

# STIKEMAN ELLIOTT

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**BY EMAIL AND COURIER**

November 18, 2009  
File No.: 100519.1011

Ms. Kirsten Walli  
Ontario Energy Board  
Yonge-Eglinton Centre  
P.O. Box 2319, Suite 2700  
2300 Yonge Street  
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Notice of Intention to Make and Order for Compliance under Section  
112.3 of the OEB Act, 1998  
Board File No: EB 2009-0308**

We write in response to the Board's letter dated November 16, 2009 requesting that the parties file proposals regarding the procedural steps to bring this matter to an oral hearing.

## **Procedural Requirements**

While the Board does not have rules of procedure specifically governing the conduct of compliance proceedings under Part VII.1 of the *Ontario Energy Board Act* (the "Act"), the Board has broad authority to control its own processes.<sup>1</sup> The Board's *Rules of Practice and Procedure* (the "Rules") also expressly apply to all proceedings of the Board and they confer authority on the Board to dispense with, amend, vary or supplement the Rules and, where procedures are not provided in the Rules, to do whatever is necessary to enable the Board to effectively and completely adjudicate on a matter before it.<sup>2</sup>

In order to meet the requirements of procedural fairness, the procedures established for this matter should ensure that THESL knows the case against it and Compliance Counsel knows the defences that will be advanced. In addition, Compliance Counsel and THESL should disclose to each other the evidence (documents and witnesses) upon which they intend to rely.

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<sup>1</sup> *Statutory Powers and Procedure Act*, R.S.O. 1990, c.22, s.25.0.1.

<sup>2</sup> *Ontario Energy Board Rules of Practice and Procedure*, Rules 1.01, 1.03, 2.01, 2.02 and 4.01.

**Proposed Procedure**

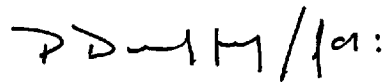
We understand that THESL does not agree with Compliance staff's interpretation of the legislative and regulatory provisions that form the basis for alleged contraventions; however, we are not aware of any material facts in dispute. We would therefore suggest that this matter proceed on the basis of an agreed statement of facts and agreed document brief and that the oral hearing be limited to legal argument.

If it is THESL's position that there are material facts in dispute and THESL is not agreeable to proceeding based on agreed facts and documents, then we propose the following:

- (a) Compliance Counsel will file witness statements and copies of all documents upon which it intends to rely. With respect to witness statements, Compliance Counsel could file formal written testimony to be adopted by witnesses at the hearing where feasible, or alternatively, summaries of the expected witness testimony that will be adduced through direct examination.
- (b) THESL file a brief response setting out its defences to the allegations contained in the Board's Notice of Intention to make an Order for Compliance dated August 4, 2009 and pre-file any evidence upon which it intends to rely - i.e., written testimony or witness statements and copies of documents.
- (c) Oral hearing with direct examination (if necessary) and the right to cross-examine.

In its earlier correspondence, THESL suggested a pre-hearing interrogatory process. It is our view that interrogatories are not customary or appropriate in a compliance proceeding of this nature. We believe that the pre-hearing exchange of documents and witness statements will sufficiently inform the parties of the allegations and defences they have to meet, as well as the evidence that will be relied upon in support of the allegations and defences.

Yours truly,



Glenn Zacher

GZ/rah

cc: George Vegh, *Counsel to THESL*  
Maureen Helt, *OEB*  
Patrick Duffy, *Stikeman Elliott*  
Dennis O'Leary, *Counsel to SSMWG*  
Andrew Taylor, *Counsel to EDA*