

NEW YORK STATE  
DEPARTMENT OF ECONOMIC DEVELOPMENT  
633 THIRD AVENUE  
NEW YORK, NY 10017

In the Matter

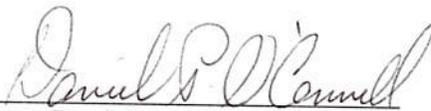
- of -

the Application of **On Line - Power Technologies, Inc.**  
for Certification as a Minority and Woman-owned Business Enterprise  
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60549

RECOMMENDED ORDER

- by -



Daniel P. O'Connell  
Administrative Law Judge

November 6, 2017

## SUMMARY

The determination of the Division of Minority and Women's Business Development (Division) of the New York State Department of Economic Development to deny On Line – Power Technologies, Inc. (On Line or applicant) certification as a minority and a woman owned business enterprise (MWBE) should be affirmed for the reasons set forth below.

## PROCEEDINGS

On November 5, 2015, Linda Hack, as president of On Line, filed a joint application (Application No. 1749913) with the Division for certification as both a minority as well as a woman owned business enterprise. In response to inquiries made by Division staff, Ms. Hack provided additional information about On Line. (*See* MWBE Exh. 1.)

In separate denial letters dated July 14, 2016, the Division determined that On Line – Power Technologies does not meet the eligibility requirements to be certified as a minority or woman owned business enterprise, and denied the joint application (*see* MWBE Exh. 2). In a letter dated August 10, 2016 from Jeffrey L. Levin, Esq. (Scarsdale, New York), On Line appealed from the Division's determination to deny MWBE certification. In the August 10, 2016 letter, Mr. Levin argued, among other things, that On Line meets the eligibility criteria to be certified as a MWBE business enterprise, and requested a hearing (*see* MWBE Exh. 8).

By notice dated January 4, 2017, the Division acknowledged On Line's request for an appeals hearing and scheduled it for February 21, 2017 (*see* MWBE Exh. 9). Adjournments were duly taken at the request of the parties. Subsequently, in a notice of adjournment dated May 30, 2017, I directed On Line to file a written appeal, in lieu of a hearing, by July 14, 2017, and the Division to file its reply by August 11, 2017.

With a cover letter dated July 14, 2017, Mr. Levin timely filed a written appeal on behalf of On Line. The statements and arguments outlined in the July 14, 2017 appeal are similar to those presented in the initial appeal letter dated August 10, 2016. No exhibits were filed with the July 14, 2017 written appeal. However, Mr. Levin noted that On Line had provided the following documents to support its joint application for MWBE certification: (1) the articles of incorporation; (2) minutes from the first corporate organizational meeting; and (3) the company's bylaw and all subsequent amendments.<sup>1</sup>

Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, filed the Division's response on July 31, 2017. The Division's response consists of the following: (1) a memorandum of law; (2) an affidavit of Iliana Farias,<sup>2</sup> sworn to July 28, 2017 (Farias Aff.); and (3) exhibits 1 through 7, inclusive. The exhibits attached to Ms. Farias's affidavit, and other pertinent documents are listed in the exhibit chart attached to this recommended order.

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<sup>1</sup> None of these documents relate to the eligibility criteria at issue in this appeals proceeding.

<sup>2</sup> Since June 2008, Ms. Farias has served as a Senior Certification Analyst with the Division. Ms. Farias reviewed On Line's application for MWBE certification. (*See* ¶¶ 1 and 2 Farias Aff.)

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to the certification of minority and woman owned business enterprises are established by regulation (*see* Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York [5 NYCRR] § 144.2). To determine whether an applicant should be granted MWBE status, the Division assesses the ownership, operation, and control of the business enterprise on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application, information presented in supplemental submissions and, if appropriate, from interviews conducted by Division analysts (*see* 5 NYCRR 144.5[a]).

## **STANDARD OF REVIEW**

On this administrative appeal, On Line – Power Technologies, as applicant, bears the burden of proving that the Division’s denial of the joint application for MWBE certification is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard “demands only that a given inference is reasonable and plausible, not necessarily the most probable,” and applicant must demonstrate that the Division’s conclusions and factual determinations are not supported by “such relevant proof as a reasonable mind may accept as adequate” (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

## **POSITIONS OF THE PARTIES**

### The Division

In the July 14, 2016 denial letters, the Division determined that On Line does not meet the MWBE certification criteria outlined at 5 NYCRR 144.2 (*see* MWBE Exh. 2). With respect to ownership, the Division asserted that Ms. Hack’s contribution is not proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division also asserted that Ms. Hack does not share in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

With respect to Ms. Hack’s ability to operate the business enterprise, the Division contended that On Line – Power Technologies failed to show that the minority woman owner makes decisions pertaining to operations, as required by 5 NYCRR 144.2(b)(1). The Division contended further that Ms. Hack does not have adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i). Finally, the Division contended that On Line – Power Technologies failed to show that the minority woman owner devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

## On Line – Power Technologies, Inc.

On Line represents manufacturers that produce electric generation and transmission equipment. On Line negotiates the sale of this equipment between equipment manufacturers and purchasers. Purchasers may include electric generating companies like Consolidated Edison, or other users such as the Metropolitan Transit Authority (MTA). On Line receives a commission for the sales that it negotiates. (See MWBE Exh. 1 at 0012; Appeal at 2.)

In its appeal papers dated July 14, 2017, On Line contended that it is a minority and woman owned business enterprise and should be certified as such. Linda Hack, a woman, identifies as a member of the Hispanic ethnic group. From 1988 to January 2015, Ms. Hack was a 50% shareholder in On Line. Her husband, Bruce Hack, was the other shareholder. On January 15, 2015, On Line issued additional stock certificates, which resulted in Ms. Hack becoming the majority (51%) shareholder. According to the appeal papers, the stock was treasury stock held in the corporate minute book. No value was assigned to the shares, and Ms. Hack paid no consideration for the stock. (See Appeal at 3-4; see also MWBE Exh. 1 at 0012.)

In addition to serving as the president of the corporation, Ms. Hack is On Line's chief financial officer. She manages the office, the finances, and the budget of the business enterprise. According to the appeals papers, Ms. Hack is employed fulltime by the Yonkers Board of Education. Mr. Hack, who is an electrical engineer, is the vice-president and On Line's head of sales. The appeals papers contended that if Ms. Hack left the business, On Line would need to hire a chief financial officer and a general manager. Furthermore, if Mr. Hack left the business, Ms. Hack, as On Line's president, would need to hire a replacement sales person. (See Appeal at 5.)

In closing, the appeal papers noted that the Hacks are compensated based on their duties and responsibilities. Mr. Hack, as a salesperson, earns more than Ms. Hack, as the company's administrator. (See Appeal at 6.) Because Linda and Bruce Hack are married and file joint tax returns, "any net income earned ... is household income shared equally by each of them" (Appeal at 6).

## **FINDINGS OF FACT**

### **I. General**

1. On Line – Power Technologies, Inc. was incorporated in 1988. On Line represents manufacturers that produce electric generation and transmission equipment. On Line negotiates the sale of this equipment between equipment manufacturers and purchasers. Purchasers may include electric generating companies like Consolidated Edison, or other users such as the Metropolitan Transit Authority (MTA). On Line receives a commission for the sales that it negotiates. (See MWBE Exh. 1 at 0003-0004, 0012.)
2. On Line's business address is 113 Sunnyside Drive, Yonkers, New York 10705 (see MWBE Exh. 1 at 0002).

3. Linda Hack identifies as a member of the Hispanic ethnic group. On January 15, 2015, Ms. Hack became the majority shareholder (51%), and president of On Line. (*See* MWBE Exh. 1 at 0003-0004, 0012.)
4. On November 5, 2015, Ms. Hack filed a joint application (Application No. 1749913) on behalf of On Line with the Division for certification as both a minority and woman owned business enterprise (*see* MWBE Exh. 1 at 0002).
5. By letters dated July 14, 2016, the Division denied MWBE certification to On Line (*see* MWBE Exh 2).

## II. Ownership

6. The joint application for MWBE certification identifies two capital contributions to On Line – Power Technologies made in May 1988. The first is a cash contribution of \$500 from Linda Hack, and the second is \$500 from Bruce Hack. (*See* MWBE Exh. 1 at 0004.)
7. On January 15, 2015, On Line issued additional stock certificates, and Ms. Hack became the majority (51%) shareholder. The stock was treasury stock held in the corporate minute book. No value was assigned to the shares, and Ms. Hack paid no consideration for the stock. As of January 15, 2015, Mr. Hack holds 49% of On Line’s shares. (*See* MWBE Exh. 1 at 0012.)
8. Ms. Hack did not provide any information as part of the joint application and supporting materials to demonstrate that she made a contribution, subsequent to January 2015, proportionate to her equity interest in the business enterprise.
9. For 2015, Ms. Hack’s total compensation from On Line was [REDACTED] and Mr. Hack’s total compensation from On Line was [REDACTED] (*see* ¶¶ 18, 20, and 21 Farias Aff.; MWBE Exh. 5 and 6).

## III. Operation

10. On Line’s significant business operations are sales and related activities. Only Mr. Hack is responsible for managing sales and marketing at On Line. (*See* ¶¶ 22, 23, 26, and 29 Farias Aff.; MWBE Exh. 1 at 0004-0005, 0012.)
11. At On Line, Ms. Hack does not perform any business operations related to sales and marketing. (*See* ¶¶ 22, 23, and 25 Farias Aff.; MWBE Exh. 1 at 0004-0006, 00012, and Exh. 7 at 070.)
12. Mr. Hack has a Bachelor of Electrical Engineering degree, and over 35 years of experience selling electrical equipment with On Line and other companies. (*See* ¶¶ 23, and 29 Farias Aff.; MWBE Exh. 7 at 0071-0072.)

13. On average, Ms. Hack works about one hour per day (or about 5 hours per week) for On Line, and 32.5 hours per week as a teacher's assistant for the Yonkers Board of Education. (*See* ¶ 25 Farias Aff.; MWBE Exh. 1 at 0012, and Exh. 7 at 0070.)

## DISCUSSION

This recommended order considers On Line's August 10, 2016 appeal and subsequent written filing dated July 14, 2017 from the Division's July 14, 2016 determination to deny certification of On Line as both a minority and woman owned business enterprise pursuant to Executive Law Article 15-A. The bases identified in the Division's July 14, 2016 denial letters (*see* MWBE Exh. 2) are addressed below.

### I. Ownership

With respect to the ownership criteria, Division staff asserted that On Line – Power Technologies did not show that Ms. Hack's contributions were proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1) (*see* MWBE Exh. 2). Staff noted that On Line's application for MWBE certification identifies two capital contributions made in May 1988 when Mr. and Ms. Hack each provided \$500 in cash. The application also states that Mr. and Ms. Hack provided expertise. However, the application does not assign a dollar-value to the expertise or otherwise quantify the expertise contributed to the business enterprise. (*See* MWBE Exh. 1 at 0004.)

In support of the application, Ms. Hack provided an affidavit in which she stated that On Line cannot document the initial capital contributions to the business enterprise. Because the company was incorporated in 1988, On Line no longer has any bank records. Ms. Hack also stated that the value of the shareholders' knowledge and experiences cannot be quantified. (*See* MWBE Exh. 4 at 0043.)

On January 15, 2015, On Line issued additional stock certificates. As a result, Ms. Hack became the majority (51%) shareholder.<sup>3</sup> The stock was treasury stock held in the corporate minute book. No value was assigned to the shares, and Ms. Hack paid no consideration for the stock. As of January 15, 2015, Mr. Hack holds 49% of On Line's shares. (*See* MWBE Exh. 1 at 0012, Exh. 3 at 0034-0038.)

According to staff, Ms. Hack did not provide any proof that she made a contribution proportionate to her equity interest in the business enterprise, as required by 5 NYCRR 144.2(a)(1). Therefore, staff concluded that On Line does not comply with this eligibility criterion. (*See* ¶¶ 14-15 Farris Aff.).

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<sup>3</sup> Prior to January 2015, Linda and Bruce Hack each owned 50% of On Line's shares (*see* MWBE Exh. 1 at 0004, 0012).

The issue on appeal is whether On Line's joint application for MWBE certification and supporting materials demonstrate that it complies with the requirement at 5 NYCRR 144.2(a)(1). This eligibility criterion states, in full, that:

[t]he contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

Pursuant to the regulations, the contribution need not be limited to capital contributions. However, the Division's July 14, 2016 determination did not identify any alternative contributions as additional bases for the denial. Rather, the application materials, and the record of this proceeding focus exclusively on Ms. Hack's capital contributions to the business enterprise.

Whether On Line can document the initial capital contributions from 1988 is immaterial. At that time, the Hacks were 50/50 owners of On Line, and On Line did not meet the threshold eligibility criteria at 5 NYCRR 144.2(a)(5). Rather, the period at issue is January 2015, when On Line issued additional shares. The joint application and supporting documents show that On Line assigned no value to the shares issued on January 15, 2015, and that the Hacks paid no consideration for their respective shares (*see* MWBE Exh. 1 at 0012). On Line did not offer any information related to contributions, and the absence of any information in the joint application materials is conspicuous given the express wording of the eligibility criterion. Therefore, On Line failed to meet its burden of proof. Accordingly, the Division's determination that On Line – Power Technologies does not comply with the eligibility criterion at 5 NYCRR 144.2(a)(1) is based on substantial evidence, and should be affirmed.

The Division also asserted that Ms. Hack does not share in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). With respect to this eligibility criterion, Division staff reviewed On Line's 2015 US Tax Return (MWBE Exh. 5), and the Hacks' W-2 Forms (MWBE Exh. 6).

Schedule K-1 (Form 1120S) from On Line's 2015 US Tax Return shows the shareholders' distributions (*see* MWBE Exh. 5). In 2015, Ms. Hacks received [REDACTED] in distributions, and Mr. Hacks received [REDACTED]. (*See* ¶ 18 Farias Aff.) The 2015 W-2 Forms from On Line show that Ms. Hack's wages were [REDACTED], and that Mr. Hack's wages were [REDACTED] (*see* ¶ 20 Farias Aff.). For 2015, Ms. Hack's total compensation (*i.e.*, distributions plus wages) from On Line was [REDACTED] and Mr. Hack's total compensation (*i.e.*, distributions plus wages) from On Line was [REDACTED]. Because Mr. Hack's total compensation for 2015 from On Line was substantially greater than Ms. Hack's, staff concluded that Ms. Hack does not share in the risks and profits in proportion to her ownership interest in the business enterprise. (*See* ¶ 21 Farias Aff.).

As noted above, the appeal papers stated that the Hacks are compensated based on their duties and responsibilities. On Line acknowledged that Mr. Hack, as a salesperson, earns more than Ms. Hack, as the company's administrator. (*See* Appeal at 6.)

In *Matter of CW Brown, Inc. v Canton* (216 AD2d 841, 843 [3d Dept 1995]), the court held that staff's review of tax returns, such as those considered during the review of On Line's joint application for MWBE certification, was substantial evidence to support the Division's consideration of whether minority and woman owned businesses meet the eligibility criterion at 5 NYCRR 144.2(c)(2). In 2015, the compensation received by Mr. Hack was substantially greater than that received by Ms. Hack. Because the minority, woman owner's compensation was disproportionately less than the compensation received by the non-minority, male shareholder, I conclude that the Division's determination that On Line does not comply with the eligibility criterion at 5 NYCRR 144.2(c)(2) is based on substantial evidence. I recommend that the Director conclude the same.

## II. Operation

With respect to Ms. Hack's ability to operate the business enterprise, the Division contended that On Line – Power Technologies failed to show that the minority, woman owner makes decisions pertaining to operations, as required by 5 NYCRR 144.2(b)(1). Division staff noted that On Line serves as a manufacturer's representative and wholesale supplier to the power generation industry. On Line's significant business operations are sales and related activities. In the joint application, only Mr. Hack is identified as being responsible for managing sales and marketing at On Line. The responsibilities for these business operations are also reflected on Mr. Hack's résumé. At On Line, Ms. Hack, as the minority, woman owner does not perform any business operations related to sales and marketing. (See ¶¶ 22, 23, 26, and 29 Farias Aff.; MWBE Ex. 1 at 0004-0005, 0012, Ex. 7 at 0070-0072.)

The Division has consistently held that minority and woman owners must perform significant business operations in order to comply with the eligibility criterion at 5 NYCRR 144.2(b)(1).<sup>4</sup> I conclude, therefore, that On Line - Power Technologies did not meet its burden of proof to show that the Division's determination with respect to the eligibility criterion at 5 NYCRR 144.2(b)(1) is not supported by substantial evidence. Accordingly, the Director should affirm Division staff's determination with respect to this eligibility criterion.

The Division contended further that Ms. Hack does not have adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i). As noted above, On Line serves as a manufacturer's representative and wholesale supplier to the power generation industry. According to staff, Ms. Hack, as the minority woman owner does not perform any business operations related to sales and marketing. (See ¶¶ 22, 23, and 25 Farias Aff.; MWBE Ex. 1 at 0004-0006, 00012.) Mr. Hack, however, is responsible for managing sales and marketing at On Line. Staff observed that he has a Bachelor of Electrical

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<sup>4</sup> See e.g. *Matter of Pioneer Contractors, Inc.*, NYS DED File ID No. 60574, September 27, 2017; *Matter of Upstate Rebar, LLC*, NYS DEC File ID No. 61154, September 28, 2017; *Matter of Panko Electrical and Maintenance, Inc.*, NYS DED File ID No. 9877, August 30, 2017. The Recommended Orders are available at the New York State Department of Economic Development website: <https://esd.ny.gov/doing-business-ny/mMWBE/mMWBE-certification-appeal-hearings>. For the Final Orders associated with these matters, contact the Department's Division of Minority and Woman's Business Development, 625 Broadway, Albany New York 12245. See also *Matter of Northeastern Stud Welding Corp. v Webster*, 211 AD2d 889, 890 (3d Dept 1995).

Engineering degree, and over 35 years of experience selling electrical equipment with On Line and other companies. (See ¶¶ 23, and 29 Farias Aff.; MWBE Exh. 7 at 0071-0072.)

According to the appeals papers, Ms. Hack is the administer of On Line. She manages the office, the finances, and the budget with Mr. Hack. In order to become MWBE certified, On Line argued that it is unreasonable to require Ms. Hack to assume the responsibilities of an electrical engineer. If Mr. Hack left the business, Ms. Hack, as On Line's president, would need to either hire a replacement sales person, or sell the business enterprise. (See Appeal at 5.)

The eligibility criterion at 5 NYCRR 144.2(b)(1)(i) states in full that:

[m]inority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.

The wording of this criterion requires an applicant for MWBE certification to demonstrate that the minority woman owner has either adequate managerial experience or, in the alternative, technical competence in the business enterprise. The application and supporting documents show that Ms. Hack does not have the technical competence to sell power generation equipment. Rather, her husband, Mr. Hack, has the requisite education and experience to perform this business operation. Therefore, the Division's determination that On Line does not comply with the eligibility criterion at 5 NYCRR 144.2(b)(1)(i) is based on substantial evidence, and it should be affirmed.

Finally, the Division contended that On Line – Power Technologies failed to show that the minority woman owner devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The joint application and supporting materials show that, on average, Ms. Hack works about one hour per day for On Line, but 32.5 hours per week as a teacher's assistant for the Yonkers Board of Education. (See ¶ 25 Farias Aff.; MWBE Exh. 1 at 0012, Exh. 7 at 0070.) On Line's factual statements in its appeal papers related to this eligibility criterion are consistent with the information presented with the application and supporting materials (see Appeal at 5).

On Line failed to demonstrate that Ms. Hack, as the minority woman owner devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 144.2(b)(1)(iii). I conclude that the Division's denial was based on substantial evidence included in the joint application and available at the time the denial determinations were made. The Director should affirm the determination.

## CONCLUSIONS

1. With respect to Ms. Hack's contribution to the business enterprise, as required by 5 NYCRR 144.2(a)(1), On Line – Power Technologies did not meet its burden to show that the Division's July 14, 2016 determinations to deny the joint application for MWBE certification are not based on substantial evidence.

2. With respect whether Ms. Hack shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2), On Line did not meet its burden to show that the Division's July 14, 2016 determinations to deny the joint application for MWBE certification are not based on substantial evidence.
3. With respect to the operational criterion at 5 NYCRR 144.2(b)(1), On Line – Power Technologies did not meet its burden to show that the Division's July 14, 2016 determinations to deny the joint application for MWBE certification are not based on substantial evidence.
4. With respect to the whether Ms. Hack, as the minority woman owner has adequate managerial or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1), On Line did not meet its burden to show that the Division's July 14, 2016 determinations to deny the joint application for MWBE certification are not based on substantial evidence.
5. With respect to devoting time on an ongoing basis to the daily operation of the business enterprise as required by 5 NYCRR 144.2(b)(1), On Line did not meet its burden to show that the Division's July 14, 2016 determinations to deny the joint application for MWBE certification are not based on substantial evidence.

#### **RECOMMENDATION**

The Division's determination to deny On Line – Power Technologies, Inc.'s joint application for certification as both a minority and woman owned business enterprise should be affirmed for the reasons discussed above.

Attachment: Exhibit Chart

Division of Minority and Women's Business Development

Exhibit Chart  
**Matter of On Line-Power Technologies, Inc.**  
**NYS DED File ID No. 60549**

<b>MWBE Exhibit No.</b>	<b>Description</b>
1	On Line – Power Technologies, Inc. Minority and Woman owned Business Enterprise Certification Application (Application No. 1749913) Submitted November 5, 2015 [Bates Nos. 0002-0014]
2	Division's denial letter dated July 14, 2016 (Minority-owned business enterprise). [Bates Nos. 0016-0019]  Division's denial letter dated July 14, 2016 (Woman-owned business enterprise). [Bates Nos. 0020-0023]
3	On Line – Power Technologies, Inc. Stock Ledger Stock Certificates [Bates Nos. 0025-0041]
4	Sources of Capitalization Affidavit by Linda Hack Sworn to November 4, 2015 Various attachments [Bates Nos. 0043-0046]
5	US Income Tax Return for an S Corporation – 2015 On Line – Power Technologies Corp. IRS Form 1120S and Schedules B, K, L, M-1, M-2 IRS Form 1125-A IRS Form 1120S, Schedule K-1 – Bruce Hack IRS Form 1120S, Schedule K-1 – Linda Hack IRS Form 4562 IRS Form 4797 [Bates Nos. 0048-0066]

6	2015 W-2 Forms for Bruce Hack and Linda Hack [Bates No. 0088]
7	Résumé of Linda Hack Résumé of Bruce Hack [Bates Nos. 0070-0072]
8	Letter dated August 10, 2016 Jeffrey L. Levin, Esq. Request to Appeal on behalf of On Line – Power Technologies, Inc.
9	Division’s Notice of Appeal Hearing dated January 4, 2017
10	Division’s Notice of Appeal Hearing dated March 22, 2017