. My
22 friend suggested that the O'Connor case should govern in
23 this proceeding. We've relied on the Board's
24 jurisprudence, but whether the Board's previous
25 jurisprudence or the O'Connor case govern, I don't think
26 there is much difference between them. Again, the O'Connor
27 case says you have to demonstrate that there are documents
28 in the hands of third parties that are relevant and, in the

1 interests of justice, merit disclosure and merits of
2 justice largely concern whether there would be any
3 infringement or undue prejudice from whom production is
4 sought. I don't think there is much difference.

5 My friend has -- there is one point I do want to
6 comment on. My friend suggested that be an order for
7 disclosure from third parties as opposed to parties to the
8 proceeding is an exceptional order, and I would
9 respectfully submit that is a bit of an overstatement.
10 Production orders are not always made against third
11 parties, but it's fairly routine and to the extent that the
12 cases talk about this being exceptional, it really is in
13 the context of third parties who are true strangers to the
14 litigation. So you can imagine where documents are being
15 sought from people that have nothing to do with the matter
16 in issue, health providers, financial institutions, et
17 cetera, and you do have to be careful in those
18 circumstances that you're not unduly intruding on the
19 rights of people that don't have any stake in the
20 proceeding.

21 But the individuals from whom the documents are sought
22 in this case are all fully implicated in this case. They
23 are going to be witnesses on behalf of the enforcement
24 team, and they are voluntary witnesses on behalf of the
25 enforcement team. So there really is no prejudice and
26 nothing that would sort of fall within the cases that talk
27 about these kind of orders being exceptional.

28 So let me turn to the grounds for production, and I'll

1 first address Mr. MacArthur and Mr. Nahid. They are the
2 two alleged salespersons upon whom the Board's case, the
3 enforcement team's case is largely premised. And it is
4 alleged in the notice of intention, and this is referenced
5 at paragraphs 11 and 12 of our written submissions, that
6 Mr. Nahid and Mr. MacArthur were provided with deficient
7 training and testing by Planet Energy, that they made
8 various misrepresentations in the marketing of Planet
9 Energy products and services to prospective customers --
10 represented savings, misrepresented the impact of the
11 global adjustment -- and that they didn't comply with the
12 requirements for in-person sales and various other
13 requirements. And notably, the enforcement team's position
14 is that the alleged misconduct by Mr. Nahid and Mr.
15 MacArthur applied in respect of every single contract that
16 is the subject of this proceeding, so all 45 transactions.
17 It's alleged to have been systemic. And so in the
18 circumstances, documents that Mr. MacArthur or Mr. Nahid
19 have that are of obvious relevance to the matters in issue
20 concern any training, testing or sales materials from
21 Planet Energy or from ACN, which is the multi-level
22 marketing company through whom this was done, any
23 communications that they had with Planet Energy or ACN, any
24 communications that they had with the OEB, particular Board
25 Staff and the enforcement team staff, and any
26 communications they had with the underlying customers that
27 are the subject of this proceeding.

28 Okay, let me just leave that for a moment. And then

1 with regard to Mr. Hawkins, he was alleged to have been a
2 customer of Mr. MacArthur. He has signed a witness
3 statement which the enforcement team is relying upon, and
4 he is going to be a witness. He has alleges he was misled
5 by Mr. MacArthur with regards to cancellation fees,
6 promised savings with regards to Planet Energy products.
7 And the record before you is replete with communications
8 that Mr. MacArthur has had with OEB, with the OEB following
9 a complaint he made, communications he has had with Planet
10 Energy, communications that he has had with Mr. MacArthur.
11 There is reference in some of the new documents we've
12 received to communications with the Better Business Bureau
13 about the matters that are the subject of this proceeding.

14 If I might just ask you to turn up very quickly our
15 motion record -- sorry, before I do that, sorry -- and just
16 to be clear, before we brought this motion we requested
17 these documents of the enforcement team. We made a request
18 in the middle of April, April 17th I believe, for all
19 relevant documents to be produced that were in the hands of
20 the expected witnesses, Mr. Hawkins, Ms. Andrassin, Mr.
21 MacArthur and Mr. Nahid. We didn't receive any documents
22 in response to that request.

23 We requested again one month later in the middle of
24 May, and the enforcement team's position has been these
25 people are not parties; they are witnesses. We have no
26 power to compel them to produce documents that are
27 relevant. We will ask on your behalf. They did, which we
28 appreciate, make a request on our behalf. Those responses,

1 with the exception of Ms. Andrassin, were not responded to.

2 And so almost two full months later after no
3 cooperation, no response from their witnesses, we brought
4 the motion. We had to bring it at that point. We hadn't
5 received a response. And the, as I said, the evidence in
6 the record is clear that there have been communications
7 between the witnesses, Planet Energy, OEB Staff, with their
8 customers.

9 And more specifically, at paragraph -- actually,
10 sorry, paragraph 15 to 18 of our written submissions, you
11 will see there is reference there to Mr. MacArthur's
12 witness statements. Yeah, he provided two witness
13 statements. He indicates that he was provided with a
14 script from other ACN IBOs -- IBOs are the sales
15 representatives -- that he was provided with other
16 materials and documents about various ACN products, which
17 would include Planet Energy, and further down in paragraph
18 16 you'll see that he refers to hard-copy documents and
19 other relevant e-mails.

20 Mr. Nahid in turn at paragraph 17 indicates -- and
21 this is referenced in OEB Staff interview notes -- that he
22 has a computer folder containing documents relating to
23 Planet Energy. And he also indicated that he would forward
24 on training material.

25 And with regards to Mr. Hawkins, you'll see at
26 paragraph 20 to 21 again references to the various
27 communications that Mr. Hawkins has had with Mr. MacArthur,
28 with Planet Energy, a collection agency, and Board Staff,

1 all with regards to the matters that are the subject of
2 this proceeding.

3 So as I said, none of the witnesses have opposed this
4 motion. My friend on behalf of the enforcement team
5 doesn't oppose it, doesn't suggest that there are not
6 relevant documents that ought to be produced. And since
7 the motion was filed, we have received a couple of
8 responses. And I should draw your attention to those.

9 At tab 1 of the second supplementary motion record --
10 that's the motion record that was filed this morning --
11 you'll see at page 5 that there was an email from Mr. Nahid
12 to our office. This was in response to having been served
13 with the motion.

14 And on page 6 is Mr. Nahid's response, which is simply
15 to say: "I spoke with Ms. Armstrong. She asked me about
16 some documents from ACN. Sorry, I don't have any contract
17 letters with my customer. Every contract was online."

18 So it's not responsive to our request that he produce
19 all relevant documents and it's not consistent with the
20 notes -- the Staff interview notes indicating that he has
21 got a computer file.

22 You'll see at tabs 1B and C of that motion record,
23 these are the responses that we've received from the
24 enforcement-team counsel enclosing documents that have been
25 provided by Mr. MacArthur. But we haven't had any direct
26 response from Mr. MacArthur, nor have we had any direct
27 response from Mr. Hawkins.

28 So Madam Chair, turning quickly to the orders that are

1 requested, we would like orders for production from Mr.
2 MacArthur, Mr. Nahid, and Mr. Hawkins.

3 With regards to all of them, the evidence is that they
4 do have documents that are likely relevant to the matters
5 in issue in this proceeding, which is part one of the test
6 that we're required to satisfy.

7 Number two, there is simply no prejudice to providing
8 documents by persons who are already going to be full
9 participants in this proceeding.

10 And to simply anticipate very briefly what I suspect
11 may be a position my friend takes that, is it necessary to
12 make orders with regards to Mr. Hawkins and Mr. MacArthur,
13 Mr. MacArthur, because since the motion has been filed we
14 have received documents from him through the enforcement
15 team, and with regards to Mr. Hawkins he says, "I've
16 provided everything to Mr. MacArthur."

17 My position is that we made these requests for almost
18 two months through the enforcement team's counsel. There
19 was no response or cooperation by any of these people. It
20 took us filing a motion to receive any response. Obviously
21 with respect to Mr. Nahid it's not responsive at all. With
22 regards to Mr. MacArthur, we've received materials in dribs
23 and drabs. The last bit we received at the end of the day
24 on Friday. It still doesn't include everything.

25 And there's simply no prejudice to making an order.
26 If Mr. MacArthur has provided everything and if Mr. Hawkins
27 has provided everything through the disclosure made by Mr.
28 MacArthur, then they can send a response to that effect.

1 And there is no harm in having made the order.

2 But I'm concerned, given the lack of response by more
3 than two months, that we may not have received everything
4 from Mr. MacArthur and Mr. Hawkins, and that it's important
5 that they know that there's a legal obligation on them to
6 produce these documents and that there are consequences if
7 they're not produced.

8 Subject to any questions you have, those are my
9 submissions.

10 MS. LONG: I just want to clarify two things with you,
11 Mr. Zacher. First, the materials that you received Friday
12 night, we do not have copies of those?

13 MR. ZACHER: They would have been in this second
14 motion record had they arrived before Friday evening. I
15 just --

16 MS. LONG: Well, I just want to make sure that --

17 MR. ZACHER: -- until the weekend --

18 MS. LONG: Okay. I just want to make sure they are
19 not in here.

20 MR. ZACHER: They are not in here.

21 MS. LONG: Okay. Thank you. And with respect to -- I
22 mean, if I can break this motion down into two parts -- one
23 is for production of documents, the other is for the
24 identities of individuals referenced by Mr. Nahid and Mr.
25 MacArthur -- I understand that Planet Energy disagrees with
26 their position of not putting those names forward at this
27 point, but do I understand that you are postponing that
28 battle for another day and that will be dealt with at the

1 hearing even though you object to that, but that's not
2 going to be the subject of this motion?

3 MR. ZACHER: Yeah, I should have been clear on that.
4 I'm not abandoning that. I'm not postponing it for another
5 day --

6 MS. LONG: Okay. I just want to be clear what your
7 position is.

8 MR. ZACHER: My friend says there is no authority in
9 the Board to order pre-discovery from non-parties. And
10 this is something that I simply have to deal with through
11 cross-examination or otherwise at the hearing. And I'm not
12 going to overstate my case and tell you that there is some
13 authority for you to make this order. I acknowledge the
14 Board is a statutory entity, it derives all its powers from
15 the statute, and I don't disagree that there is not
16 authority in the SPPA or the rules to order production of
17 -- or make -- order pre-discovery from non-parties.

18 So I acknowledge that, which is the reason I
19 abbreviated my submissions on that point, but I'm not
20 giving it up, and if you see fit to make that order, then
21 that's a good thing.

22 MS. LONG: Okay. Thank you.

23 MR. JANIGAN: I have one question concerning the issue
24 of relevance and what documents have to be produced. I
25 think you went into a list of documents that you wanted
26 from Mr. MacArthur that you deemed to be relevant. But I
27 guess I'm a little bit concerned to have an order that says
28 produce all relevant documents, when the test itself is

1 relevance for the documents to be produced.

2 Do you get what I'm driving at? Are you asking the
3 witnesses to determine the relevance of the documents, or
4 are there some modifiers with respect to --

5 MR. ZACHER: Yes, Mr. Janigan, it's clearly limited to
6 documents that are relevant to the matters at issue in this
7 proceeding. And yes, ordinarily that is a determination
8 that has to be made by the party from whom production is
9 sought. I have actually prepared a draft order that I
10 would be happy to hand up now or at the conclusion, which
11 itemizes it more particularly, and I did that because I
12 appreciate that the three witnesses don't have counsel and
13 they perhaps need a little bit more guidance.

14 And so I've indicated that, for instance, from Mr.
15 MacArthur, that the documents that should be produced are
16 training, testing, marketing, promotional, or sales
17 documentation relating to Planet Energy products and
18 services; communications and recordings of communications
19 including emails, text messages, faxes, letters, notes with
20 Planet Energy or ACN; and likewise those same
21 communications on behalf of Mr. MacArthur with Mr. Hawkins
22 and his other customers, and with the OEB or other
23 regulatory agencies. But I've tried to particularize it,
24 so it's not a guessing game. There may be other documents
25 that I can't envision that are also relevant, but I've done
26 my best to try and capture.

27 MR. JANIGAN: With respect to the other two witnesses,
28 have you done a sort of similar list?

1 MR. ZACHER: I've done the same thing, yes.

2 MR. JANIGAN: Okay. Perhaps those -- at some point in
3 time, those will be put on the record as well, so that we
4 don't simply have an order that is --

5 MR. ZACHER: I wasn't proposing, as in some cases, to
6 hand this order up to ask you to endorse it. It was more
7 as an aid to inform your own decision. So I can hand those
8 up now, or at the conclusion.

9 MS. LONG: Why don't you do it now? Are there copies,
10 Mr. Zacher?

11 MR. ZACHER: Yes.

12 MS. LONG: Are there copies for Mr. MacArthur and Mr.
13 Hawkins? I would prefer they have copies. Perhaps we can
14 share one on the dais.

15 MR. ZACHER: Is it okay if I hand copies to them?

16 MS. LONG: Yes.

17 MR. RICHLER: Madam Chair, would you like to mark this
18 as an exhibit?

19 MS. LONG: Yes, please.

20 MR. RICHLER: This will be KM1.2. And this is the
21 draft order prepared by Planet Energy.

22 **EXHIBIT NO. KM1.2: DRAFT ORDER PREPARED BY PLANET**
23 **ENERGY**

24 MS. LONG: Thank you. Ms. Gonsalves, are you prepared
25 to proceed?

26 **SUBMISSIONS BY MS. GONSALVES:**

27 MS. GONSALVES: Thank you, yes. I just want to begin
28 with a point of housekeeping. There are a couple of

1 paragraph references in my written submissions that were
2 incorrect, for which I apologize. But I'll just correct
3 those now. That's my very slim volume, written submissions
4 of Board enforcement staff.

5 So on page 6, footnote number 10, there's a reference
6 there to the Supreme Court of Canada's decision in the
7 O'Connor case. When we wrote paragraph 124, we transposed
8 those numbers accidentally; it should be paragraph 142.

9 Over the page, footnote 11; this error is harder to
10 explain, but the references to paragraphs 36 and 38, you
11 can strike those out. It should be paragraphs 132 and 156,
12 also from the O'Connor case.

13 And finally, in footnote 12, the Elekssiuk case, it
14 references paragraph 6 and that should be paragraph 26.
15 Again, my apologies for those.

16 Before responding to my friend's submissions -- and I
17 agree with him that we're not that far apart on the law, or
18 indeed on how the Panel should proceed. But I would again
19 urge the Panel, before reaching a decision on this motion,
20 to hear directly from Mr. MacArthur and Mr. Hawkins. You
21 have the benefit of having them here today. I acknowledge,
22 as Mr. Zacher has said, they didn't formally respond to the
23 motion. But the fact they're in attendance today suggests
24 they may have something they would like the Panel to
25 consider in deciding the motion. The Panel may have
26 questions for them that they're best placed to answer. So
27 I would invite the Panel to do that, if you deem it useful
28 to you.

1 I think the point we've come to is that the issue on
2 this motion is less a question of whether, on the
3 applicable law, documents should in fact be ordered
4 produced, and it's more a question of whether there are in
5 fact any unproduced responsive documents. But I do want to
6 say a little bit about the legal framework that, in my
7 submission, should govern the Panel's consideration of this
8 motion.

9 As Mr. Zacher has said, you are a statutory tribunal
10 and all of your power derives from statute. Most relevant
11 today of course is the Statutory Powers Procedures Act and
12 your own rules of procedure. And specifically, you don't
13 need to turn to them, but I've excerpted at tab B, schedule
14 B of my written submissions both section 12 of the
15 Statutory Powers Procedures Act and rule 21.01 of your
16 rules of practice in enforcement proceedings.

17 It's my submission clear that the Panel's authority to
18 order anything from a third party prior to commencing an
19 enforcement proceeding is limited to documents alone.
20 That's quite clear on the face of rule 21.01A, which speaks
21 to a party seeking production of documents from third
22 parties, so documents there. And it also arises from
23 section 12 of the Statutory Powers Procedure Act, which
24 makes it clear that a tribunal such as this can only
25 require a person to give evidence, that is to answer
26 questions, at a hearing.

27 We are not of course in the hearing of this matter
28 yet. And so while the third parties are free to

1 voluntarily hand over information if they choose prior to
2 the start of the hearing, it's my submission that this
3 Board has no power to order that they do so. Your
4 jurisdiction is limited to ordering that they produce
5 documents.

6 Now, I don't deny, of course, that Planet Energy has a
7 right to know and respond to the allegations that are made
8 against it. But it's my submission that it must be borne
9 in mind that it's enforcement staff who is making the case
10 against Planet Energy; it's not the third parties. And
11 that's why it's enforcement staff alone that has disclosure
12 obligations; not third parties, not mere witnesses.

13 And there is a special framework for dealing with
14 third party document requests like this for good reason.
15 Information in the hands of third parties does not form
16 part of the Board's case against Planet Energy. It's not
17 part of Planet Energy's case to meet or the Board's case to
18 meet. And third parties have no obligation to assist
19 Planet Energy with its defence. And those two points
20 emerge from the O'Connor case at paragraph 19.

21 Because of those two facts, the framework for a third-
22 party production motion holds Planet Energy to a higher
23 burden than just showing possible relevance of possibly
24 existing documents. There's a higher burden to ensure that
25 the Board pays due regard to other legitimate legal and
26 societal interests.

27 This higher burden is necessary to protect the privacy
28 interests of third parties and to preserve the integrity of

1 the administrative system by preventing fishing expeditions
2 or other collateral tactics.

3 And so for those reasons a third-party production
4 order should be granted only where, firstly, the
5 information sought cannot be obtained by any other
6 reasonably available and effective means. And I'll pause
7 there to note that some of the documents that my friend is
8 asking you to order, or part of the scope of the order he
9 is asking you to make, are communications with Planet
10 Energy itself, which Planet Energy should already have.
11 They're asking you to make an order for production of
12 communications with the Board, and of course to the extent
13 there are any such communications they would fall within
14 the Board's own disclosure obligations and would already be
15 produced. And they're asking for production -- or for the
16 scope of the order to include communications with other
17 third parties, for example ACN, against whom they have not
18 decided to bring a third-party production motion, and we
19 don't know what communications or voluntary cooperation
20 Planet Energy might be getting from ACN.

21 And so it's my submission that Planet Energy has not
22 demonstrated that there is no other reasonably available
23 and effective means to get any of the documents they're
24 looking for.

25 It should also be borne in mind in fashioning an order
26 for production from a third party that any privacy rights
27 of the third party should be infringed as little as
28 possible. And there must be proportionality between the

1 positive effects, the helpful effects of the production
2 order to Planet Energy's ability to mount a defence and the
3 harmful effects of the production order on the witness's
4 dignity or security of the person. All of those points
5 were set out by the Supreme Court in the O'Connor case.

6 And so the question for the Board to turn its mind to,
7 in my submission, is whether all of the documents sought,
8 the full scope of the order you're being asked to make,
9 meet the threshold of being likely relevant. And "likely
10 relevant" should be interpreted having regard to the
11 disclosure obligation on Board Staff in rule 16.02; that
12 is, relevant to a response that Planet Energy will make,
13 proposes to make, or could reasonably be expected to make.

14 It's not a fishing expedition. Planet Energy must
15 point to clear evidence showing that the documents it's
16 seeking do exist and that they are likely relevant.

17 The next step, in my submission, if you are satisfied
18 of likely relevance, is not to simply order production to
19 Planet Energy. That skips over the balancing exercise
20 where the third-party interests are taken into account.

21 What the law makes clear is that the next step is only
22 for the Panel to look at those documents. If you're
23 satisfied of likely relevance, you should make an order
24 requiring the third parties to produce the documents to
25 you, the Panel, and then you enter the second stage, where
26 you weigh the relevance of the documents and the benefit
27 they might bring to Planet Energy in its defence against
28 the interests of the third parties, be it privacy or some

1 other interest.

2 We have, for example, evidence from Mr. MacArthur that
3 he has been threatened by some other individuals, and
4 that's something the Panel may want to take into account,
5 particularly to the extent it reflects on the integrity of
6 these proceedings.

7 And so if you do order production of the documents to
8 you, the Panel, your task is to balance the competing
9 rights, and the following factors, in my submission, should
10 be considered: The extent to which the documents are
11 necessary for Planet Energy to make answer and defence,
12 bearing in mind, of course, that this is an administrative
13 proceeding and not a constitutional right to make answer
14 and defence; the probative value of the documents in
15 question, how might the document assist the Panel in
16 deciding an issue in the case; the nature and extent of the
17 reasonable expectation of privacy in the document. And
18 I'll make the obvious point that some sort of medical or
19 therapeutic document which many of the cases speak about
20 would be impressed with a greater expectation of privacy
21 than, for example, a business-related e-mail.

22 And a fourth factor for you to consider in the
23 balancing exercise is the potential prejudice, if any, to
24 the witness's dignity, privacy, or security of the person
25 if the documents are ordered produced to Planet Energy.
26 And that's where the Panel may benefit from hearing
27 directly from the third parties.

28 Now, it is my position that, based on the responses

1 that have been come subsequent to my materials being
2 delivered before today, it's my position that the evidence
3 does not show that there remain specific documents that are
4 likely relevant that have not been produced apart from
5 those e-mails I spoke about where there was this
6 technological issue, and Mr. MacArthur has committed to me
7 that those will be produced.

8 Apart from those e-mails, I have not seen in the
9 record any evidence showing that there are specific likely
10 relevant unproduced documents. I interpret to the extent
11 it's possible Mr. Nahid's e-mail at tab A of Exhibit KM1.1
12 as meaning that he does not have the documents being sought
13 from him.

14 Now, if the Board wishes to make an order because it
15 is satisfied that there are unproduced documents and in
16 fact there aren't, then of course that's the simple answer,
17 would be for the third parties to say, I don't have any
18 more documents.

19 And I don't -- to cut -- I mean, I've given you the
20 legal framework, and it's my position that it should be
21 applied. But to cut through it all in a fairly practical
22 way, if you hear from the third parties that they have
23 responsive documents that they don't object to producing on
24 privacy or other grounds, then it would be most efficient
25 and most practical to simply order that they be produced.
26 And so while I've made submissions about the legal
27 framework, I think that practically speaking, that's of
28 most concern where either it's unclear that there are

1 responsive documents or the third parties are objecting to
2 producing them. They acknowledge the documents exist, but
3 they object to producing them for one or more reasons.

4 If that's not the case, then I would agree that you
5 can simply make an order for production. I just --

6 MS. LONG: Ms. Gonsalves, I guess if I understand your
7 position, if we were to make a production order, it's your
8 position that production would be to this Panel in order to
9 then make a determination as to what would then be produced
10 to Planet Energy. I imagine Mr. Zacher will speak to that
11 in his reply. But am I clear on that, that's where you're
12 coming from?

13 MS. GONSALVES: That's where I'm coming from. And if
14 you have my book of authorities and you turn to tab 1, I'll
15 take you first to paragraph 103. This is where the Supreme
16 Court is setting out the framework for these kinds of
17 motions, and their starting point is with a step that was
18 not followed in this case, which is to serve a subpoena on
19 the third party so that they physically bring the documents
20 to court with them. So had that been done, Mr. MacArthur
21 and Mr. Hawkins may have brought with them their documents
22 today, but no subpoena was served.

23 Paragraph 103, after moving on from the subpoena
24 point:

25 "The subpoena does not automatically call for an
26 order requiring the documents to be produced to
27 the court for inspection, let alone to the
28 defence. Production will only be ordered if the

1 documents are likely to be relevant and if
2 production is appropriate having regard to the
3 relevant considerations."

4 And they go on to talk about what those are in the
5 context where the Charter of Rights and Freedoms applies.

6 If you move forward then to paragraph 137 -- without
7 reading it, I'll just sort of take you through the decision
8 here. At 137, they explain the process for production;
9 they spend some time talking about the threshold for
10 relevance. And then at 150, we get to the balancing stage:

11 "If the trial judge concludes that the records
12 are not likely to be relevant to an issue in the
13 trial, the application should be rejected. If,
14 on the other hand, the judge decides that they
15 are likely to be relevant, then the analysis
16 proceeds to the second stage, which has two
17 parts. First, the trial judge must balance the
18 salutary and deleterious effects of ordering the
19 production of the records to the court for
20 inspection, having regard to the accused's right
21 to make full answer and defence, and the effect
22 of such production on the privacy and quality
23 rights of the subject of the records. If the
24 judge concludes that production to the court is
25 warranted, he or she should so order."

26 Then it goes on to explain that if the judge orders
27 production to the court, to him or herself, the judge then
28 looks at the documents and applies a more robust balancing

1 analysis and then decides what, if any, gets produced to
2 the moving party.

3 Now, as I've said, that's the way the law should work,
4 in my submission. But if the third party, the witnesses,
5 are not objecting on the basis of some countervailing
6 concern, then I would accept that the panel could order
7 production directly to Planet Energy. There is no point
8 doing a balancing exercise if the third party is not
9 raising any concerns for you to balance against Planet
10 Energy's interest in having those documents available to it
11 for the sake of responding to the case.

12 The only final thing I wanted to say, subject to any
13 other questions, is just in regards to, Madam Chair, your
14 exchange with Mr. Zacher at the end of his submissions. He
15 has acknowledged, as I understood it, that there is no
16 authority possessed by the Board to order that the names of
17 the individuals be disclosed, if it doesn't otherwise
18 appear in a document. But he is not withdrawing the
19 request, and it sounds like he invited the panel to make
20 such an order if it felt it appropriate.

21 It's my submission that the Board should not be making
22 an order that both sides have acknowledged it doesn't have
23 the legal authority to make.

24 Apart from that, I'm happy to answer any other
25 questions. But those are my submissions.

26 MS. LONG: Thank you, Ms. Gonsalves. At this point,
27 I'm going to ask -- Mr. MacArthur and Mr. Hawkins, this
28 motion is returnable on both of you. So if there is

1 anything that you would like to add in response to Mr.
2 Zacher's submissions this morning and the motion brought by
3 Planet Energy, we would like to hear from you, if you would
4 like to make any submissions.

5 **SUBMISSIONS BY MR. MACARTHUR:**

6 MR. MacARTHUR: There was mention that Planet Energy,
7 through their counsel, made several request back in the
8 spring -- April, May, June -- and the documents were not
9 forthcoming. The reason for that, and he is aware of it,
10 is that I had some medical conditions and I was in and out
11 of the hospital, which did not allow me to have that work
12 done. And as of today, the counsel for me or whatever,
13 they have everything, with the exception of information
14 that is on one computer stick that wouldn't work on their
15 system, which I intend today to print and then forward on.
16 And that would -- everything that has been provided, except
17 what is on this stick, that's all I have.

18 There was a question about producing names, and in
19 fact, it's all through the material. They just have to
20 look for it. But I can give you the names today, if you
21 wish. And when you join ACN, you pay your \$500 and the
22 next thing you know -- there is no real training session --
23 you get a website, and you have a back office for the
24 website. There is training portals there.

25 But when I went through the process, nobody discussed
26 that. There was -- you know, the main concern is that five
27 minutes after you pay your \$500, they want you to set up a
28 meeting and sign up people. That was the whole concept in

1 the beginning. You know, the submissions are there. I was
2 not aware of the cancellation penalty really, but I am now.

3 But I might also say that I can name 50 or 60 people
4 that joined ACN and that are told by their peers, let's say
5 for the global adjustment, just tell your customer it
6 averages 5 percent a year -- Well, that's not true. At the
7 time I believed it to be true, because they were telling me
8 that.

9 MS. LONG: So Mr. MacArthur, with respect, I just want
10 to focus today -- we're focusing on production of
11 documents. So as I understand it, what you are saying is
12 you've produced everything but for documents that will be
13 printed off a computer stick. Is that your position?

14 MR. MacARTHUR: Right. Yes.

15 MS. LONG: Mr. Hawkins, anything that you would like
16 to add with respect to production of documents?

17 **SUBMISSIONS BY MR. HAWKINS:**

18 MR. HAWKINS: No. Everything that I've had I've
19 produced, I've given to Mr. MacArthur, and he has
20 submitted. I didn't -- you know, my complaints -- my
21 complaints were about -- exactly stated at the time, okay?
22 I didn't see any point -- I can check my records, I can go
23 through it, but I thought -- I didn't think that we'd be
24 requested. It was quite a while ago for me. I mean, this
25 is going back a couple years ago for me. So I should have
26 kept a better file, but everything as I progressed has
27 brought the complaint forward -- is this working?

28 MS. LONG: Can you hear? No, just...

1 [Reporter appeals.]

2 MS. LONG: Okay. Let's just check your mic there.

3 Okay.

4 MR. HAWKINS: Just start again. Everything -- like I
5 said, when -- when I brought my complaint forward I
6 produced -- I brought it to Mr. MacArthur's attention, and
7 I supplied him with information as it became available or
8 he requested.

9 But as far as the file goes -- I can check my computer
10 if you like. What I remember most are collection notices,
11 and they never ended. But I'll cooperate to the best of my
12 knowledge. Whatever I have, it's more than welcome to
13 have. I have nothing to hide, nothing to dissuade anybody
14 from finding the -- you know, whatever is going on.

15 But like I say, Mr. MacArthur has the information. He
16 was the person I was dealing with through Planet Energy.
17 And if I have something else I'll produce it, but I don't
18 know of anything else I have that would be of interest.

19 MS. LONG: Thank you, Mr. Hawkins. So Mr. MacArthur,
20 I just want to be clear. When you say you produced
21 everything to either enforcement counsel or Planet Energy,
22 does that include the information that Mr. Hawkins sent to
23 you?

24 MR. MacARTHUR: Yes, that's -- everything is all in
25 there.

26 MS. LONG: Okay. Thank you for clarifying that.

27 Okay. Thank you for those submissions. What we
28 propose to do now, Ms. Gonsalves and Mr. Zacher, is ask if

1 Mr. Richler has any comments that he would like with
2 respect to the status of the law as far as we're concerned,
3 so he is going to make those submissions now so that if,
4 Mr. Zacher, you want to address anything in your reply
5 you'll have the opportunity to do so. Mr. Richler.

6 **SUBMISSIONS BY MR. RICHLER:**

7 MR. RICHLER: Thank you, Madam Chair, and I'll try to
8 keep this very brief. And I -- again, I emphasize that I
9 offer my assistance as an independent counsellor to the
10 Board. I'm non-partisan. But I will attempt to shed some
11 light on some of the legal arguments that you heard today.

12 Frankly, in light of the thorough arguments of both
13 plaintiff's counsel and the enforcement team's counsel
14 there is very little for me to add. Just three points I
15 would like to make.

16 The first, on the question of your jurisdiction to
17 order the production of information that is not in
18 documentary form, we heard Mr. Zacher essentially, as I
19 understood it, concede the legal point, and while he said
20 he is not abandoning that part of his motion, he said he
21 would leave it to the hearing on the merits and deal with
22 it in cross-examination, although I also heard him say that
23 if you are so inclined to make that part of the order he
24 would welcome it.

25 So the only thing I would say on that is in light of
26 what -- the position that Mr. Zacher is taking, I might
27 suggest that the Board may wish to consider making -- may
28 wish to consider holding off on making any sweeping

1 findings on jurisdiction in its decision on this motion.
2 Perhaps that's better left to another day where the point
3 is fully argued. That's really all I wanted to say on that
4 point, because while -- again, while we've heard it sounds
5 like both counsel for the enforcement team and Planet
6 essentially agree on the law, it hasn't been fully argued,
7 and so I wouldn't want the Board to completely foreclose a
8 party from making an argument in another case.

9 The second point deals with the O'Connor case, and
10 this is just a simple point of context. We heard the
11 O'Connor case referred to several times today, but as Ms.
12 Gonsalves noted, what we are dealing with today is an
13 administrative case, not a constitutional case, and I would
14 just remind the Board that O'Connor was a constitutional
15 case that arose in the criminal context.

16 The accused in that case was accused of serious
17 crimes, sexual crimes, against former students at a
18 residential school where the accused was the principal.
19 And so I merely highlight that because as you read
20 O'Connor, which is in the authorities that have been
21 provided to you, I think you should bear that in mind.

22 As this Board said in the Toronto Hydro case, which
23 Mr. Zacher referred you to, there is a difference between
24 what this Board does and what the courts do in purely
25 criminal cases. And as the Board said in that Toronto
26 Hydro case, the implications for what types of disclosure
27 are required are therefore different.

28 I think it -- I wouldn't want this Board to get the

1 impression that the exact same standards set out in the
2 criminal constitutional case of O'Connor should govern this
3 motion, and I think the Toronto Hydro case is a good
4 starting point for your analysis.

5 The final point I would make is if the Board does
6 decide to issue an order against one or more of the
7 expected witnesses, I would just urge you to take care in
8 crafting the order so as to avoid the disclosure of
9 irrelevant or other documents that may not be -- that may
10 have some prejudice to the witnesses.

11 We heard Ms. Gonsalves refer you to the O'Connor
12 procedure, where the documents would actually be produced
13 to you to review them and screen them before they were --
14 they are passed on to Planet. That's one possible
15 approach, although I don't think it's the only approach,
16 but -- and we also heard -- I take it Mr. Zacher is
17 sensitive to this issue, and that is why he has taken the
18 time to craft a draft order.

19 So again, I merely say this to remind the Board that
20 if it does decide to order anything it should tailor the
21 order narrowly, and if it sees fit to include some sort of
22 screening process or other safeguards to ensure that things
23 -- that only truly relevant and non-prejudicial documents
24 make their way to Planet.

25 Unless the Board has any specific questions, that is
26 all I wanted to comment on. And I would just add that
27 again I think it would be only fair for the parties to have
28 an opportunity to comment on anything I've just said.

1 MS. LONG: Ms. Gonsalves, Mr. Zacher, I was going to
2 allow you to respond in your reply, but Ms. Gonsalves, is
3 there anything that you would like to say in respect of Mr.
4 Richler's comments to us?

5 **FURTHER SUBMISSIONS BY MS. GONSALVES:**

6 MS. GONSALVES: Yes, thank you. I just want to
7 comment on the advice you received from your independent
8 counsel concerning the application of the O'Connor
9 framework, around which I've based my submissions, and I
10 wanted to make two points: First, that the Toronto Hydro
11 system case that Mr. Richler mentioned and Mr. Zacher
12 relies upon was of course a case where no production was
13 ordered against the third party, and so it doesn't -- while
14 they certainly recognize the availability of an order
15 against a third party, at paragraph 34 they say no
16 production will be ordered.

17 And so it doesn't speak to the more fundamental point
18 I was making, which is that this needs to be a two-step
19 process where the Panel reviews the documents first. In
20 Toronto Hydro that wasn't seen as being necessary.

21 The other point I wanted to make is that the O'Connor
22 test, acknowledging that it was a criminal case that
23 engaged constitutional interests, has been followed by
24 other statutory administrative tribunals, including the Law
25 Society of Upper Canada. You've got the case at tab 2 of
26 my authorities. The Ontario College of Teachers at tab 3
27 of my authorities. The Saskatchewan College of Physicians
28 and Surgeons. And then, in the securities context, at

1 tab 5. And it's my submission that this is really the
2 accepted approach to third party records motions that,
3 certainly in my experience before other tribunals, it's the
4 approach that is essentially universally followed because
5 of what the Supreme Court said in O'Connor about the need
6 to balance competing considerations.

7 That's all I wanted to say about Mr. Richler's advice.

8 MS. LONG: Thank you, Ms. Gonsalves.

9 MS. SPOEL: I'm just looking at the other cases, the
10 Law Society and the College of Teachers, and it seems to me
11 these are all cases where somebody is seeking somebody's
12 medical records, or that kind of thing. Is that maybe a
13 little different -- and which was similar situation to the
14 O'Connor case. Is that perhaps a somewhat different
15 situation than records dealing with what is a business or
16 consumer transaction. We're not looking for, I don't think
17 in this case, Planet Energy is looking for anything that we
18 don't know deal with things like people's psychiatric
19 history, or their medical records, or anything of that
20 nature, which seems to be what these other cases -- perhaps
21 with the exception of the securities one -- are dealing
22 with.

23 MS. GONSALVES: I don't dispute that. I think it's
24 more a difference of degree than kind. Certainly when
25 you've got psychiatric or therapeutic records or medical
26 records, those really go to the heart of the privacy
27 concerns that animated the O'Connor decision.

28 But it is my submission that the law applies the

1 framework more broadly. It's just that the privacy
2 considerations are attenuated where it's other kinds of
3 documents. And if you look at tab 6 of my authorities in
4 the Elekssiuk case, again a criminal case, but you turn to
5 paragraph 26, this is the one I meant to refer to in my
6 factum.

7 At paragraph 26, the court is summarizing the law on
8 third party records productions as of 2013, so some time
9 after O'Connor which was a mid-1990s case. And it refers
10 to the McNeil case from the Supreme Court and in the
11 summary of how the law in this area works at paragraph A,
12 it says:

13 "The O'Connor regime provides a general mechanism
14 at common law for ordering production of any
15 record beyond the possession or control of the
16 prosecuting Crown," and I would read in there
17 enforcement staff. "The O'Connor regime is not
18 limited to cases where the third party has an
19 expectation of privacy in the target documents."

20 Based on that, it is my submission that this is meant
21 to be the overarching framework, but that the privacy
22 concerns are mitigated when we're talking about commercial
23 or business records.

24 MS. LONG: Mr. MacArthur, Mr. Hawkins, did you have
25 anything that you wanted to add, or in response to what Mr.
26 Richler said this morning? No? Okay. Then, Mr. Zacher,
27 we're going to give you some time to prepare your reply
28 before hearing it. Do you know how much time you think

1 you'll need?

2 MR. ZACHER: I can be brief. I'm happy to do that
3 now. But if you -- I'm also happy to do it after the
4 break. I expect I won't be more than 5 or 10 minutes.

5 MS. LONG: Why don't we take a 10-minute break and
6 come back and hear your reply. Thank you.

7 --- Recess taken at 11:24 a.m.

8 --- On resuming at 11:37 a.m.

9 MS. LONG: Mr. Zacher, we're ready for your reply.

10 **REPLY SUBMISSIONS BY MR. ZACHER:**

11 MR. ZACHER: And having given me more time to prepare,
12 I hope I now don't go over the ten minutes I promised I
13 would be.

14 I just want to make -- I've got a few points that I
15 would like to respond to, but just make one contextual
16 point up front to help frame this a little bit. Again, the
17 way that this motion came about was as a result of us
18 having asked through the enforcement team that relevant
19 documents from the four proposed witnesses be disclosed.
20 And they were not disclosed, and again, the reason for that
21 was because enforcement-team counsel properly said, "Don't
22 take issue with the law, that we've got no control over
23 these witnesses. We've asked them to produce the
24 documents. They haven't produced them, so you'll have to
25 go get them yourself", which is why we brought the motion.

26 Part of my friend's submission today was having
27 initially told us we don't speak for the witnesses, we've
28 got no control over the witnesses, is to now suggest maybe

1 the order that we're seeking ought to be scoped or the
2 manner in which the documents are produced ought to be
3 controlled in some way to address what are effectively
4 privacy concerns or other concerns by the witnesses, and in
5 my submission -- and there is nothing wrong with my friend
6 having explained what she says the law is, but these really
7 are positions that are to be articulated by the witnesses
8 from whom the documents are sought and not by the
9 enforcement team, and particularly not by the enforcement
10 team, given the position that they earlier took when we
11 requested these documents.

12 That having been said, I'm not sure that we're all
13 that far apart, because what Ms. Gonsalves allowed and I
14 think reasonably allowed was that, look, if there are no
15 privacy issues that are implicated and the witnesses don't
16 advise you that they have any of these concerns, then it
17 may be entirely appropriate to simply make the order
18 requested, and it may not be necessary to have the
19 documents produced first to the Panel to examine them
20 before they're provided to Planet Energy.

21 So I think it may be that we're largely at the same
22 end point. And then I think, more importantly, Mr. Hawkins
23 and Mr. MacArthur were given an opportunity to address
24 this, and neither of them addressed any issue in terms of
25 prejudice that would result from a production order.

26 I think it goes without saying, as Ms. Spoel and Mr.
27 Richler pointed out, this is not a case where we're dealing
28 with, you know, psycho -- you know -- therapy records or

1 medical records or criminal records or anything of that
2 sort. They're plain-Jane business records.

3 And so what I would submit -- and I want to address
4 the two issues -- is that, first, it's not necessary to
5 have the documents produced first to the Panel to screen
6 them. If that is your determination I don't take any
7 violent opposition to that. But documents from third
8 parties are routinely ordered produced and they're ordered
9 produced to the party who is seeking them. They are not
10 vetted through a tribunal.

11 And as long as the order itself is appropriately
12 narrow so that it is only targeting documents that are
13 likely relevant, then that is in my view sufficient. And I
14 don't think there is any grave danger in having them
15 produced to the Panel first, but we have not -- Planet
16 Energy, having not received the enforcement team's
17 documents upon which they intend to rely upon, nor their
18 formal witness lists, we have not articulated precisely
19 what our case is. That will be further articulated as the
20 case unfolds.

21 But what we may view as relevant may differ from what
22 the Panel may view as relevant, and so there is some risk
23 that documents that get vetted in this way have the
24 unintended consequence of screening out what are pertinent
25 documents.

26 And if you were dealing with medical records or some
27 other type of sensitive records maybe you have to balance
28 those two issues, but in this case I really don't -- I

1 submit there really is no privacy issue to balance.

2 The second point -- and this goes to the scope of the
3 order requested. I've handed up a draft order which
4 itemizes the specific types of documents which I submit
5 ought to be produced.

6 Ms. Gonsalves suggested that there may be some
7 overbreadth there. She referenced communications with OEB
8 Staff, communications with Planet Energy, and I think she
9 rightly said those are documents that presumably are
10 already produced or ought to be in Planet's possession.

11 And two points. There is no harm in ordering the
12 witnesses to produce those. And sometimes parties don't
13 hang on to all of their documents, and in fact this was the
14 subject of the pre-conference that we attended before Mr.
15 Quesnelle. It took three or four tries before Board Staff
16 made full disclosure to Planet. Having initially told us
17 that disclosure had been fully made, it turned out that it
18 hadn't been.

19 I don't cast any aspersions. That's just what often
20 happens. And so in order to make sure that all relevant
21 documents are collected, it is helpful to ask senders and
22 receivers of documents to produce them even if there is
23 some overlap.

24 The other reason why I don't think this portion of the
25 order ought to be scoped is we've not simply asked for
26 communications sent and received, but we've also asked for
27 recordings or notes of communications, so to the extent the
28 witnesses had telephone conversations with Planet Energy or

1 with OEB Staff or with their customers and made notes on
2 their computer or handwritten notes or recorded those
3 calls, those are obviously documents that would not be --
4 to the extent they are communications with Board Staff,
5 they wouldn't be in the possession of Board Staff. To the
6 extent they're communication with Planet Energy, they
7 wouldn't be in the possession of Planet Energy. These are
8 contemporaneous recordings or notes made by the witnesses.

9 So that's another reason why the -- why I suggest the
10 scope of the order ought not to be pared back.

11 Just to respond to Mr. MacArthur and Mr. Hawkins, Mr.
12 MacArthur indicated that a reason he had not produced the
13 documents in the first instance was that he had been -- he
14 had had some health issues, which I, of course, am
15 sympathetic to. He suggested that this was something that
16 was known. I just want to be clear. I have never known
17 this. It has never been communicated to me by Mr.
18 MacArthur nor by the enforcement-team counsel, so that's
19 not something that we were aware of.

20 But the other point is, it's been four months since we
21 requested these documents. We were still receiving
22 documents from Mr. MacArthur through enforcement-team
23 counsel Friday after 4:00 p.m., and the cover letter
24 indicates it still doesn't include everything.

25 So it is appropriate to make an order, and truly, if
26 Mr. MacArthur has produced everything, then a letter to
27 that effect will suffice. But these are circumstances in
28 which I submit that the licensee, Planet Energy, is

1 entitled to an order.

2 With regards to Mr. Hawkins, I appreciate that Mr.
3 Hawkins in his brief submissions was forthcoming and said,
4 "I don't have anything to hide. I'm happy to disclose
5 everything. I've provided documents in response to
6 requests from Mr. MacArthur." Fair enough. I'm happy to
7 go back and look in my computer to see if there is anything
8 else.

9 So the necessary, exhaustive -- reasonable and
10 exhaustive search has not been undertaken by Mr. Hawkins.
11 To the extent he wants to resist an order, he ought to have
12 done that. He hasn't done that.

13 And for the same reason an order ought to be made
14 against Mr. Hawkins, and he can go back and search his in-
15 box and his sent box and all other hard-copy files that he
16 may have, and if he determines that, yes, he has provided
17 every single document to Mr. MacArthur and those have been
18 forwarded to Planet Energy, again, a response to that
19 effect is fine. But in my submission, an order ought to be
20 made.

21 Subject to any questions, those are my reply
22 submissions. Thank you.

23 MS. LONG: Thank you, Mr. Zacher. We are going to
24 reserve our decision, and we will be providing our decision
25 in writing. Thank you, everyone, for your attendance
26 today.

27 --- Whereupon the hearing adjourned at 11:48 a.m.

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