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

DECISION AND ORDER

EB-2017-0007

Planet Energy (Ontario) Corp.

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

BEFORE: Christine Long
Vice-Chair and Presiding Member

Michael Janigan
Member

Cathy Spoel
Member

September 20, 2018

TABLE OF CONTENTS

1 INTRODUCTION

On February 9, 2017, the Ontario Energy Board (OEB) issued a Notice of Intention to Planet Energy (Ontario) Corp. (Planet Energy) to make an order for compliance, restitution and payment of an administrative penalty. The Notice of Intention alleged that Planet Energy, an OEB-licensed electricity retailer and gas marketer, contravened the *Energy Consumer Protection Act, 2010* (ECPA), O. Reg. 389/10 (General) under the ECPA (ECPA Regulation), and the OEB's *Electricity Retailer Code of Conduct* and *Code of Conduct for Gas Marketers* (these instruments are referred to as the "Consumer Protection Regime" throughout).

For the reasons that follow, the OEB finds that a subset of the allegations set out in the Notice of Intention have been proven on a balance of probabilities. As a result, the OEB finds that 26 contracts Planet Energy entered into with consumers are void, and those consumers are entitled to a refund of the money paid under those contracts. In addition, Planet Energy is to pay an administrative penalty.

1.1 Background

The Enforcement Team and Planet Energy filed an Agreed Chronology setting out certain uncontested facts. The Agreed Chronology explains that, for seven years, from November 2009 to November 2016, Planet Energy had a contractual arrangement with a "multi-level marketing" company called All-Communications Network Canada (ACN). ACN markets various products, including contracts for energy, telephone and internet services, through "independent business owner" representatives who introduce the products to their "warm network" of family, friends, and acquaintances. Since the expiry of its contract with ACN in November 2016, Planet Energy has not promoted its offerings through ACN or any other multi-level marketing company.

Some but not all of the allegations concerned the activities of two ACN independent business owners, known as J.M. and K.N., who promoted and sold Planet Energy products to their respective warm networks.

The Notice of Intention grouped the allegations under the following headings:

- Providing false, misleading or incomplete information to consumers
- Inadequate training for salespersons
- Failure to meet requirements for door-to-door sales

- Failure to meet requirements for contracts and disclosure statements
- Seeking to impose an improper cancellation fee

During the hearing, the Enforcement Team advised that it wished to withdraw the allegations in respect of four of the contracts which were entered into by J.M. and K.N. on their own behalf or on behalf of a spouse.

1.2 Process

By way of letter dated February 23, 2017, Planet Energy gave notice under section 112.2(4) of the *Ontario Energy Board Act, 1998* (OEB Act) requiring the OEB to hold a hearing on the Notice of Intention.

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

A pre-hearing conference was held on July 11, 2017, at which certain administrative matters were resolved.

Planet Energy brought a motion for an order seeking the production of certain documents and other information by certain individuals who were expected to be called by the Enforcement Team as witnesses. After an oral hearing on the motion, the OEB ordered the individuals to provide relevant documents to Planet Energy.

The OEB heard evidence on the alleged non-compliance over five days in November 2017, and heard oral arguments on January 11, 2018.

2 FINDINGS

2.1 The Prescriptive Nature of the Consumer Protection Regime

The OEB noted in the Energhx Green Energy Corporation case that "the requirements of the ECPA, the relevant regulations and the Board's Codes are highly prescriptive and detailed, leaving little room for discretion for retailers and marketers."[1] By the same token, the Consumer Protection Regime leaves little room for discretion for the OEB, in a case like this, in terms of determining whether or not a breach occurred.

2.2 Issues Raised by Planet Energy

The OEB will address each of the categories of alleged non-compliance in turn. But first, it is necessary to deal with two legal issues raised by Planet Energy.

First, Planet Energy maintains that the contracts at issue were not "in person" contracts but "internet agreements" or "contracts entered into over the internet".

It is not disputed that J.M. and K.N. enrolled consumers by filling out an online form on the consumers' behalf. The consumers themselves were not present at the time, and were not shown a copy of the contract or the disclosure statement and price comparison beforehand.

If Planet Energy was correct that the contracts were "internet agreements" referred to in section 17 of the ECPA (as it read at material times), there would have been no need for the contracts to be verified.[2] Section 17 provided that the verification requirements (as well as the provisions voiding a contract that was not verified) did not apply to "[a]n internet agreement within the meaning of Part IV of the *Consumer Protection Act, 2002*." That Act in turn defined an "internet agreement" as "a consumer agreement formed by text-based internet communications." Planet Energy submits that the impugned contracts all meet that definition, as they were all formed by text-based internet communications.

[1] EB-2011-0311, Decision and Order, March 26, 2012, p. 15.
[2] As a result of amendments to the ECPA effective January 1, 2017, all contracts, even those entered into online, must now be verified.

Similarly, Planet Energy submits that, for the purpose of section 9 of the ECPA Regulation, the contracts were "entered into over the internet". Section 9 (when read in concert with section 7) has the effect of removing contracts entered into over the internet from the requirement that the contract, disclosure statement and price comparison be signed by the consumer.

Planet Energy says that J.M. and K.N. acted as agents for the consumers they enrolled. Although Planet Energy's policy was that independent business owners were not to enroll consumers on their own, J.M. and K.N. did so with the permission of the consumers. By completing the online enrollment process on behalf of the consumers, J.M. and K.N. entered internet agreements on the consumers' behalf.

The OEB cannot accept that the contracts in question were internet agreements or contracts entered into over the internet. It is clear that the ECPA and the Consumer Protection Regime, in general, have been designed to ensure an informed consumer enters into an energy contract through a process that is transparent and free from sales pressure. If the procedure used here were legitimized, enrollments could be completed before the consumer was given an opportunity to review the contract, the disclosure statement and the price comparison – and therefore, before the consumer was given an opportunity to make an informed decision about whether to proceed. Moreover, there would have been (prior to the ECPA amendment that extended the verification requirement to internet agreements) no verification call to confirm that the consumer understood and wished to proceed with the contract he or she had never signed. Planet Energy's interpretation is at odds with the principle that "consumer protection legislation must be interpreted generously in favour of the consumer."[3]

The second legal issue is whether Planet Energy is responsible at law for the conduct of J.M. and K.N. Planet Energy submits that it is not. Although Planet Energy concedes that J.M. and K.N. were "salespersons" within the meaning of the ECPA during the period of time they were authorized to sell Planet Energy products,[4] it argues that

[3] *Harvey v. Talon International Inc.,* 2017 ONCA 267, para. 63.

[4] Planet Energy Closing Submissions, para. 107. "Salesperson" is defined in section 2 as follows:

> (a) in respect of gas marketing, a person who, for the purpose of effecting sales of gas or entering into agency agreements with consumers, conducts gas marketing on behalf of a gas marketer or makes one or more representations to one or more consumers on behalf of a gas marketer, whether as an employee of the gas marketer or not, and
> (b) in respect of the retailing of electricity, a person who, for the purpose of effecting sales of electricity or entering into agency agreements with consumers, conducts retailing of electricity on

electricity retailers and gas marketers are not automatically liable for the acts of their salespersons.

Section 10 of the ECPA deems the supplier (i.e., the electricity retailer or gas marketer) to be engaging in an unfair practice if "a salesperson acting on behalf of the supplier does or fails to do anything that would be an unfair practice if done or if failed to be done by the supplier." Planet Energy argues that this deeming provision merely creates a presumption of liability, which is rebuttable by evidence of adequate systems in place to address potential non-compliance.

The Supreme Court of Canada's decision in *St. Peter's Evangelical Lutheran Church v. Ottawa* notes the importance of the context of the statute in construing the application of a deeming provision: "the words 'deemed' or 'deeming' do not always import a conclusive deeming into a statutory scheme. The word must be construed in the entire context of the statute concerned."[5] The OEB agrees with the Enforcement Team that the ECPA is a consumer protection statute that should be interpreted generously to protect consumers. If the deeming provision were not "conclusive", the enforcement of the ECPA would be frustrated. As the Enforcement Team points out, neither ACN nor the independent business owners were licensed by the OEB. The ECPA does not create a parallel compliance process for a supplier's subcontractors or salespersons; rather, it contemplates that the supplier will be vicariously liable for their misconduct. Planet Energy's argument amounts to a due diligence defence. But in *Summitt Energy Management Inc. v. Ontario (Energy Board)*, the Divisional Court held that no such defence is available in enforcement matters such as this: "Due diligence is only relevant to the determination of penalty."[6]

At the hearing, Planet Energy's co-CEO downplayed the role of the independent business owners: "They aren't selling products. They don't sell products, they direct their potential customer to the [ACN] website to promote the product and advertise the product. I would not describe it as selling products."[7] The OEB finds that this description is inconsistent with the testimony of J.M., K.N., and their customers, and with the Sales Agency Agreement between Planet Energy and ACN, which clearly contemplated that

> behalf of a retailer or makes one or more representations to one or more consumers on behalf of a retailer, whether as an employee of the retailer or not.

[5] [1982] 2 S.C.R. 616.
[6] 2013 ONSC 318, para. 72.
[7] Tr. Vol. 5, p. 2.

independent business owners would sell Planet Energy products. In particular, the Sales Agency Agreement included clauses providing that "ACN shall use its commercially reasonable efforts to cause the IBOs: (i) to sell Energy Products and otherwise promote Planet's retail energy business (the 'Business') within the territory, and (ii) to act as agents for the sale of Energy Products within the territory, for and on behalf of Planet," and that "Planet shall provide Energy Products for the IBOs to sell in accordance with the following terms…"

2.3 Credibility of J.M.

Planet Energy argues that J.M., on whose evidence much of the Enforcement Team's case is founded, was an unreliable witness. Planet Energy takes the position that the evidence of J.M. should be discounted and that all of his contracts should be excluded from a liability finding.

There is no doubt that J.M. was not a model salesperson and that some of his conduct was clearly outside what the OEB would expect. J.M.'s evidence was that he coached his customers to tell Planet Energy, in the event they were asked, that they themselves had enrolled in the contract on their own behalf. Planet Energy urged the OEB to classify this behaviour as dishonest and to allow it to influence a finding as to J.M.'s trustworthiness. The OEB has considered this behaviour along with all of J.M.'s conduct put forward in evidence. The OEB finds that on the whole, and particularly in the areas in which the OEB must make a finding, his evidence was credible.

The OEB accepts the evidence of J.M. and his customer R.H., that J.M. entered into contracts on customers' behalf. This evidence was not specifically challenged by Planet Energy as Planet Energy took the position that the contracts were internet contracts, an argument the OEB has rejected in this decision.

The OEB is also prepared to accept J.M.'s evidence as it relates to his business practices such as not wearing an identification badge and only handing out a business card in some instances, but not in others. J.M. sold contracts over a period of years, and his recollection of his sales practice demonstrates a routine that was both consistent and credible.

The OEB agrees with the Enforcement Team that J.M. candidly gave evidence that paints himself in a negative light, and his evidence was consistent with other evidence, in particular that of his customer, R.H., and of the other salesperson who testified, K.N.

2.4 Allegations of Non-compliance

2.4.1 *Providing false, misleading or incomplete information to consumers*

The Notice of Intention alleges that Planet Energy, as a result of the actions of J.M. and K.N., misled consumers into believing that they would save money on their electricity or gas bill by entering into a contract with Planet Energy, and failed to discuss and explain all the charges to be paid under the contract, including the global adjustment. According to the Notice, this amounts to a breach of section 10 of the ECPA, which prohibits "unfair practices".[8] In particular, the Notice cites the following provisions of the ECPA Regulation, which prescribe certain activities as unfair practices: paragraphs 4,[9] 5[10] and 14[11] under section 5. The Notice also refers to paragraph 1 under section 5, which prescribes knowingly making a false or misleading statement to the consumer as an unfair practice. However, in its closing argument, the Enforcement Team advised that it was not pursuing those allegations, as it concedes based on the evidence that J.M. and K.N. honestly believed what they told their prospective customers.

[8] In particular, the Notice cites the following paragraphs under section 5 of the ECPA Regulation, which prescribe certain activities as unfair practices: (1)(i), (1)(v), (1)(viii), (4), (5) and (14).

[9] "When making a statement to the consumer about the contract price, whether directly or by way of an advertisement or other publicly released statement, failing to make clear that additional energy charges would be payable by the consumer if he or she enters into the contract."

[10] "When making a statement to the consumer about the contract price in relation to the price charged by an energy distributor or another supplier, whether the statement is made directly or by way of an advertisement or other publicly released statement,

> i. failing to make clear that the additional energy charges are not included in the contract price and would be payable by the consumer if he or she enters into the contract, or
> ii. failing to make clear that those additional energy charges are included in the price charged by the energy distributor."

[11] "Failing to comply with any applicable code, order or rule issued or made by the Board, including but not limited to the Fair Marketing Practices set out in the Electricity Retailer Code of Conduct or the Code of Conduct for Gas Marketers issued by the Board." The provisions of the Codes cited in the Notice are sections 1.1(d) (requirement to state the price and term of the contract), (f) (requirement to allow a consumer sufficient opportunity to read all documents provided), and (h) (prohibition against false or misleading statements, answers or measures) under Part B. In argument, the Enforcement Team explained that, although the ECPA and the ECPA Regulation apply only to "consumers" (defined as those using less than the prescribed amount of electricity or gas annually, being 150,000 kilowatt-hours and 50,000 cubic metres, respectively), these provisions of the Electricity Retailer Code of Conduct apply equally to everyone regardless of the volumes consumed. Four of the electricity contracts enrolled by J.M. were with commercial customers who exceeded the 150,000 kWh threshold and were therefore not "consumers" within the meaning of the ECPA. The OEB agrees with the Enforcement Team that those four "large volume" customers were nevertheless entitled to protection under the Code for electricity. The Code for gas, on the other hand, applies only to consumers using less than the prescribed volumes; it does not cover anyone who is not also protected by the ECPA.

Most of the evidence about the sales pitches used by J.M. and K.N. concerned electricity contracts. There was little or no evidence about what J.M. and K.N. told prospective customers specifically about gas contracts, including about the price of those contracts and what was (or was not) included in that price. Accordingly, the OEB finds that the allegations of non-compliance in respect of the gas contracts are not made out.

As for the electricity contracts, the OEB is satisfied that J.M. and K.N. provided false, misleading or incomplete information when selling Planet Energy products. When asked by counsel for the Enforcement Team what his main focus was in his discussions with sales targets, J.M. replied, "Very simple. 'I can save you a lot of money by switching to the ACN products.'" J.M. further testified that he did not advise prospective customers of the global adjustment.[12] Indeed he was not even aware of what the global adjustment was until after one of his customers complained about their electricity bills going up after switching to Planet Energy, and he "made it my business to find out what it is and how it affects the rates." Similarly, J.M. did not advise prospective customers about the cancellation fees under the Planet Energy contracts, and was not aware that such fees existed until a customer complained.

J.M. recounted that his "standard practice" was to ask to see the prospective customer's electricity bill; J.M. would then calculate the average time-of-use rate under that bill and compare it to Planet Energy's fixed rate (typically 4.99 cents/kilowatt-hour). That exercise would always result in the Planet Energy rate appearing cheaper. However, J.M. did not explain to the consumer that the time-of-use amounts shown on the utility bill included the global adjustment, while Planet Energy's fixed rate did not (nor that the consumer would still be liable for the global adjustment even if he or she chose to switch). Planet Energy's co-CEO acknowledged that comparing the time-of-use rates on

[12] The OEB explains the global adjustment on its website as follows:

> Most electricity generating companies get a guaranteed price for the electricity that they produce. The Global Adjustment is the difference between that guaranteed price and the money the generators earn in the wholesale marketplace. The Global Adjustment also covers the costs of some conservation programs.
>
> All electricity consumers have to pay a share of the Global Adjustment. The time-of-use and tiered electricity rates charged by your electricity utility already include an estimate of the Global Adjustment. If you sign up for a contract with an energy retailer, you have to pay your share of the Global Adjustment on top of the contract price. The Global Adjustment will also appear as a separate line on your bill.

the utility bill to Planet Energy's fixed rate is not a fair comparison and does not compare "apples to apples".

The OEB has in fact issued an official "price comparison" which electricity retailers and gas marketers are required to provide to consumers, and which is designed to provide an "apples to apples" comparison of the price under the contract offering and the price the consumer would pay if he or she remained with the utility. But J.M. did not provide it to prospective customers before enrolling them in the contract. Nor did J.M. provide the disclosure statement or contract prior to enrollment. As discussed below, these materials were not sent to J.M.'s customers until after they had been enrolled.

Another sales tool used by J.M. was a "before and after" comparison comprising two bimonthly electricity bills issued by the same electricity utility to the same customer. The first bill, marked "before", showed an amount owing of $196.36. The second bill, marked "after", and with the line identifying Planet Energy as the retailer underlined, showed an amount owing of $108.74. The tool was included in a sales binder given to J.M. by another ACN independent business operator. J.M. would show prospective customers the two bills and tell them that they could save around $80. What he failed to point out was that the "after" bill included a credit of $66.26 from a previous overpayment. He also did not explain that the "before" bill reflected electricity supplied under the account-holder's previous contract with another retailer – the tool compared bills between two different retailers, and did not give an accurate impression of how a consumer's bills would change if he or she switched from electricity supplied by the utility to Planet Energy.

K.N. also told his prospective customers that they would save money with Planet Energy. He did not tell them about the global adjustment or cancellation charges (and indeed he was unaware that there were cancellation charges under the contract). K.N. would meet with them for five or 10 minutes but did not provide them with a copy of the actual contract to review, nor with the OEB-approved disclosure statement and price comparison, before enrolling them in the contract.

The OEB accepts K.N.'s evidence that he was genuinely concerned when he learned that customers he had enrolled in Planet Energy contracts (including friends and family) were paying more than they had before. While there was no intention to mislead customers, they were, in fact, misled. This reflects poorly on the training provided to K.N., which is addressed later in this Decision and Order.

Planet Energy submits that there was no obligation in the Consumer Protection Regime for salespeople to mention the global adjustment, cancellation fees or other charges to customers. The OEB cannot accept that argument, at least in respect of the global adjustment and other charges. Paragraph 4 under section 5 of the ECPA Regulation reads, "When making a statement to the consumer about the contract price, whether directly or by way of an advertisement or other publicly released statement, failing to make clear that additional energy charges would be payable by the consumer if he or she enters into the contract." Paragraph 5 further provides:

> When making a statement to the consumer about the contract price in relation to the price charged by an energy distributor or another supplier, whether the statement is made directly or by way of an advertisement or other publicly released statement,
>
> i. failing to make clear that the additional energy charges are not included in the contract price and would be payable by the consumer if he or she enters into the contract, or
>
> ii. failing to make clear that those additional energy charges are included in the price charged by the energy distributor.

"Additional energy charges" are defined in the ECPA Regulation as follows:

> "additional energy charges" means all categories of amounts payable by a consumer with respect to the supply or delivery of electricity or gas, other than,
>
> (a) the category or categories of amounts payable as part of the contract price,
> (b) interest,
> (c) penalties, and
> (d) any charges and fees referred to in clause 22 (1) (a) of the Act.

This would include, in respect of contracts for electricity, the global adjustment and any other charges not enumerated in the list of exceptions. While it is perhaps arguable that these provisions do not require the salesperson, when making statements about the contract price, to specifically mention the global adjustment by name, but merely to mention generally the fact that there are additional charges, the better view is that the salesperson must explain that contract price does not include the global adjustment. The global adjustment is a significant part of the consumer's overall cost of electricity, and any representation that the consumer would save money by switching to a retail contract without disclosing that fact is unfair. This reading is consistent with the OEB's approach in the Summitt Energy case, where it found that "An effective compliance plan would have ensured that the retail salespersons consistently expressed in an unequivocal and accurate way the likely effect of the Provincial Benefit [as the global

adjustment was then known] on prospective electricity retail customers."[13] On either reading, J.M. and K.N.'s sales practices amounted to a contravention: they not only failed to mention the global adjustment by name, but failed to mention that there would be other charges besides the flat rate for the electricity commodity.

It is true that the cancellation charges are not captured by the definition of "additional energy charges", as they are "penalties". And it would seem that the intent of paragraphs 4 and 5 under section 5 is to ensure consumers are not misled about their electricity bills if they elect to sign a contract; it is not to ensure consumers are advised of all their rights and responsibilities under the contract, such as those pertaining to cancellation or renewal.

The OEB therefore finds that the allegations under this heading have been made out, but only in respect of the sale of electricity contracts by J.M. and K.N., and only in respect of their failure to mention the global adjustment or other "additional charges" when representing that switching to Planet Energy would save the consumer money.

Although the OEB finds that the failure of J.M. and K.N. to mention the cancellation charges was not in itself a contravention, it is problematic, especially considering that it was the routine of each salesperson to enroll consumers without providing them with the contract, the disclosure statement and the price comparison in advance (which routine is discussed further below). Without the benefit of the actual contract or the disclosure statement, and without having to complete the online enrollment process themselves, consumers would have been unaware of the cancellation charges.

2.4.2 *Inadequate training for salespersons*

The Notice of Intention alleges that Planet Energy failed to provide adequate training for its salespersons J.M. and K.N. The allegations concern both the substance of the training material provided to the salespersons and the training test the salespersons were required to take.

Detailed training requirements are set out in the Electricity Retailer Code of Conduct and the Code of Conduct for Gas Marketers. Anyone acting on behalf of a licensed

[13] EB-2010-0221, Decision and Order, November 18, 2010, p. 18.

electricity retailer or gas marketer must successfully complete the training before meeting in-person with a low-volume consumer.[14]

The OEB agrees with the Enforcement Team that both the training material and the training test were deficient.

J.M. and K.N. were provided with online access to a "Training Manual" which was prepared by Planet Energy. This was a slide deck comprising about 100 slides.

The Enforcement Team points to a number of specific flaws in the Training Manual:

- the Training Manual does not explain that large residential consumers (those using at least 15,000 kWh of electricity per year) were liable for higher cancellation fees than other residential consumers
- the Training Manual includes only one slide on the global adjustment, and does not convey that the global adjustment has been a major component of monthly energy costs
- the Training Manual refers to the OEB-approved disclosure statement and price comparison but does not explain what they are
- the Training Manual does not explain any of the additional charges or fees to be paid under a Planet Energy contract (apart from the fixed monthly rate)

The OEB agrees that these omissions are problematic. While they might have been explicable if the Training Manual were merely one component of a thorough training program, that was not the case. The Training Manual was all there was. J.M. and K.N., who had no background in the energy industry, were not provided with any additional instruction. No one from Planet Energy or ACN walked them through the Training Manual. They were not required to attend any training sessions or to "shadow" a more experienced salesperson.

Indeed the evidence is that J.M. and K.N. did not even read the Training Manual. They clicked on the link to the Training Manual in the ACN system and then immediately clicked to the online training test.

[14] Section 7 of O. Reg. 90/99 (Licence Requirements – Electricity Retailers and Gas Marketers) made under the OEB Act. In addition, Planet Energy is required to comply with the Codes as a condition of its electricity retailer and gas marketer licences. Non-compliance with the Codes is prescribed as an unfair practice under section 5, paragraph 14, of the ECPA Regulation.

The Enforcement Team says that the test was poorly designed and did not adequately assess a salesperson's knowledge. The OEB agrees. The test included some questions with obvious answers that did not require study of the Training Manual.[15] The "correct" answers to some questions about cancellation charges were misleading, as they failed to distinguish between the higher charges that applied to large residential consumers. And the test itself was very short, with an insufficient number of questions to truly gauge the salesperson's knowledge of the complicated subject matter.[16]

Of more concern than the wording of the test was the manner in which it was invigilated. The test was taken online, with no supervision or monitoring by Planet Energy or ACN, nor any way to verify that the answers were filled in by the person who was supposed to be taking the test.

J.M. testified that both times he was required to take the test he sat in a coffee shop with a laptop next to another ACN independent business owner who answered the questions on his behalf. K.N. also took the test in a coffee shop with another independent business owner by his side, although he stated that he answered all the questions himself.

Planet Energy pointed out that ACN business owners were required to click on an "Attestation" before taking the test. The Attestation read:

> **My Attestation that I have completed the Planet Energy through ACN training, and that I will not share answers on the Exam (the "Attestation")**
>
> 1. I hereby confirm – (i) if this is my first attempt at the official Planet Energy examination (the "Exam"), that I have completed the full 'Planet Energy through ACN' training (the "Training") prior to attempting the Exam, and (ii) if I have previously attempted the Exam (regardless of

[15] For instance:
Q: What is the name of the partner that ACN works alongside to market natural gas and electricity product offerings?
A: Planet Energy

Q: A representative should always make statements and representations to a customer that will ensure a sale even if those statements and representations are lies and falsehoods.
A: False

[16] There was some ambiguity about whether there were 20 questions (as recalled by Planet Energy's co-CEO), or only 15, as asserted by the Enforcement Team (which pointed out that J.M. and K.N. scored 93%, which corresponds to 14 out of 15 but is not possible on a 20-question test). In either case, the OEB is of the view that there were not enough questions. (The questions were randomized, so not every test-taker saw the same questions.)

whether I passed or failed), I further confirm that I have re-completed the Training since my last attempt at the Exam.

2. I hereby confirm that I will not share answers with any other person taking the Exam.

   By checking this box, and clicking "Continue Test" below, I am electronically signing the Agreement and Attestation.

☐ I Agree

The Enforcement Team says the Attestation is merely a "mechanical, *pro forma* step in the process": "At best, the attestation is a version of the 'honour system.'"

The OEB finds that the Attestation was not a sufficient control. It was not enough to fulfill Planet Energy's obligation under section 5.6(e) of the Codes to "ensure that the training test is not conducted in a manner that would permit the persons taking the training test to share questions and answers with one another while taking the training test." To be clear, even if J.M. had read the Training Manual and taken the test on his own, he would still have been ill equipped to promote Planet Energy products to consumers, on account of the deficiencies in the Training Manual and the content of the test described above.

Planet Energy also submitted that previous OEB audits and inspections had not identified problems with its training program. Planet Energy put particular emphasis on an audit conducted of all retailers and marketers by Ernst & Young on behalf of the OEB in 2010-2011, and a 2015 compliance inspection conducted by the OEB of Planet Energy arising from complaints about Planet Energy's internet enrollment process, in which the Training Manual, among other documents, was provided to the OEB. It would be unfair, Planet Energy argued, for the OEB to now find that the same program was non-compliant.

The OEB does not accept this argument. The fact that previous reviews of Planet Energy's operations did not lead to allegations of non-compliance does not prevent the OEB, based on the evidence in this case, from finding that the training program was inadequate. The focus and scope of the previous audits and inspections were different than the focus and scope of the inspection that gave rise to the allegations in this case. The Ernst & Young audit was a broad review of the entire retailer and marketing sector. It is not apparent that Ernst & Young conducted a page by page review of Planet Energy's Training Manual. (In any case, Ernst & Young actually did point out two aspects of the testing procedure where "requirements were not met": first, the test

reminded the salesperson that it was open book, and second, the test was administered online, such that the salesperson was not prevented from sharing answers. These concerns were not addressed by Planet Energy.) Such a review does not exempt a retailer from ensuring that its training and testing continues to be consistent with the regulatory requirements, adequately supports its salespersons, and addresses issues that come to light based on actual experience. As for the 2015 compliance inspection, it did not relate specifically to Planet Energy's training and testing and therefore is of limited relevance.

Moreover, a similar argument was rejected by the Divisional Court in the Summitt Energy appeal, where the retailer suggested that it was an abuse of process to bring an enforcement action even though the OEB had, through prior inspections, led the retailer to believe that it was in compliance. The Court said: "We agree with Compliance Counsel that the earlier proceedings did not, and could not, limit the Board's ability to seek compliance remedies in respect of Summitt's door-to-door sales activities, or the ability of a duly constituted Hearing Panel to make findings in that regard."[17]

Overall, the OEB finds that the training regime was seriously deficient. Although both J.M. and K.N. aced the test, scoring 93%, the evidence is that when marketing Planet Energy products to consumers, neither of them actually understood vital elements that should have been taught to them, such as the nature and scope of the global adjustment or the cancellation charges that applied to Planet Energy contracts. In the Summitt Energy case, the OEB found that the licensee's training program, which consisted of "a few hours of classroom instruction and some limited in-field observation", was insufficient, considering that "[t]he energy market in Ontario is notoriously complex, containing many somewhat obscure elements that have implications for the price of the respective commodities."[18] The training given to J.M. and K.N., by comparison, did not include any classroom instruction or mentoring at all.

In summary, there was insufficient oversight by Planet Energy to ensure that these salespeople were aware of the intricacies of the Ontario energy market, the terms and conditions of the contracts they were offering, and their regulatory obligations. The Training Manual and the online test did not adequately prepare them to promote Planet Energy products to consumers.

[17] *Summitt Energy Management Inc. v. Ontario Energy Board,* 2013 ONSC 318, para. 92.
[18] EB-2010-0221, Decision and Order, November 18, 2010, paras. 17 and 67.

2.4.3 *Failure to meet requirements for door-to-door sales*

The Notice of Intention alleges that Planet Energy is liable for the failure by J.M. and K.N. to offer a business card in the proper form (or at all)[19] and to prominently display an identification badge in the proper form (or at all)[20] while meeting in person with prospective customers.

K.N. testified that he did not give a Planet Energy business card to any of the 10 consumers he enrolled when he met with them at their home or office. J.M. said he did occasionally give Planet Energy business cards, but "it was kind of hit and miss." Both testified that they never wore an identification badge when meeting with any of the consumers they enrolled. Their evidence was corroborated by one of K.N.'s customers and one of J.M.'s customers (although K.N.'s customer could not recall if K.N. wore a badge).

The OEB finds that J.M. and K.N. did not comply with the business card and identification badge requirements when selling electricity contracts, and Planet Energy is liable for their actions by virtue of the deeming clause in section 10 of the ECPA. However, as noted previously, there was limited evidence specifically concerning gas contracts. Unlike with electricity contracts, the OEB did not hear any evidence from witnesses who had entered into gas contracts with J.M. and K.N. While it may be that business cards and identification badges were not used when gas contracts were being sold, the OEB is not willing to extrapolate that the same sales practices were used for both types of contracts.

Even though Planet Energy's business model, at the material times, was for independent business operators to promote contracts to their warm network, the badge and business card requirements still applied. There is no exemption under the Consumer Protection Regime for dealing with friends or family. As the OEB noted in the Energhx case, "There is nothing in the legal and regulatory framework governing the activities of retailers and marketers that diminishes or eliminates the entitlement of friends, family or company employees to the protections that form part of that

[19] Contrary to section 10 of the ECPA, section 5(6)(ii) of the ECPA Regulation and section 1.1(b) of the Codes. The ECPA Regulation refers to the business card requirements set out in O. Reg. 90/99 (Licence Requirements – Electricity Retailers and Gas Marketers) under the OEB Act.
[20] Contrary to section 10 of the ECPA, section 5(6)(i) of the Regulation and section 1.1(c) of the Codes. The ECPA Regulation refers to the identification badge requirements set out in O. Reg. 90/99 (Licence Requirements – Electricity Retailers and Gas Marketers) under the OEB Act.

framework."[21] Moreover, and contrary to the suggestion by Planet Energy, those requirements apply regardless of whether the contracts in this case are characterized as in-person agreements or an internet agreement. They apply whenever a salesperson or someone else acting on behalf of a supplier "calls on a consumer in person".[22] Both J.M. and K.N. met in person with consumers without wearing a badge or offering a card.

The Notice of Intention also alleges that Planet Energy is liable for the failure by J.M. and K.N. to provide a text-based copy of the contract, disclosure statement and price comparison at the required times.[23]

The Agreed Chronology states that, for each of the contracts referenced in the Notice of Intention, Planet Energy electronically sent text-based copies of the contracts, disclosure statements and price comparisons to the e-mail address provided for the consumer shortly after enrollment. Planet Energy also sent by regular mail a welcome letter enclosing the contract terms and conditions to the service address for the consumer for each of the contracts. But the Consumer Protection Regime requires more than that.

Specifically, the ECPA Regulation requires anyone acting on behalf of a supplier to give the consumer "a text-based copy of the contract, including the disclosure statement, before the consumer enters into the contract, irrespective of whether the consumer requests a copy" (emphasis added).[24] The evidence is that J.M. and K.N. did not do that. Rather, after discussing the contract with the consumer, they would complete the online enrollment process on the consumer's behalf. At no time did the consumer sign the contract, the disclosure statement, the price comparison, or an acknowledgement that the consumer had received a text-based copy of the contract, all of which signatures are required for in-person contracts.

The last allegation under this heading is that Planet Energy failed to verify the contracts, contrary to section 15 of the ECPA. Planet Energy acknowledges that none of the contracts at issue were verified through the prescribed process (which, at the time,

[21] EB-2011-0311, Decision and Order, March 26, 2012, p. 18.
[22] ECPA Regulation, section 5(6). Similarly, O. Reg. 90/99 requires a badge to be prominently displayed "when meeting in person with a low-volume consumer" (section 6(3)) and a business card to be offered "at every meeting in person with a low-volume consumer" (section 5).
[23] The Enforcement Team cites sections 11 and 12(1)(a) of the ECPA, and sections 5(7) and 10(1) of the ECPA Regulation.
[24] ECPA Regulation, section 5(7).

required a telephone call following an OEB-approved script).[25] Rather, Planet Energy argues that verification was not required at the time because these were internet agreements. For the reasons already provided, the OEB does not accept that the contracts in question can be so characterized. They were not exempt from verification. The fact that Planet Energy followed up with "quality assurance calls" to some consumers (it says that 60% of J.M.'s customers received such calls) does not change the analysis, as Planet Energy concedes that these calls were not "technically" verification calls.

2.4.4 *Failure to meet requirements for contracts and disclosure statements*

The Notice of Intention alleges that Planet Energy breached the ECPA because J.M. and K.N. enrolled consumers using contracts, disclosure statements and price comparisons that did not require signatures by consumers and that were not, in fact, signed by consumers.[26] In the alternative, the Notice of Intention alleges that even if these were considered to be contracts entered into over the internet, they were non-compliant because they did not include any opportunities for consumers to review, print, check off boxes on, or accept the contracts.

The evidence was that J.M. and K.N. did not provide prospective customers with a copy of the contract, the disclosure statement or the price comparison prior to enrollment. If someone agreed to sign up, J.M. and K.N. would complete the online enrollment process on their behalf, without them being present. Only after that process was completed would the documents be sent (directly by Planet Energy, not by the salespersons), by e-mail and regular mail. The customer never actually signed any of the documents.

Planet Energy does not deny that this was the modus operandi of J.M. and K.N. However, it argues that there was no contravention because these were contracts entered into over the internet. That argument was addressed, and dismissed, above. For that reason, the OEB finds that these allegations are made out. However, this finding only extends to the electricity contracts. As explained above, there was not the same level of evidence about how J.M. and K.N. sold gas contracts as there was for

[25] Subsequent amendments allowed for online verification as an alternative to telephone verification.
[26] The Notice cites sections 11 and 12(2) of the ECPA, and sections 7(1)(17), 7(1)18, 8(1)(d), 8(3)(d) of the Regulation.

electricity contracts. In particular, the OEB heard no testimony from any consumers who enrolled in a gas contract.

2.4.5 *Seeking to impose an improper cancellation fee*

The Notice of Intention alleges that a Planet Energy representative advised a customer, R.A., that she would have to pay a cancellation fee of $250 plus tax, when in fact R.A. was entitled to cancel the contract without penalty, because the telephone call took place within 30 days of the contract being signed.[27]

Planet Energy concedes that R.A. was provided with incorrect information. Planet Energy further advises that, in addition to cancelling R.A.'s contract without penalty (which it did a year before this proceeding was commenced), it is willing to make restitution to her for the difference, if any, between the amount she paid to Planet Energy in commodity charges and the amount she would have paid to her utility had she remained on standard supply.

In light of Planet Energy's candid concession, the OEB finds that this allegation is made out.

As discussed in the following section, R.A.'s contract is one of the 12 electricity contracts sold by K.N. which are deemed to be void. Accordingly, R.A. is entitled to a refund of the full amount she paid to Planet Energy under the contract.

[27] The Enforcement Team cites section 19(4) of the ECPA and section 21(d) of the Regulation. The Notice also referred to section 5(1)(xi) of the Regulation, which prohibits knowingly make a false or misleading statement to a consumer about the consumer's rights, but the Enforcement Team did not pursue the allegation that the misleading advice was provided knowingly.

3 PENALTY AND REFUND

3.1 Administrative Penalty

The Enforcement Team seeks an administrative penalty of $383,000. This is less than the $450,000 referenced in the Notice of Intention, the reduction reflecting the Enforcement Team's decision not to pursue certain of the allegations.

Planet Energy denies liability. It submits that, even if the OEB finds that there was non-compliance, a large penalty is not warranted, as any contraventions were isolated and anomalous.

As described above, the OEB has found that many of the Enforcement Team's allegations have been made out. In assessing an appropriate penalty, the OEB is guided by O. Reg. 51/16 (Administrative Penalties), which reads in full:

> **Determination of administrative penalty**
>
> 1. (1) In making a determination under section 112.5 of the Act respecting the amount of an administrative penalty for a contravention of an enforceable provision, the Board shall consider the following criteria, and may consider any other criteria that it considers relevant:
>
> 1. The extent to which the contravention deviates from the requirements of the enforceable provision.
>
> 2. The extent to which the contravention has the potential to adversely affect consumers, persons licensed under the Act or other persons.
>
> 3. The extent to which adverse effects of the contravention have been mitigated by the person who committed the contravention.
>
> 4. Whether the person who committed the contravention has previously contravened any enforceable provision.
>
> 5. Whether the person who committed the contravention derived any monetary benefit from the contravention.
>
> (2) An amount determined by the Board under subsection (1) shall not, by its magnitude, be punitive in the circumstances.

The OEB has considered these factors and concluded that an administrative penalty of $155,000 is appropriate.

The $155,000 was derived as follows:

(a) $100,000 for the contraventions relating to Planet Energy's training and testing program

(b) $50,000 for the contraventions relating to providing false, misleading or incomplete information to consumers; the failure to wear an identification badge and to provide a business card; the failure to provide the required documentation and to obtain the required signatures; and the failure to conduct contract verification

(c) $5,000 for providing R.A. with incorrect cancellation information

This breakdown reflects the OEB's view that the most serious deficiencies were in respect of training and testing. Planet Energy outsourced its sales function to ACN but failed to ensure that ACN's independent business operators understood the products they were selling, their own responsibilities under the Consumer Protection Regime, or the rights and obligations taken on by their customers upon entering a contract. This was a marked deviation from the Consumer Protection Regime. The inadequacy of Planet Energy's training materials and test invigilation procedures created a real risk of harm to consumers. An improperly trained salesperson is prone to provide misleading information to consumers, even if unwittingly, and the evidence in this case is that J.M. and K.N. did so. Indeed the other allegations in this case can largely be traced to the inadequacies in the training and testing program.

The OEB has determined that $50,000 is a reasonable penalty for the contraventions described in paragraph (b) above. These contraventions relate specifically to the contracts sold by J.M. and K.N.; the OEB made no finding concerning the prevalence of these failures to observe the elements of the Consumer Protection Regime among other independent business operators acting on behalf of Planet Energy. Although some of the contraventions might seem, in isolation, to be technical or minor, when considered together they reveal a pattern of non-compliance by these two salespersons. Ultimately consumers were enrolled in contracts after being misled to believe they would save money, and without the (legally required) opportunity to review the contract or the disclosure statement and price comparison. Then, they were denied the right to verify that they wished to proceed with the contract in a verification call. The fact that few of those consumers complained to Planet Energy or the OEB does not excuse the company or prove that there was limited potential to adversely affect consumers. The manner in which those consumers were enrolled was at odds with both the letter and the objectives of the Consumer Protection Regime. As noted, the Consumer Protection Regime is highly prescriptive and detailed. There is a real risk of harm to consumers when salespersons disregard their responsibilities, or are unaware of them (which in

this case was compounded when the company failed to follow up with the prescribed verification calls). Planet Energy derived a monetary benefit from these contracts, which consumers entered into without the full range of protections they were due.

As for Planet Energy's handling of R.A.'s request to cancel her contract, the OEB has concluded that $5,000 is appropriate. Planet Energy incorrectly told R.A. that she would have to pay a $250 cancellation penalty. While Planet Energy eventually cancelled the contract without penalty, that was only after R.A. complained to the OEB. Notwithstanding the declaration that this contract is void, an additional penalty is necessary to emphasize the importance of consumer cancellation rights.

In assessing these amounts, the OEB has taken into consideration the fact that Planet Energy no longer has a sales arrangement with ACN and no longer promotes its products through the multi-level marketing model. This lowers the risk of further contraventions of this nature.

The OEB has also taken into consideration Planet Energy's compliance history. In 2011, Planet Energy entered into an Assurance of Voluntary Compliance, in which it admitted to contraventions of the Consumer Protection Regime concerning identification badges, business cards, and providing written confirmation of cancellation, and agreed to pay an administrative penalty of $30,000. Planet Energy characterizes the infractions in that case as minor and unrelated to the allegations in this proceeding. The OEB views Planet Energy's compliance record as a neutral factor: it does not tip the balance one way or the other.

Although it does not fall neatly into any of the enumerated factors that the OEB is required to consider, the OEB has considered Planet Energy's argument that it took reasonable precautions to prevent the contraventions, and that J.M. and K.N. were two anomalies among the thousands of independent business operators who promoted Planet Energy contracts. In the OEB's view, this factor does not support a lower penalty. In essence, Planet Energy's argument is that these two salespersons ignored or defied the training they were given – they knew or ought to have known not to have completed the online enrollment process on their customers' behalf, and so forth. This characterization of J.M. and K.N. as rogue agents is unconvincing in light of the OEB's finding that Planet Energy's training and testing program was inadequate. Planet Energy did not meet its obligation under the Consumer Protection Regime to ensure these salespersons were prepared to promote energy contracts in accordance with the Regime. Moreover, Planet Energy would likely have discovered that these salespersons were departing from the Regime if it had arranged for the verification calls that were required. To be clear, there was no evidence that any salespersons other than J.M. and

K.N. engaged in the same sales practices, and the OEB makes no findings about any contracts other than those sold by those two salespersons. Nevertheless, the OEB does not accept that Planet Energy did enough to prevent J.M. and K.N. from engaging in those practices.

On balance, the OEB finds that $155,000, while less than what was sought by the Enforcement Team, is sufficient to promote compliance with the Consumer Protection Regime. The quantum is not "punitive" within the meaning of section 1(2) of O. Reg. 51/16. It is broadly proportionate with the $234,000 penalty imposed in the Summitt Energy case. The Divisional Court found in the appeal of that decision that the magnitude of the penalty did "not constitute a true penal consequence."[28]

3.2 Refund for Consumers

The Enforcement Team asks the OEB to declare all of the contracts enrolled by J.M. and K.N. to be void (with the exception of the four contracts J.M. and K.N. entered into on their own behalf or on behalf of a spouse) and the four other contracts for large-volume commercial accounts). For each of the contracts that are declared void, the Enforcement Team asks the OEB to require that Planet Energy refund consumers for all amounts paid under the contract.

Section 16(1)(a) of the ECPA provides that a contract "is deemed to be void" if at the time the consumer enters into the contract the consumer does not provide the acknowledgments and signatures required under section 12(2). Section 16(1)(b) provides that a contract is void if a text-based copy of the contract is not delivered to the consumer in accordance with section 13(1). Section 16(1)(c)(i) provides that a contract is void if a text-based copy of the contract is delivered but the contract is not verified.

For the reasons provided, the OEB has found that the consumers enrolled in electricity contracts by J.M. and K.N. did not sign the contract, disclosure statement and price comparison, as required under section 12(2). Nor were those consumers provided with a copy of the contract at the time the contract was entered into, as required under section 13(1) of the ECPA and section 10(1)(a) of the ECPA Regulation. It follows that, by operation of law, the electricity contracts in question are void. (Even if the consumers had been provided with the contract at the prescribed time, they would still be void, because they did not receive a verification call.)

[28] *Summitt Energy Management Inc. v. Ontario Energy Board,* 2013 ONSC 318, para. 69.

Planet Energy argues that it is unreasonable to void the contracts years after they were entered into and without any evidence that the consumers actually want their contracts voided. The OEB finds, however, that section 16(1) of the ECPA leaves no room for discretion. The voiding of the contracts follows automatically from a finding that any of the triggering breaches listed in section 16(1) occurred.

Section 16(3) of the ECPA states: "Within a prescribed number of days after a contract is deemed to be void under this section, the supplier shall refund to the consumer the money paid by the consumer under the contract." The prescribed number of days is 60.[29]

Again, whether or not to refund the consumer is not a matter of discretion: if the contract is deemed to be void, the refund must follow. There is, however, a question of what "the money paid by the consumer under the contract" entails. The Enforcement Team submits that it includes all amounts actually paid under the contract for the supply or delivery of the electricity or natural gas, but excludes any amounts paid by the consumer on account of the global adjustment or as a final Regulated Price Plan variance settlement amount (which are payable in accordance with legislation or the OEB's regulatory requirements and are thus not properly considered as amounts paid "under the contract"). The Enforcement Team notes that its interpretation is consistent with an OEB staff bulletin on the issue.[30] The bulletin explained that all amounts paid for the commodity should be returned to the consumer, not only the difference between the contract price and the market price of the commodity.

Planet Energy says this approach would result in a "windfall" to consumers, who would "end up getting the commodity supplied for free over the period covered by the refund." It adds, "This is not restitution, which requires the wrongful party to disgorge and restore the innocent party the amount by which the wrongful party was enriched and the innocent party was deprived."

The OEB agrees with the Enforcement Team's reading of section 16(3). That provision requires that all amounts paid under the contract must be returned to consumers, not only the difference between what the consumers actually paid and what they would have paid to their local utility had they never entered into the contract. It speaks of a "refund", not "restitution". Although the Enforcement Team occasionally used the term "restitution", including in the Notice of Intention, it was clear from the Notice of Intention

[29] ECPA Regulation, section 14(2).
[30] OEB Staff Bulletin, "Refund Payable to a Low-Volume Consumer Following Cancellation of a Contract", March 15, 2012.

that what was sought – and what section 16(3) requires – was actually a refund. Planet Energy is correct that consumers will end up getting the commodity for free, but that is precisely what was intended by the provision.

3.3 Costs

Both parties agreed that the issue of costs should be dealt with following the issuance of the OEB's Decision and Order. The OEB will accept written submissions on costs in accordance with the schedule below.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Planet Energy shall pay an administrative penalty in the amount of $155,000 within 60 days.

2. The 14 electricity contracts sold by J.M. and the 12 electricity contracts sold by K.N (as listed in Appendix A) are declared void. Planet Energy shall refund consumers for the money paid by them under the contracts within 60 days, and shall file a letter with the Board Secretary when all refunds have been provided.

3. The Enforcement Team shall serve and file written submissions on costs by October 1, 2018, and Planet Energy shall serve and file a response by October 8, 2018.

DATED at Toronto September 20, 2018

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

DECISION AND ORDER

Planet Energy (Ontario) Corp.

EB-2017-0007

September 20, 2018

Electricity Contracts Deemed to be Void

Salesperson	Electricity Contract Number
K.N.	10029998
K.N.	10031772
K.N.	10031789
K.N.	10031820
K.N.	10031872
K.N.	10032584
K.N.	10032586
K.N.	10032673
K.N.	10032661
K.N.	10033874
K.N.	10035220
K.N.	10031791
J.M.	93212198E
J.M.	93235468E
J.M.	93236169E
J.M.	10007170
J.M.	10020676
J.M.	10032906
J.M.	10033208
J.M.	10033268
J.M.	10033269
J.M.	10033272
J.M.	10033273
J.M.	10033317
J.M.	10033621
J.M.	10020662