

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Notice of Intention to Make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (EB-2017-0007)

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

October 17, 2018

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PART 1 OVERVIEW

1. Planet Energy (Ontario) Corp. (“Planet Energy”) makes these submissions on costs pursuant to the Panel’s Decision and Order (“Decision”) dated September 20, 2018 and in response to the Enforcement Team’s Cost Submissions dated October 2, 2018.

2. The Enforcement Team was not it is respectfully submitted “substantially successful” on “almost all of the allegations” set out in the Notice of Intention to Make an Order for Compliance (“Notice”).¹ Success was divided and Planet Energy was required to defend this matter through to an oral hearing in order to have a number of the allegations withdrawn or dismissed and the proposed administrative penalty substantially reduced.

3. In the circumstances, Planet Energy submits that it would be reasonable to order a modest cost award (between \$10,000 to \$20,000) be awarded in favour of the Enforcement Team.

PART 2 SUBMISSIONS

A. Costs are Discretionary

4. In enforcement proceedings before the Board, neither party is entitled to costs. Section 30 of the *Ontario Energy Board Act, 1998* (“Act”) and Rule 26.01 of the OEB’s *Rules of Practice and Procedure for Enforcement Proceedings* provide the Board with the discretion to award costs and states that the Board is not limited to the considerations that govern cost awards granted in Court:

30 (1) The Board may order a person to pay all or part of a person’s costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.

(2) The Board may make an interim or final order that provides,

(a) by whom and to whom any costs are to be paid;

(b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed; and

¹ Enforcement Team's Cost Submissions at paras. 2 and 9

(c) when any costs are to be paid.

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

26.01 As set out in section 30 of the OEB Act, the Board may make an interim or final order in an enforcement proceeding or a review referred to in Part V that provides:

(a) by whom and to whom any costs are to be paid;

(b) the amount of any costs to be paid or by whom any costs are to be assessed or allowed; and

(c) when any costs are to be paid.

26.02 Costs may be awarded against the Enforcement Team only in special or exceptional circumstances or where its actions have been frivolous or vexatious.

5. As Ontario courts have regularly noted, the task of assessing costs is not a mechanical one, beginning and ending with a calculation of hours and rates. Rather, the general principle and overall objective in determining costs is usually to fix an amount that is fair and reasonable to be paid in the circumstances² in light of relevant factors, including the amount involved, importance of the issues, complexity and success, and offers of compromise.

B. Divided Success, Amounts Claimed and Recovered and Offers of Settlement

6. The Enforcement Team was successful in obtaining an administrative penalty for breaches by Planet Energy of a number of enforceable provisions, however, the result obtained was substantially less than the Enforcement Team sought in its Notice, and the Enforcement Team was comparatively less successful than it was in the *Summitt* case, which the Enforcement Team offers as a useful analogue. In particular:

² *Boucher v. Public Accountants Council for the Province of Ontario*, [2004] O.J. No. 2634 (C.A.) at paras. 24, 26, 38, attached at Tab A.

- (a) The Enforcement Team sought findings of breach in respect of 45 contracts, but the Board only found contraventions in respect of 26 contracts, a success rate of less than 60%. The Board held that none of the alleged contraventions were made out in respect of the gas contracts as the Enforcement Team had not adduced any evidence on the point.³ In addition, the Enforcement team withdrew or abandoned alleged contraventions with regard to large-volume commercial consumers and spousal contracts. This contrasts with *Summitt* where the Enforcement Team established 17 out of the 19 contraventions of s. 88.4 of the Act alleged, and 8 out of 10 contraventions of s. 88.9 of the Act.⁴
- (b) The Enforcement Team sought an administrative penalty of \$450,000, but obtained an administrative penalty of only \$155,000, barely more than one third of the amount sought. By contrast, the Enforcement Team in *Summitt* sought an administrative penalty of \$335,000 and the Board levied an administrative penalty of \$234,000, less than a one third reduction.

7. Planet Energy was required to defend this matter through to an oral hearing in order to have a number of the alleged contraventions dismissed and to substantially reduce the proposed administrative penalty. The amount proposed by the Enforcement Team (\$450,000) was close to double the amount awarded in *Summitt*. The Enforcement Team did not at any time prior to the hearing offer to drop any of the alleged contraventions or reduce the proposed administrative penalty, or otherwise compromise.

8. At the pre-hearing conference, the Enforcement Team stated that it was only willing to consider settlement if Planet Energy was prepared to admit all the allegations, in which case the Enforcement Team said it would consider a joint submission on an administrative penalty, restitution, measures to remedy the contraventions, agreement on a set of assurances to prevent similar breaches and payment of the Enforcement Team's costs.⁵

³ Decision at p. 8, 22, 23.

⁴ *Re Summitt* (EB-2010-0221) at p. 2, 55, attached as Tab A to the Enforcement Team's Cost Submissions.

⁵ Enforcement Team's Pre-Hearing Conference Memorandum dated June 8, 2017, attached as Tab B.

9. Further, while the Enforcement Team fairly withdrew certain alleged contraventions during the hearing (and abandoned other allegations in its closing submissions), this did not, coming as late as it did, materially reduce the amount of time and expense incurred by Planet Energy to respond to these allegations.

10. Lastly, Planet Energy was successful in the one interlocutory motion brought, an August 14, 2017 motion to obtain production of certain documents and other information.⁶

C. The Complexity of the Proceeding

11. This case was not as complex or involved as *Summitt*, where the Board awarded the Enforcement Team costs "to a ceiling of \$65,000".⁷

12. In *Summitt* the Enforcement Team had called evidence from 19 consumer complainant witnesses as well as the Board staff's lead investigator and cross-examined five of *Summitt's* sales agents, 26 witnesses in total. This contrasts with the current case which focused solely on two independent business owner representatives and in which the Enforcement Team called five witnesses and cross-examined one witness called by Planet Energy.

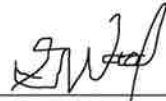
13. Further as set out by the Enforcement Team in its cost submissions, Planet Energy and the Enforcement Team prepared an Agreed Statement of Facts, a Joint Document Book, agreed-upon call transcripts, and an agreement on the authenticity of other documents, which streamlined the hearing and reduced the issues in dispute.

14. Planet Energy respectfully submits that, in the circumstances, it is fair and reasonable to order a modest award of costs between \$10,000 to \$20,000 in favour of the Enforcement Team.

⁶ Decision and Order on Motion issued August 28, 2017, attached as Tab C.

⁷ *Re Summitt* (EB-2010-0221) at p. 56, attached as Tab A to the Enforcement Team's Cost Submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2018.

A handwritten signature in black ink, appearing to be 'GZ' followed by a stylized flourish, positioned above a horizontal line.

Glenn Zacher and Genna Wood,
Counsel for Planet Energy