



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

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## **DECISION AND ORDER ON COSTS**

**EB-2017-0007**

### **PLANET ENERGY (ONTARIO) CORP.**

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

**BEFORE: Michael Janigan**  
Member

**Cathy Spoel**  
Member

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**March 10, 2020**

## INTRODUCTION AND SUMMARY

This is the decision of the Ontario Energy Board (OEB) on costs with respect to the Planet Energy (Ontario) Corp. (Planet Energy) enforcement proceeding. The only parties to the proceeding were Planet Energy and the members of OEB staff assigned to bring these matters forward (the Enforcement Team).

On September 20, 2018, the OEB issued its Decision and Order in this proceeding, in which it found that Planet Energy had contravened the *Energy Consumer Protection Act, 2010*, O. Reg. 389/10 (General) under that Act, and the OEB's *Electricity Retailer Code of Conduct*. As a result, the OEB determined that 26 electricity contracts were void and ordered Planet Energy to refund customers for the money paid by them under those contracts within 60 days. The OEB also ordered that Planet Energy pay an administrative penalty in the amount of \$155,000, also within 60 days.

The Decision and Order also made provision for the filing of written submissions on costs, the parties having agreed that the issue of costs should be dealt with following the issuance of the OEB's Decision and Order.

The Enforcement Team's cost submission was filed on October 1, 2018. On October 5, 2018, the OEB issued a letter requiring the Enforcement Team to file additional information supporting the amount claimed, including at a minimum a detailed breakdown of the costs and hours spent. The Enforcement Team filed supporting information on October 11, 2018. Planet Energy filed its responding submission on costs on October 17, 2018. Tab B appended to Planet Energy's submission contains personal information, and has therefore not been placed on the public record.

The OEB held off on issuing a cost decision pending the outcome of Planet Energy's appeal of the September 20, 2018 Decision and Order. The Divisional Court dismissed the appeal on January 31, 2020.<sup>1</sup>

For the reasons that follow, the OEB has determined that Planet Energy should pay costs in the amount of \$72,252.34.

### Submissions

The Enforcement Team seeks costs in the amount of \$72,252.34, consisting of 40% of total legal fees (\$59,576), plus legal counsel's out-of-pocket disbursements (\$4,364.12) and HST (\$8,312.22). The Enforcement Team submitted that costs are within the discretion of the OEB under section 30 of the *Ontario Energy Board Act, 1998* (OEB Act) and Rule 26.01 of the OEB's *Rules of Practice and Procedure for Enforcement*

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<sup>1</sup> *Planet Energy (Ontario) Corp. v. Ontario Energy Board*, 2020 ONSC 598.

*Proceedings* (Rules), and that in exercising its discretion the OEB may have regard to certain relevant factors, which are similar to those that pertain to costs under Rule 57.01 of the *Rules of Civil Procedure*, R.R.O 1990, Reg. 194. The Enforcement Team submitted that the amount claimed is fair and proportionate having regard to the following considerations:

- the Enforcement Team was substantially successful in, and acted responsibly throughout, the proceeding
- the proceeding was factually and legally complex and raised important issues with consequences that extend well beyond the present proceeding
- the amount claimed is reasonable, as:
  - it represents only 40% of the actual legal fees incurred
  - costs are not being sought in respect of OEB staff costs, Planet Energy's June 9, 2017 Motion for production or activities occurring prior to the issuance of the OEB's Notice of Intention in this matter
  - in 2018 dollars, the amount is less than the costs ordered in the OEB's November 18, 2010 Decision and Order in the enforcement proceeding regarding Summitt Energy (Summitt Proceeding).<sup>2</sup>

In its responding cost submission, Planet Energy also noted the discretionary nature of costs under section 30 of the OEB Act and Rule 26.01 of the Rules. Citing a decision of the Ontario Court of Appeal respecting Rule 57.01 of the *Rules of Civil Procedure*, Planet Energy submitted that 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 circumstances in light of relevant factors, including the amount involved, importance of the issues, complexity and success, and offers of compromise. Planet Energy further submitted that a fair and reasonable award of costs in favour of the Enforcement Team would be between \$10,000 and \$20,000, having regard to the following considerations:

- contrary to the Enforcement Team's submission, in Planet Energy's view the Enforcement Team was not substantially successful on almost all of the allegations. Rather, 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 from the \$450,000 amount set out in the Notice of Intention
- the Enforcement Team did not at any time prior to the hearing offer to drop any of the alleged contraventions, although certain alleged contraventions were

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<sup>2</sup> EB-2010-0221.

withdrawn during the hearing and others were abandoned during closing argument

- the Enforcement Team did not at any time prior to the hearing offer to reduce the proposed administrative penalty or otherwise compromise
- Planet Energy was successful on its Motion for production
- the Enforcement Team was comparatively less successful than was the case in the Summitt Proceeding, where a greater percentage of alleged contraventions were upheld by the OEB and an administrative penalty of \$234,000 was ordered, being roughly two-thirds of the \$335,000 administrative penalty sought in that case
- this case was not as complex or involved as the Summitt Proceeding, where the OEB awarded costs to a ceiling of \$65,000

## Findings

Under section 30 of the OEB Act, the OEB may order a person to pay all or part of a person's costs of participating in a proceeding before the OEB. Section 26.01 of the Rules reiterates that the OEB may make an order in an enforcement proceeding that provides by whom and to whom any costs are to be paid, the amount of any costs to be paid and when any costs are to be paid.

The parties agree that costs are within the discretion of the OEB. None of section 30 of the OEB Act, the Rules or the OEB's decision in the Summitt Proceeding provide guidance in respect of principles or criteria to be applied in determining costs in enforcement proceedings.

Rule 57.01 of the *Rules of Civil Procedure* is not applicable to OEB proceedings, and while the OEB is not bound by that Rule the OEB considers it informative. The OEB accepts that the objective is to fix costs in an amount that is reasonable in the circumstances.

The Enforcement Team has asked for costs. Planet Energy's submission does not argue against costs, but rather focusses on the quantum of the costs that it should be made to pay. In the circumstances of this case, the OEB considers the following factors to be germane in determining the reasonable costs to be paid by Planet Energy:

- The result obtained by the party seeking costs
- The complexity of the case and the importance of the issues
- The efficient use of time and resources by the parties
- The hourly rates for the individuals for whom costs are claimed
- The overall proportionality of the costs

The parties agree that the result obtained was less than what was sought in the Notice of Intention, although they disagree in their perspective on the degree of success achieved by the Enforcement Team. The Enforcement Team's cost claim represents 40% of the actual legal fees incurred, together with out-of-pocket disbursements and HST. The OEB is satisfied that this level of costs is appropriate in light of the outcome of the proceeding.

Although this proceeding involved only a limited number of witnesses, there was a significant number of documents to be reviewed and issues of interpretation of the relevant legislation to be considered and applied.

The Enforcement Team has not claimed costs for investigative activities occurring prior to the issuance of the Notice of Intention, for OEB staff costs or for costs in respect of Planet Energy's Motion for production. With respect to legal costs for the proceeding itself, the OEB notes that the time claimed for preparation (272.9 hours) is almost five times the time claimed for attendance. When assessing costs, each case is unique. The OEB has considered the particulars of this case in determining an appropriate amount of costs. While some elements of this case were complex, including the presentation of witnesses and the necessary review of documentation, the OEB is not convinced that the amount of time spent on preparation is reasonable.

However, the OEB notes that the Enforcement Team has reduced its potential cost claim by over \$100,000 – from \$173,233.66 (including \$148,940.00 in actual legal fees) to \$72,252.34. This was done by reducing the \$148,940.00 in actual legal fees by 60% to \$59,576.00 (and reducing the HST on those fees from \$19,362.20 by 60% to \$7,744.88). As a result, the OEB will allow the full amount claimed by the Enforcement Team in its cost submission.

The OEB notes that Rule 26.01 of the Rules, unlike its counterpart (Rule 39) in the OEB's *Rules of Practice and Procedure*, makes no reference to the OEB's *Practice Direction on Cost Awards*. Nevertheless, the OEB notes that the hourly rates claimed for the Enforcement Team's legal counsel, after being reduced by 60%, are much lower than the hourly rates set out in the Tariff under that *Practice Direction* for counsel of equivalent years of experience.

The resulting cost award of \$72,252.34 is not disproportionate to the result obtained and the general importance of compliance with the consumer protection regime.

**THE ONTARIO ENERGY BOARD ORDERS THAT:**

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Planet Energy shall pay costs of \$72,252.34.

**DATED** at Toronto, March 10, 2020

**ONTARIO ENERGY BOARD**

*Original Signed By*

Christine E. Long  
Registrar and Board Secretary