EB-2010-0221

ONTARIO ENERGY BOARD

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 for Compliance, Suspension and an Administrative Penalty against Summitt Energy Management Inc. dated June 17th, 2010

MEMORANDUM OF FACT AND LAW OF SUMMITT ENERGY MANAGEMENT, INC. (Motion Returnable August 23, 2010)

INDEX

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PART I - OVERVIEW

1. Summitt Energy Management Inc. ("**SEM**") brings this motion seeking to establish, among other things, a timetable scheduling pre-hearing procedures for the within proceeding in accordance with the Board's *Rules of Practice and Procedure* (the "**Rules**").

2. Such pre-hearing procedures are designed to allow the Board to clarify evidence, narrow issues and limit the scope of a hearing before it begins. Establishing a timetable will allow the parties and the Board to proceed in an orderly fashion, and ensure that each party has an opportunity to present its case to the best of its ability and to gather the necessary information to advance its position fairly.

3. For these reasons, and others as set out below, a procedural timetable encompassing the steps proposed by SEM is beneficial both to the Board and to all parties involved, and will ensure a full and fair hearing on the merits.

PART II - THE FACTS

A. OVERVIEW

4. On June 17, 2010, the Board issued a Notice of Intention to require that SEM comply with certain provisions of the *Ontario Energy Board Act*, 1998, S.O. 1998, C. 15, (Schedule B) ("**Act**") and pay administrative penalties for alleged contraventions of the Act, the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct (the "**Codes of Conduct**").

> **Reference:** Notice of Intention, Affidavit of Daniel Lester sworn August 4, 2010 ("Lester Affidavit"), Exhibit A.

5. Following SEM's request for a hearing, the Board issued a Notice of Hearing on July 9, 2010, and scheduled an oral hearing in this matter for August 23, 2010. The Board further indicated that it may make such further procedural orders as necessary from time to time.

> **Reference:** Notice of Hearing: Lester Affidavit, Exhibit C.

B. PRE-HEARING PROCEDURES PROPOSED BY SEM

6. On July 21, 2010, counsel for SEM wrote to Compliance Staff proposing a draft timetable for the proceeding and setting out in principal the procedural steps that, in its view, were necessary to ensure a full and fair hearing on the merits.

> **Reference:** Correspondence from Stephen Selznick to Maureen Helt, July 21, 2010: Lester Affidavit, Exhibit D.

7. Among other things, SEM contemplated that it would be necessary and appropriate to convene a technical conference to resolve procedural and evidentiary matters, including establishing deadlines for the disclosure of the evidence Compliance Staff intends to rely upon at the hearing. SEM's proposal contemplated time to schedule pre-hearing examinations of Compliance Staff witnesses, to provide

for the exchange of interrogatories and replies, to hold an issues conference, ADR and a pre-hearing conference as necessary, and to allow for the scheduling of any motions arising out of the foregoing.

Reference: Proposed Timetable, July 21, 2010: Lester Affidavit, Exhibit E.

8. SEM has also proposed including a deadline by which Compliance Staff is to tender any expert evidence it may call.

Reference: Proposed Timetable, July 21, 2010: Lester Affidavit, Exhibit E.

9. On July 22, 2010, counsel retained on behalf of Compliance Staff informed SEM counsel that Compliance Staff would neither consent to the proposed timetable, nor engage in a discussion in respect of scheduling these necessary procedural steps.

Reference: Correspondence from Phil Tunley to Stephen Selznick, July 22, 2010: Lester Affidavit, Exhibit F.

10. On July 23, 2010, counsel for SEM replied, expressing a hope that the parties could cooperate in dealing with procedural matters, which would allow them to focus on the substantive allegations. SEM also expressed concerns with respect to procedural fairness and the requirement for full disclosure and an opportunity for SEM to prepare its response.

Reference: Correspondence from Stephen Selznick to Phil Tunley, July 23, 2010: Lester Affidavit, Exhibit G.

11. On July 27, 2010, Compliance Staff wrote to SEM, acknowledging that the parties are in disagreement in respect of disclosure issues, the scope of the Notice of Intention and the evidence that may be admissible with respect to it.

Reference: Correspondence from Phil Tunley to Stephen Selznick, July 27, 2010: Lester Affidavit, Exhibit H.

12. SEM brought this motion on August 4, 2010, after it was unable to reach an agreement for establishing a timetable with Compliance Staff on a consent basis.

Reference: Notice of Motion, August 4, 2010.

13. Notwithstanding Compliance Staff's statements on July 27 that the disclosure it provided was "fulsome", on August 10, 2010, SEM received further disclosure by email, including a signed witness statement of Chris Marijan, the lead OEB investigator.

Reference: Correspondence between Maureen Helt and Stephen Selznick, August 10: Supplementary Affidavit of Daniel Lester, sworn August August 17, 2010 ("Supplementary Lester Affidavit"), Exhibit F.

14. The next day, on August 11, 2010, Compliance Staff provided SEM with hard copies of the documents provided on August 10. Curiously, the hard copies included new materials not included in the electronic disclosure received on August 10.

Reference: Correspondence between Compliance Staff and SEM, August 11, 2010: Supplementary Lester Affidavit, Exhibit G.

15. This additional disclosure provided on August 10 and 11 includes evidence which in SEM's view is not relevant to the issues as alleged in the Notice of Intention, and which has nothing to do with the 28 specific allegations set out in the Notice.

Reference: Correspondence between Maureen Helt and Stephen Selznick, August 10: Supplementary Lester Affidavit, Exhibit F.

Correspondence between Compliance Staff and Summitt Energy, August 11, 2010: Supplementary Lester Affidavit, Exhibit G.

16. On August 13, 2010, the Board issued Procedural Order No. 3, setting August 23 as the date for the hearing of SEM's motion, as well as the University of

Western Ontario Community Legal Services' ("CLS") request for intervenor status and SEM's request for certain customer data.

Reference: Procedural Order No. 3, Supplementary Lester Affidavit, Exhibit I.

C. INTERVENOR APPLICATION

17. In a letter dated July 20, 2010, CLS submitted an Application for Intervenor Status in the within proceedings. On July 30, 2010, the Board served SEM with the CLS application.

Reference: CLS Intervenor Application, July 20, 2010: Supplementary Lester Affidavit, Exhibit A.

18. On August 6, 2010, SEM filed a reply opposing CLS's application to join the proceedings as an intervenor.

Reference: SEM Reply to Intervenor Application, August 6, 2010: Supplementary Lester Affidavit, Exhibit B.

19. On August 10, 2010, Compliance Staff also opposed the CLS application.

Reference: Compliance Counsel Reply to Intervenor Application, August 10, 2010:Supplementary Lester Affidavit, Exhibit C.

20. On August 12, 2010, CLS responded to state that it's proposed intervention is limited "to making submissions on the regulatory sanctions that should be enforced if the allegations are found in fact."

Reference: CLS Response Letter to Board, August 12, 2010: Supplementary Lester Affidavit, Exhibit D.

D. AGGREGATED CUSTOMER DATA REQUESTED BY SEM

21. On August 10, 2010, SEM requested, on an aggregated basis, that the Board provide certain customer data for all Ontario electricity retailers and gas marketers, as filed pursuant to the Board's reporting and record keeping requirements ("RRR").

Reference: Request for Customer Data, August 10, 2010: Supplementary Lester Affidavit, Exhibit E.

22. Compliance Staff has not opposed this disclosure request.

Reference: Compliance Counsel letter, August 13, 2010.

PART III - THE ISSUES

23. The following issues are before the Board on this motion:

(a) Should the Board order the following pre-hearing procedures:

(i) production of a copy of all documents Compliance Staff intends to rely on as evidence at the hearing;

(ii) a signed witness statement or a summary of the expected testimony for every witness upon whose oral evidence Compliance Staff intends to rely, and the names and current contact information for each witness;

(iii) scheduling of pre-hearing examinations of the individual customers identified in the June 17 Notice of Intention and the names and current contact information for each of these customers;

(iv) a list of expert witnesses that Compliance Staff intends to call, their curriculum vitas and a summary of their anticipated oral evidence;

(v) a technical conference, the exchange of written interrogatories, issues conference, facilitated mediation or ADR, in addition to a pre-hearing conference; and

(vi) a deadline for each of the foregoing pre-hearing procedures.

(b) Should CLS be granted Intervenor Status?

(c) Should the Board provide SEM with the aggregated customer data for all Ontario electricity retailers and gas marketers it requested on August 11, 2010?

(d) Is this motion the proper venue for Compliance Staff to request that the Board place conditions on SEM until the hearing?

PART IV - LAW AND ANALYSIS

A. PRE-HEARING PROCEDURES

(i) Disclosure

24. SEM seeks to establish a deadline for Compliance Staff to serve and file the documents upon which it intends to rely at the hearing. There is nothing unusual or onerous in this request, and in fact the Rules, and principles of procedural fairness provide for it.

25. Rule 14.01 provides that the Board may direct when a party is to file and serve any document on which it intends to rely on or refer to in a proceeding. Similarly, if a party fails to comply with a Board direction in this regard, that party shall not put such a document into evidence or use it in the cross-examination of a witness.

> **Reference:** Ontario Energy Board Rules of Practice and Procedure ("**Rules**") 14.01, 14.02

26. Similarly, where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

> **Reference:** Rule 14.03

27. In this case, which is disciplinary in nature, the good character and propriety of SEM sales agents' conduct is at issue. By implication, the good character and conduct of SEM is also at issue.

28. Disciplinary proceedings are near the judicial end of the spectrum of administrative decision-making and therefore call for a high degree of procedural fairness.

> **Reference:** *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 at para. 25.
>
> *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 at para. 31.

29. One of the requirements of procedural fairness is adequate disclosure. It is an essential element of a fair hearing. An affected party is entitled to know the case against it in advance of the hearing, and requires that the affected party be provided with the right of full answer and defence.

> **Reference:** *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.) at paras. 35-37.
>
> *Ontario (Human Rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (C.A.) at paras. 39-44.

30. It is appropriate and necessary in this proceeding for Compliance Staff to provide full disclosure to SEM of the evidence and documents upon which it intends to rely, well in advance of the hearing, so that SEM has the opportunity to know the case against it and prepare its answer accordingly.

31. It is further appropriate and necessary to establish a deadline by which such disclosure must be provided, so that SEM can prepare its case with confidence that it knows the case to be met and can prepare its own case in response, including the retention of any appropriate expert witnesses and an opportunity for those witnesses to consider the Compliance Staff evidence and respond accordingly.

(ii) Examinations of Character Witnesses

32. As part of the right to full answer and defence, an affected party has the right to investigate the case against it, including interviewing witnesses whose evidence the adverse party intends to rely upon. This is particularly true where issues of credibility and good character are raised.

33. Compliance Staff's evidence substantially rests on uncorroborated statements of 31 Customers in respect of 28 alleged instances of non-compliance.

34. The nature of this evidence is such that the credibility of those Customers is essential both to Compliance staff's onus of proving the allegations, and to SEM's ability to rebut the allegations.

35. As part of its right to full answer and defence, SEM is entitled to an opportunity to interview each of the 31 witnesses in advance of the hearing. Any timetable flowing from a procedural order ought to allow time for SEM to conduct these interviews.

36. Such examinations will provide SEM with an opportunity to know the case it has to meet and to prepare accordingly in advance of the hearing. They will narrow the scope of cross-examination at the hearing, will focus the issues to be addressed at the hearing, and may allow SEM to admit certain facts or the proof thereof. These considerations will all work to shorten the time necessary to conduct the hearing.

37. Similarly, failing to provide SEM an opportunity to examine the Customers in advance of the hearing may result in delays to the proceeding. If SEM is not given an opportunity to address the witnesses until the hearing then it is likely those witnesses will proffer evidence which SEM will have to rebut. The hearing may need to be adjourned or otherwise delayed to provide SEM an opportunity to gather rebuttal evidence and witnesses in response to testimony given at the hearing.

38. Pre-hearing examinations will not only provide SEM with the ability to know the case it has to meet, but will also streamline the hearing process. As such, any timetable ought to include time for SEM to conduct same.

39. Moreover, interrogatories would not be an appropriate format to examine character witnesses on credibility issues. Firstly, these witnesses are not parties per se. As such, any response would be hearsay via interrogatories directed at the Board. Responses of this nature may not accurately reflect the substance of the witnesses statements if asked a question directly.

40. Furthermore, given the nature of the witnesses expected testimony, the Board ought to require Compliance Staff to advise which of the 31 complainants it intends to call at the hearing and require that any such witnesses make themselves available for a pre-hearing examination or interview by SEM.

(iii) Right to Witness Statements and Contact Information

41. Separate and apart from the right to interview Compliance Staff's character witnesses, SEM is entitled to a signed witness statement or summary of the anticipated oral evidence of each witness, for every witness upon whose oral evidence Compliance Staff intends to rely. This accords with procedural fairness and is necessary for SEM to know the case it has to meet.

> **Reference:** *Markandey v. Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 at para. 43 (Ont. Gen. Div.).

42. Similarly, SEM is entitled to the name and last known contact information for each witness upon whom Compliance Staff intends to rely so that it may have an opportunity to interview these witnesses in advance of the hearing.

43. Compliance Staff's disclosure obligations ought to include a deadline for Compliance Staff to provide both witness statements and name and contact

information to SEM, and to allow SEM a reasonable amount of time to investigate and prepare its response.

(iv) Technical Conference, Interrogatories, ADR, Pre-Hearing Conference

44. Part IV of the Rules provides for various pre-hearing procedures including the scheduling of a technical conference, the exchange of interrogatories and replies, an issues conference, ADR and a pre-hearing conference. These procedures are intended to facilitate resolution of procedural issues between the parties, such that delays are avoided and that substantive issues are resolved at the hearing in accordance with the requirements of procedural fairness.

45. These Rules apply to all proceedings of the Board, regardless of whether it is a rate setting hearing or disciplinary in nature. Where procedures are not provided for in the Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

Reference: Rules 1.01, 2.02

46. The procedures available in Part IV of the Rules allow the Board to clarify evidence, narrow issues and limit the scope of a hearing before it begins.

Reference: Written Submissions of Compliance Counsel, para. 5.

47. SEM's proposed timetable is intended to mirror Part IV of the Rules in an effort to ensure that this proceeding advances in an orderly fashion. Establishing a clear procedural framework ensures that each party has an opportunity to present its case to the best of its ability and gather the information it requires to fairly advance its position.

(a) Technical Conference

48. The Rules allow for the scheduling of a technical conference for the purposes of reviewing and clarifying an application, an intervention, a reply, the evidence of a party, or matters connected with interrogatories.

Reference: Rule 27.01

49. All of these are live issues in this proceeding and addressing each of them is vital to clarifying the scope of the Notice of Intention and allegations put forward by Compliance Staff. In particular SEM seeks to clarify that the within proceeding concerns the 28 specific allegations of non-compliance set out in the Notice of Intention. There are no allegations of an ongoing non-compliant course of conduct by SEM in the Notice of Intention, and none ought to be raised.

50. Additionally, there are significant issues with respect to: confidentiality; evidentiary matters, including the need to establish a timeline for disclosure; the provision of the names and addresses of witnesses Compliance Staff intends to rely upon; and the extent to which Compliance Staff may rely on Customers' evidence at the hearing.

51. Furthermore, on August 10, 2010 and 11, 2010 Compliance Staff provided additional disclosure, some of which is beyond the scope of the Notice of Intention. A technical conference would assist in addressing this evidence specifically and result in a Board determination as to its admissibility.

52. It will be necessary to establish procedures by which SEM can examine OEB staff members involved in the investigation of the Customers' complaints and the process and procedures undertaken in formulating the Notice of Intention.

53. There is a further purely technical issue in respect of evidence SEM intends to provide, namely evidence in various audio formats rather than transcript evidence.

Transcribing audio recordings takes time and incurs expense. It also does not accurately reflect the tone of the call and the credibility of the witness. A technical conference will allow the Board to consider whether it would like to receive transcript evidence in addition to the audio recordings.

54. A technical conference is also contemplated for resolving issues relating to interrogatories, which SEM deems necessary in this proceeding as set out below.

55. These are all matters contemplated by and properly resolved at a technical conference, and any procedural timetable ordered by the Board ought to account for the scheduling of same.

(b) Exchange of Interrogatories

56. An interrogatory is defined as "a request in writing for information or particulars made to a party in a proceeding." As part of the discovery and disclosure process, the Board's Rules allow for the exchange of written interrogatories and replies to those interrogatories.

Reference: Rules 3, 28 and 29

57. The exchange of interrogatories is intended to promote any or all of the following objectives: clarifying evidence filed by a party; simplifying issues; permitting a full and satisfactory understanding of the matters to be considered; or expedite proceedings.

Reference: Rule 28.01

58. It appears that Compliance Staff does not oppose written requests for documents and information, since it has offered to consider requests by SEM for specific information and has not objected to SEM's request for aggregated customer data collected via RRRs.

Reference: Correspondence from Stephen Selznick to Phil Tunley, July 23, 2010: Lester Affidavit, Exhibit G.

59. SEM simply seeks to formalize such requests, establish a deadline for their completion, and to provide for a clear and mutually agreed upon (or Board mandated) dispute resolution process in the event the parties cannot agree on the exchange of information.

60. Providing a formal process for interrogatory exchange ensures that such requests are made in an orderly fashion, within the knowledge of the Board and in accordance with the Board's directions. This allows for the proper adjudication and resolution of any disputes in respect of requests in writing for information, should they arise.

61. This is an appropriate case for the exchange of written interrogatories. Once it receives disclosure from Compliance Staff, SEM is entitled to an opportunity to clarify this evidence in an effort to simplify issues and gain a more fulsome and satisfactory understanding of the matters to be considered.

62. Specific issues in this case that are appropriate for interrogatories include, but are not limited to: the source and nature of instructions for Ms. Marijan's investigation of the complaints; requests for internal memos and documents relating to the formulation of the investigation and related documents; the extent to which subjective analysis was introduced in the preparation of complaint reports; calculations explaining the scale of the Administrative Monetary Penalties proposed in the Notice of Intention; the scope and extent of the suspension sought; general complaint statistics against electricity and gas retailers compiled by the Board; information relating to pricing trends and return to system customers; aggregated customer data filed pursuant to the Board's reporting and record keeping requirements.

63. Ultimately, any order permitting interrogatories ought to provide time for: (i) service and filing of interrogatories; (ii) reply; and (iii) an opportunity for motions seeking direction from the Board where a party is not satisfied with an interrogatory response provided.

Reference: Rules 28.02, 29.01, 29.02 and 29.03

(c) Issues Conference

64. The Rules provide for an issues conference for the purposes of identifying issues and formulating a proposed issues list to be filed with the Board. Such a conference and narrowing of issues is intended to assist the Board in the conduct of the proceeding, where the documents filed do not sufficiently set out the matters in issue at the hearing. An issues conference may also allow the parties to participate more effectively in the hearing.

Reference: Rule 30.01, 30.02

65. Given the evidence provided in the August 10, 2010 and 11, 2010 disclosure, SEM has concerns that Compliance Staff is seeking to raise issues beyond the scope of the Notice of Intention. It may ultimately be necessary for the Board to resolve these concerns at an issues conference. In SEM's view, having the Board identify issues that it will consider in the proceeding will ensure procedural fairness.

66. Accordingly, an issues conference is necessary and appropriate to ensure effective participation in the hearing and clarity in respect of the issues raised in Compliance Staff's allegations. Any timetable ought to account for the scheduling of same.

(d) ADR Conference

67. The Board may direct that participation in alternative dispute resolution be mandatory.

Reference: Rule 31.01

68. However, SEM's proposed timetable does not propose a mandatory settlement conference. Rather, a settlement conference ought to be provided for in the event one or both of the parties are of the opinion that such a conference may be necessary and helpful in the resolution of this dispute. The best time to assess the potential benefit of a settlement conference is once all the evidence has been exchanged.

69. The purpose of an ADR conference is to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

Reference: Rule 31.05

70. An ADR conference is confidential and intended to foster full and frank discussion between the parties in an attempt to clarify and assess positions or interests and encourage each party to evaluate its own position or interests in relation to other parties by introducing objective standards.

Reference: Rules 31.09, 31.10

71. Given the nature of the issues in this proceeding, ADR may be particularly appropriate. There are 28 separate allegations on non-compliance, each of which are unique. There are separate allegations in respect of various sections of the Act and the Codes of Conduct. There are issues of administrative penalties and an expressed intention to suspend SEM's licence.

72. Given these various and sundry issues, anything that can be done to narrow the issues in advance of the hearing, and even possible resolve the dispute entirely in the form of a settlement, can only be beneficial to all parties involved and ultimately benefits the Board.

73. Any procedural order issuing from the Board ought to allow a party to request ADR and allow time for the scheduling of same.

(e) Pre-Hearing Conference

74. In addition to technical, issues and ADR conferences, the Board may direct the parties to make submissions in writing or to participate in a pre-hearing conference or conferences for the purposes of:

(a) admitting certain facts or proof of them by affidavit;

(b) permitting the use of documents by any party;

(c) recommending the procedures to be adopted;

(d) setting the date and place for the commencement of the hearing;

(e) considering the dates by which any steps in the proceeding are to be taken or begun;

(f) considering the estimated duration of the hearing; or

(g) deciding any other matter that may aid in the simplification or the just and most expeditious disposition of the proceeding.

Reference: Rule 33.01

75. Ultimately, given the complexity of this proceeding, the amount of evidence likely to be heard and the seriousness of the allegations, a pre-hearing conference

will be an important and necessary step in this proceeding for any and all of the purposes provided for in the Rules.

76. Accordingly, any timetable endorsed by the Board ought to include reference to and time for a pre-hearing conference.

(v) Conclusion on Pre-Hearing Procedures

77. In light of the wide scope of issues set out above, it is necessary and appropriate to establish a timetable to allow for the various pre-hearing procedures proposed by SEM. A timetable will assist both the parties and the Board in ensuring that this matter proceeds in an orderly fashion and in accordance with the principles of procedural fairness.

78. Accordingly, the Board ought to order the implementation of a timetable in accordance with the SEM proposed timetable, or such other timetable as the Board sees fit.

79. The procedural measures proposed by SEM are non-exhaustive and are not intended to limit or otherwise confine any further requests to the Board in respect of procedural matters by any party, nor are they intended to confine the Board's powers to make any further orders in respect of procedural matters it may deem necessary.

B. CLS SHOULD NOT BE GRANTED INTERVENOR STATUS

80. SEM repeats and relies on its argument set out in its reply submission, dated August 6, 2010.

Reference: Supplementary Lester Affidavit, Exhibit B.

81. In short, when considering an application for intervention, a tribunal or court ought to have regard for the nature of the case, the relevant issues, and any injustice to the parties. An intervenor is not entitled to widen or add to the points in issue.

> **Reference:** *Sudbury (City) v. Union Gas Ltd.*, [2001] O.J. No. 80 (Ont. C.A.) at para. 12.
> *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.) at para. 2.

82. The tribunal or court must consider whether the contribution that might be made by the would-be intervenor is sufficient to counterbalance the disruption caused by the increase in the dimensions and complexity of the proceeding.

> **Reference:** *Sudbury (City) v. Union Gas Ltd.*, [2001] O.J. No. 80 (Ont. C.A.) at para. 13.

83. Here, the relevant issues in this proceeding are defined by the Notice of Intention. They relate exclusively to the 28 specific allegations of non-compliance against 5 independent SEM sales agents. CLS has had no involvement in any of the 28 allegations and has no specific knowledge in respect of any of them.

84. SEM notes that in its August 12, 2010 submission CLS explicitly limits its own proposed involvement to "making submissions on the regulatory sanctions that should be enforced if the allegations are found in fact".

85. Respectfully, such a task is squarely within the role and responsibilities of Compliance Counsel. The Board would not be aided by CLS's assistance in this regard, and the application ought to be denied.

C. SEM REQUEST FOR AGGREGATED CONSUMER DATA

86. By letter on August 9, 2010, SEM requested that the Board provide certain customer data for all Ontario electricity retailers and gas marketers, as filed pursuant to the Board's reporting and record keeping requirements. This information was requested on an aggregated basis.

Reference: Request for Customer Data, August 10, 2010: Supplementary Lester Affidavit, Exhibit E.

87. SEM has retained an expert specializing in the gas and electricity retail sector, who deems this information necessary in the preparation of his report. It is relevant to the matters in issue, and SEM ought to be provided with it.

88. Compliance Counsel has not opposed this disclosure request.

Reference: Compliance counsel letter, August 13, 2010, Supplementary Lester Affidavit, Exhibit H.

D. SETTING CONDITIONS ON TIMETABLE NOT APPROPRIATE

89. This is a motion brought by SEM seeking, among other things, to establish a procedural timetable for the within proceeding. If Compliance Staff seeks to impose certain conditions on SEM, as it has requested in its orders sought, then it is entitled to bring a motion in respect of same on proper evidence. Their request is both inappropriate on SEM's motion, and in any event lacks a proper evidentiary foundation.

90. In paragraph 46 of its written submissions, Compliance Staff makes anecdotal reference to concerns about "ongoing, similar complaints received by the Board since its Interim Compliance order was made on June 17, 2010".

91. In paragraph 47 of its written submissions, Compliance Staff suggests that it may be appropriate to impose certain pre-hearing conditions on SEM, including requiring SEM to file with the Board information relating to future complaints.

92. With respect, there is no proper evidence of any additional complaints, and SEM asks that any mention of additional complaints be removed from the record. These purported complaints have not been adduced with affidavit evidence and SEM has no ability to test their truth. Furthermore, and in any event, these additional

purported complaints have no bearing on the within proceeding and are unrelated to the 28 specific allegations of non-compliance set out in the Notice of Intention.

93. A complaint is not evidence *per se* of wrongdoing. There is no indication that any of the complaints are actionable.

94. There is simply no basis to impose conditions in the proceeding based on the further purported complaints Compliance Counsel refers to.

PART V - ORDER SOUGHT

95. SEM hereby requests that the motion be allowed and that the Board order:

(a) The following pre-hearing procedures be established:

(i) production of a copy of all documents Compliance Staff intends to rely on as evidence;

(ii) a signed witness statement or a summary of the expected testimony for every witness upon whose oral evidence Compliance Staff intends to rely on, and the names and current contact information for each witness;

(iii) scheduling of pre-hearing examination of the individual customers identified in the June 17 Notice of Intention and the names and current contact information for each of these customers;

(iv) a list of expert witnesses that Compliance Staff intends to call, their curriculum vitas and a summary of their anticipated oral evidence;

(v) a technical conference, the exchange of written interrogatories, issues conference, facilitated mediation or ADR, in addition to a pre-hearing conference; and

(vi) a deadline for each of the foregoing pre-hearing procedures.

(b) the CLS application for invervenor status be denied;

(c) SEM be provided with the aggregated customer data for all Ontario electricity retailers and gas marketers it requested, within 5 days of the issuing of a decision on this motion; and

(d) a date for the hearing of this proceeding, in accordance with the deadlines set out above.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY,

Date: August 17, 2010

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SCHEDULE "A"
STATUTORY AND REGULATORY PROVISIONS

Ontario Energy Board Rules of Practice and Procedure

1. Application and Availability of Rules

1.01 These Rules apply to all proceedings of the Board.

[...]

2. Interpretation of Rules

2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

[...]

3. Definitions

3.01 In these Rules,

[...]

"interrogatory" means a request in writing for information or particulars made to a party in a proceeding

[...]

14. Disclosure

14.01 A party who intends to rely on or refer to any document that has not already been
filed in a proceeding shall file and serve the document in accordance with the Board's directions.

14.02 Any party who fails to comply with **Rule 14.01** shall not put the document in evidence or use it in the cross-examination of a witness, unless the Board otherwise directs.

14.03 Where the good character, propriety of conduct or competence of a party is an issue in the proceeding, the party is entitled to be furnished with reasonable information of any allegations at least 15 calendar days prior to the hearing.

[...]

23. Intervenor Status

23.07 A party may object to a person applying for intervenor status by filing and serving
written submissions within 10 calendar days of being served with a letter of intervention.

[...]

27. Technical Conferences

27.01 The Board may direct the parties to participate in technical conferences for the purposes of reviewing and clarifying an application, an intervention, a reply, the evidence of a party, or matters connected with interrogatories.

[...]

28. Interrogatories

28.01 In any proceeding, the Board may establish an interrogatory procedure to:

(a) clarify evidence filed by a party;
(b) simplify the issues;
(c) permit a full and satisfactory understanding of the matters to be considered; or
(d) expedite the proceeding.

28.02 Interrogatories shall:

(a) be directed to the party from whom the response is sought;
(b) be numbered consecutively, or as otherwise directed by the Board, in respect of each item of information requested, and should contain a specific reference to the evidence;
(c) be grouped together according to the issues to which they relate;
(d) contain specific requests for clarification of a party's evidence, documents or other information in the possession of the party and relevant to the proceeding;
(e) be filed and served as directed by the Board; and
(f) set out the date on which they are filed and served.

[...]

29. Responses to Interrogatories

29.01 Subject to Rule 29.02, where interrogatories have been directed and served on a party, that party shall:

(a) provide a full and adequate response to each interrogatory;
(b) group the responses together according to the issue to which they relate;
(c) repeat the question at the beginning of its response;
(d) respond to each interrogatory on a separate page or pages;
(e) number each response to correspond with each item of information requested or with the relevant exhibit or evidence;
(f) specify the intended witness, witnesses or witness panel who prepared the response, if applicable;
(g) file and serve the response as directed by the Board; and
(h) set out the date on which the response is filed and served.

29.02 A party who is unable or unwilling to provide a full and adequate response to an interrogatory shall file and serve a response:

(a) where the party contends that the interrogatory is not relevant, setting out specific reasons in support of that contention;
(b) where the party contends that the information necessary to provide an answer is not available or cannot be provided with reasonable effort, setting out the reasons for the unavailability of such information, as well as any alternative available information in support of the response;
(c) where the party contends that the information sought is of a confidential nature, setting out the reasons why it is considered confidential and any harm that would be caused by making it public; or
(d) otherwise explaining why such a response cannot be given.

29.03 Where a party is not satisfied with the response provided, the party may bring a motion seeking direction from the Board.

29.04 Where a party fails to respond to an interrogatory made by Board staff, the matter may be referred to the Board.

[...]

30. Identification of Issues

30.01 The Board may identify issues that it will consider in a proceeding if, in the opinion of the Board:

(a) the identification of issues would assist the Board in the conduct of the proceeding;
(b) the documents filed do not sufficiently set out the matters in issue at the hearing; or
(c) the identification of issues would assist the parties to participate more effectively in the hearing.

30.02 The Board may direct the parties to participate in issues conferences for the

purposes of identifying issues, and formulating a proposed issues list that shall be filed within such a time period as the Board may direct.

[...]

31. Alternative Dispute Resolution

31.01 The Board may establish *Practice Directions* for alternative dispute resolution ("ADR"), and may direct that participation be mandatory.

[...]

31.05 The chair of an ADR conference may enquire into the issues and shall attempt to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

[...]

31.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.

31.10 Admissions, concessions, offers to settle and related discussions in **Rule 31.09** shall not be admissible in any proceeding without the consent of the affected parties.

[...]

33.01 In addition to technical, issues and ADR conferences, the Board may, on its own motion or at the request of any party, direct the parties to make submissions in writing or to participate in pre-hearing conferences for the purposes of:

(a) admitting certain facts or proof of them by affidavit;
(b) permitting the use of documents by any party;
(c) recommending the procedures to be adopted;
(d) setting the date and place for the commencement of the hearing;
(e) considering the dates by which any steps in the proceeding are to be taken or begun;
(f) considering the estimated duration of the hearing; or
(g) deciding any other matter that may aid in the simplification or the just and most expeditious disposition of the proceeding.

SCHEDULE "B"
AUTHORITIES

1. *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817.

2. *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483 (C.A.).

3. *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105.

4. *Markandey v. Ontario (Board of Ophthalmic Dispensers)*, [1994] O.J. No. 484 (Gen. Div.).

5. *Ontario (Human Rights Commission) v. Dofasco Inc.* (2001), 57 O.R. (3d) 693 (C.A.).

6. *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (S.C.C.).

7. *Sudbury (City) v. Union Gas Ltd.*, [2001] O.J. No. 80 (Ont. C.A.).

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 for Compliance, Suspension, and an Administrative Penalty against Summitt Energy Management Inc. dated June 17th, 2010

Case Number: EB-2010-0220

ONTARIO ENERGY BOARD

Proceeding commenced at TORONTO

MEMORANDUM OF FACT AND LAW OF SUMMITT ENERGY MANAGEMENT INC. (MOTION RETURNABLE: AUGUST 23, 2010)

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