CASSELS BROCK
LAWYERS

September 23, 2010

DELIVERED BY EMAIL

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Our File No.: 37347-053

Attention: Ms. Kristen Walli, Board Secretary
E Mail: boardsec@oeb.gov.on.ca

Dear Ms. Walli:

Re: IN THE MATTER OF a Notice of Intention to Make an Order for Compliance, Suspension and an Administrative Penalty Against Summitt Energy Management, dated June 17th, 2010

Case Number: EB-2010-0221

We are in receipt of Compliance Counsel's reply submissions, dated September 23, 2010. Summitt Energy Management Inc. ("**Summitt**") continues to be deeply concerned by Compliance Counsel's repeated and improper attempts to introduce, in its closing submissions, certain factual assertions not addressed in the Notice of Intention and not introduced in the evidentiary portion of this proceeding.

Compliance Counsel's reply submission is replete with references to both matters raised in the additional binder of material it handed up to the Panel post-hearing and to generalized statements regarding "a broader problem of unfair practices or other sales agent misconduct in Ontario's retail energy markets." Such statements bear no relevance to the Notice of Intention, and there is no evidence in the record to support such statements. Given the extent of Compliance Counsel's reliance on unproven factual assertions in its reply, that reply submission can only be considered improper and the Board ought to disregard it entirely.

Summitt respectfully submits that this issue has now become a significant problem, such that Compliance Counsel has run the risk of tainting the entire evidentiary record in this proceeding. Furthermore, this is not a new issue, as explained below.

On August 4, 2010, Summitt brought a notice of motion requesting, among other things, an issues conference to deal with matters including the scope of the hearing. On August 23, 2010, the Board heard this motion and denied Summitt's request. At that time the Board placed the onus on Compliance Counsel to demonstrate why the introduction of evidence beyond the scope of the Notice of Intention ought to be permitted, and both parties made written submissions on that point.

The issue was again raised at the commencement of the hearing, and Summitt argued that if the Board was considering admitting extraneous evidence, a *voir dire* was necessary to determine the issue prior to the commencement of the hearing. The Board refused Summitt's request, and ruled that it would determine the issue of extraneous evidence when and as it came up during the examinations of witnesses.

During the hearing, Compliance Counsel then sought to introduce extraneous evidence of unproven allegations of other complaints during the cross-examination of G.W., a Summitt sales agent. The Board ruled that such attempt was improper, and that evidence of other complaints ought not be admitted.

However, *after* the evidentiary portion of the hearing had concluded, Compliance Counsel again sought to introduce new and extraneous evidence of matters beyond the scope of the hearing. It handed up to the Panel a binder of new material, the contents of which had not been disclosed to Summitt, had not been introduced through or identified by a witness, and which contains entirely unproven and untested allegations of a factual nature. It purported to do so "for the purposes of remedy only".

Despite Summitt's strenuous objections, the Board agreed to receive and consider the admissibility of Compliance Counsel's new binder of material. Summitt, in an attempt to limit the potentially prejudicial effect of this material, proposed to Board Counsel that the additional material and any argument related to it ought to be segregated in a sealed envelope unless and until the Board ruled on its admissibility. This request was refused.

The result is that Compliance Counsel has interspersed factual assertions in its closing submissions based on these unsupported materials. It is clear that Compliance Counsel is seeking to prejudice the Board by reference to unsupported allegations against Summitt, and to use purported evidence of "sales agent misconduct in Ontario's retail energy markets" to hold Summitt accountable for alleged conduct of other industry retailers.

Surely, the purpose of this hearing is limited to a determination of the 19 allegations in the Notice of Intention for which Compliance Counsel has proffered evidence. Summitt cannot be held or arbitrarily made responsible, in this proceeding, for "other" complaints,

industry standards established within a legislative framework, or its business practices in general. In Summitt's view, any consideration of matters beyond the scope of the Notice of Intention would be an improper exercise of discretion, would constitute an error of law, and is outside of the Board's jurisdiction.

Accordingly, Summitt renews its request that the Board not consider this purported new "evidence". We ask that it disregard Compliance Counsel's reply in its entirety, or at the very least disregard the portions of Compliance Counsel's submissions beyond the scope of the Notice of Intention and based on factual assertions not in evidence.

To determine liability or fashion a remedy based on Compliance Counsel's assertions on matters outside the scope of the Notice of Intention would be a mistake.

We ask that you kindly bring this letter to the attention of Mr. Sommerville and Ms. Hare, in reference to the above-noted matter.

Yours very truly,

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