



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

DECISION AND ORDER

EB-2017-0022 / EB-2017-0223

Active Energy Inc.

Notice of Intention to Make an Order for Compliance and Payment of an
Administrative Penalty

BEFORE: Christine Long
Vice-Chair and Presiding Member

Michael Janigan
Member

Cathy Spoel
Member

June 14, 2018

1 INTRODUCTION

On May 25, 2017, the Ontario Energy Board (OEB) issued a Notice of Intention to Active Energy Inc. (Active) to make an order for compliance, restitution and payment of an administrative penalty (EB-2017-0022). The Notice of Intention alleged that Active, an OEB-licensed electricity retailer and gas marketer, had contravened the *Energy Consumer Protection Act, 2010* (ECPA), the General Regulation under the ECPA (O. Reg. 389/10), and the OEB's *Electricity Retailer Code of Conduct* (these instruments are referred to as the "Consumer Protection Regime" throughout) in respect of 86 electricity contracts it had entered into with customers. The OEB issued a second Notice of Intention on June 1, 2017 (EB-2017-0223), setting out similar allegations in respect of an additional 15 contracts.

It is alleged that Active failed to meet the obligations under the Consumer Protection Regime by, among other things, failing to provide disclosure statements and price comparisons contrary to sections 11 and 12 of the ECPA, sections 5(7) and 10(1) of the Regulation, and sections 4.1 and 4.6 of the Code, as well as not verifying the contracts contrary to section 15 of the ECPA and section 4.10 of the Code. Pursuant to section 16(1) of the ECPA, if non-compliance were proven, the 101 contracts at issue would be deemed void and the monies paid under the contracts would need to be refunded.

The findings sought by the OEB Enforcement Team turn on whether the 101 contracts have been made with customers who meet the definition of "consumer" under section 2 of the ECPA or "low volume consumer" under the Code. The ECPA defines a consumer with respect to retailing electricity as a person who uses, for the person's own consumption, less than the prescribed amount of electricity. This amount is set out in section 4(a) of the Regulation as 150,000 kilowatt hours/annum. The Code provides that a low volume consumer means a consumer who annually uses less than 150,000 kWh of electricity or such other amount as may be prescribed for the purposes of section 2 of the ECPA.¹

¹ Most of the provisions of the OEB's *Electricity Retailer Code of Conduct*, including the requirements to provide a disclosure statement and a price comparison, to verify contracts by telephone or over the internet, and to include in all contracts standard terms and conditions approved by the OEB, apply only to contracts with "low volume consumers", who are defined in the Code to mean consumers using less than 150,000 kWh or such other amount as may be prescribed for the purposes of section 2 of the ECPA. Some other provisions of the Code, such as the prohibition against making false or misleading statements, apply equally in respect of a retailer's dealings with low volume consumers and consumers above the low volume threshold.

The consumption pursuant to each of the 101 subject contracts exceeds the threshold amount. Active aggregated the volumes of commodity purchased at different locations by the same customer to conclude that Active is in compliance with the Consumer Protection Regime.

The issue before the OEB is whether an electricity contract covering multiple locations where electricity is used by the same customer, which together exceed the low volume threshold of 150,000 kWh, but which on their own may be below the threshold (say, for example, a chain of five restaurants, each restaurant consuming 50,000 kWh per year), is subject to the full range of protections under the Consumer Protection Regime or not.

For the reasons that follow, the OEB agrees with Active that the provisions of the Consumer Protection Regime cited by the Enforcement Team do not apply to the subject contracts. The allegations of non-compliance are dismissed.

Process

By way of letter dated June 6, 2017, Active gave notice under section 112.2(4) of the *Ontario Energy Board Act, 1998* requiring the OEB to hold a hearing on the Notices of Intention.

Because the allegations in the two Notices were similar in nature, the OEB combined proceedings EB-2017-0022 and EB-2017-0223 pursuant to section 21(5) of the *Ontario Energy Board Act, 1998*.

The only parties to the proceeding were Active and the members of OEB staff assigned to bring these matters forward (the Enforcement Team).

An oral hearing was held over three days in November and December, 2017.

Position of the Enforcement Team

The Enforcement Team conceded that the instruments of the Consumer Protection Regime do not provide how to calculate whether a consumer exceeds the threshold amount that provides an exemption from its application. However, the Enforcement Team argued that in order not to limit the protection that the Consumer Protection Regime provides, this regime must apply at each location supplying the consumer where consumption is less than the threshold. This must occur despite the fact that the aggregate amount supplied under contract to the consumer exceeds that threshold. This would mean that a retailer such as Active would have to comply with the ECPA and all Code protections at every location under the contract where less than 150,000 kWh

per annum is consumed. Otherwise, it is alleged that all manner of individuals and small businesses that need protection would be excluded. The Enforcement Team interpretation was referred to by both parties as the “location approach”.

The Enforcement Team position is based on what is termed the modern principle of statutory interpretation which requires that the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.² The Supreme Court of Canada’s decision in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*³ was cited to note that the ordinary and grammatical meaning of a section is not determinative without considering the total context of the provisions being interpreted.

The Enforcement Team referred to section 6 of the ECPA which directs the resolution of any ambiguity in a contract that allows for more than one reasonable interpretation to be interpreted for the benefit of the consumer. The Enforcement Team submitted that a broad approach to the extension of the protections of the Consumer Protection Regime must be used, and that this requires the location approach which protects small business owners, people with multiple residences, etc. Without this interpretation, in the Enforcement Team’s view, the Regime excludes more people than necessary.

The Enforcement Team noted that the use of the term “aggregation of energy use” was well recognized in energy legislation. It further submitted that the absence of this terminology here supports an interpretation that the legislature intended for aggregation not to apply in considering the application of the threshold for protection.

While a specific example of harm associated with allowing aggregation of use, from the contracts in question, was not given, it was submitted that the intent of the Regime supported the location approach. Potential difficulties of retailers accommodating some customers who do not need protection under the Regime were acknowledged. However, the Enforcement Team submitted that the purpose of the ECPA was better served by extending the Regime protection to some that do not require it than by an interpretation that excludes some that need it. The Enforcement Team suggested that this would be consistent with the general tendency of the courts to prefer broad interpretations of consumer protection over narrower ones.

² *Sullivan on Statutes* (6th Edition) page 7.

³ [2006] 1 S.C.R. 140.

Position of Active

Active submitted that it was clear that the Consumer Protection Regime was intended to only apply to consumers which use less than the prescribed threshold of electricity. The aggregate consumption of a customer must be used to determine whether there has been compliance with the Regime pursuant to the definitions provided in the ECPA and the Code. This was referred to as the “aggregation approach”.

Active cited the Supreme Court of Canada case of *R. v. McIntosh*⁴ which provides that a correct interpretation of an Act involves a reading of the words in their entire context, and in their grammatical and ordinary sense in harmony with the scheme and intention of the Act. Active submits that there is no inconsistency or ambiguity in the definition of consumer under the ECPA by reading it in its ordinary and grammatical sense to mean a total aggregate consumption threshold. The definition is clear and exhaustive.

Active argued that the use of words in other legislation dealing with the consequences of energy aggregation does not necessarily lead to the conclusion urged by the Enforcement Team. The absence of such words in the ECPA does not show that it is impermissible to aggregate metered amounts at different customer locations just because “aggregation” could have been mentioned in the relevant sections.

This reading also does not conflict with the legislative scheme and intent of the ECPA. The contextual approach provides no basis for the OEB effectively to amend the legislation. Creating a threshold test that inserts a missing location component rather than a simple aggregate consumption measure is tantamount to amending the language of the ECPA.

To further address the Enforcement Team’s argument that the context of the legislation required its expansive approach, Active offered evidence from its principal officers concerning the kind of customers associated with the 101 contracts in issue to which it provides supply without applying the provisions of the Consumer Protection Regime at issue. Active described its customers in general as sophisticated and knowledgeable. These customers, many of whom consume in aggregate many times the 150,000 kWh threshold, have metered locations at some of which they do not consume the threshold amount. Under the Enforcement Team position, these contracts would have to go through verification and transparency safeguards, and acquire contract cancellation rights that would make it commercially untenable for the retailer and the customer.

⁴ [1995] 1 S.C.R. 686.

Noting the requirement that an interpretation of legislation should not lead to absurdity, Active pointed out the various practical frailties and contradictions of the use of the location approach. For example, Active raised the scenario of a customer with one property and an annual consumption of 1 million kWh who one day purchases the property next door with consumption of 10,000 kWh. Active argued that, under the location approach, the customer would be treated, for the purposes of the second property, as an ECPA consumer, even though the nature of the customer and its level of sophistication had not changed.

2 ANALYSIS

Determining whether Active's aggregation approach or the Enforcement Team's location approach applies is a question of statutory interpretation.

The relevant part of the ECPA is Part II. Section 3(1) says, "This Part applies to gas marketing and retailing of electricity to consumers" (emphasis added).

"Consumer", in turn, is defined as follows in section 2:

"consumer" means,

(a) in respect of the retailing of electricity, a person who uses, for the person's own consumption, electricity that the person did not generate and who annually uses less than the prescribed amount of electricity, and

(b) in respect of gas marketing, a person who annually uses less than the prescribed amount of gas.

For electricity, the prescribed amount is 150,000 kWh.⁵

The term "person", which is referenced in the definition of "consumer", is itself defined in the ECPA:

"person", or any expression referring to a person, means an individual, sole proprietorship, partnership, including a limited partnership, trust or body corporate, or an individual in his or her capacity as a trustee, executor, administrator or other legal representative or such other class of persons as may be prescribed.

Active argues that the plain and unambiguous test written into the legislation is thus the level of a person's total consumption. If a person uses more than 150,000 kWh per year, even if that consumption is spread over multiple locations, then the person is not a "consumer" within the meaning of the ECPA and subject to the protection the ECPA provides. The OEB agrees. The ordinary and grammatical meaning of section 2, when read in concert with section 3, is that the 150,000 kWh threshold is determined on the basis of the total consumption by the customer who entered into the contract.

⁵ Section 4(a) of O. Reg. 389/10.

The OEB accepts that this interpretation must also be consistent with the context and purpose of the legislation. However, in the OEB's view, the aggregation approach does not appear to be in conflict with the objectives of the Act, and there is no evidence that it will deny protection to customers who require it. The adoption of the 150,000 kWh threshold suggests that the legislative drafters presumed that customers using at least that amount of electricity in a year have a level of sophistication that does not require the need for protection. (The 150,000 kWh threshold is more than 16 times higher than the typical residential customer's annual consumption.) The OEB cannot infer that a customer using a total of 150,000 kWh over three properties is any less sophisticated than a customer who uses 150,000 kWh all at one site. The evidence in this case was that none of the 101 customers had complained about their contracts.

Conversely, the use of the location test might significantly burden larger customers and their retailers and undermine potential commercial benefits to both. An Active executive testified that the Enforcement Team's location approach would impede Active's ability to offer contracts to larger users. Of particular concern was that applying the ECPA cancellation rights to customers with multiple low volume sites would expose the company to significant risk. These rights include the ability to cancel a contract, without charge, within 30 days of receiving the second bill under the contract; and the ability to cancel the contract afterwards on 10 days' notice, with a maximum cancellation charge of \$50. The example of a bank with many branches was provided. If the bank could cancel a large contract on such short notice and at no or virtually no cost, the retailer would either not be willing to offer the contract, or would need to build the cancellation risk into the price, which would make the offering less attractive.

While not part of the allegations against Active, the concern was raised during the course of the proceeding about the possibility that someone other than the "person" who executed the contract would consume some of the electricity under the contract. This might be a low volume residential or business customer to whom the ECPA would normally apply. The Active witness testimony as to the degree of Active's knowledge and supervision of this possibility was somewhat vague.

To be clear, this case was about aggregating the consumption of multiple locations owned or occupied by the same customer (or "person"). It was not about aggregating the consumption of multiple locations where electricity is used by different people among different family members residing at different addresses. In the OEB's view, the latter practice could not be used by a retailer as a way to circumvent the ECPA. If there were multiple persons consuming electricity under the same contract, the provisions of

the ECPA may apply. The retailer is responsible for ensuring that the customer entering into the contract is actually consuming the electricity.

Active and the Enforcement Team addressed the fact that an FAQ (Frequently Asked Questions) had been published by the OEB in 2011. The Enforcement Team advanced that the FAQ could assist the OEB in determining the issue before the OEB in this case. The OEB accepts that while an FAQ does not have the force of law, it is recognized that FAQs can be referred to as a source of policy guidance to industry participants and the public. However, in this case, the OEB does not find that the question and the answer are directly related to the facts in this case. The FAQ speaks to whether each account is considered to be a separate consumer for the purposes of determining whether the low-volume consumption threshold has been exceeded.⁶ The OEB finds that the concept of aggregating accounts is distinguishable from the concept of aggregating locations. As such, the FAQ was not persuasive.

In summary, the OEB concludes that the Consumer Protection Regime allows a retailer to aggregate the same person's consumption at multiple locations for the purpose of determining whether the 150,000 kWh threshold is exceeded. To adopt the Enforcement Team's location test would be equivalent to rewriting the legislation.

Costs

Although Active is the successful party, the OEB's *Rules of Practice and Procedure for Enforcement Proceedings* stipulate that "Costs may be awarded against the enforcement team only in special or exceptional circumstances or where its actions have been frivolous or vexatious." This is not such a case. Accordingly, no costs are awarded.

⁶ The FAQ says, "Each account is considered to be a separate consumer for the purposes of determining whether the low-volume consumption threshold has been exceeded." However, as Active argues, that is not quite the same as the location approach advanced by the Enforcement Team in this case. To illustrate, Active pointed to one of its customers who has multiple meters on the same property, each of which is below the threshold but which in aggregate exceed it.

3 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. The allegations against Active are dismissed.
2. No costs are awarded.

DATED at Toronto June 14, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary