EB-2011-0316

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 and an Administrative Penalty against Summitt Energy Management Inc., Licence Number ER-2010-0368 and GM-2010-0369

WRITTEN SUBMISSIONS OF COMPLIANCE COUNSEL ON THE MOTION OF SUMMITT ENERGY MANAGEMENT, INC.

December 19, 2011

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PART I—OVERVIEW

1. These submissions address the motion by Summitt Energy Management Inc. ("Summitt") dated December 15, 2011 for, *inter alia,* further disclosure from Compliance counsel and a written interrogatory process. The balance of relief requested by Summitt on this motion is generally acceptable to Compliance counsel, and will not be the focus of these submissions.

2. This motion arises in the context of a compliance proceeding initiated by the Ontario Energy Board (the "Board") under s. 112.2 of the *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, Schedule B (the "*Act*"). The two sets of allegations against Summitt concern improperly drafted consumer contracts and the provision of improper price information to a consumer, in violation of the *Energy Consumer Protection Act, 2010,* S.O. 2010, c. 8 (the "*ECPA*") and the associated regulations and codes.

3. The allegations are based on a compliance audit of Summitt conducted by Ernst & Young ("E&Y"), who were appointed as inspectors under s. 106 of the Act.

4. Summitt's arguments for additional disclosure are premised on an entitlement to 'enhanced' disclosure, which this Board and the courts have already decided does not apply in the context of regulatory proceedings, such as those now before the Board. Compliance counsel has already made disclosure fully in accordance with previous decisions of this Board and the case law governing procedural fairness.

5. Moreover, in an effort to reduce further wasted time and expense, Compliance counsel has agreed to provide some of the information requested by Summitt in schedule "A" of its Notice of Motion.

6. Compliance counsel submits that the remaining disclosure requests of Summitt are inappropriate and should be denied. The additional information requested is irrelevant and unnecessary to satisfy the requirements of procedural fairness.

7. Compliance counsel submits that the interrogatory process requested by Summitt should also be denied. Rule 28.01 of the Board's *Rules of Practice and Procedure* contemplates interrogatories in order to clarify evidence, simplify or permit a fuller understanding of the issues and expedite the proceedings. None of these purposes would be served in this case. The allegations involve a small number of straightforward factual and legal questions that will be resolved on the basis of non-technical and uncomplicated evidence. Ordering written interrogatories will only result in additional delay, at the expense of the public interest.

8. Compliance counsel requests that the Board set a hearing date at the earliest available that is mutually convenient for the parties.

PART II—THE FACTS

9. Compliance counsel generally accepts the facts as set out in Summitt's Memorandum of Fact and Law, dated December 15, 2011. Accordingly, these submissions will focus on points of clarification and additional facts relevant to this motion.

A. E&Y hired as inspectors to perform compliance audit

10. Following the coming into force of the *ECPA* and the regulations promulgated thereunder on January 1, 2011, the Board appointed E&Y as inspectors for the purpose of conducting a series of compliance audits of electricity retailers and gas marketers operating in the Ontario. The compliance audit focused on the activities of suppliers related to the retailing of electricity or the marketing of gas to low-volume consumers.

Reference: *Briefing Note*, Affidavit of Jonathan Ho sworn December 15, 2011 ("Ho Affidavit"), Exhibit "Q"

11. The inspectors were appointed pursuant to s. 106 of the *Act* to exercise and perform the powers and duties of an inspector under Part VII of the *Act*. The objective of the compliance audit was to assess the extent to which electricity retailers' and gas marketers' practices and procedures complied with the regulatory requirements set out in the *ECPA* and its associated regulations and codes.

Reference: *Briefing Note*, Ho Affidavit, Exhibit "Q"

12. The inspectors compiled a Regulatory Compliance Inspection Report regarding Summitt's practices, dated June 8, 2011 (the "E&Y Report"). The E&Y Report identified several areas of potential non-compliance.

Reference: *E&Y Report,* Ho Affidavit, Exhibit "L"

13. The E&Y Report included four attachments that set out the supporting details behind the statements made in the E&Y Report in memorandum form (the "Detailed Summary Memos"). The Detailed Summary Memos are, in turn, based on Regulatory Compliance Audit Checklists (the "Audit Checklists"), which run approximately 140 pages and detail the precise information obtained by the Inspectors during their audit of Summitt. The Audit Checklists are, in essence, the 'raw data' of the compliance audit.

Reference: *E&Y Report,* Ho Affidavit, Exhibit "L";

Detailed Summary Memos, Ho Affidavit, Exhibits "M", "N", "O, "P";

Audit Checklists, Affidavit of Ephry Mudryk sworn December 19, 2011 ("Mudryk Affidavit"), Exhibits "A" and "B"

B. Board issues Notice of Intention to Make an Order for Compliance

14. Board staff reviewed the E&Y Report and the supporting documentation to determine if the issues identified in the E&Y Report were supported by the evidence. Following this review, Board staff issued a Briefing Note dated August 8, 2011 (the "Briefing Note"), which focused on two potential areas of non-compliance and summarized the options available to the Board.

Reference: *Briefing Note*, Ho Affidavit, Exhibit "Q"

15. On August 25, 2011, the Board issued a Notice of Intention to Make an Order for Compliance and an Administrative Penalty (the "Notice of Intention"). The Notice of Intention sets out full particulars of two different allegations. The first set of allegations concerns Summitt's alleged multiple failures to ensure that the person signing the contract on behalf of Summitt does so at the bottom of the contract, before the acknowledgement that has to be signed and dated by the consumer or the account holder's agent. The Notice of Intention specifies that

such conduct is contrary to s. 12 of the *ECPA*, as well as ss. 7(1)17 and 18 of O. Reg. 389/10 (the "Regulations"). Appendix "A" to the Notice of Intention sets out the specific contract numbers of the 25 gas contracts and 25 electricity contracts that form the basis for this set of allegations.

Reference: *Notice of Intention,* Ho Affidavit, Exhibit "A"

16. The second allegation in the Notice of Intention concerns Summit's alleged failure to provide the consumer with price information in the electricity price comparison template that matched the price of the program selected by the consumer under the contract. The Notice of Intention specifies that such conduct is contrary to s. 12 of the *ECPA,* s. 8.3 of the Regulations and ss. 4.6(a) and 4.7 of the *Electricity Retailer Code of Conduct* (the "*Code*"). Appendix "B" to the Notice of Intention sets out the contract number of the contract that forms the basis for this set of allegations.

Reference: *Notice of Intention,* Ho Affidavit, Exhibit "A"

17. The Notice of Intention states Summitt faces the potential of an administrative penalty of $15,000.00 and an order requiring Summitt to comply with certain legislative and regulatory provisions. The Notice of Intention does not raise the risk of Summitt losing its licence.

Reference: *Notice of Intention,* Ho Affidavit, Exhibit "A"

C. Board provides Summitt with extensive disclosure

18. On or about August 25, 2011, Board staff provided Summitt with extensive disclosure in relation to the allegations raised in the Notice of Intention. This disclosure included:

(a) ***The Briefing Note***, setting out the background, relevant statutory and regulatory provisions, staff analysis and recommendation leading to the commencement of this proceeding.

(b) ***The E&Y Report***, setting out the scope of the compliance audit, the approach of the auditors, the methodology employed and a summary of findings and observations;

(c) ***The Detailed Summary Memos***, setting out, in memorandum form, details of the findings and observations in respect of each aspect of the compliance audit;

(d) ***The Audit Checklists***, setting out all details of the audit, including all of the actions taken and documents reviewed by Inspectors in respect of each alleged instance of non-compliance;

(e) Copies of the relevant parts of the contracts in issue for each allegation; and

(f) Audio files of verification calls with customers.

Reference: Ho Affidavit at para. 13;

Mudryk Affidavit at para. 4

D. Dispute over interrogatory process and timeline

19. On September 7, 2011, Summitt requested a hearing in this proceeding.

Reference: Ho Affidavit, Exhibit "B"

20. On October 31, 2011, counsel for Summitt wrote to the Board and proposed a timetable, which included an interrogatory process extending into mid-January 2012, with a hearing on the merits in or around February 2012.

Reference: Ho Affidavit, Exhibit "C"

21. On November 2, 2011, Compliance counsel responded to Summitt and suggested an alternate timetable with a view to securing a hearing date by early January 2012. That timetable provided the opportunity for Summitt to submit, and Compliance counsel to consider, interrogatories, which Summitt has not taken up. It contemplated that a motion for any disputes regarding interrogatories be set for the end of November 2011. At no point did Compliance counsel accept or suggest that an interrogatory was necessary or appropriate, however. Rather, Compliance counsel expressed a willingness to consider interrogatories in the context of an expedited timeline in order to eliminate needless time and delay.

Reference: Ho Affidavit, Exhibit "D"

22. On November 3, 2011, Summitt advised that it could not agree to the timeline proposed by Compliance counsel.

Reference: Ho Affidavit, Exhibit "F"

23. On November 4, 2011, Compliance counsel wrote to Summitt, explaining its position on the interrogatories as follows:

> I should also clarify that my previous correspondence should not be taken as an indication that Board staff accepts Summitt Energy Management Inc. ("Summitt") is in any way entitled to written interrogatories or further disclosure. Indeed, Board staff is of the view that the disclosure and information already provided to Summitt fully satisfies the demands of procedural fairness in the context of this regulatory/compliance proceeding. However, in the interests of moving this matter forward and avoiding unnecessary delay, we tentatively agreed that we would review your interrogatory and disclosure requests according to the proposed timeline proposed in our November 2, 2011 letter, which would ensure that such requests do not unreasonably delay the hearing on the merits. Board staff is strongly of the view that the public interest requires a resolution of this matter as soon as practicable. In short, Board staff's tentative agreement to any interrogatory process was motivated by a concern to ensure an early hearing date is not jeopardized; it should in no way be understood as an acknowledgment that procedural fairness requires Summitt to be provided with further information.

Reference: Ho Affidavit, Exhibit "G"

24. The letter by Compliance counsel goes on to request a draft list of interrogatory questions/requests, based on the fact that certain issues raised in Summitt's October 31, 2011 letter fell outside the proper scope and function of interrogatories. Although Compliance counsel still expressed a willingness to consider proper interrogatories – again, in the interests of moving the matter forward, and not because any such process was necessary or appropriate – it advised Summitt that it could not consent, in advance, to an interrogatory process without an understanding of the questions involved. Compliance counsel expressed its concern that the scope of interrogatories would extend beyond the proper purpose of interrogatories, as set out in rule 28.01 of the Board's *Rules of Practice and Procedure.*

Reference: Ho Affidavit, Exhibit "G"

25. Accordingly, the statement at paragraph 54 of Summitt's submissions that "both Summitt and Compliance counsel contemplate written interrogatories being submitted by Summitt as part of this pre-hearing process" is inaccurate. Compliance counsel agreed to explore such a process under certain conditions, none of which were satisfied by Summitt. Further, as the correspondence demonstrates, Compliance counsel has maintained that an interrogatory process was not appropriate in this proceeding, and has explained that it only considered such an arrangement in the interests of having a hearing on the merits proceed expeditiously.

26. After Summitt refused to provide draft interrogatories, it brought this motion for an order compelling interrogatories.

Reference: Notice of Motion of Summitt Energy Management Inc, returnable December 22, 2011, in file EB-2011-0316

E. Summitt's late request for additional disclosure

27. By way of email on November 17, 2011, in response to an email exchange regarding scheduling, Summitt advised Compliance counsel and members of the Board administration that "there may an issue concerning the sufficiency of OEB disclosure depending upon Compliance counsel's response to a request to be made shortly for additional disclosure".

Reference: Mudryk Affidavit, Exhibit "C"

28. No such request was made by Summitt until the evening of December 13, 2011, when it wrote to Compliance counsel and raised, for the first time, the details of its request for extensive additional disclosure.

Reference: Ho Affidavit, Exhibit "K"

29. Compliance counsel replied to Summitt on December 15, 2011. In that letter, Compliance counsel advised that much of the information Summitt had requested was already provided in the disclosure or otherwise publicly available. Moreover, although Compliance counsel did not agree that any additional disclosure was necessary or relevant, it had carefully considered Summitt's requests and had agreed to provide a number of the documents requested in an attempt to avoid further needless delay in this matter. Specifically, Compliance counsel agreed to provide Summitt with:

(a) A copy of the retainer letter or agreement by which Compliance Counsel retained E&Y to conduct the audit in question;

(b) A copy of the E&Y no conflict acknowledgment/confirmation provided to the Board[1];

(c) The "full" Audit Checklist (which is the same as the Audit Checklist provided, except it also contains instances of compliance)[2]; and

(d) The name of the Board contact who reviewed and verified the findings in the E&Y Report (Mr. Lou Mustillo, who will be the Board's first witness).

Reference: Mudryk Affidavit, Exhibit "D"

30. Compliance counsel also advised that, based on Board staff's review to date, certain information requested by Summitt did not exist, or was not in the possession of Board staff, including:

(a) Additional notes, policies, documents and instructions provided by or on behalf of the Board to E&Y regarding the audit engagement or the interpretation of the legislation, regulation and codes;

(b) The audit working papers, investigator notes and memoranda;

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[1] This acknowledgment is actually a term in the retainer letter.

[2] Since December 15, 2011, Compliance counsel has determined that there is no "full" Audit Checklist, and the Audit Checklist provided includes instance of compliance as well as non-compliance. The only additional documents in Compliance counsel's possession are the primary documents referred to in the Audit Checklist (e.g. copies of Summitt's underlying contracts), which Compliance counsel can provide to Summitt upon request. Note that Summitt already has copies of the underlying contracts at issue in this proceeding.

(c) Memoranda, notes and other documents prepared in connection with meetings and conferences between Board representatives and Ernst & Young; and

(d) Particulars and supporting reasons for the calculation of the administrative monetary penalty (beyond what is set out in the Briefing Note and the applicable regulations).

Reference: Mudryk Affidavit, Exhibit "D"

31. Nevertheless, Board staff will continue to review their files for any other relevant documents, and expect that this review will be complete before the New Year. Should any relevant documents be identified in the course of this review, Compliance counsel will provide this information to Summitt.

32. In short, after the disclosure process is complete, Compliance counsel will have provided Summitt with:

(a) all reports, summaries, drafts, notes, memoranda and other documents in Board staff's possession from E&Y in respect of the Summitt compliance audit; and

(b) all correspondence and other documents exchanged between E&Y and Board staff concerning the Summitt compliance audit.

33. As a result, Compliance counsel expects that only the following from Summitt's initial list of disclosure requests (found at schedule "A" of its Notice of Motion) remains unresolved:

(a) The audit working papers, investigator notes and memoranda;

(b) The names, addresses and telephone numbers of the individuals at the Board who instructed E&Y, to whom E&Y reported and with whom E&Y discussed the auditor's process and findings, and from whom the auditors sought guidance and instruction (beyond Mr. Mustillo);

(c) The names, addresses and telephone numbers of the individuals at E&Y who conducted the audit of Summitt Energy, who reviewed and commented upon the audit findings, who prepared and submitted the audit report to the Board and who discussed the audit and its findings with the Board (beyond Stephen Hack, the E&Y partner who signed the E&Y Report);

(d) Particulars of the audits of other energy retailers and marketers, including the identity of such retailers and marketers, the scope of the audit, copies of the audit reports and other materials put before decision-makers in those instances;

(e) Particulars and supporting reasons for the calculation of the administrative monetary and other penalties sought in each of the other Notices of Intention issued at or about the same time in respect of the concurrent audits of other energy retailers and marketers, as well as for the calculation of the administrative penalty sought in this proceeding.[3]

34. Compliance counsel is mindful of its obligation of continuing disclosure of all potentially relevant information prior to the hearing, and will provide Summitt with such information should it come to Compliance counsel's attention.

PART III—THE ISSUES

35. The issues raised on this motion are whether the Board should:

(a) order additional disclosure, as requested by Summitt in Schedule "A" to Summitt's Notice of Motion (and, in particular, the outstanding requests summarized at paragraph 32 of these submissions); and

(b) order a process of written interrogatories.

36. The various other issues raised in Summitt's Notice of Motion had not been previously discussed with Compliance counsel (except for the confidentiality protocol, which was raised in Summitt's letter dated December 13, 2011). After reviewing Summitt's requests in this regard, Compliance counsel:

(a) agrees to establish a confidentiality protocol in this proceeding with respect to customer information;

(b) does not oppose a confidentiality protocol in this proceeding with respect to the information related to Summitt's employees and/or agents;

(c) will provide a copy of every document it intends to rely upon as evidence;

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[3] Compliance counsel had initially advised Summitt that there are no further particulars or supporting reasons in respect of the administrative penalty set in the Summitt proceeding, but a subsequent review has indicated that this was technically inaccurate.

(d) will provide a summary of anticipated evidence for each witness it intends to call; and

(e) will advise of any expert witnesses it intends to call, and provide a summary of their anticipated evidence and expert report (if any).

37. The parties also request that the Board set a hearing date in this matter.

PART IV—LAW AND ANALYSIS

A. Disclosure

38. Compliance counsel submits that no order for further disclosure is warranted since the information already provided to Summitt meets the requisite standard of procedural fairness for regulatory proceedings such as this case. The additional information requested by Summitt (beyond what Compliance counsel has already provided, agreed to provide, or has advised does not exist) is irrelevant to these proceedings, disproportionate and/or is not in the possession of Compliance counsel.

i. No enhanced disclosure standard in compliance proceedings before the Board

39. The appropriate standard for disclosure before regulatory tribunals, including the Board, is well-established. As this Board put it recently, the question is whether the disclosure provided will allow Summitt "to know the case it is expected to meet with sufficient detail to enable it to mount an effective defence to the allegations contained in the notice of intention to make an order."

Reference: EB-2010-0221, *Re Summitt Energy Management, Inc.* Decision on Motion (Transcript), August 23, 2010, at pp. 87-88

40. Summitt's argument for 'enhanced' disclosure is predicated on the view that this compliance proceeding is "disciplinary in nature" and that it puts Summitt's "good character and propriety" in issue. Summitt cites cases from the professional discipline and human rights contexts in support of its position that enhanced disclosure is required.

41. Summitt's arguments in this regard have already been clearly and repeatedly rejected, both by this Board and the courts. This Board recently ruled on the scope of Compliance counsel's disclosure obligations in the context of compliance proceedings in *Re Toronto Hydro Electric Systems Ltd.* In that decision, the Board concluded that compliance proceedings are **not** akin to disciplinary or human rights proceedings – particularly where Compliance counsel is not seeking to suspend or revoke a licence, as is the case here. The Board also held that imposing the same disclosure requirements as in proceedings where individual rights are at stake actually risks undermining the Board's ability to function effectively:

> ***To require a Board to disclose all possibly relevant information gathered in the course of its regulatory activities could easily impede its work from an administrative standpoint.*** As Macaulay and Sprague note "there must be a reason the functions have been mandated to an administrative agency and not to a court." ***There is also a significant difference between disciplinary proceedings where an individual may lose his livelihood and a situation where a corporation faces a sanction by way of fine or administrative penalty. An economic regulator, such as this Board, has little ability to affect human rights in the manner of a criminal or disciplinary proceeding. No individual is at risk in this case.*** Counsel for Toronto suggested that there may be an analogy in that Toronto could lose its licence and ability to operate. Compliance Counsel responded that he is not seeking such a remedy. [Emphasis added].
>
> **Reference:** *Re Toronto Hydro Electric Systems Ltd.*, EB-2009-0308, Decision and Order on Motion for Disclosure, October 14, 2010, at para. 19

42. The Board's approach in *Re Toronto Hydro Electric Systems* is a reflection of the administrative law jurisprudence more generally, including the Federal Court of Appeal's

decision in *Ciba-Geigy v. Canada,* which is a leading case on disclosure obligations in the context of regulatory tribunals. In that decision, the Court upheld the trial judge's finding that, in the context of a hearing by the Patented Medicine Prices Review Board to determine whether a certain drug was being sold at an excessive price, full disclosure of all potentially relevant material was unnecessary and could compromise the tribunal's public interest mandate:

> Disclosure cannot be decided in the abstract. The Board is supposed to proceed efficiently and to protect the interest of the public. This requires, *inter alia*, that a hearing shall not be unduly prolonged. ***Certainly, the subject of an excess price hearing is entitled to know the case against it, but it should not be permitted to obtain all the evidence which has come into the possession of the Board in carrying out its regulatory functions in the public interest on the sole ground that it may be relevant to the matter at hand...***
>
> When the statutory scheme of this Board is looked at, the Board is a regulatory board or tribunal... ***To require the Board to disclose all possibly relevant information gathered while fulfilling its regulatory obligations would unduly impede its work from an administrative viewpoint.*** Fairness is always a matter of balancing diverse interests. I find that fairness does not require the disclosure of the fruits of the investigation in this matter. [Emphasis added].

The Federal Court of Appeal went on to explicitly reject the notion that the regulatory proceeding in question could be analogized to the human rights context.

> **Reference:** *Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)* [1994] 3 F.C.J. No. 884 at paras. 5-8 (Fed. C.A.);
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> Guy Régimbald, *Canadian Administrative Law,* 1st ed. at p. 261 ("the *Stinchcombe* principle does not apply in most contexts of administrative law, but full discovery may apply when a *Charter* right is involved, in disciplinary matters and in more judicial-like proceedings such as human rights adjudication")

43. These principles were reaffirmed by the Federal Court of Appeal in *Sheriff v. Canada (Attorney General).* In that case, the Court held that although companies in cases such as *Ciba-Geigy* face "potential economic hardship", those cases do not involve "the individual's right to

work or professional reputation." The Court concluded: "The interests of the appellants in these cases do not parallel those of the accused in a criminal proceeding; therefore, a lower level of disclosure was appropriate."

Reference: *Sheriff v. Canada (Attorney General),* 2006 FCA 139 at para. 30

44. In short, Compliance counsel accepts that Summitt is entitled to disclosure sufficient to know the case against it and allow it to mount an effective defence, but rejects the notion that this includes an entitlement to the further information requested. The Board decides matters in a regulatory context, not a professional discipline or human rights context where individual rights are in play. Decisions of the courts and this Board have consistently refused to find a right to enhanced disclosure in regulatory proceedings. Summitt's invitation to depart from this well-established legal principle should be rejected.

ii. Disclosure obligations have been satisfied by Compliance counsel

45. As outlined above, Compliance counsel has already provided, or has agreed to provide, Summitt with much of the additional information it has requested, including:

(a) all reports, summaries, drafts, notes, memoranda and other documents in Board staff's possession from E&Y in respect of the Summitt compliance audit; and

(b) all correspondence and other documents exchanged between E&Y and Board staff concerning the Summitt compliance audit.

46. Compliance counsel submits that this satisfies, and in fact goes well beyond, the standard required for compliance proceedings before the Board – namely, whether Summitt has the ability to know the case it must meet and mount an effective defence in response to that case.

47. Before considering the additional disclosure requests made by Summitt, it is important to remember the nature of this proceeding and, in particular, the nature of the allegations made

against Summitt. The first set of allegations concerns the improper placement of a signature line in several contracts. The second allegation concerns an improper price comparison template given to a customer as part of a contract. Compliance counsel submits that these are straightforward and narrow allegations that turn mainly, if not entirely, on the contracts in question and the application of the *ECPA,* the Regulations and the *Code* to these contracts.

48. With this in mind, the additional information sought by Summitt falls, broadly speaking, into three categories.

49. The first category is for the Inspectors' working papers, notes and memoranda. This information is not in Board staff or Compliance counsel's possession (to the extent that it even exists). Given the clear message in *Re Toronto Hydro Electric Systems* and *Ciba-Geigy* that adequate disclosure in the context of a regulatory proceeding does not require turning over all potentially relevant documents, it would be passing strange if a regulator were to required to turn over *irrelevant* documents that are *not* in its possession, as Summitt requests. Moreover, the information is not necessary to allow for Summitt to effectively mount its defence: Summitt has already received (or will receive) all documents that E&Y sent to the Board, including the final Report, the Detailed Summaries and the 'raw data' Audit Checklists. It also has copies of the exact contracts in question. This is more than sufficient to satisfy the disclosure obligations of Compliance counsel. In any event, if Summitt believes such information is required, it may pursue the appropriate procedural steps to acquire those documents from E&Y.

50. The second category requests the personal information of individuals at the Board and E&Y who were involved in the compliance audit of Summitt. Compliance counsel has already provided the name of the main contact at the Board involved reviewing and validating Summitt's findings, Mr. Mustillo, who will be the Board's first witness at the hearing. Mr. Mustillo also

authored the Briefing Note. Other individuals were involved in structuring and co-ordinating the Board staff's general compliance strategy on the 'front end' of the audit, but had no involvement on the Summitt file specifically. Moreover, to the limited extent (if any) that other members of Board staff were involved in the Summitt compliance audit, their names will be apparent in the documents Compliance counsel has already provided or agreed to provide.

51. In addition, the name of the partner at E&Y responsible for the compliance audit and the E&Y Report is already disclosed in the materials provided to Summitt (Stephen Hack). To the extent Summitt requires the name of others at E&Y, such information is likely already in their possession (as Summitt employees and agents interacted with the Inspectors). In any event, this information is irrelevant and unnecessary given the information already disclosed, including name of the Board staff member responsible for reviewing and validating E&Y's findings.

52. The third category concerns a request for detailed information about the audits and penalties imposed on other suppliers, as well as the penalty imposed on Summitt itself. Such information about other proceedings is confidential, irrelevant and falls well outside the confines of required disclosure. Once again, if the proper disclosure standard contemplates that not all information in the tribunal's possession regarding a particular proceeding needs to be disclosed, how can Summitt properly be entitled to all information about *other* proceedings in which it has no involvement whatsoever? With respect to the administrative penalty set out in the Notice of Intention for Summitt, sufficient information has already been provided to allow Summitt to analyze and contest the quantum set before a panel of the Board.[4] The criteria used to assess that penalty are set out in the statutory regime, and the Briefing Note sets out a matrix with numeric ranges. The Board sets the administrative penalty based on these considerations. No further information needs to be provided to satisfy the purposes of disclosure in the regulatory context.

[4] See footnote 3, supra.

53. It is worth noting that the question to be asked with respect to these categories of information is "not whether there is good reason to withhold the evidence, but whether enough information has already been disclosed to permit the individual to adequately prepare his/her case." If this standard has been met, further disclosure is unnecessary.

Reference: Régimbald, *supra,* at p. 264

54. Ultimately, given the level of disclosure already provided (and that will be provided), the regulatory context in which this proceeding arises and the nature of the allegations against Summitt, Compliance counsel submits that Summitt does not require any additional information to know the case it must meet and prepare a defence. The words of this Board in a recent compliance proceeding are apposite:

> ... There is simply no mystery as to [what] the nature of the allegations being made are, or who, what, where, when or how the alleged instances of non-compliance arose. The Board does not consider enhanced disclosure to be necessary in these circumstances.

Reference: EB-2010-0221, *Re Summitt Energy Management, Inc.*
Decision on Motion (Transcript), August 23, 2010, at p. 88

55. Accordingly, Compliance counsel submits that no order regarding further disclosure is necessary in this proceeding.

iii. Admissibility of evidence not relevant to this motion

56. Summitt's submissions on this motion discuss, in some detail, issues relating to the admissibility of certain documents provided in the disclosure.

57. This motion is not the appropriate forum in which to debate issues of admissibility. If Summitt wishes to argue that the evidence sought to be relied upon by Compliance counsel is inadmissible, it can advance such arguments in the context of a hearing before the Board, once

the evidence proposed to be led and relied upon by Compliance counsel is clear.[5]

58. Summitt's argument that admissibility must be determined so that it can assess the case it has to meet confuses two different considerations. Whether a document is ultimately admissible at a hearing is a separate consideration from that document's value at the disclosure stage in terms of allowing a party to understand the case against them and to prepare a defence. If Summitt's position were accepted, then all manner of pre-hearing motions would arise to determine admissibility during the disclosure stage.

59. Compliance counsel's position is that the E&Y Report, Briefing Note, Detailed Summary Memos and Audit Checklists are all admissible through its proposed first witness, Mr. Mustillo, and that Summitt can fully assess its position on that basis.

60. The Board is not bound by the formal rules of evidence relating to hearsay, opinion and expert evidence, and retains the discretion to admit evidence that may be inadmissible in the civil litigation context. The case law relied upon by Summitt arises in the criminal context, which is even further removed from the applicable evidentiary standards before tribunals.

Reference: *Statutory Powers and Procedures Act,* R.S.O. 1990, c. S.22, s. 15;

Régimbald, *supra,* at pp. 265-66 ("Tribunals are not subject to the common law rules of evidence and may rely on hearsay evidence even if it deprives the other party of any possibility to cross-examine or challenge the witness")

[5] It is interesting to note that if Summitt is correct in its submissions regarding admissibility, then the evidence relied upon by Compliance counsel would be ruled inadmissible at the hearing, which operates exclusively to Summitt's benefit, particularly in a document-driven case such as this proceeding. Summitt's argument that it is prejudiced by the inadmissibility of the evidence upon which Compliance counsel intends to rely is difficult to understand.

61. In any event, none of the written documents from E&Y constitute hearsay, opinion or expert evidence. Rather, they reflect factual evidence gleaned from Summitt's own files, directly witnessed by the inspectors, and reported to Compliance staff.

B. Interrogatories

62. Under the Board's *Rules of Practice and Procedure*, the Board "may" establish an interrogatory procedure for any of the purposes outlined in rule 28.01. Those purposes are to:

(a) Clarify evidence filed by a party;

(b) Simply the issues;

(c) Permit a full and satisfactory understanding of the matters to be considered; or

(d) Expedite the proceeding.

63. Compliance counsel respectfully submits that none of the purposes identified in rule 28.01 would be served by ordering interrogatories in this proceeding.

64. Interrogatories are reserved for complicated, technical matters raising complex factual and/or legal issues. As Macaulay and Sprague explain in their text on administrative law:

> Interrogatories were introduced many years ago by some agencies such as the NEB and OEB as a substitute for examination-for-discovery. Most boards can authorize (order) discovery, but it is not common to do so. ***The concept of interrogatories is that if a party does not understand material that has been filed, it may address questions in writing to another party.*** The interrogatories shall be answered by the one party in writing on or before a certain date, unless a motion is brought before the tribunal dispensing with a duty to answer the question. The practice, where there are interrogatories, is that the question and answers are numbered so that they can be easily associated with the party asking the question and the subject matter.
>
> Needless to say, an interrogatory process, although common with regulatory tribunals is not common with other kinds of agencies. ***This is, perhaps, because the issues coming before regulatory boards are unusually complex. They involve, as a rule, a large volume of paper and statistics.*** [Emphasis added].

Reference: Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals,* Vol. II (loose-leaf) at p. 12-66.4(3)

65. As is clear from the Notice of Intention and the subsequent disclosure, this is not a case involving "a large volume of paper and statistics". It does not include complicated evidence or technical information that requires clarification. Nor does it engage any complex factual or legal issues that would benefit from being simplified. The disputed facts will be few, and the evidence that can be called to support or rebut them is inherently limited by the nature of the allegations. (Moreover, to the extent that the disclosure is more voluminous than necessary, it is mainly a function of Summitt's ongoing requests for additional information rather than the nature of the allegations or the information required to adequately defend against such allegations.)

66. Indeed, at the end of the day, the allegations simply involve contracts improperly drafted and the wrong information being given to a customer. Compliance counsel submits that the disclosure and the Notice of Intention permit a full understanding of the factual and legal matters raised by these allegations.

67. Against this backdrop, Summitt's purported reasons for requiring an interrogatory process, set out at paragraph 58 of its submissions, ring hollow. This is particularly so when considered in light of the nature of the allegations, the disclosure provided by Compliance counsel, and the further disclosure that Compliance counsel has agreed to provide. A brief response to each of Summitt's arguments in this regard follows.

(a) ***The underlying auditing and inspection procedure and extent to which subjective analysis was involved in the process.*** The E&Y Report sets out, in detail, the scope and approach of the audit, as well as the methodology employed in compliance activities, evidence assessment and documentation (at pp. 2-7). Moreover, Summitt may call Stephen Hack as a witness if it requires further information, and can cross-examine Mr. Mustillo on the topic as well.

(b) ***Internal memos and documents relating to formulation of investigation to appreciate scope and breadth of E&Y's knowledge and expertise.*** Compliance counsel has agreed to provide Summitt with all documents given to it by E&Y in respect of the compliance audit of Summitt. Further information is not in Board staff's possession. To the extent Summitt may want to challenge E&Y's "knowledge and expertise", it may do so by calling and cross-examining its representatives at the hearing. Interrogatories with Compliance counsel is not the appropriate means by which to complete this task, as it does not serve any of the purposes identified in rule 28.01.

(c) ***The industry standards used to assess Summitt's due diligence efforts.*** To the extent that such a consideration is even relevant to these proceedings, or that evidence is available in this regard, Summitt may raise this issue with Mr. Mustillo at the hearing.

(d) ***Calculations explaining the scale of the administrative penalty.*** These have already been provided in the Briefing Note, which also references the relevant regulations. Administrative penalties for other suppliers are irrelevant, as explained above.

68. The Board does not order interrogatories in these proceedings as a matter of course, and has refused similar requests in the past. In a recent decision, the Board explained that the disclosure provided by Compliance counsel was sufficient and refused to order interrogatories:

> Summitt suggests that interrogatories are especially important with respect to the evidence of the lead compliance staff investigator, Ms. Marijan. Compliance counsel has already provided a detailed witness statement from this investigator, a copy of the briefing note used to outline the case against Summitt, and the investigator will be made available for cross-examination. In the Board's view, this is adequate.[6]
>
> **Reference:** EB-2010-0221, *Re Summitt Energy Management, Inc.* Decision on Motion (Transcript), August 23, 2010, at p. 91

69. Similarly, Compliance counsel in the current proceeding has (i) agreed to provide a summary of the evidence of its first witness, Mr. Mustillo, who reviewed and validated the E&Y Report and its supporting documents in relation to the findings of potential non-compliance with respect to Summitt; (ii) provided Summitt with the Briefing Note; (iii) advised that Mr.

[6] This matter is distinct from the present compliance proceeding against Summitt.

Mustillo (the author of the Briefing Note) will be a witness, and thus be made available for cross-examination.

70. Compliance counsel submits that interrogatories not only fail to satisfy any of the purposes in rule 28.01(a) to (c), but also undermine the fourth purpose of expediting the proceeding. The timeline proposed by Summitt in schedule "B" to its Notice of Motion contemplates approximately an extra month of delay for the interrogatory process to run its course, in addition to any motions that would arise from the process (with the latter being a near certainty, given Summitt's preliminary position on the scope of proper interrogatories).

71. Compliance counsel has been clear that due to the nature of the allegations, the public interest requires that this matter be resolved expeditiously. To order interrogatories at this point in the proceedings would undercut the objective of an expeditious process by pushing out a hearing date well into 2012. The public interest will suffer as a result.

C. Conclusions

72. There is no right to enhanced disclosure in the regulatory context, where individual rights are not at stake. Although prosecutorial in form, the case law – including decisions of this Board itself – recognizes that compliance proceedings in a regulatory setting, such as this Board presides over, must be efficient and timely in order to protect the interests of vulnerable stakeholders, and to ensure prompt compliance with the law. The disclosure provided by Compliance counsel is more than sufficient to meet the obligation of fairness to Summitt, in a manner that is balanced with these important public interests that underlie the proceeding. This is particularly true when one considers the additional disclosure the Compliance counsel has agreed to provide in an effort to move this matter forward expeditiously.

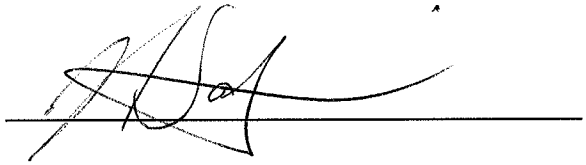
73. Compliance counsel submits that none of the purposes of rule 28.01 would be served by ordering interrogatories in this case. The facts are simple. The issues are clear. Summit can fully understand the allegations it faces based on the disclosure already provided, to say nothing of the additional disclosure that will be provided. In these circumstances and at this point in the process, ordering interrogatories will only multiply the needless expense and delay, with no commensurate benefit in terms of procedural fairness or streamlining the process.

PART V—ORDER REQUESTED

74. Compliance counsel respectfully requests that the motion by Summitt be dismissed, and that this matter be set down for a hearing at the earliest available date convenient to all parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: December 19, 2011



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SCHEDULE "A" STATUTORY AND REGULATORY PROVISIONS

	LEGISLATION
1.	*Energy Consumer Protection Act,2010*, Reg. 389/10, ss. 7(1) and 8(3)
2.	*Energy Consumer Protection Act,2010*, S.O. 2010, c.8, s.12
3.	*Ontario Energy Board Act, 1998*, S.O. 1998, c.15, sched. B, Part VII and Part VII.1
4.	*Statutory Powers and Procedures Act*, R.S.O. 1990, c. S.22, s. 15
	RULES
5.	*Ontario Energy Board Electricity Retailer Code of Conduct*, ss.4.6 - 4.7
6.	*Ontario Energy Board Rules of Practice and Procedure, Rule 28*

SCHEDULE "B" AUTHORITIES

	CASE LAW
1.	*Ciba-Geigy Canada Ltd. v. Canada (Patented Medicine Prices Review Board)*(F.C.A.), [1994] F.C.J. No. 884
2.	*Sheriff v. Canada (Attorney General)*, 2006 FCA 139 (CanLII)
	TEXTS
3.	Guy Régimbald, *Canadian Administrative Law*, 1st ed.
4.	Macaulay and Sprague, *Practice and Procedure before Administrative Tribunals*, vol. II (loose-leaf)
	OTHER
5.	EB-2010-0221, *Re Summitt Energy Management, Inc.* Decision on Motion (Transcript), August 23, 2010
6.	*Re Toronto Hydro Electric System Limited*, EB-2009-0308, Decision and Order on Motion for Disclosure, October 14, 2010

OEB Case Number **EB-2011-0316**

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 and an Administrative Penalty against Summitt Energy Management Inc., License Numbers ER-2010-0368 and GM-2010-0369, dated August 25th, 2011

ONTARIO ENERGY BOARD

Proceeding commenced at Toronto

WRITTEN SUBMISSIONS OF AUTHORITIES OF COMPLIANCE COUNSEL ON THE MOTION OF SUMMITT ENERGY MANAGEMENT, INC.

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