EB-2010-0221

**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

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# REPLY SUBMISSIONS OF COMPLIANCE COUNSEL

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September 22, 2010

**Stockwoods LLP Barristers**
Royal Trust Tower
77 King Street West
Suite 4130, P.O. Box 140
Toronto-Dominion Centre
Toronto, ON M5K 1H1

**M. Philip Tunley** LSUC #26402J
Email: *PhilT@stockwoods.ca*
**Andrea Gonsalves** LSUC #52532E
Email: *AndreaG@stockwoods.ca*
Tel: 416-593-7200
Fax: 416-593-9345

**ONTARIO ENERGY BOARD**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

**Maureen Helt**
Tel: 416-440-7672
Email: *Maureen.Helt@oeb.gov.on.ca*

Compliance Counsel

TO: **ONTARIO ENERGY BOARD**
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

**Attention: Kirsten Walli**
Board Secretary
Tel: 888-632-6273
Fax:416-440-7656
E Mail: *Boardsec@oeb.qov.on.ca*

AND TO: **Cassels Brock & Blackwell LLP**
2100 Scotia Plaza, 40 King Street West
Toronto, ON M5H 3C2

**Stephen I. Selznick** LSUC#: 18593C
Tel: 416-860-6883
Fax: 416-642-7147
Email: *sselznick@casselsbrock.com*

**Jason Beitchman** LSUC#: 564770
Tel: 416-860-2988
Fax: 647-259-7993
Email: *jbeitchman@casselsbrock.com*

Lawyers for Summitt Energy Management Inc.

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## TABLE OF CONTENTS

**PAGE**

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

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## PART I - INTRODUCTION

1. The Closing Submissions of Summitt Energy Management Inc. ("Summitt") would give no effect to the testimony of the 22 complainant witnesses called by Compliance counsel, respecting any of the 19 incidents of alleged non-compliance that are before the Board in this proceeding. Summit asks this Board to find that all 22 are not credible. Summitt also denies there is any broader problem of unfair practices or other sales agent misconduct in Ontario's retail energy markets, and denies that the 19 incidents are in any way illustrative of that broader problem. Alternatively, Summitt denies any responsibility for such misconduct, on the basis that the 5 Summitt sales agents involved in these incidents were all "rogues", who acted in "wilful disobedience" of Summitt's training and compliance systems and procedures. Those positions must be rejected on the evidence and the facts herein.

2. More importantly, the legal analysis offered in support of these positions would, if accepted, make it impossible for this Board to ever hold licensed energy marketers in Ontario to account for the conduct of their door-to-door sales agents.

3. In this Reply, Compliance counsel do not intend to respond to Summitt's detailed analysis of the evidence of the witnesses and their credibility. This Board heard their

evidence. It already has Compliance counsel's submissions in chief as to why the evidence of the complainants, individually and collectively, should be accepted in preference to that of the agents, and why the evidence of Summitt's witnesses is deficient. The Board is well able to make its findings of fact in that regard.

4. However, Compliance counsel do take issue fundamentally with Summitt's analysis of the law and the broader industry "context" in which those findings should be made by this Board. In summary, for the reasons that follow, Compliance counsel submit that the proper analysis and context must include the following.

(a) There is indeed a problem. The public, the legislature, other stakeholders and this Board have all recognized, and (despite Summitt's continued denial) the fact is, that the level of complaints, particularly against licensed energy marketers and retailers, and particularly involving sales agent misconduct and unfair practices, was and remains unacceptably high throughout the period in issue from 2008 to date.

(b) The Board's *Retail Compliance Plan Report*, August, 2009 ("RCP Report") was a first major step in addressing that problem, through industry-wide inspections, information-gathering, and voluntary improvements in industry compliance measures. However, the completion of that first step can in no way be interpreted, as Summitt now seeks to do, as a representation to marketers and retailers that they were compliant, or as giving rise to any "reasonable expectation" in that regard.

(c) Despite the findings in the RCP Report, recommended changes were not voluntarily adopted by the industry or by Summitt. The level of complaints remained unacceptably high. The evidence of Ms. Marijan establishes that Compliance staff within the Board took a careful and principled approach to the review of that problem before commencing this proceeding against Summitt.

(d) Finally, the evidence led at the hearing of this matter has revealed important aspects of this problem that could never have been revealed simply by on-site inspection, including the following

(i) Complainants face systemic problems in getting prompt action on their complaints, including Compliance staff's lack of follow-up power, the tendency of Summitt and its contracted agencies to disbelieve complaints where a signed contract document and clean reaffirmation call script are apparently in place, excessive delegation of follow-up by Summitt to its contracted agencies, and the lack of follow-up with individual agents, even following multiple, similar complaints.

(ii) The evidence revealed specific weaknesses in Summitt's marketing materials and re-affirmation call procedures, that are exploited or reinforced by the particular misrepresentations made by the agents in many of these cases.

(iii) There is a significant disconnect or "gap" between Summitt's documented training and compliance policies and its actual operation and enforcement of those polices in practice in the field.

5. Thus, while the record shows that Summitt has implemented changes to its systems over time since 2008, it has done so only in response to this and earlier compliance proceedings, and only to the extent that it deems necessary to forestall further steps by this Board. More importantly, the apparent "gap" between Summitt's written policies and the effective operation and enforcement of those policies means than the mere adoption of new policies and procedures, by itself, cannot suffice.

6. Compliance counsel respectfully submit that this record fully supports the request for remedies that include, but go beyond, simple financial measures such as the administrative monetary penalties ("AMPs") and restitutionary payments sought. The remedies sought include the suspension of Summitt's door-to-door sales activities pending the results of an audit and the implementation any resulting recommendations. This is not sought as a punitive measure as Summitt suggests, but rather because this Board can otherwise have no assurance whatever that even the recently-implemented improvements are in fact in place and are addressing the continuing problem of agent misconduct that is highlighted in this proceeding.

7. This Board must be assured, not just that new measures have been put in place within Summitt's compliance system, but that Summitt has also taken steps "***to ensure the effective operation***"[1] of that system, as a means to "ensure that its salespersons adhere to the standards" established by the applicable legislation, regulations, and the Board's *Code of Conduct for Gas Marketers* and the *Electricity Retailers Code of Conduct* (the "*Codes*").[2] Summitt's Closing Submissions not only fail to provide that assurance, they deny Summitt's fundamental obligation to provide such assurance, and would undermine this Board's authority to insist upon it.

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[1] *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, at p. 1331
[2] See s. 1.5 of both the *Codes*

8. The remedies proposed by Compliance counsel, and particularly the suspension pending an audit, are intended provide that assurance to the Board. They do so prospectively, to protect the public. They are within this Board's jurisdiction, and they are a measured and appropriate response to the evidence led at this hearing, and to the broader context in which that evidence is to be assessed.

## PART II - THE FACTS

9. Compliance counsel repeats and relies on the facts as set out in its Written Submissions, filed with the Board on September 13, 2010. Compliance counsel limit their reply to statements of fact in Summit's Closing Submissions to the following points, relevant to the discussion of the legal issues that follows.

10. In summary, the evidence of the five Summitt agents who testified, as well as K.B. and Ms. Girardi, has revealed that, despite its extensive documentation of policies and procedures to prevent infractions, there are significant problems with Summitt's actual operation and enforcement of those processes that make them ineffective. These problems would never have come to light had this matter not proceeded to a hearing, and the evidence about them is important to understanding how the 19 complaints at issue in this proceeding are representative of a much broader problem.

11. First, the evidence shows that Summitt systematically failed to address complaints promptly upon being notified of them. When Compliance staff referred complaints to Summitt, the usual response was that the complaint had been referred to the sales agent's manager for "review and retraining".[3] While Summitt provided that response to the Board within 21 days of receipt of the complaint, there is no evidence that Summitt informed the Board after that of any specific steps that had been taken to retrain the agent so as to prevent future similar occurrences.

12. The evidence is also clear that Summitt and its contracted agencies habitually disbelieved complaints and their investigation went no further once they confirmed that the customer had signed a Registration Form and had said "yes" to the questions asked on a

[3] See Consumer Complaint Response Forms, Tab G to the Complainant Witness Binders

reaffirmation call.[4] Summitt then did nothing further to determine objectively what happened at the door. It assumed the complaints were not legitimate so long as the customer signed a contract and reaffirmed it on a call. Ms. Girardi testified that in none of the 19 complaints did Summitt verify that an infraction occurred and take remedial action to correct it.[5]

13. Yet this Board has heard specific evidence from complainants that their signature on the Registration form was obtained by outright misrepresentation.[6] This Board has also heard from complainants that, in many cases given the nature of the misrepresentations made to them by the agents at their doors, the wording used in the reaffirmation calls was simply not specific or clear enough to clear up the misapprehension they were under, either as to who Summitt was and its relationship to the utilities,[7] or as to what the terms or implications of the particular contract they were affirming were.[8] Thus, the evidence shows that Summitt's reliance upon these two factors to disbelieve complainants, and to refuse to further investigate and respond to their complaints, is unjustified. This is a systemic issue that needs to be addressed if the complaints management process between the Board and energy retailers and marketers is to become more responsive and effective.

14. As the Consumer Complaint Response forms show, Summitt never took responsibility itself to review individual complaints with its agents and to ensure they were retrained to prevent similar problems in the future. Rather, Summitt delegated those tasks to its contracted agencies. For example, after receiving Z.P.'s complaint about G.W., Summitt had a "compliance meeting with the sales agency regarding the complaints received during that period" and that meeting "would have" included Z.P.'s complaint.[9] At best, complaints were discussed generally with the sales agency. Summitt then simply assumed the sales agency dealt with them with the agent. In fact, G.W. was not made aware of *any* complaints against

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[4] Transcript of Evidence, Vol. 6, Sept. 8, 2010, Girardi direct examination, p. 73, lines 16-26
[5] Transcript of Evidence, Vol. 6, Sept. 8, 2010, Girardi direct examination, p. 71, lines 20-25
[6] For example, J.W. (Transcript of Evidence, Vol. 1, Aug. 30, 2010, p. 156, lines 8—23); Z.A. (Transcript of Evidence, Vol. 2, Aug. 31, 2010, p. 124, lines 15-22); T.V. (Transcript of Evidence, Vol. 2, Aug. 31, 2010, p. 192, lines 11-17); K.S. (Transcript of Evidence, Vol. 2, Aug. 31, 2010, p. 240, lines 9-21); R.S. (Transcript of Evidence, Vol. 2, Aug. 31, 2010, p. 273, lines 9-23); J.M.(1) (Transcript of Evidence, Vol. 3, Sept. 1, 2010, p. 56, lines 4-11); C.L. (Transcript of Evidence, Vol. 3, Sept. 1, 2010, p. 80, line 19 – p. 81, line 3); P.S. (Transcript of Evidence, Vol. 3, Sept. 1, 2010, p. 106, lines 5-19); A.Z. (Transcript of Evidence, Vol. 3, Sept. 1, 2010, p. 136, lines 1-5); W.G. (Transcript of Evidence, Vol. 4, Sept. 2, 2010, p. 69, lines 7-15)
[7] For example, A.S. (Transcript of Evidence, Vol. 2, Aug. 31, 2010, p. 92, lines 4-15); V.T. (Transcript of Evidence, Vol. 2, Aug. 31, 2010, p. 150, line 9 – p. 151, line 21); A.G. (Transcript of Evidence, Vol. 4, Sept. 2, 2010, p. 49, lines 3-28); P.K. (Transcript of Evidence, Vol. 4, Sept. 2, 2010, p. 97, lines 8-27)
[8] For example, J.W. (Transcript of Evidence, Vol. 1, Aug. 30, 2010, p. 159, lines 13-22); A.H. (Transcript of Evidence, Vol. 1, Aug. 30, 2010, p. 225, line 25 – p. 226, line 4); C.L. (Transcript of Evidence, Vol. 3, Sept. 1, 2010, p. 84, lines 10-24); Z.P. (Transcript of Evidence, Vol. 4, Sept. 2, 2010, p. 10, line 22 – p. 12, line 13)
[9] Transcript of Evidence, Vol. 6, Sept. 8, 2010, Girardi direct examination, p. 77, lines 14-18

him until June 2010.[10] Similarly, whatever Summitt ***thought*** would happen when it referred complaints to the sales agencies for "review and retraining", the other agents testified that, except in a few instances, they were not in fact individually notified of each complaint in any prompt or meaningful way, even when there were numerous, similar complaints.[11]

15. The evidence also reveals specific weaknesses in Summitt's marketing materials and re-affirmation call procedures, that are exploited or reinforced by the particular misrepresentations made by the agents in many of these cases. In one particularly troubling example, M.G. testified that he used the graph on the back of the Summitt contract terms and conditions brochure to show potential customers the difference between the utility price of gas and what they would pay under a fixed price contract with Summitt. Based on that marketing material, he mistakenly believed that the utility price of gas was over 40 cents per cubic metre in 2008, and that that price could be compared to the commodity price offered under a Summitt plan.[12] In fact, the utility price of natural gas as a commodity did not rise about 40 cents in 2008. Ms. Girardi testified that the graphs on the back of the brochure in fact reflected AECO index pricing, and not the utility price.[13] Summitt's marketing materials thus materially contributed to M.G.'s misrepresentations.

16. Similarly, the transcripts of reaffirmation calls demonstrate that they reinforced rather than corrected any misrepresentations made by sales agents at the door. Summitt representatives on the calls typically ask the customer to confirm their address, and whether the agent "came to [the customer's] house with [Summitt's] brochure and a copy of the signed agreement" or left those documents, and that the customer needs to "confirm his or her agreement by responding with the word 'yes'".[14] There was no statement to the customer on the reaffirmation call that Summitt is a retailer and not the utility; that the customer is entering a five year contract to which early termination fees will apply; that the "brochure" contains the terms and conditions of the contract; or that there is no guarantee that the customer will save money by entering into the contract. Indeed, even though Z.P. and D.M. in their reaffirmation calls made statements that showed that were fundamentally misinformed about

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[10] Transcript of Evidence, Vol. 4, Sept. 2, 2010, G.W. cross-examination, p. 168, lines 22-28

[11] See Written Submissions of Compliance Counsel, paras. 22-23, 54, 81-82, and 97-99, and evidence cited in the footnotes thereto

[12] Transcript of Evidence, Vol. 5, Sept. 3, 2010, M.G. direct examination, p. 90, lines 10-27; Questions from the Panel, p. 123, line 18 – p. 124, line 16

[13] Transcript of Evidence, Vol. 6, Sept. 8, 2010, Girardi direct examination, p. 86, lines 12-26

[14] See Transcripts of Reaffirmation Calls at Tab I of the Complainant Witness Binders and in particular those of W.G. (Exhibit K4.3), P.K. (Exhibit K4.4), AS (Exhibit K2.3), J.W. (Exhibit K1.6)

Summitt's product – Z.P. spoke about the $12.99 green energy program and conveyed that he did not know about the price protection program, while D.M. mentioned that the agent talked about a "rebate program",[15] the call proceeded despite their obvious confusion left, and Summitt still considered the contracts to have been reaffirmed.

17. Finally, as noted in Compliance counsel's Written Submissions and below, the evidence discloses significant "gaps" between Summitt's documented policies and its actual operation and enforcement of those polices in practice in the field, specifically in the areas of "clawback" of agent compensation, agent training, and complaint management, including the sending of "compliance notices", complaint reporting to agencies and agent, and complaint follow-up.

18. Such "gaps" in enforcement and operation of an apparently-documented training and compliance program cannot be identified simply by a field inspection. They are only revealed by a probing inquiry, such as this hearing has allowed, or as would be conducted by an appropriately mandated field auditor.

## PART III - ISSUES AND THE LAW

### A. Interpretation of the Enforceable Provisions: "Absolute" vs. "Strict Liability"

19. Compliance counsel maintain their position that the enforceable provisions in issue impose "absolute" rather than "strict liability", and respond to Summitt's arguments on this issue as follows.

20. Summitt's Closing Submissions at paragraphs 464-465 fail to address the Divisional Court's judgments in *Gordon Capital* and *Rejeanne's Bar & Grill*, which are the controlling authorities.[16] Contrary to those submissions, the Divisional Court in those cases has expressly drawn "the clear distinction between Criminal/quasi-criminal offences and proceedings to regulate the conduct of those licensed to carry on business".[17] Summitt's suggestion that this Board rely on the dissenting judgment in the latter case is unsound. The clear effect of these

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[15] Exhibit K4.1, Z.P. Complainant Witness Binder, Tab I, Transcript of Reaffirmation Call; Exhibit K2.2, D.M. Complainant Witness Binder, Tab I, Transcript of Reaffirmation Call

[16] Cited in the Written Submissions of Compliance Counsel

[17] See *Rejeanne's Bar & Grill* at para. 14, quoting from *Shooters 222 Restaurant Ltd. v. Ontario (Alcohol and Gaming Commission)*, [2004] O.J. No. 5595 (Div. Court)

decisions is that the *Sault Ste Marie* analysis, and the presumption favouring "strict liability" for public welfare offences, simply do not apply in Tribunal proceedings to regulate the conduct of licensed businesses.

21. Further, that holding eliminates the need to look in great detail at the legislative wording: as in *Rejeanne's Bar & Grill*, the word "permitted", which was held in *Sault Ste Marie* to be indicative of a "strict liability" offence, did not have that effect in the context of Tribunal enforcement of licensing requirements. Nevertheless, Compliance counsel submit there is no ambiguity in the words "shall be deemed" in ss. 88.4(3)(c), and no analogy between that language and the provision "no operator shall" at issue in *R. v. Nickel City Transport.*[18] There is simply no room for a "due diligence defence" in light of this language deeming the retailer or marketer to commit the infraction, if the salesperson does so.

22. Finally, Summitt's Closing Submissions fail to address the issue of effective enforcement. As this Board recognized when drafting the *Codes*, the allowance of a "due diligence" defence could have implications for the Board's ability to ensure compliance. This proceeding has surely confirmed the wisdom of that analysis. Summitt's strict liability, "due diligence" approach has vastly expanded the scope and duration of this hearing, which sought to prove just 28 (now 19) of the many hundreds of complaints outstanding against it in the relevant time period. At the same time, Summitt insists upon limiting evidence (of which this Board ought to be able to take administrative notice without proof) which seeks to demonstrate the representative nature of those proven complaints, and the nature and extent of ongoing harm to the public if effective compliance measures are not imposed.

23. With respect, Summitt's obligation under the *Codes* is to "ensure compliance" with legislated standards, and when that does not occur, it is this Board's duty to take timely and effective remedial action, without the delays and costs that have been incurred in this case.

## B. The Onus and Standard of Proof, and Credibility

24. Compliance Counsel have no Reply submissions on this issue.

[18] Cited in the Closing Submissions of Summitt

## C. The Contraventions and their Proof

25. Compliance Counsel have no Reply submissions on this issue, except on the question raised by the Board's Procedural Order #4 and addressed in paragraphs 567-571 of Summitt's Closing Submissions.

26. Compliance counsel agree that the Board cannot find deficiencies or instances of non-compliance with the legislation that are not properly set out and particularized in the Notice of Intention. However, that does not mean that deficiencies in Summitt's marketing and contract materials are irrelevant to the instances that are so set out and particularized. For example, to the extent that deficient contract and marketing materials actually contributed to, or reinforced the misrepresentations made by particular agents to particular customers in the 19 cases, they may be an integral part of the contravention alleged and proven. More broadly, to the extent that specific deficiencies in these materials simply "permitted", or failed to prevent the contraventions alleged and proven, Compliance counsel submit they contribute to the lack of due diligence, and are relevant to the Board's assessment of the appropriate remedial actions it may require.

## D. The Issue of Due Diligence

27. As noted, Compliance Counsel maintain that "due diligence" arises only in regulatory offences prosecuted before the courts, and is not relevant in compliance proceedings before administrative tribunals such as the present, except in relation to the appropriate remedy or sentence imposed.

28. However, even if this Board were to entertain this issue as a defence, Summitt's Closing Submissions fail to establish the required elements. Specifically:

(i) Summitt has failed to demonstrate that its written policies, procedures and systems from time to time were actually enforced and in effective operation; and

(ii) Summitt's reliance upon the "rogue employee" cases cannot be sustained on the facts of this case.

### i. The "Effective Operation" of Summitt's Compliance Policies

29. Summitt's Written Submissions address only one half of the test articulated by the Supreme Court of Canada in *R. v. Sault Ste. Marie* with respect to the issue of due diligence in regulatory offences. As that Court emphasized, when a due diligence defence is raised, the question is not simply whether the accused established "a proper ***system*** to prevent commission of the offence", but also whether it took "reasonable steps ***to ensure the effective operation of the system***."[19]

30. Summitt's own selective review of its "due diligence" evidence speaks to the systems it had in place at various times, but not to their "effective operation". This is because, as noted in the Written Submissions of Compliance Counsel and in the Facts reviewed above, the evidence called at the hearing shows repeatedly and conclusively that Summitt did not enforce many of its own policies, including, for example, the following which are not proposed to be changed by Summitt's touted "Fourteen Point Compliance Program".

> (a) Summitt did not enforce, or require its contracted agencies to enforce, the claw-back of agent compensation except in one of the 19 cases. (Written Submissions, paragraph 107(a))
>
> (b) Summitt did not and does not make the content of agent training programs mandatory, leaving discretion in that regard to its contracted agencies. (Written Submissions, paragraph 107(b))
>
> (c) Summitt did not enforce, and eventually phased out, its complaints response policy of warning agents on a first complaint, fining on a second, and considering termination on a third complaint to the Board. It now proposes a more complex, softer "Points System" policy in its place. (Written Submissions, paragraph 107(e))

31. Many other deficiencies, both in Summitt's systems and in their effective operation at the time of the infractions in issue, are detailed in the Written Submissions, and are effectively acknowledged in Summitt's Closing Submissions.

32. The case law since *Sault Ste. Marie* consistently maintains this distinction between mere prescription, and actual operation, of the "system" relied upon. The case law also maintains the requirement of "***effective*** operation". This is especially so with respect to the

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[19] *R. v. Sault Ste. Marie*, above, at p. 1331

"rogue employee" cases including, for example, the *Town of Napanee* decision quoted in paragraph 515 Summitt's Closing Submissions, which expressly finds that the employer in that case "had in place an effective, ongoing system of 'worker supervision'." The other cases cited by Summitt in this category implicitly, if not explicitly, involve a similar finding that the training and other systems relied upon were in operation and normally effective.

33. No such finding is possible on the evidence here.

### ii. The "Rogue Employee" Cases Do Not Apply

34. Further, the cases in this "rogue employee" category invariably involve a single incident, usually involving a single employee. None of them involve proven misconduct by 5 different agents, in 19 separate incidents, which are the facts before the Board.

35. Moreover, none of these cases involve a legislative provision such as ss. 88.4(3)(c) of the *Act*, which provides that a retailer "***shall be deemed to be engaging in an unfair practice*** if a salesperson acting on [its] behalf" does so. This language is clearly intended to exclude the "rogue employee" defence, and it must be given that effect.

## E. The Appropriate Remedy

### i. Admissibility of the Evidence of Other Complaints on Sentence

36. It is respectfully submitted that Summitt's Closing Submissions on the relevance and admissibility of the evidence of other complaints in the binder delivered by Compliance counsel at the close of the hearing fail to address the limited purpose for which the evidence was tendered, which is the issue of appropriate remedy or sentence. The prior rulings of the Board during the hearing relate to its use on the liability issues, and do not address the issue that is now raised.

37. Even in true criminal proceedings, it has always been the law that the rules of evidence at the sentencing stage are more relaxed and, specifically, that hearsay evidence is admissible, unless the court considers it in the interests of justice to compel live testimony and permit cross examination.[20] The evidence in these complaints is properly viewed as hearsay, in that

[20] See now ss. 723(5) of the *Criminal Code*

the forms record the out-of-court statements or allegations of complainants about Summitt sales agents, and the response made by Summitt.

38. The evidence of these complaints is reliable, as it is in all instances taken from the Board's own complaints databanks and website. It is not unfair to Summit to admit this evidence, as the Consumer Complaint Response forms included in the binder were provided to Summitt for response at the relevant times, and they reflect Summitt's response to each of the complaints, including any denials. In the case of the website charts, the data is prepared and presented for comparative purposes using a methodology that has been approved by the industry, including Summitt, and which is neither imposed nor even endorsed by the Board. Summitt certainly knew of all this evidence more than 15 days prior to the hearing, and specifically knew of the reliance placed by Compliance staff on this type of evidence for purposes of this proceeding from the Briefing Note seeking authority to issue the Notice of Intention, which was included in the disclosure.

39. As for the probative value, and any attendant prejudice to Summitt, they depend upon the use to be made of this evidence. Compliance counsel submit there can be no prejudice at all to Summitt if the evidence is used by this Board solely to fashion an appropriate remedy for contraventions that it finds to be established by other evidence properly led and admitted at the hearing. Moreover the evidence is clearly relevant to that issue.

(a) The evidence about other complaints involving the same 5 agents is clearly relevant to the issue of "due diligence", raised by Summitt, given the admissions of both K.B. and Ms. Girardi that the general level of complaints against an agent is a good indicator of whether the agent is doing his or her job properly.[21]

(b) The evidence about other complaints involving Summitt is also clearly relevant to Summitt's "due diligence", given the admissions of Ms. Girardi that the general level of complaints is also a good indicator of whether the sales agencies, and indeed Summitt, itself, are doing their jobs properly.[22]

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[21] The evidence shows, at Tab A that agent A.B. had a total of 7 other complaints in the relevant period, in addition to the 4 for which evidence was called; at Tab B that agent M.G. had 20 other complaints in addition to the 5 proven; at Tab C that agent G.S.. had 6 other complaints in addition to the 3 proven; at Tab D that agent A.T.. had 4 other complaints in addition to the 4 proven; and at Tab E that agent G.W. had 8 other complaints in addition to the 3 proven;

[22] The charts from the Board's website, at Tabs G1 to G3 show that the level of complaints against Summitt relating to agent conduct (in yellow) were rising from January 1 to December 31, 2008, and remained high through March 31, 2009, both in absolute terms, and per 1000 new enrollments or renewals, and both in relation to electricity retailing and natural gas

(c) The evidence about ongoing complaints, even after implementation of Summitt's June 30, 2010 responses to the Interim Compliance Order made by the Board on June 17 cannot be considered all-inclusive, given the evidence that many complaints do not surface until 2 to 3 months after the agent encounter. However, that evidence still reinforces the concern that Summitt's systems on paper are not in effective operation, and that further protective measures may yet be required to safeguard the public.[23]

40. Finally, all of this evidence tends to reinforce the weaknesses identified by Compliance Counsel in Summitt's claim to due diligence, as detailed in the Written Submissions and paragraphs 4(d) and 10-18 of these Reply Submissions, specifically in relation to its agent compensation, training, quality management and quality assurance and complaint management procedures. For example, the evidence of other similar complaints involving the same and other agents further weakens Summitt's reliance upon a "rogue employee" defence, and the related submission that the actions of the sales agents in these cases were "unforeseeable". It supports the conclusion that Summitt's own gradual improvements to its training and compliance systems over time have not been effective to ensure compliance by Summitt's salespersons with the standards set out in the *Act*, in Regulation 200/02 and in the *Codes*. It specifically highlights both the gravity of the individual infractions, in the broader policy context, and the need for specific, forward-looking measures to protect the public, that go beyond Summitt's continuing promises to improve its system and, in effect, be its own police and judge with respect to the degree of enforcement and effective operation within that system.

41. As such, it is submitted that this evidence is clearly relevant to the remedies sought.

### ii. Reasonable Expectation of Compliance

42. At paragraph 529 of Summitt's written submission Summitt argues that it is the "Board's practice of marking complaint files 'closed' with no further follow up to Summitt following Summitt Energy's response, which it believed was fulsome." The Panel should note that Summitt itself, once it received these complaints, made no attempts to verify that the recommended action, as set out in the Consumer Complaint Response, was in fact completed

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marketing. They show that Summitt had the highest level of agent conduct complaints relative to other energy retailers and marketers at the end of that period

[23] Te evidence at Tab F relates to 8 further complaints included in the disclosure to August 8, 2010.

and was done so in an effective manner. On cross-examination the five agents whose conduct is the subject of the Notice of Intention, in the majority of cases, could not recall the complaint at all, or could not recall having a review with their manager or any retraining. In those cases where there was some recollection, their evidence was that they had a casual conversation with their manager about their presentation. Compliance counsel submits that this is not sufficient in any compliance system.

43. It is Summitt's positive duty to comply, and to "ensure" compliance by its agents, with the legislated standards, and to make full disclosure to the Board so that the Board may properly classify and assess their response. Particularly in a voluntary compliance system, such as that created by Consumer Interaction and Dispute Resolution Application ("CIDRA"), it does not lie in the mouth of the retailer or marketer to say that, after they supplied information to the Board within the 21 days as required, that it was unfair that it took so long for the Board to become aware of their own failure to follow up and verify the information they provided, or for the Board to take further action. It is only when they provide complete disclosure to the Board, that any onus shifts to the Board to properly classify the response.

### iii. The Board's Authority under Section 112.3

44. As noted in Compliance counsel's argument in chief, the broad language of s. 112.3(1) of the *Act* provides the Board with substantial flexibility to fashion an appropriate order to address the circumstances of a particular case. It is our submission that s. 112.3(1) shows a clear intention on the part of the legislature to give this Board the necessary flexibility to fashion remedies to best address the entire spectrum of problems it may confront.

### iv. Board's Jurisdiction to Order Restitution and Remedy the Contraventions

45. Subsection 112.3(1) of the *Act* is also clear that the Board has authority to "***remedy*** a contravention that has occurred", and not simply impose a sanction. This broad language confers a large measure of discretion on the Board to define the proper remedial solution. As the Supreme Court of Canada stated in *Royal Oak Mines Inc. v. Canada*,[24] an administrative tribunal should strive to fulfill the objective of the applicable regulatory regime when exercising such a discretion.

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[24] Cited in the Written Submissions of Compliance Counsel

46. The remedial order sought by compliance counsel is consistent with the principles set out in *Royal Oak*. In that case the Supreme Court of Canada stated that a remedial order would only be considered unreasonable where: (1) the remedy is punitive in nature; (2) the remedy granted infringes the *Canadian Charter of Rights and Freedoms*; (3) there is no rational connection between the breach, its consequences, and the remedy; and (4) the remedy contradicts the objects and purposes of the legislation. Compliance counsel submit that the remedial order in this case is not punitive in nature, does not infringe the *Charter*, is rationally connected to the breaches they ask this Board to find, and is consistent with the purpose of the legislation and regulations with respect to consumer protection.

### v. Calculation of Administrative Monetary Penalty

47. It is clear from the nature and seriousness of the misrepresentations that have been proven, and from the extent of the the departures from what the legislation and regulations require, that all of the alleged contraventions appropriately fall in the "major – major" category. This conclusion is based on the vulnerability of consumers to activities of door to door agents and the serious nature of the misrepresentations made. Contrary to what is alleged in Summitt's Closing Submissions, Compliance counsel have taken into account the four factors listed in Ontario Regulation 331/03 in proposing where, in the appropriate range, each of the penalties should be assessed, and have proposed the appropriate determination in Schedule C to its Closing Submissions. It is no answer for Summitt to assert that there is no benefit to the sales agents or to Summit, as the contracts were or may be cancelled. The misconduct still occurred with a view to financial gain, and the submission is self-serving, because if the consumers did not complain and ask to be let out of their contract, then there would have been a benefit.

### vi. Suspension Order

48. Summitt argues, in paragraph 589(f) that a suspension order is not warranted because the Notice of Intention "speaks simply to 28 specific allegations of contravention of specific enforceable provisions by an identified sales agent." In this statement, Summitt clearly fails to take responsibility and be accountable for its actions, or lack thereof. Sections 88.4(2)(c) and 88.4(3)(c) of the *Act* clearly provide that Summitt "shall be deemed to be engaging in an unfair practice" if its sales agents, acting on behalf of Summitt, does or fails to do anything

that is an unfair practice. That fact, in combination with the evidence adduced at this hearing with respect to Summitt's lack of effective operation or enforcement of the controls and processes available to it to ensure compliance, make it clear why a suspension is indeed warranted. While Summitt may have processes and controls in place on paper, this can never be sufficient to ensure compliance or to protect the public from undue risk.

49. Summitt also suggests, at paragraph 588(c) that Compliance counsel seeks a suspension for an improper purpose. There is no evidence to support that submission. The suspension order is being sought with respect to the contraventions and Summitt's lack of controls and processes to ensure compliance. When the public is at risk a suspension order is appropriate. In fact, by limiting the suspension to the door-to-door activities of Summitt, Compliance counsel is appropriately requesting only what is necessary to ensure compliance. The request for an audit is to ensure that an independent third party can assess Summitt's processes and controls and make any recommendations to ensure their sufficiency and effective operation. This is completely consistent with the Board's objective of consumer protection.

50. Compliance counsel similarly takes strong exception to the assertion made in paragraph 589(h) that "these 19 complaints were carefully screened and selected according to a pre-determined criteria established by Compliance staff." Again, there is no evidence to support such an assertion. Nor is there any evidence that "Staff was able to identify only 28 complaints which it identified as serious." That suggestion was simply never put to Ms. Marijan or otherwise during the hearing. Rather, it is clear from the evidence given by Ms. Marijan that her review of sales agent conduct of all retailers made it clear to her that "Summitt Energy had a larger number of complaints than the other retailers."[25] In addition she noted that when she reviewed the complaints related to Summitt sales agents "there were many agents that had multiple complaints against them. So it wasn't just a single complaint for a particular agent."[26]

51. Summitt well knows, from the disclosure materials and from the evidence in the Complaint Material: Remedy binder showing that, with respect to the five agents there have been 75 complaints involving 63 instances for the five agents, why these agents and

[25] Transcript of Evidence, Vol. 1, Aug. 30, 2010, Marijan direct examination, p. 77, lines 24-26
[26] Transcript of Evidence, Vol. 1, Aug. 30, 2010, Marijan direct examination, p. 78, lines 17-24

complaints were made the subject of the Notice of Intention. Compliance counsel submits again, that this evidence is relevant to and needs to be considered by the Board, both in response to these veiled allegations of bias on the part of Compliance counsel and staff, and to refute the misleading statistical analysis offered by Summitt to suggest that the only complaints the Board received with respect to Summitt are the 19 proven instances.

52. Summitt has acknowledged that it was only after the Board issued a Notice of Intention to Make an Order for alleged breaches with respect to reaffirmation calls that Summitt entered into an assurance of voluntary compliance in January, 2009 with respect to those deficiencies.[27] Similarly, it was only after this Notice of Intention was issued on June 17th that Summitt put in place new measures to address compliance issues with respect to door-to-door sales agent activities. Now, in their Closing Submissions, having failed to convince Compliance staff of their efficacy, Summitt proposes to this Board implementing an additional 14 point compliance system upgrade to address other deficiencies in their processes (i.e. Business cards, annual recertification reaffirmation call script, disclosure form, etc.) which became apparent during the hearing[28]. Clearly Summitt itself acknowledges that there are deficiencies in its processes, and is again asking the Board to take its word that they will be implemented and made effective without independent third party audit or review. Compliance counsel rejects this position, and submit that the only way to ensure that the public is not at risk is to require an independent audit, and to suspend door-to-door activities pending implementation of its recommendations.

53. In making that recommendation, Compliance counsel have carefully considered the implications of the proposed suspension. However, in this case, where the licensee's course of conduct compels a finding of significant prospective risk to the public, it is submitted that the Board has no alternative but to suspend the door to door activities until such time as an audit has been completed.

## PART IV - ORDER REQUESTED

54. Compliance counsel requests that, if the Board agrees that a temporary Suspension Order, coupled with an audit, as proposed, is an appropriate and necessary remedy, the Board

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[27] Transcript of Evidence, Volume 6, page 92 at line. 21; page 130; at line 6
[28] Closing Submission of Summitt at page 197, para 593

should consider making that Order immediately, even if its Reasons for the Order are to follow at a later time.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: September 22, 2010

Stockwoods, LLP
M. Philip Tunley LSUC#: 26402J
Tel: 416-593-3495

M. HELT. per

Ontario Energy Board
Maureen Helt
Tel: 416-440-7672