



EB-2011-0311

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

AND IN THE MATTER OF a Notice of Intention to Make
an Order under sections 112.3, 112.4 and 112.5 of the
Ontario Energy Board Act, 1998 for Compliance,
Suspension and an Administrative Penalty against
Energhx Green Energy Corporation.

BEFORE: Marika Hare
Presiding Member

Paula Conboy
Member

DECISION AND ORDER

On August 25, 2011 the Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act") issued a Notice of Intention to Make an Order (the "Notice") against Energhx Green Energy Corporation ("Energhx").

The Notice provides that the Board intends to make an Order: (i) under sections 112.3 and 112.5 of the Act, requiring Energhx to comply with certain enforceable provisions as defined in section 3 of the Act and to pay an administrative penalty in the amount of \$32,500 for breaches of those enforceable provisions; and, (ii) under section 112.4 of the Act, to suspend Energhx's activities with respect to sales, renewals, extensions or amendments of contracts using the following channels: Door-to Door, Exhibitions, Trade Shows and Direct Mail. The Notice describes the allegations of non-compliance as follows:

It is alleged that Energhx has contravened sections of Ontario Regulation 90/99, Ontario Regulation 389/10, section 12 of the Energy Consumer Protection Act, 2010... and the Electricity Retailer Code of Conduct and the Code of Conduct for Gas Marketers.¹

The particulars in support of the allegations are set out in the Notice, and are reproduced below.

On September 9, 2011, Energhx filed a letter with the Board requesting a hearing on the matter, as it was entitled to do under the Notice and the Act.

On November 11, 2011, the Board issued a Notice of Hearing and Procedural Order No. 1 setting January 23, 2012 and January 24, 2012 as dates for an oral hearing.

On January 18, 2012, Compliance counsel requested adjournment of this proceeding to a later date due to the unavailability of its main witness. The Board approved that request.

On January 20, 2012, the Board issued Procedural Order No. 2 setting February 7, 2012 as the date for the oral hearing.

I. BACKGROUND

A. Energhx's Licences

Energhx initially received a Gas Marketer Licence (GM-2009-0188) and an Electricity Retailer Licence (ER-2009-0189) (collectively, the "Licences") on October 22, 2009, which authorized it, among other things, "to sell or offer to sell" gas or electricity, respectively, to a consumer. The Licences require that Energhx comply with all

¹ The statutory and other references noted in this excerpt from the Notice are as follows: Ontario Regulation 90/99 (Licence Requirements – Electricity Retailers and Gas Marketers) made under the Act, as most recently amended by Ontario Regulation 390/10 filed on October 13, 2010 and effective January 1, 2011; Ontario Regulation 389/10 (General) made under the *Energy Consumer Protection Act, 2010*, also filed on October 13, 2010 and effective January 1, 2011; the *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, in force on January 1, 2011; Ontario Energy Board *Electricity Retailer Code of Conduct*, as restated November 17, 2010 and in force January 1, 2011; and Ontario Energy Board *Code of Conduct for Gas Marketers*, as restated November 17, 2010 and in force effective January 1, 2011.

applicable provisions of the Act and the regulations made under the Act. The Licences also require that Energhx comply with applicable rules (gas) or codes (electricity), for present purposes these being the Electricity Retailer Code of Conduct (in the case of the Electricity Retailer Licence) and the Code of Conduct for Gas Marketers (in the case of the Gas Marketer Licence) (collectively, the “Codes”). The Licences were issued for a one year period and were to expire on October 20, 2010.

By its terms, the Gas Marketer Licence applies only in relation to marketing activities pertaining to “low volume” consumers. Although the Electricity Retailer Licence applies to retailing activities in respect of all consumers, the allegations in the Notice relate only to retailing activities pertaining to “low volume” consumers.²

On June 8, 2010, Energhx filed applications to renew its Licences (the “Licence Applications”).³ The Licences were extended to January 31, 2011.⁴ On January 28, 2011 the Board re-opened the record of the Licence Applications proceeding to provide Energhx an opportunity to submit evidence of compliance with the legislative and regulatory requirements, and also extended the Licences until March 31, 2011.⁵ Energhx filed the requested evidence on February 4, 2011 and, while the evidence was being considered, on March 24, 2011 the Board ordered that the Licences be extended until “the final determination of the [Licence Applications] or October 31, 2011, whichever is earlier.”⁶ On October 31, 2011, the Board ordered that, while certain compliance inspections were underway, the Licences be extended until “the final determination of the [Licence Applications] or April 30, 2012, whichever is earlier.”⁷ The current versions of the Licences state that they are “valid by extension until April 30, 2012.”

² A “low volume” consumer is, in the case of gas, a consumer that annually uses less than 50,000 cubic meters of gas and, in the case of electricity, a consumer that annually uses less than 150,000 kilowatt hours of electricity. The Board’s Code of Conduct for Gas Marketers applies on in relation to low-volume consumers, while the Board’s Electricity Retailer Code of Conduct contains provisions that apply only in relation to low volume consumers and others that apply in relation to all consumers.

³ EB-2010-0236 and EB-2010-0237.

⁴ Decision and Procedural Order No. 1 issued in respect of the Licence Applications on October 1, 2010.

⁵ Decision and Procedural Order No. 3 issued in respect of the Licence Applications on January 28, 2011.

⁶ Decision and Order issued in respect of the Licence Applications on March 24, 2011.

⁷ Decision and Order issued in respect of the Licence Applications on October 31, 2011.

B. Compliance Inspection

The *Energy Consumer Protection Act, 2010* (the “ECPA”) came into effect on January 1, 2011. It is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices and that consumers are provided with essential information before they sign energy contracts. The Board’s compliance activities which resulted in issuance of the Notice against Energhx were initiated shortly after the ECPA and the restated Codes came into effect on January 1, 2011.

The record indicates that Energhx filed Certificates of Compliance dated December 15, 2010 with the Board in which Dr. Emmanuel Ogedengbe, on behalf of Energhx, certified that, as of January 1, 2011, Energhx will meet all applicable legal and regulatory requirements pertaining to the following in relation to all sales channels that Energhx identified in the Certificates of Compliance as being those that it intended to use: training and testing for salespersons and verification representatives; business cards; identification badges; text-based contracts; disclosure statements; price comparisons; use of verification scripts; and adequate processes and controls to ensure compliance for each of the foregoing, as well as for contract cancellations.

Starting in early 2011, the Board conducted compliance inspections of all retailers and marketers who had filed Certificates of Compliance. Staff from Ernst and Young LLP (“Ernst & Young”) were appointed to serve as “inspectors” pursuant to the power set out in section 106 of the Act. Ernst & Young conducted an inspection of Energhx between March 7 and April 13, 2011, covering the period from January 1, 2011 to February 28, 2011. In the process, Ernst & Young attended Energhx’s premises, made inquiries and observations, inspected documents, communicated with Energhx representatives and retained copies of certain documents. After the compliance inspection was complete, Ernst & Young provided to the Board its observations, as well as the documents related to those observations.

On August 25, 2011, following the completion of Board Compliance staff’s review and validation process regarding the compliance inspection, the Board issued the Notice.

At the commencement of the hearing on February 7, 2012, Compliance counsel indicated that an order to suspend Energhx activities with respect to sales, renewals, extensions or amendments of contracts using all its sales channels was no longer being sought.⁸

II. ALLEGATIONS AND PARTICULARS OF NON COMPLIANCE

As noted above, in the Notice the Board alleges that Energhx has contravened sections of Ontario Regulation 90/99, Ontario Regulation 389/10, section 12 of the ECPA and the Codes.

The particulars set out in the Notice in support of the allegations are described below.

A. Training Materials - Salespersons

Section 7 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee has successfully completed such training as may be required by a code, rule or order of the Board before meeting in person with a low volume consumer. Section 5 of the Codes requires a retailer or marketer to ensure that salespersons acting on its behalf have successfully completed training (as demonstrated by a minimum 80% pass mark on the required training test), and also requires that the training materials used be adequate and accurate and cover certain specified subject matter.

The Notice indicates that the electricity and gas training material used by Energhx for prospective salespersons was reviewed during the inspection and that, at the time of the inspection, three prospective salespersons had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

1. How to complete a contract application; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ii) of the Codes.

2. Use of business cards; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(iv) of the Codes.

⁸ Transcript of the oral hearing, page 2, lines 17 to 23.

3. Use of Identification badges; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(v) of the Codes.
4. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vi) of the Codes.
5. Price Comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vii) of the Codes.
6. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ix) of the Codes.
7. Renewals and extensions; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(x) of the Codes.
8. Persons with whom Energhx may enter into, verify, renew or extend a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(xii) of the Codes.

B. Training Materials - Verification Representatives

The legal and regulatory regime regarding the training of verification representatives is largely the same as that for salespersons as described above (the subject matter to be covered by the training is different in some respects).

The Notice indicates that the electricity and gas training materials used by Energhx for prospective verification representatives were reviewed during the inspection and that, at the time of the inspection, one prospective verification representative had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

9. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iii) of the Codes.

10. Price comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iv) of the Codes.
11. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(vi) of the Codes.
12. Persons with whom Energhx may enter into and verify a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(viii) of the Codes.

C. Training test

The Notice indicates that the electricity and gas training test questions used by Energhx which are designed to assess the state of the salesperson's or verification representative's knowledge of the required topic areas stated in the Codes were reviewed during the inspection. As noted above, the Codes require a minimum pass mark of 80% on the required training test. Section 5.6 of the Codes also states that a prospective salesperson or verification representative may re-take the training test once, but only after having re-taken the full training required by the Codes.

The Notice alleges as follows:

13. Energhx confirmed with the inspector that it requires a salesperson or verification representative to achieve a minimum 75% pass mark on the training test; contrary to section 5.6(c) of the Codes which requires a pass mark of 80%.
14. In one case reviewed the prospective salesperson (initials A. Z.) attempted the test twice but scored 70% each time however, the individual was considered to have passed the test; contrary to section 5.6(c) and (d) of the Codes.

D. Record retention

Section 5.10 of the Codes requires that complete records relating to training and testing be retained for a period of not less than two years from the date on which a salesperson or verification representative ceases to act on behalf of the retailer or marketer in relation to low volume consumers.

The Notice alleges that Energhx has contravened the following requirements in relation to record retention pertaining to salespersons and verification representatives for electricity and gas:

15. Energhx does not have its salespersons and verification representatives sign a statement that he or she will comply with all applicable legal and regulatory requirements in relation to the activities the person will conduct on behalf of Energhx in relation to low volume consumers. The required records are therefore not retained; contrary to section 5.10(g) of the Codes.

16. Energhx stated during the inspection that it plans on maintaining salesperson and verification representative records for a period of one year; contrary to section 5.10 of the Codes.

E. Business cards

Section 5 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee offer a business card at every meeting in person with a low volume consumer. That business card must comply with the requirements set out in section 5 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.1 and 2.2 of the Codes address requirements for business cards.

The Notice indicates that, during the inspection, Energhx confirmed that all business cards issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the electricity and gas business card requirements as follows:

17. During the inspection it was observed that the business card does not state the electricity and gas licence numbers issued to Energhx under the Act nor does it

state Energhx's toll-free telephone number; contrary to section 5 of Ontario Regulation 90/99 and section 2.2(a) and (d) of the Codes.

18. As the content of the business cards provided by Energhx are in breach of section 2.2(a) and (d) of the Codes, it is likely that the use of such business cards by Energhx salespersons in their current form will result in a breach of section 5(6)(ii) of Ontario Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes.

F. Identification badges

Section 6 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that the licensee issue a photo identification badge ("ID badge") to every person who meets in person with a low volume consumer while acting on behalf of the licensee, and that the person at all times prominently display that ID badge. That ID badge must comply with the requirements set out in section 6 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.3 to 2.5 of the Codes address requirements for ID badges.

The Notice indicates that, during the inspection, Energhx confirmed that ID badges issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the following in relation to the electricity and gas ID badge requirements:

19. During the inspection, it was noted that the ID badge does not state that the salesperson is (a) not associated with any electricity or gas distributor or government, contrary to section 6 of Ontario Regulation 90/99; and (b) not a representative of the consumer's electricity or gas distributor and is not associated with the Ontario Energy Board or the Government of Ontario. It was also observed that the ID badge does not state an expiry date. This is contrary to section 2.4(a) and (g) of the Codes.

20. As the content of the ID badges provided by Energhx are in breach of section 2.4(a) and (g) of the Codes, it is likely that the use of such ID badges by Energhx salespersons in their current form will result in a breach of section 5(6)(i) of Ontario Regulation 389/10 and sections 1.1(c) and 2.3 of the Codes.

G. Contract content requirements for new contracts

Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, contain the information prescribed by regulation. The information required to be contained in a contract is listed in section 7 of Ontario Regulation 389/10.

The Notice indicates that one transaction for electricity and one transaction for gas were reviewed. In respect of both transactions, the Notice alleges that Energhx contravened the following content requirements in relation to electricity and gas contracts:

21. The contract fails to include a statement that if the consumer cancels the contract within the 10-day period, the consumer is entitled to a full refund of all amounts paid under the contract; contrary to section 12 of the ECPA and section 7(1)9 of Ontario Regulation 389/10.
22. The contract fails to include a description of any other circumstances in which the consumer or Energhx is entitled to cancel the contract with or without notice or cost or penalty, the length of any notice period, the manner in which notice can be given and the amount of any cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.
23. The contract fails to include the applicable conditions/rights under section 21(a), (b) & (e) of Ontario Regulation 389/10 which provide that the consumer can cancel the contract without cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.
24. The signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the contract on behalf of Energhx, is contained below the acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text based copy of the contract. The signature of the person signing

on behalf of Energhx and the acknowledgement of the consumer are therefore in the reverse order to the specified requirements in Ontario Regulation 389/10; contrary to section 12 of the ECPA and section 7(1)17 & section 7(1)18 of Ontario Regulation 389/10.

H. Completion of price comparisons for new contracts

Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, be accompanied by the information or documents prescribed by regulation or required by a code, rule or order of the Board. Under section 8(3) of Ontario Regulation 389/10, a price comparison that complies with the requirements of a code, rule or order of the Board must accompany the disclosure statement that itself is required to accompany a contract. Sections 4.6 to 4.9 of the Codes address requirements for price comparisons, including the requirement that a price comparison be completed using the template approved by the Board and in accordance with the instructions contained in that template.

The Notice alleges as follows:

25. Energhx advised that it has one five-year contract offer available to residential and non-residential electricity and gas consumers. Board staff observed that the price comparison had been completed accurately according to the template instructions with the exception of the document control number box which also includes a date which is not in accordance with instruction number 8; contrary to section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10, and section 4.6(b) of the Codes.

I. Verification call (use of the applicable Board-approved script)

Subject to certain exceptions, under section 15 of the ECPA a contract with a low volume consumer must be verified within the time and in the manner required by the ECPA, Ontario Regulation 389/10 and any applicable code, rule or order of the Board. Sections 4.10 to 4.12 of the Codes address requirements for verification, notably the obligation to use a Board-approved script.

The Notice indicates that Energhx had only conducted one verification call during the period covered by the inspection (January 1 to February 28, 2011), and that this was a dual fuel verification call to verify both electricity and gas contracts. The Notice alleges that Energhx contravened the following requirements and deviated from the Board-approved script in the following areas:

26. The verification representative did not introduce her name to the consumer and did not identify herself as calling on behalf of Energhx; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

27. The verification representative did confirm the consumer's name but did not confirm if she was speaking to the account holder or the account holder's agent; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

28. The verification representative did not ask if the customer was comfortable to proceed with the call in English; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

29. The verification representative did not advise the consumer that the call was being recorded; contrary to section 15 of the ECPA, section 13(2) and section 13(3) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

J. Compliance monitoring and quality assurance program

Sections 7.4 and 7.5 of the Codes require that a retailer maintain a compliance monitoring and quality assurance program that enables the retailer or marketer to monitor compliance with the Act, the ECPA, the regulations and all applicable regulatory requirements in relation to retailing or marketing to low volume consumers and to identify any need for remedial action. Such a program must meet the minimum requirements specified in the Code.

The Notice alleges that Energhx contravened the requirement as follows:

30. During the inspection, Energhx confirmed that it does not maintain a compliance monitoring and quality assurance program as required by section 7.4 and section 7.5 of the Codes.

III. BOARD FINDINGS ON ISSUES BEFORE THE BOARD OTHER THAN THE SPECIFIC ALLEGATIONS

The following issues emerged during the oral hearing and in written submissions.

Certificates of Compliance

On December 15, 2010, Energhx filed Certificates of Compliance in the form required, certifying to a variety of matters regarding compliance with “all applicable legal and regulatory requirements” in respect of all sales channels that Energhx indicated it intended to use as of January 1, 2011.⁹

In its submissions, Energhx characterized its certification as follows:

*The Certificates of Compliance confirm Energhx’s obligation to comply with the stated retailing activities, relating to the retailing/marketing channels, recruitment, training and conduct of salespersons, contracts, verification, handling of cancellations, complaints and retractions. These are statements of **intentions** and not **actions**. For example, the certification confirms retailing/marketing activities as “...channels that the gas marketer/retailer intends to use..”¹⁰*

⁹ In the Certificates of Compliance, Energhx indicated that it did not intend to use certain sales channels (Energhx’s place of business, internet and telephone renewals). The Certificates of Compliance are available for viewing on the Board’s website at:

<http://www.ontarioenergyboard.ca/OEB/Consumers/Consumer+Protection/Retail+Energy+Contracts/List+of+Retailers+and+Marketers>

¹⁰ Energhx written submissions dated February 16, 2012, at page 6.

The Board is of the view that the Certificates of Compliance, by their terms, attest to the state of compliance by the signing retailer or marketer, and do not represent “statements of intentions”. For example, the Certificates of Compliance refer to salespersons having undergone training and testing in accordance with all applicable legal and regulatory requirements, to contracts having been revised as required to comply with all applicable legal and regulatory requirements and to the company using only compliant contracts on and after the “Effective Certification Date” (being the later of the date of signature of the Certificate and January 1, 2011). Execution by Energhx of the Certificates of Compliance certified Energhx’s compliance with those requirements. The Board agrees with the submission of Compliance counsel that Ontario Regulation 90/99 and the Certificates of Compliance make it clear that Energhx was subject to all applicable legal and regulatory requirements.¹¹

All retailers and marketers doing business in Ontario must understand and abide by the statutory and regulatory requirements regardless of whether they are new businesses or established sector participants. The Board notes that the legal and regulatory requirements should have been known and understood by all marketers and retailers in advance of the January 1, 2011 implementation date. The ECPA was tabled in Bill form on December 8, 2009 and received Royal Assent on May 18, 2010. Proposed drafts of Ontario Regulation 389/10 and of the amendments to Ontario Regulation 90/99 were posted for comment on July 2, 2010, and final versions were filed on October 13, 2010. The two Codes, as restated, were issued on November 17, 2010 following a notice and comment process that commenced in August of that year.

As will be discussed in detail later in this Decision, the evidence shows that Energhx was not in full compliance with the ECPA, the relevant regulations and the Codes during the period covered by the compliance inspection. While the evidence also indicates that Energhx later addressed these deficiencies,¹² which is reassuring to the Board, it does not mitigate the fact that at the time of the inspection a number of infractions of the ECPA, the relevant regulations and the Codes were noted.

¹¹ Compliance counsel written submissions dated February 10, 2012, at pages 9-10.

¹² Letter dated September 9, 2011, Exhibit K, in which it was acknowledged that Energhx “provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice”.

Standard of proof

Compliance counsel acknowledges that it bears the burden of proving the allegations set out in the Notice and that this is a civil standard, often referred to as a “balance of probabilities”.¹³ The Supreme Court of Canada has described the applicable test as “whether it is more likely than not that an alleged event occurred”.¹⁴

Energhx did not comment on who bears the burden of proving the allegations set out in the Notice or on the standard of proof.

There is no dispute, and the Board agrees, that the onus of proving the allegations rests with Compliance counsel, and that the standard is “whether it is more likely than not that an alleged event occurred”.

Prescriptive nature of legal and regulatory requirements

Compliance counsel submits that the Act, the ECPA, the relevant regulations and the Codes are highly detailed and prescriptive and thus provide little room for discretion on the part of retailers and marketers.¹⁵ Furthermore, Compliance counsel submits that it is incumbent on the Board to give full effect to the legal and regulatory scheme and to require full compliance with its requirements.¹⁶

Energhx did not comment on Compliance counsel’s submissions as to the prescriptive nature of the legal and regulatory scheme.

The Board agrees 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. Nonetheless, the Board must consider whether the burden of proof has been met in relation to each allegation, and must then also consider in each case the appropriate enforcement action to be taken.

¹³ Compliance counsel written submissions dated February 10, 2012, at page 11.

¹⁴ *F.H. v. McDougall*, [2008] S.C.R. 41 at para. 49.

¹⁵ Compliance counsel written submissions dated February 10, 2012, at page 11.

¹⁶ *Ibid.*

Interim licence versus extension of existing licences

During oral testimony, the Energhx witness spoke to the issue of licence extensions versus interim licences.¹⁷ In its written submissions, Energhx submits that, without an “interim licence”, it could not commence its general public offering of its electricity retailing and gas marketing services during the period covered by the compliance inspection.¹⁸

Compliance counsel submits that, even if there is a distinction between an “interim licence” and an extension of an existing licence, it is irrelevant to the question of whether Energhx was bound to follow the various legislative and regulatory requirements set out in the Notice.¹⁹

The Board also notes that the record of the Licence Applications proceeding clearly shows that Energhx’s existing Licences were extended, which allowed it to continue with any marketing and retailing activities in accordance with those Licences. It is also clear that the Licences issued to Energhx do not themselves contain limitations on the nature of the retailing or marketing activities that can be carried out by Energhx, beyond those that apply by operation of law or that devolve from the Codes. Contrary to the position taken by Energhx, an “interim licence” issued under section 59 of the Act does not inherently confer any additional benefits on the licensee relative to licences issued in the normal course under section 57 of the Act as far as permitted activities go.

In any event, the Board agrees with Compliance counsel that the distinction between an interim licence and a licence extension, if any, is not in any way relevant to the issue of the obligation on Energhx to comply with applicable legal and regulatory requirements.

Whether Energhx engaged in retailing and marketing activities

Compliance counsel submits that Energhx was engaged in “retailing” and “marketing” to “consumers”, as those terms are defined in the Codes and the ECPA.²⁰ In particular,

¹⁷ Transcript of the oral hearing, page 117, line 16 to page 120, line 8; and page 142, line 18 to page 144, line 14.

¹⁸ Energhx written submissions dated February 16, 2012, at pages 2-3.

¹⁹ Compliance counsel written submissions dated February 10, 2012, at page 10.

²⁰ *Ibid*, at page 12.

Compliance counsel relies on the following facts, all of which were admitted by Energhx in the course of the proceeding:

- (a) Energhx representatives interacted with “acquaintances” and “friends” in order to offer them the opportunity to become Energhx “associates” – which later was understood by the Board to be a synonym for consumer;
- (b) A single verification call was made by Energhx; and
- (c) At the time of the compliance inspection, Energhx had approximately 10 customers, three of whom were not affiliated with Energhx as employees or sales agents.²¹

During the oral hearing and in its submissions, Energhx submits that it has consistently set its focus on developing a unique supply service which would be marketed as the Green Energy Credit™. According to Energhx, the Green Energy Credit™ was submitted for patent protection in December 2010, and there was a lag in time to market caused by technical development and administrative setup procedures.²² Energhx asserts that, in the absence of an interim licence, it could not commence its electricity retailing and gas marketing services during the period covered by the compliance inspection, and that it was constrained to “limit its activities to the training of associates, using their accounts for setup implementation procedures”.²³

The Board finds the evidence of Energhx internally contradictory with respect to the degree of retailing and marketing that it carried out during the period covered by the compliance inspection.²⁴ On the one hand, the witness insisted that Energhx only dealt with “associates”, but on the other hand it was clear that a verification call was made and that at least three customers were signed up for the Energhx offer who were not affiliated with the company,²⁵ and it is not clear how those customers came to be enrolled with Energhx in the absence of some type of sales activity.

²¹ *Ibid.*, at page 13, referring to various portions of the transcript of the oral hearing.

²² Energhx written submissions dated February 16, 2012, at page 2.

²³ *Ibid.*, at page 3.

²⁴ Transcript of the oral hearing, page 120, line 15 to page 124, line 1.

²⁵ Transcript of the oral hearing, page 138, line 25 to page 139, line 10.

It was, however, evident that at the time of the compliance inspection the company was in a start-up phase and it appears that no marketing and retailing was undertaken beyond friends, family or company employees.²⁶ The testimony of Energhx's witness to that effect was not challenged by Compliance counsel. However, the Board is mindful that the statutory and regulatory requirements apply in relation to retailing and marketing to all low volume consumers, even those that are friends, family or company employees. 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 framework. As a general proposition then, the legal and regulatory framework does not provide for greater tolerance simply because the consumer may be in some way affiliated or associated with the marketer or retailer.

Administrative penalties

Energhx submits that the administrative penalty assessed against a person under section 112.5 of the Act "is designed to follow the Board's Cost Assessment Model".²⁷ The Board understands Energhx's argument in this regard to be that, in determining the amount of any administrative penalty, the Board should apply the principles of the Cost Assessment Model ("CAM") and consider Energhx as a start up business with no significant record of sales (few electricity customers and no gas customers enrolled during the period covered by the compliance inspection).

Energhx appears to misunderstand the applicability of the CAM. The CAM is the methodology that the Board uses to apportion its costs amongst the persons or classes of persons who pay cost assessments under section 26 of the Act. These persons and classes of persons are identified in Ontario Regulation 16/08 (Assessment of Expenses and Expenditures), and include licensed retailers and marketers. The CAM has nothing to do with the assessment of administrative penalties, in respect of which Ontario Regulation 331/03 (Administrative Penalties) applies.

²⁶ Transcript of the oral hearing, page 145, line 20 to page 147, line 14.

²⁷ Energhx written submissions dated February 16, 2012, at page 6.

Energhx also submits that the Board has unjustly imposed a “high-handed barrier to fair competition in the deregulated energy market” and that the administrative penalty “represents an undue burden against new technology-driven competition”.²⁸ The Board does not agree with this characterization.

Compliance counsel submits that any purported benefit Energhx presents to the market in terms of advancing competition or green energy technology as a start up business is irrelevant for the purposes of setting an administrative penalty.²⁹ The Board agrees.

The Board notes that a number of the allegations set out in the Notice relate to the same underlying subject matter or transaction. For example, four allegations of non-compliance are associated with a single verification call, and 12 allegations are associated with the same training materials. Compliance counsel acknowledges that “the presentation of certain allegations as ‘distinct’ contraventions may be more a matter of style than substance”.³⁰ Although Compliance counsel submits that, once proven, it is appropriate to consider each allegation as a distinct contravention for the purposes of calculating the appropriate administrative penalty as long as the allegation cites a breach of a unique requirement, Compliance counsel also concedes that the Board may consider at least some of the allegations as a single contravention.³¹ For the reasons discussed later in this Decision, the Board believes that this is an appropriate case in which to assess administrative penalties on a transaction-by-transaction basis rather than on the basis of each allegation individually.

The Board also notes that the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. Specifically, section 112.5(1) of the Act states that, “if the Board is satisfied that a person has contravened an enforceable provision, the Board *may*, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order...” (emphasis added). Where the Board considers it appropriate to impose an administrative penalty, the amount of that penalty must be determined in accordance with the rules set out in Ontario Regulation 331/03 (Administrative Penalties), which sets the minimum penalty at \$1,000.

²⁸ *Ibid.*, at pages 1 and 4.

²⁹ Compliance counsel written submissions dated February 10, 2012, at page 40.

³⁰ *Ibid.*, at page 34.

³¹ *Ibid.*, at page 35.

IV. BOARD FINDINGS ON SPECIFIC ALLEGATIONS

During the oral hearing and in its written submissions, Compliance counsel reviewed in detail each allegation in the Notice. The focus of the evidence and hearing was on the compliance inspection of Energhx during the two month period from the beginning of January to the end of February, 2011 and the allegations arising from that inspection. Of interest to the Board however was also to understand the compliance process following the inspection. The two witnesses who were presented were not able to provide evidence of that process or to address the assessment of the severity of the allegations³². In cases such as these, the Board expects witnesses who are familiar with the *entire* compliance process, not just the inspection phase, to be available to provide evidence to the Board.

In Energhx's written submissions, comments on the specific allegations were largely restricted to the alleged deficiencies of its training program.³³

The Board's findings with respect to the specific allegations are set out below.

A. Training of Sales Representatives – Allegations 1 to 8

The Notice contains eight allegations of inadequate training of sales representatives. Deficiencies in the training materials identified by Compliance counsel were presented relative to the power point presentation provided by Energhx to its trainees.

Allegation 1 pertains to training regarding how to complete a contract application, allegation 5 pertains to training regarding price comparisons and allegation 7 pertains to training regarding renewals and extensions. The power point presentation did not contain any information in relation to these topics. The Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in this respect, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

³² Transcript of the oral hearing, page 111, lines 12 to 20.

³³ Energhx written submissions dated February 16, 2012, at pages 4-5.

Allegations 2, 3, 4, 6 and 8 pertain to training regarding the use of business cards, the use of ID badges, disclosure statements, consumer cancellation rights and persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. These topics are referred to in the power point presentation. In the opinion of Compliance counsel, however, they are not addressed in sufficient detail, and the training material is not adequate in terms of thoroughness.

In his testimony, Dr. Ogedengbe stated that the power point presentation was augmented by an “in-classroom” session for sales representatives.³⁴ However, in the Board’s view, the Code requirement for “adequate and accurate material” that covers certain topics is a requirement for written material. As such, while an oral component may usefully supplement written materials, it is not a substitute for them.

Gauging the adequacy of training materials is necessarily a subjective exercise. The references to the topics referred to in allegations 2, 3, 4, and 8 in the power point presentation are limited to identifying that it is an unfair practice for a retailer or marketer to be in non-compliance with requirements relating to those topics. The Board notes that the Codes require training material on “behavior that constitutes an unfair practice” separate and apart from material on the use of business cards, the use of ID badges, disclosure statements and the persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. With respect to allegation 6, the reference in the power point presentation to consumer cancellation rights is limited to noting the 10-day cooling off period and the “reaffirmation option”. The ECPA and Ontario Regulation 389/10 include cancellation rights beyond the 10-day cooling off period, refer to verification and not “reaffirmation”, and make it clear that a contract that is not verified as and where required is void. The Board finds that Energhx’s training materials were non-compliant with section 5.2 of the Codes in respect of the topics referred to in allegations 2, 3, 4, 6 and 8, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly

B. Training of Verification Representatives – Allegations 9 to 12

The training material used by Energhx for verification representatives consists of the same power point presentation as that used for sales representatives. The allegations

³⁴ Transcript of the oral hearing, page 140, lines 7 to 10.

of inadequate training of verification representatives are therefore similarly based on Compliance counsel's assessment of that power point presentation.

Allegation 10 pertains to the absence of training material on the topic of price comparisons, and allegations 9, 11 and 12 pertain to the inadequacy of training material on the topics of disclosure statements, consumer cancellation rights and the persons with whom a marketer or retailer may enter into, verify, renew or extend a contract. For the reasons noted above, the Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in respect of these topics and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

C. Training test – Allegations 13 and 14

Energhx admits that it initially required a passing score of 75% on the training test, contrary to the Code requirement.³⁵ Energhx also admits that a person was allowed to take the training test twice, scoring 70% on both attempts.³⁶ As noted by Compliance counsel, there was no evidence that the person re-took the training program.³⁷ The Board finds that Energhx contravened section 5.6(c) and section 5.6(d) of the Codes.

D. Record retention - Allegations 15 and 16

The Board finds that Energhx has contravened section 5.10(g) of the Codes in relation to the records required to be maintained in relation to salespersons and verification representatives, as set out in allegation 15.

Energhx admits that it advised Ernst & Young that Energhx plans on maintaining records pertaining to salespersons and verification representatives.³⁸ It is understood that the Codes require that such records be maintained for a period of two years. The Board notes, however, that at the time of the compliance inspection the two-year period had not yet elapsed. As such, a finding of a contravention would necessarily be prospective (i.e., that Energhx is likely to contravene this requirement of the Code). Allegation 16 is not cast in such terms.

³⁵ Admitted Fact #4, Document Binder, Exhibit K1 at Tab 6.

³⁶ Admitted Fact #5, Document Binder, Exhibit K1 at Tab 6.

³⁷ Compliance counsel written submissions dated February 10, 2012, at page 25.

³⁸ Admitted Fact #7, Document Binder, Exhibit K1, Tab 6.

The Board notes that it may, under section 112.3 of the Act, make an order requiring a person to comply with an enforceable provision and to take such action as the Board may specify to prevent a contravention in circumstances where the Board is satisfied that a contravention is likely. However, administrative penalties may only be levied where the Board is satisfied that a contravention has occurred.

As noted earlier in this Decision, the evidence indicates that Energhx has addressed this deficiency (as well as all others identified in the Notice).³⁹ The Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 16.

E. Business cards – Allegations 17 and 18

At the time of the Board's compliance inspection, the business cards issued to Energhx salespersons who meet in person with low-volume consumers did not include the numbers of the Licences issued to Energhx, as required by section 5 of Ontario Regulation 90/99 and section 2.2 of the Codes. The business cards also did not include a toll-free number for Energhx, as required by section 2.2 of the Codes. While it is arguable that a toll-free number (i.e., a "1-800" number) should not be required for a company only doing business in one area code, it is a requirement of the Codes. Accordingly, the Board finds there have been breaches of the Codes and of Ontario Regulation 90/99, as set out in allegation 17.

Allegation 18 alleges that the business card deficiencies noted above will result in a breach of section 5(6)(ii) of Ontario Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes. These sections pertain to the use of business cards that fail to meet the requirements of the Codes and Ontario Regulation 90/99. Compliance counsel argues that, given the deficiencies in the business cards, Energhx is likely to contravene these sections, and that the Board may take action accordingly under section 112.3 of the Act.⁴⁰

³⁹ Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

⁴⁰ Compliance counsel written submissions dated February 10, 2012, at pages 27-28.

The evidence indicates that Energhx has addressed the deficiencies in its business cards,⁴¹ and the Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 18.

F. Identification badges (ID badges) – Allegations 19 and 20

As with the business cards, it was not disputed that the ID badges did not conform with section 6 of Ontario Regulation 90/99 and sections 2.4(a) and (g) of the Codes. The Board therefore finds that Energhx was in contravention of those sections, as set out in allegation 19.

With respect to allegation 20, for the same reason as noted in relation to business cards the Board does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 20.

G. Contract content requirements for new contracts – Allegations 21 to 24

Energhx did not refute the allegations regarding the format or content of the contracts at issue in the transactions reviewed during the compliance inspection. The Board finds that Energhx's contracts were non-compliant as set out in allegations 21 to 24, and that there have been contraventions of the legal and regulatory requirements set out in those allegations.

H. Completion of price comparisons for new contracts – Allegation 25

The Board notes that, with one exception, the price comparison document used by Energhx is fully compliant with the legal and regulatory requirements. The exception, which Energhx did not refute, is that a date has been included in the place that has been set aside for a document control number. As noted earlier in this Decision, the

⁴¹ Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

legal and regulatory framework is highly prescriptive and leaves little room for discretion on the part of retailers and marketers. The Board finds that Energhx has failed to comply with the Board's instructions for completing the price comparison, and that there has been a violation of section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10 and section 4.6(b) of the Codes accordingly.

I. Verification call (use of the applicable Board-approved script) – Allegations 26 to 29

Allegations 26 to 29 all pertain to the same verification call. Dr. Ogedengbe confirmed during oral testimony that this one verification call was to a family friend.⁴² As noted previously, the Board is of the view that all low volume consumers, including persons that are friends with or the family of the retailer or marketer, are entitled to the same protections under the legal and regulatory framework that is currently in place. Although the verification script may not lend itself as well to circumstances where the consumer is a friend of or related to the retailer or marketer, the fact remains that strict adherence to the script is required. Allegations 26 to 29 are therefore upheld, and the Board finds that there were contraventions of the legal and regulatory requirements as set out in those allegations.

J. Compliance monitoring and quality assurance program – Allegation 30

The Board finds that Energhx contravened sections 7.4 and 7.5 of the Codes in failing to maintain a compliance monitoring program. This was not disputed.

Administrative Penalties

As also noted earlier in this Decision, the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. The Board believes that it is appropriate in this case to refrain from imposing an administrative penalty in respect of the contraventions pertaining to the training test, record retention, business cards, ID badges, completion of price comparisons, verification call and compliance monitoring. The evidence is that Energhx has come

⁴² Transcript of the oral hearing, page 134, lines 7 to 8.

into compliance in respect of all of these items; that the company had a very limited number of customers at the relevant time and was not offering its product to the public on a widespread basis; that the one salesperson cited with a failing score of 70% did not engage in any sales activities until she achieved a pass score of 90%;⁴³ and that a sole verification call was made.

The Board emphasizes that its decision not to impose an administrative penalty in this case should not be misunderstood as indicative of a view that violations of these legal and regulatory requirements are unimportant or trivial. The Board also emphasizes that it expects Energhx to take whatever steps are necessary to ensure that it has a comprehensive and accurate understanding of all applicable legal and regulatory requirements and remains fully compliant with them if it intends to continue business operations as a retailer and/or marketer.

Where the Board intends to impose an administrative penalty, the Board must do so in accordance with Ontario Regulation 331/03 (Administrative Penalties). Ontario Regulation 331/03 requires that the Board first determine the following: (a) whether the contravention was a minor, moderate or major deviation from the requirements of the enforceable provision; and (b) whether the contravention had a minor, moderate or major potential to adversely affect consumers, other licensees or other persons. The determination on these two questions then establishes the range of administrative penalties that applies, as set out in the Schedule to Ontario Regulation 331/03. In selecting the appropriate amount from within that range, the analysis involves a consideration of the extent of mitigation by the person that committed the contravention; whether that person is a repeat offender; whether that person derived any economic benefit from the contravention; and any other criteria the Board considers relevant.

The range of administrative penalties for contraventions as per Ontario Regulation 331/03 are shown below.

⁴³ *Ibid*, pages 141 to 142, lines 27 to 29 and 1 to 3.

	Deviation from the requirements of the enforceable provision that was contravened			
		Major	Moderate	Minor
Potential to adversely affect consumers, persons licensed under the Act or other persons	Major	\$15,000 - \$20,000	\$10,000 - \$15,000	\$5,000 - \$10,000
	Moderate	\$10,000 - \$15,000	\$5,000 - \$10,000	\$2,000 - \$5,000
	Minor	\$5,000 - \$10,000	\$2,000 - \$5,000	\$1,000 - \$2,000

Compliance counsel submits that, at least for certain of the allegations, the appropriate range is from “major” to “moderate” in terms of deviation from the requirement and/or potential adverse affect as set out in Ontario Regulation 331/03.⁴⁴

The onus is on compliance staff to satisfy the Board of the contraventions and the factors leading to the level of administrative penalty proposed. In this case, the Board was not presented with any evidence upon which it could make a determination as to the potential of the contravention to adversely affect consumers. For this reason, the Board finds the potential to adversely affect consumers to be minor. This does not undermine the importance of these contraventions or their impact – the matter is simply one of lack of evidence.

In assessing the administrative penalties the Board also took into consideration that Energix did not appear to derive any economic benefit from these contraventions and the very limited marketing and retailing that was undertaken beyond friends, family or company employees. It also reflects that Energix has brought itself into subsequent compliance with all issues as indicated by the Board’s letter of September 2011.

The ECPA is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices, have been adequately trained and that consumers are provided with essential information before they sign energy contracts. Contraventions of the legal and regulatory framework that derogate from these requirements are, in the Board’s view, matters of particular concern.

⁴⁴ Compliance counsel written submissions dated February 10, 2012, at pages 36 to 39.

As noted earlier in this Decision, the Board has discretion to consider multiple allegations associated with the same transaction or subject matter as one contravention for the purposes of determining the level of administrative penalties to be imposed. The Board believes that it is appropriate to do so in this case, including consolidating all 12 allegations pertaining to training 1 to 8 being in relation to salespersons and 9 to 12 being in relation to verification representatives. In the context of these 12 violations, the Board finds the deviations in training from the requirements of the enforceable provisions that were contravened to be major and because of the lack of evidence as to the potential adverse affect on consumers, a default of “minor adverse impact” is will be used. An administrative penalty of \$5,000 is therefore imposed.

The contraventions pertaining to the contract content are considered in this case to be major deviations from the requirements of the enforceable provisions that were contravened but with minor potential adverse effect on consumers, due to the lack of evidence supporting any other finding. It is also noted that there were only 3 customers unaffiliated with the company who had signed contracts during this period, and that marketing and retailing was not undertaken to the general public. The administrative penalty is therefore \$5,000.

The Board fixes the amount of the administrative penalties at \$10,000.

Costs

Although Compliance counsel submits that this is an appropriate case in which to seek costs against Energhx, Compliance counsel has decided not to do so.⁴⁵ The Board makes no order as to costs in this proceeding.

THE BOARD ORDERS THAT:

1. Energhx shall, by December 31, 2012, pay to the Ontario Energy Board an administrative penalty in the amount of \$10,000.

⁴⁵ *Ibid*, at page 41.

ISSUED at Toronto, March 26, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary