**ONTARIO ENERGY BOARD**

**EB-2016-0226**

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

**AND IN THE MATTER OF** an Application by XOOM Energy ONT, ULC pursuant to section 50 of the Act for a Gas Marketer license.

**EB-2016-0227**

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

**AND IN THE MATTER OF** an Application by XOOM Energy ONT, ULC pursuant to section 60 of the Act for an Electricity Retailer license.

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# WRITTEN SUBMISSIONS OF PLANET ENERGY (ONTARIO) CORP.

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October 7, 2016


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## I - OVERVIEW

1. All indications are that the Applicant XOOM Energy ONT, ULC (Xoom Energy) intends to market to electricity and gas customers in Ontario through All Communications Network of Canada Co. (ACN), a multi-level marketing company that for the past seven years marketed and promoted Planet Energy products and services.

2. Xoom Energy's plans to market through ACN will, unless appropriate protections are put in place, risk confusion and harm to consumers because ACN representatives — who only market to their "warm network" of family and friends — will invariably market to the ***same circle of friends and family*** to whom they previously marketed Planet Energy products and services, many of whom are enrolled as customers with Planet Energy.

3. What distinguishes this unique scenario from the ordinary situation where incumbent retailers/marketers face competition from a new entrant is that, in the unique circumstances of this case, the new entrant (Xoom Energy/ACN) is in effect the alter ego of one of the incumbents (Planet Energy). This poses serious risks of harm to customers who will face the confounding circumstance of being solicited to switch from the incumbent (Planet Energy) to the new entrant (Xoom Energy) by the ***very same ACN representative (and family member/friend)*** who initially solicited the customer to enroll with Planet Energy.

4. The prospects for misrepresentation, confusion and harm to customers raised by this extraordinary situation are significant. Yet Xoom Energy refuses to acknowledge any risk, let alone propose any measures to prudently manage the transition of ACN representatives from Planet Energy to Xoom Energy. In this unusual circumstance, the Board should not license Xoom Energy without imposing appropriate license conditions to adequately protect consumers.

## II - FACTS

5. Planet Energy is a licensed retailer and marketer of electricity and natural gas in Ontario.

6. Planet Energy has since 2010 marketed energy products in Ontario (as well as British Columbia, Manitoba and Quebec) through ACN. ACN, as the Board is aware, is a multi-level marketing company (MLM) and ACN representatives (also referred to as "independent business owners") have marketed Planet Energy electricity and gas products (along with other retail products such as telephone long distance and home security) through their "warm network" of friends and family.

### (a) Relationship Between Xoom Energy and ACN

7. In 2016, ACN notified Planet Energy that it intended to terminate its sales agency agreement with Planet Energy effective November 9, 2016. ACN is terminating the sales agency agreement due to the entry into Canada of Xoom Energy.

8. Xoom Energy and ACN are affiliated companies.[1] Xoom Energy markets its products and services through ACN in the United States and in Alberta, a market it recently entered.[2] As further explained below, the evidence before the Board indicates that Xoom Energy likewise intends to market through ACN in Ontario.

### (b) Potential for Harm to Consumers

9. Planet Energy intervened in this proceeding for the discrete purpose of ensuring that in the event Xoom Energy markets through ACN in Ontario, appropriate protections will be put in place to prevent confusion and harm to electricity and gas consumers.

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[1] The Nova Scotia Registry of Joint Stock Companies shows Xoom Energy and ACN as sharing the same registered office and mailing address, as well as officers and directors listed at the same civic addresses. See registry profiles for Xoom Energy and ACN, attached as **Tab 1A** and **Tab 1B**, respectively.

[2] Attached at **Tab 1C** is a 2015 U.S. service flyer which states that "ACN markets energy services provided by XOOM Energy". Attached at **Tab 1D** is a promotional document which indicates that Xoom Energy is now available in Alberta and also references the connection between ACN and Xoom Energy; the flyer states that customers may "enroll....at ACN@xoomenergy.ca".

10. The potential for confusion and harm to Ontario consumers if Xoom Energy markets through ACN is readily apparent for, *inter alia*, the following reasons:

(a) It is possible, if not probable, that Xoom Energy will solicit customers through the ***same ACN representatives*** who for all or part of the last seven years presented themselves to consumers as sales representatives for Planet Energy;

(b) ACN representatives, as noted, do not cold-call or prospect for new customers. Rather, they market to friends and family. It is therefore probable that ACN representatives will market to the ***same network of friends and family*** to whom they previously marketed Planet Energy electricity and gas products;

(c) It is likewise probable that ACN representatives will market to the same friends and family who enrolled with and are ***current Planet Energy customers***, and encourage them to switch from Planet Energy to Xoom Energy.[3]

11. These circumstances are highly unusual. First, the marketing by Xoom Energy through ACN in effect transitions the entire sales force of one marketer/retailer to another. Second, under the form of marketing engaged in by ACN — multi-level marketing — ACN representatives market solely to friends and family. These circumstances inherently give rise to the potential for customer confusion and harm.

12. The Board and Board Staff have previously raised concerns about multi-level marketing because of the potential for MLM representatives to exert undue pressure on friends and family members, and because of the risk that MLM representatives may not

[3] Planet Energy's gas and electricity contract terms are typically 5 years, and it has approximately 50,000 existing gas and electricity customers in Ontario who were enrolled through ACN representatives.

adhere to requisite consumer protection requirements (badges, scripts, price comparisons, etc.) when dealing with friends and family.[4]

13. In these circumstances, the transition of ACN representatives from Planet Energy to Xoom Energy will naturally result in the same ACN individuals — who previously promoted Planet Energy products and services — promoting Xoom Energy products and services to their same network of family and friends.

14. In this context, there is an inherent risk that customers will be confused as to who ACN represents and whose products/services are being promoted unless appropriate measures are put in place to, among other things, retrain ACN representatives, expressly notify friends and family/customers of the transition, and carefully monitor and proscribe certain practices and conduct.

15. For instance, without appropriate measures and protections, customers may be confronted with the confounding situation of the ***same ACN representative/family member*** who earlier encouraged them to enroll with Planet Energy now encouraging them to terminate their Planet Energy agreement and switch to Xoom Energy, potentially without the customer being made aware, or understanding, that he or she will be exposed to early termination penalties. Likewise, it is possible that ACN representatives may seek Planet Energy customers who are nearing the end of their contracts to invite them to transition to Xoom Energy, albeit under the auspices of a renewal.[5]

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[4] Ontario Energy Board, Bulletin, "Requirements Related to Network and Multi-level Marketing and the Status of Internet-based Transactions When a Salesperson is Present" (13 April 2012), attached as **Tab 1E**.
Also see *Re Energhx Green Energy Corp.* (26 March 2012), 2012 LNONOEB 119 (EB-2011-0311) at paras 56 and 85, attached as **Tab 2A**: "However, the Board is mindful that the statutory and regulatory requirements apply in relation to retailing and marketing to all low volume consumers, even those that are friends, family or company employees [...] the Board is of the view that all low volume consumers, including persons that are friends with or the family of the retailer or marketer, are entitled to the same protections under the legal and regulatory framework that is currently in place. Although the verification script may not lend itself as well to circumstances where the consumer is a friend of or related to the retailer or marketer, the fact remains that strict adherence to the script is required."

[5] ACN representatives, because they marketed on behalf of Planet Energy — in some cases going back as far as seven years — will be in the unique situation of knowing which of their friends and family enrolled with Planet Energy and when their agreements may be up for renewal.

16. These, and other scenarios, are real risks because ACN representatives only market to family and friends and will naturally reach out to the same network of family and friends to whom they have previously marketed Planet Energy products and services, including those friends and family who are enrolled with Planet Energy.

17. Without appropriate protections — which, as noted below, Xoom Energy has disavowed any intention to implement — this situation may lead to customer complainants to the Board (as well as government) relating to termination fees, renewals, misrepresentation regarding who ACN is representing, etc.

**(c) Planet Energy's Request that Xoom Energy Explain how Potential Consumer Harm will be Addressed**

18. Planet Energy asked interrogatories of Xoom Energy to clarify whether it planned to market in Ontario through ACN — and if so, how Xoom Energy/ACN proposed to manage the transition, including through appropriate training and instructing of ACN representatives. For instance, Planet Energy asked:

> 2. Does Xoom Energy plan to promote market or solicit customers in Ontario through ACN (or any affiliate thereof)?
>
> ...
>
> 4. If Xoom Energy plans to promote, market or solicit customers in Ontario through ACN (or any affiliate thereof):
>
> (a) Will it market or solicit existing or past Planet Energy customers who were enrolled through ACN? If not, how will it ensure this is not done?
>
> (b) Will Xoom Energy promote or market its products and services through the same ACN independent business owners or representatives who promoted or marketed Planet Energy services or products? If not, how will it ensure this is not done?

(d) How does Xoom Energy intend generally to manage the transition of ACN's promotion and marketing of Planet Energy's products and services to ACN's promotion and marketing of Xoom Energy's products or services (or ACN's products and services), so that there is no misunderstanding or confusion by customers as to whom ACN represents or whose products and services are being promoted and marketed by ACN? In particular:

i. Will Xoom Energy (or ACN) be retesting or retraining ACN representatives? If so, please describe the procedure and content for retesting and retraining.

ii. Will Xoom Energy (or ACN) prepare and supply ACN representatives with Xoom Energy training and marketing materials to replace Planet Energy training and marketing materials? If so, please describe how this will be done.

19. Xoom Energy refused to answer ***any*** of the interrogatories posed by Planet Energy on the grounds that they are irrelevant; relate to a company (i.e., ACN) that was not party to the proceedings; and relate to private contractual dealings between Planet Energy and ACN. Xoom Energy also alleges that Planet Energy is trying to delay its entry into Ontario and oddly asserts that Planet Energy is seeking to "pierce the corporate veil".

20. In its September 28, 2016 letter, Xoom Energy reiterated these objections and added that any harm could be effectively mitigated by Xoom Energy agreeing not to market in Ontario prior to November 9, 2016, the date when Planet Energy and ACN's sales agreement terminated.

## III - LAW AND ARGUMENT

### (a) Consumer Protection

21. Planet Energy is not, contrary to Xoom Energy's allegations, attempting to delay or thwart Xoom Energy's entry into Ontario. Subject to satisfying the Board's licensing requirements, Xoom Energy is entitled to be licensed in Ontario and to vigorously compete

with Planet Energy and other retailers and marketers. This includes the right to market through the channels Xoom Energy deems appropriate, including through its affiliate ACN.

22. Planet Energy has no intent to frustrate these legitimate aims. That is not the intention of Planet Energy's intervention or interrogatories.

23. Planet Energy's sole concern is to ensure that any transition of ACN personnel from Planet Energy representatives to Xoom Energy representatives is prudently managed to avoid customer confusion and harm. This is admittedly important to Planet Energy's commercial interest (which Planet Energy agrees is of little concern to the Board in a licensing application), but is also relevant to the Board's consumer protection mandate (which is of principal concern to the Board in a licensing application).

24. The Board's statutory objects importantly include "protect[ing] the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service" and the "prices and the reliability and quality of gas service".[6] These objects are central to the Board's determination whether to license applicants for electricity retailer and gas marketer licenses, and on what conditions. As the Board noted in *Blue Power Distributed Corp.*, in the course of considering whether to license the applicant and on what conditions:

> Maintaining consumer confidence in the electricity market and protecting consumers in that market, is an important part of the Board's mandate. The imposition of license conditions on electricity retailers, where appropriate, can facilitate this mandate.[7]

25. Consumer protection is increasingly important in Ontario, as evidenced by the Board's report, *Consumers Come First: A Report of the Ontario Energy Board on the Effectiveness of the Energy Consumer Protection Act, 2010* and the government's amendments to the *Energy Consumer Protection Act, 2010* and Regulations. It follows that electricity retailer and gas marketer license applications warrant heightened scrutiny.

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[6] *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, ss. 1(1), 2, attached as **Tab 2B**.
[7] *Re Blue Power Distributed Energy Corp.* (30 March 2012), 2012 LNONOEB 131 (EB-2010-0335) at para 8, attached as **Tab 2C**.

**(b) Xoom Energy's Unwarranted Refusal to Address Consumer Protection Risks**

26. Xoom Energy has outright refused to address the potential risks of confusion and harm to electricity and gas customers.

27. Xoom Energy refuses even to answer the simple question of what the nature is of its relationship with ACN and whether it intends to market through ACN representatives in Ontario. Xoom Energy refused to address this in both its responses to Planet Energy's and Board Staff's interrogatories.[8] There is nothing intrusive or improper in this inquiry, nor is there anything commercially sensitive about the information requested. Xoom Energy's and ACN's affiliation is a matter of public record in the U.S. (and now in Alberta) and Xoom Energy, having applied for Ontario retailer/marketer licenses, undoubtedly knows whether it intends to market through ACN (it just does not want to say).

28. Xoom Energy's assertion that ACN, and its business conduct, is not relevant because ACN is not a party to the proceeding skirts the point. If Xoom Energy intends to market through ACN representatives — and ACN representatives will therefore be *de facto* sales agents — ACN's conduct is highly relevant.

29. Xoom Energy's assertion that Planet Energy's inquiries are an attempt to "pierce the corporate veil" is a contrivance, also designed to avoid the issue. Piercing the corporate veil is a concept that entails bypassing the limited liability of the corporation to attach liability to corporate shareholders. Planet Energy's inquiries entail nothing of the sort. Planet Energy asked Xoom Energy legitimate questions about whether it plans to market through an affiliated company, ACN, and — given that ACN is a multi-level marketing company that for the past seven years represented Planet Energy — explain how it plans to do this so as to avoid confusion and harm to consumers.

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[8] Xoom Energy stated in its letter to the Board dated August 5, 2016 that "The company referred to in Planet Energy's letter is but one of Xoom's channel partners", but avoids answering whether it intends to market through ACN in Ontario.
Also see XOOM Energy ONT, ULC, Responses to Interrogatories of the Ontario Energy Board (EB-2016-0226 & EB-2016-0227) (12 September 2016; updated 26 September 2016), Interrogatory Question 1.

30. Finally, Xoom Energy's proposition that it not commence marketing until November 9, 2016, the date that Planet Energy's and ACN's sales agency agreement terminates, is no answer. It addresses none of the potential confusion and harms addressed above.

### (c) Xoom Energy's Intention to Market through ACN without Mitigating the Risk of Harm to Consumers

31. Notwithstanding Xoom Energy's blanket refusal to address these issues, the evidence filed by Planet Energy, *prima facie*, establishes that Xoom Energy and ACN are affiliates and that Xoom Energy intends to market through ACN in Ontario (as it does everywhere else in North America). The Board may also draw an adverse inference to this effect based on Xoom Energy's blanket refusal to make disclosure.[9]

32. The Board must also assume — in light of Xoom Energy's refusal to address the issue — that Xoom Energy does not intend to implement any measures to address the potential for confusion and harm to consumers arising from the ACN representatives' transition from representing Planet Energy to representing Xoom Energy.

33. In addition to the unique harm identified above that may result from one marketer/retailer effectively taking over the MLM sales force of another, there is further cause for concern. Xoom Energy has been sanctioned by other regulators for noncompliance associated with multi-level marketing through ACN. The Maryland Public Service Commission, for instance, fined Xoom Energy $40,000 and ordered that it compensate affected customers for violations of the Commission's regulations.[10]

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[9] If it is "reasonable to expect a denial in the face of an accusation, then the party's failure to do so could constitute an implied admission against him or her", Sidney Lederman, Alan Bryant & Michelle Fuerst, *The Law of Evidence in Canada*, 4th ed (Markham, ON: LexisNexis Canada, 2014) at §6.445. Also consider s. 30(2) of the *Canada Evidence Act*, R.S.C., 1985, c. C-5, which "expressly provides for a negative inference which the court can draw from the absence of relevant information in the record: the court may conclude that the matter which was not recorded did not occur or exist", *ibid* at §6.240. See excerpts, attached as **Tab 2D**.

[10] US, State of Maryland Public Service Commission, *In the Matter of the Investigation into the Marketing, Advertising, and Trade Practices of XOOM Energy Maryland, LLC et al.* (Case No. 9346(a)), Proposed Order of Public Utility Law Judge, Public Version (30 October 2015) at 5, 32, 35-38, attached as **Tab 2E**.
In this case, Xoom Energy marketed its products through ACN, Inc. See US, State of Maryland Public Service Commission, *In the Matter of the Investigation into the Marketing, Advertising, and Trade Practices of XOOM Energy Maryland, LLC et al.* (Case No. 9346), Response of XOOM Energy Maryland, LLC to Order to Show Cause, Public Version (22 April 2014) at 6, excerpt attached as **Tab 2F**.

### (d) License Conditions to Mitigate Potential Consumer Harm

34. Planet Energy submits that if Xoom Energy otherwise satisfies the Board's licensing requirements, appropriate license conditions should be imposed to address the potential harm to consumers. This is necessary because Xoom Energy has refused to offer any proposal for addressing the risks.

35. Any license conditions should not prevent Xoom Energy from marketing through lawful channels it determines are appropriate, including ACN; nor should any license conditions unduly prevent Xoom Energy from competing with Planet Energy or other retailers and marketers.

36. License conditions should, however, address the unique potential for confusion and harm to customers arising from the ***same ACN individuals***, who previously promoted Planet Energy products, now promoting Xoom Energy products to ***their same network of family and friends***.

37. In past licensing decisions, the Board has endorsed the importance of imposing appropriate license conditions. The Board has, among other conditions, imposed special monitoring/reporting requirements, limited licenses to less than the standard five year term and restricted new enrollments to low-volume consumers.[11]

38. In this case, Planet Energy submits that Xoom Energy should, for a period of not less than 18 months, be prohibited from marketing through the ***same ACN representatives*** who previously marketed Planet Energy products and services. This condition will mitigate the unique risk of confusion and harm to consumers that arises in this situation; the condition is targeted and proportionate to the potential harm; and, it will not unduly or unreasonably prejudice Xoom Energy from entering Ontario, nor restrict it from marketing through those

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[11] *Re Blue Power Distributed Energy Corp.* (30 March 2012), 2012 LNONOEB 131 (EB-2010-0335) at paras 8-9, attached as **Tab 2C**;
*Re Summitt Energy LP* (9 June 2011), 2011 LNONOEB 176 (EB-2010-0368, EB-2010-0369) at paras 10-11, 13, 15, 17, 23, attached as **Tab 2G**;
*Re Sunwave Gas & Power Inc.* (18 November 2014) (EB-2014-0259), Assurance of Voluntary Compliance at 7, attached as **Tab 2H**.

channels it determines appropriate, including through all other ACN representatives (and of course if Xoom Energy were to argue in response that it does not intend to market through ACN in Ontario, then there is no restriction at all on Xoom Energy).

39. Planet Energy submits that the proposed license condition is reasonably necessary to protect consumers. However, a narrower alternative would be to prohibit Xoom Energy, for a period of not less than 18 months, from allowing ACN representatives to market to the same friends and family to whom they previously marketed Planet Energy products and services and who are current Planet Energy customers. This will not address the general risk of confusion and harm, but it would protect against the particular risk that the same ACN representatives who encouraged friends and family members to enroll with Planet Energy will now encourage those same friends and family members to switch from Planet Energy to Xoom Energy, potentially without full disclosure and without making them aware of their exposure to early termination charges.

40. The Board may, in these circumstances, also want to consider requiring that ACN itself be licensed as an electricity retailer and natural gas marketer.

All of which is respectfully submitted this 7th day of October, 2016.

Glenn Zacher,
Counsel for Planet Energy (Ontario) Corp.

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| TAB # | DOCUMENTS |
|---|---|
| G. | *Re Summitt Energy LP* (9 June 2011), 2011 LNONOEB 176 (EB-2010-0368, EB-2010-0369) |
| H. | *Re Sunwave Gas & Power Inc.* (18 November 2014) (EB-2014-0259), Assurance of Voluntary Compliance |

## Profile

Printer Version

Profile Info | People Info | Activites Info | Related Reg's Info

**PROFILE** - XOOM ENERGY ONT, ULC - as of: 2016-10-07 11:26 AM

| | |
|---|---|
| **Business/Organization Name:** | XOOM ENERGY ONT, ULC |
| **Registry ID:** | 3299171 |
| **Type:** | N.S. Unlimited Liability |
| **Nature of Business:** | |
| **Status:** | Active |
| **Jurisdiction:** | Nova Scotia |
| **Registered Office:** | 1959 UPPER WATER STREET, SUITE 900<br>HALIFAX NS Canada B3J 3N2 |
| **Mailing Address:** | P.O. BOX 997<br>HALIFAX NS Canada B3J 2X2 |

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| CHIP BARKER | Director | 1000 PROGRESS PLACE<br>CONCORD NC 28025 | |
| DAVE STEVANOVSKI | Director | 1000 PROGRESS PLACE<br>CONCORD NC 28025 | |
| ROBERT STEVANOVSKI | Director | 1000 PROGRESS PLACE<br>CONCORD NC 28025 | |
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| | SECRETARY | | |

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| KIMBERLY A. BUNGAY | Recognized Agent | 1959 UPPER WATER STREET, SUITE 900 HALIFAX NS B3J 3N2 | P.O. BOX 997 HALIFAX NS B3J 2X2 |

## ACTIVITIES

| Activity | Date |
|---|---|
| Change of Directors | 2016-06-07 |
| Appoint an Agent | 2016-06-07 |
| Address Change | 2016-06-07 |
| Change of Directors | 2016-06-07 |
| Incorporated and Registered | 2016-06-07 |

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## RELATED REGISTRATIONS

There are no related registrations on file for this company.

## Profile

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Profile Info | People Info | Activites Info | Related Reg's Info

**PROFILE** - ALL COMMUNICATIONS NETWORK OF CANADA CO./ACN, RÉSEAU DE TOUTES COMMUNICATIONS DU CANADA C.R.I. - as of: 2016-10-06 02:13 PM

| | |
|---|---|
| **Business/Organization Name:** | ALL COMMUNICATIONS NETWORK OF CANADA CO./ACN, RÉSEAU DE TOUTES COMMUNICATIONS DU CANADA C.R.I. |
| **Registry ID:** | 3147731 |
| **Type:** | N.S. Unlimited Liability |
| **Nature of Business:** | |
| **Status:** | Active |
| **Jurisdiction:** | Nova Scotia |
| **Registered Office:** | 900 - 1959 UPPER WATER ST<br>HALIFAX NS Canada B3J 3N2 |
| **Mailing Address:** | P.O. BOX 997<br>HALIFAX NS CANADA B3J 2X2 |

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| CHARLES BARKER | Director | 1000 PROGRESS PL<br>CONCORD NORTH CAROLINA 28025 | |
| RICHARD DUNN | TREASURER | 1000 PROGRESS PL<br>CONCORD NORTH CAROLINA 28025 | |
| PAUL GAGNIER | SECRETARY | 1000 PROGRESS PL<br>CONCORD NORTH CAROLINA 28025 | |
| DRAGAN STEVANOVSKI | PRESIDENT | 1000 PROGRESS PL<br>CONCORD NORTH CAROLINA 28025 | |

| | | | |
|---|---|---|---|
| CHARLES S. REAGH | Recognized Agent | 900 - 1959 UPPER WATER ST HALIFAX NS B3J 3N2 | P.O. BOX 997 HALIFAX NS B3J 2X2 |

## ACTIVITIES

| Activity | Date |
|---|---|
| Annual Statement Filed | 2016-05-09 |
| Annual Renewal | 2016-05-09 |
| Annual Statement Filed | 2015-05-07 |
| Annual Renewal | 2015-05-07 |
| Annual Statement Filed | 2014-06-10 |
| Annual Renewal | 2014-06-04 |
| Annual Statement Filed | 2013-05-21 |
| Annual Renewal | 2013-05-21 |
| Annual Statement Filed | 2012-06-20 |
| Annual Renewal | 2012-06-20 |
| Change of Directors | 2012-03-23 |
| Annual Statement Filed | 2011-06-22 |
| Annual Renewal | 2011-06-20 |
| Annual Statement Filed | 2010-06-01 |
| Annual Renewal | 2010-06-01 |
| Annual Statement Filed | 2009-06-03 |
| Annual Renewal | 2009-05-28 |
| Change of Directors | 2008-11-10 |
| Annual Statement Filed | 2008-05-16 |
| Annual Renewal | 2008-05-14 |
| Change of Directors | 2007-10-02 |
| Annual Renewal | 2007-06-27 |
| Annual Statement Filed | 2007-06-27 |
| Special Resolution | 2007-04-12 |
| Special Resolution | 2007-01-11 |
| Change of Directors | 2006-06-15 |
| Filed Document | 2006-05-15 |

| | |
|---|---|
| Filed Document | 2006-05-08 |
| Effective Date of Amalgamation | 2006-05-08 |
| Change of Directors | 2006-05-08 |
| Appoint an Agent | 2006-05-08 |
| Date of Filing Amalgamation | 2006-05-08 |

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## RELATED REGISTRATIONS

| **This Company ...** | |
|---|---|
| ACN EXCEL CANADA INC. | Amalgamated From |
| ACN CANADA | Registered |
| EXCEL CANADA | Registered |
| ALL COMMUNICATIONS NETWORK OF CANADA CO./ACN, RÉSEAU DE TOUTES COMMUNICATIONS DU CANADA C.R.I. | Amalgamated From |

# Energy

XOOM energy Power Your World

## What is energy deregulation?

The idea behind energy deregulation is that competitive markets benefit the customer because it forces suppliers to compete on price and allows them to create unique products and services. In a deregulated market you decide who you will buy from, when you will buy and how long your contract term will be.

## How does deregulation work?

- You choose a new supplier for your electricity or natural gas supply
- Your service and delivery will still be provided through your current local utility
- Suppliers, like XOOM, buy electricity or natural gas supply and have it delivered to the local utility
- The utility then distributes the electricity or natural gas to your home or business

## Why choose an energy provider through ACN?

- Choice: variety of plans and pricing options
- Price Stability: choose programs based on the price stability you need with options to lock in your rate or have your rate fluctuate with the market
- Same Reliable Service: no change in the delivery or maintenance of your natural gas or electricity service

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When you sign up for XOOM Energy, a child gets fed.

Energy deregulation has not occurred in all U.S. states. Energy through ACN is only available in select markets. ACN markets energy services provided by XOOM Energy. ACN does not provide the actual service for your natural gas and/or electricity.

XOOM energy

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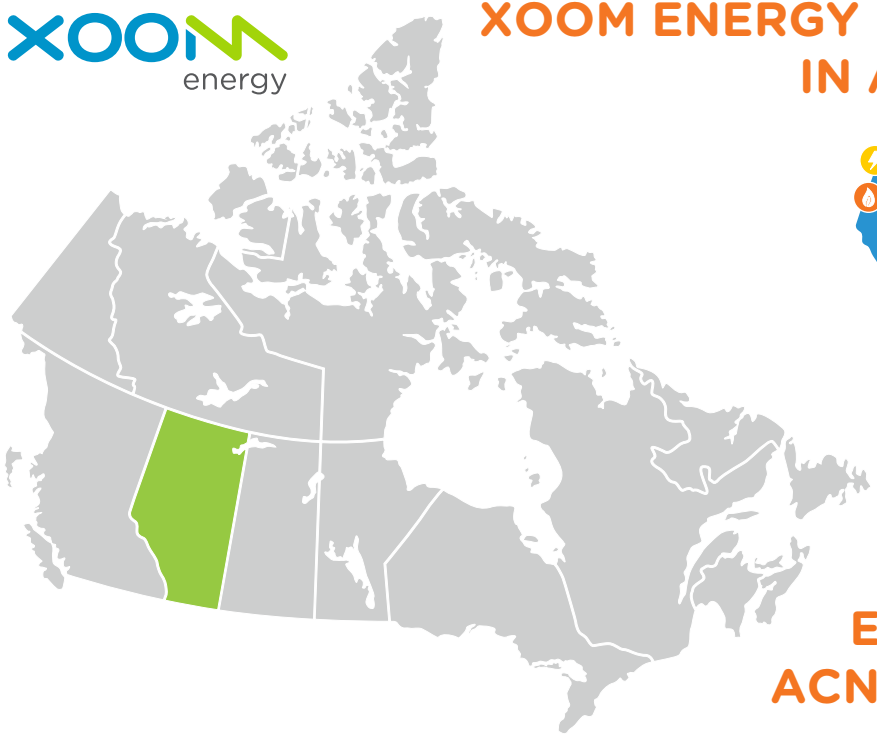

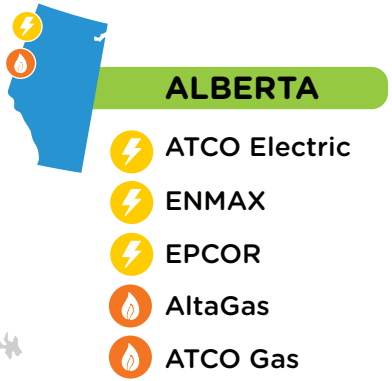


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# BULLETIN

**DATE ISSUED: April 13, 2012**

**TO: All Licensed Electricity Retailers**
**All Licensed Gas Marketers**
**All Other Interested Parties**

**RE: Requirements Related to Network and Multi-level Marketing and the Status of Internet-based Transactions When a Salesperson is Present**

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**This Bulletin provides guidance in relation to two issues pertaining to the retailing of electricity or the marketing of gas to low-volume consumers; namely, (i) requirements that apply in the context of "network" or "multi-level" activities; and (ii) the status of internet transactions effected while a salesperson is present, whether occurring in the context of "network" or "multi-level" activities or otherwise.**

## 1. Background

This Bulletin sets out Board staff's views on the retailing of electricity or the marketing of gas to low-volume consumers using a network or multi-level business model and internet transactions that are effected while a salesperson acting on behalf of a supplier is present.

## 2. Network or Multi-level Business Model

Some suppliers are using sales channels that they have characterized as falling under a "network" or "multi-level" (together, "multi-level") business model. Under such a model, a person acting on behalf of the supplier arranges to meet with consumers using a variety of means, including a 'friends and family' approach and visiting specific consumers who are known to the person through other networking channels such as social media.

Under the *Energy Consumer Protection Act, 2010* (the "ECPA"), retailing or marketing is defined to include selling or offering to sell electricity or gas, respectively, to a consumer. The Electricity Retailer Code of Conduct and the Code of Conduct for Gas Marketers (together, the "Codes") define retailing or marketing as including "…any other means by which a [supplier] interacts directly with a consumer".

Section 2 of the ECPA defines a salesperson as a person who, for the purpose of effecting sales of gas or electricity or entering into agency agreements with consumers, conducts marketing or retailing on behalf of a supplier or makes one or more representations to one or more consumers on behalf of a supplier, whether as an employee of the supplier or not. The Codes define the term "salesperson" by reference to section 2 of the ECPA, and for greater certainty add that a salesperson includes any person that offers or negotiates the renewal or extension of a contract on behalf of a supplier. Ontario Regulation 90/99 (Licence Requirements – Electricity Retailers and Gas Marketers) (the "Licence Regulation") made under the *Ontario Energy Board Act, 1998* includes provisions pertaining to business cards (section 5), identification badges (section 6), and training (section 7) in respect of persons that meet in person with a low-volume consumer while acting on behalf of a supplier. Section 1(2) of the Licence Regulation confirms that a reference to meeting in person "includes soliciting, negotiating, entering into, amending, renewing or extending the term of a contract in person with a low-volume consumer".

Based on the foregoing, it is Board staff's view that a supplier using a multi-level marketing business model is engaging in retailing or marketing, and that persons acting on the supplier's behalf are "salespersons" within the meaning of the ECPA and the Codes. Therefore, all legal and regulatory requirements pertaining to the conduct of salespersons apply to such persons. This includes: (i) the requirement to offer a business card and to wear an identification badge as required by and in accordance with section 2 of the Codes and sections 5 and 6, respectively, of the Licence Regulation; and (ii) the requirement to have successfully completed training before retailing or marketing to a consumer as required by and in accordance with section 5 of the Codes and section 7 of the Licence Regulation.

## 3. Internet Transactions when Salesperson is Present

Staff has also become aware of a sales approach whereby a consumer completes an internet-based contracting process while the supplier's salesperson is present. Staff is aware that this approach has been used in the context of the multi-level business model, but it may also be used in other circumstances. The views expressed below are therefore not limited to the multi-level business model context.

The requirements applicable to contracting with consumers as set out in the ECPA and in Ontario Regulation 389/10 (General) made under the ECPA (the "ECPA Regulation") vary depending on the manner in which a contract is entered into, whether in person, by mail or over the internet.

Notably, internet agreements are not subject to the verification requirement. Under section 17 of the ECPA, there are two further exceptions to the requirement that a contract be verified:

i. where the contract is negotiated and entered into as a result of a consumer contacting a supplier, unless the contact occurs within 30 days after the supplier contacts the consumer; and

ii. where the contract is entered into by a consumer's response to a direct mail solicitation from a supplier.

In Board staff's view, the common premise underlying the waiver of the requirement for verification in all three cases outlined above (internet agreements and the circumstances referred to in (i) and (ii) above) is that the consumer is entering into a contract having had the opportunity to consider the matter at his or her own leisure, absent any pressure or influence that may arise by virtue of the presence of a salesperson or of the expectation of a salesperson returning imminently after the consumer completes the transaction.

Board staff believes that, where a consumer is completing an internet contracting transaction in the presence of a salesperson, the transaction is properly treated as an "in person" transaction by virtue of the presence of the supplier's salesperson at the relevant time. To be compliant, the transaction must therefore meet all of the requirements applicable to "in person" transactions, including verification under section 15 of the ECPA and in relation to the manner in which the contract is to be provided to the consumer and in which the consumer acknowledges receipt of the contract (section 10(1) of the ECPA Regulation).

Board staff emphasizes that this will be the case even if the supplier's salesperson absents himself or herself from the premises while the consumer is completing the internet transaction, if the salesperson indicates that he or she will return to the premises on or imminently after completion of the transaction. Where, however, the salesperson leaves the premises, makes no representation about returning, and is not

present when the consumer completes the internet transaction, then the requirements pertaining to internet contracts will apply.

Board staff considers this view to be consistent with the purpose and intent of the overall legislative framework that governs the activities of suppliers, and ensures that the form of the transaction (over a computer as opposed to on paper) is not allowed to diminish the protections given to consumers under that framework.

**The views expressed in this Bulletin are those of Board staff and are not binding on the Board.**

**Any enquiries regarding this Bulletin should be directed to the Board's Market Operations hotline, at market.operations@ontarioenergyboard.ca** or **416-440-7604.**

Aleck Dadson
Chief Operating Officer
Ontario Energy Board

*Case Name:*

# Energhx Green Energy Corp. (Re)

**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 under sections 112.3, 112.4 and 112.5 of the Ontario Energy Board Act, 1998 for Compliance, Suspension and an Administrative Penalty against Energhx Green Energy Corporation.**

2012 LNONOEB 119

No. EB-2011-0311

Ontario Energy Board

**Panel: Marika Hare, Presiding Member; Paula Conboy, Member**

Decision: March 26, 2012.

(99 paras.)

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## DECISION AND ORDER

**1** On August 25, 2011 the Ontario Energy Board (the "Board"), on its own motion under section 112.2 of the *Ontario Energy Board Act, 1998* (the "Act") issued a Notice of Intention to Make an Order (the "Notice") against Energhx Green Energy Corporation ("Energhx").

**2** The Notice provides that the Board intends to make an Order: (i) under sections 112.3 and 112.5 of the Act, requiring Energhx to comply with certain enforceable provisions as defined in section 3 of the Act and to pay an administrative penalty in the amount of $32,500 for breaches of those enforceable provisions; and, (ii) under section 112.4 of the Act, to suspend Energhx's activities with respect to sales, renewals, extensions or amendments of contracts using the following channels: Door-to Door, Exhibitions, Trade Shows and Direct Mail. The Notice describes the allegations of non-compliance as follows:

> *It is alleged that Energhx has contravened sections of Ontario Regulation 90/99, Ontario*

*Regulation 389/10, section 12 of the Energy Consumer Protection Act, 2010... and the Electricity Retailer Code of Conduct and the Code of Conduct for Gas Marketers.*[1]

**3** The particulars in support of the allegations are set out in the Notice, and are reproduced below.

**4** On September 9, 2011, Energhx filed a letter with the Board requesting a hearing on the matter, as it was entitled to do under the Notice and the Act.

**5** On November 11, 2011, the Board issued a Notice of Hearing and Procedural Order No. 1 setting January 23, 2012 and January 24, 2012 as dates for an oral hearing.

**6** On January 18, 2012, Compliance counsel requested adjournment of this proceeding to a later date due to the unavailability of its main witness. The Board approved that request.

**7** On January 20, 2012, the Board issued Procedural Order No. 2 setting February 7, 2012 as the date for the oral hearing.

## I. BACKGROUND

### A. Energhx's Licences

**8** Energhx initially received a Gas Marketer Licence (GM-2009-0188) and an Electricity Retailer Licence (ER-2009-0189) (collectively, the "Licences") on October 22, 2009, which authorized it, among other things, "to sell or offer to sell" gas or electricity, respectively, to a consumer. The Licences require that Energhx comply with all applicable provisions of the Act and the regulations made under the Act. The Licences also require that Energhx comply with applicable rules (gas) or codes (electricity), for present purposes these being the Electricity Retailer Code of Conduct (in the case of the Electricity Retailer Licence) and the Code of Conduct for Gas Marketers (in the case of the Gas Marketer Licence) (collectively, the "Codes"). The Licences were issued for a one year period and were to expire on October 20, 2010.

**9** By its terms, the Gas Marketer Licence applies only in relation to marketing activities pertaining to "low volume" consumers. Although the Electricity Retailer Licence applies to retailing activities in respect of all consumers, the allegations in the Notice relate only to retailing activities pertaining to "low volume" consumers.[2]

**10** On June 8, 2010, Energhx filed applications to renew its Licences (the "Licence Applications").[3] The Licences were extended to January 31, 2011.[4] On January 28, 2011 the Board re-opened the record of the Licence Applications proceeding to provide Energhx an opportunity to submit evidence of compliance with the legislative and regulatory requirements, and also extended the Licences until March 31, 2011.[5] Energhx filed the requested evidence on February 4, 2011 and, while the evidence was being considered, on March 24, 2011 the Board ordered that the Licences be extended until "the final determination of the [Licence Applications] or October 31, 2011, whichever is earlier.[6] On October 31, 2011, the Board ordered that, while certain compliance inspections were underway, the Licences be extended until "the final determination of the [Licence Applications] or April 30, 2012, whichever is earlier".[7] The current versions of the Licences state that they are "valid by extension until April 30, 2012."

### B. Compliance Inspection

**11** The *Energy Consumer Protection Act, 2010* (the "ECPA") came into effect on January 1, 2011. It is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices and that consumers are provided with essential information before they sign energy contracts. The Board's compliance activities which resulted in issuance of the Notice against Energhx were initiated shortly after the ECPA and the restated Codes came into effect on January 1, 2011.

**12** The record indicates that Energhx filed Certificates of Compliance dated December 15, 2010 with the Board in which Dr. Emmanuel Ogedengbe, on behalf of Energhx, certified that, as of January 1, 2011, Energhx will meet all applicable legal and regulatory requirements pertaining to the following in relation to all sales channels that Energhx identified in the Certificates of Compliance as being those that it intended to use: training and testing for salespersons and verification representatives; business cards; identification badges; text-based contracts; disclosure statements; price comparisons; use of verification scripts; and adequate processes and controls to ensure compliance for each of the foregoing, as well as for contract cancellations.

**13** Starting in early 2011, the Board conducted compliance inspections of all retailers and marketers who had filed Certificates of Compliance. Staff from Ernst and Young LLP ("Ernst & Young") were appointed to serve as "inspectors" pursuant to the power set out in section 106 of the Act. Ernst & Young conducted an inspection of Energhx between March 7 and April 13, 2011, covering the period from January 1, 2011 to February 28, 2011. In the process, Ernst &Young attended Energhx's premises, made inquiries and observations, inspected documents, communicated with Energhx representatives and retained copies of certain documents. After the compliance inspection was complete, Ernst & Young provided to the Board its observations, as well as the documents related to those observations.

**14** On August 25, 2011, following the completion of Board Compliance staff's review and validation process regarding the compliance inspection, the Board issued the Notice. At the commencement of the hearing on February 7, 2012, Compliance counsel indicated that an order to suspend Energhx activities with respect to sales, renewals, extensions or amendments of contracts using all its sales channels was no longer being sought.[8]

## II. ALLEGATIONS AND PARTICULARS OF NON COMPLIANCE

**15** As noted above, in the Notice the Board alleges that Energhx has contravened sections of Ontario Regulation 90/99, Ontario Regulation 389/10, section 12 of the ECPA and the Codes.

**16** The particulars set out in the Notice in support of the allegations are described below.

### A. Training Materials - Salespersons

**17** Section 7 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee has successfully completed such training as may be required by a code, rule or order of the Board before meeting in person with a low volume consumer. Section 5 of the Codes requires a retailer or marketer to ensure that salespersons acting on its behalf have successfully completed training (as demonstrated by a minimum 80% pass mark on the required training test), and also requires that the training materials used be adequate and accurate and cover certain specified subject matter.

**18** The Notice indicates that the electricity and gas training material used by Energhx for prospective salespersons was reviewed during the inspection and that, at the time of the inspection, three prospective salespersons had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

1. How to complete a contract application; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ii) of the Codes.

2. Use of business cards; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(iv) of the Codes.

3. Use of Identification badges; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(v) of the Codes.

4. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vi) of the Codes.

5. Price Comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(vii) of the Codes.

6. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(ix) of the Codes.

7. Renewals and extensions; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(x) of the Codes.

8. Persons with whom Energhx may enter into, verify, renew or extend a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.2(a) and 5.2(b)(xii) of the Codes.

**B. Training Materials - Verification Representatives**

**19** The legal and regulatory regime regarding the training of verification representatives is largely the same as that for salespersons as described above (the subject matter to be covered by the training is different in some respects).

**20** The Notice indicates that the electricity and gas training materials used by Energhx for prospective verification representatives were reviewed during the inspection and that, at the time of the inspection, one prospective verification representative had completed the Energhx training. The Notice alleges that the training materials used by Energhx did not include adequate and accurate material in the following areas as they pertain to low volume consumers:

9. Disclosure statements; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iii) of the Codes.

10. Price comparisons; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(iv) of the Codes.

11. Consumer cancellation rights set out in section 21 of Ontario Regulation 389/10; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(vi) of the Codes.

12. Persons with whom Energhx may enter into and verify a contract; contrary to section 7 of Ontario Regulation 90/99 and sections 5.3(a) and 5.3(b)(viii) of the Codes.

**C. Training test**

**21** The Notice indicates that the electricity and gas training test questions used by Energhx which are designed to assess the state of the salesperson's or verification representative's knowledge of the required topic areas stated in the Codes were reviewed during the inspection. As noted above, the Codes require a minimum pass mark of 80% on the required training test. Section 5.6 of the Codes also states that a prospective salesperson or verification representative may re-take the training test once, but only after having re-taken the full training required by the Codes.

**22** The Notice alleges as follows:

> 13. Energhx confirmed with the inspector that it requires a salesperson or verification representative to achieve a minimum 75% pass mark on the training test; contrary to section 5.6(c) of the Codes which requires a pass mark of 80%.
>
> 14. In one case reviewed the prospective salesperson (initials A. Z.) attempted the test twice but scored 70% each time however, the individual was considered to have passed the test; contrary to section 5.6(c) and (d) of the Codes.

**D. Record retention**

**23** Section 5.10 of the Codes requires that complete records relating to training and testing be retained for a period of not less than two years from the date on which a salesperson or verification representative ceases to act on behalf of the retailer or marketer in relation to low volume consumers.

**24** The Notice alleges that Energhx has contravened the following requirements in relation to record retention pertaining to salespersons and verification representatives for electricity and gas:

> 15. Energhx does not have its salespersons and verification representatives sign a statement that he or she will comply with all applicable legal and regulatory requirements in relation to the activities the person will conduct on behalf of Energhx in relation to low volume consumers. The required records are therefore not retained; contrary to section 5.10(g) of the Codes.
>
> 16. Energhx stated during the inspection that it plans on maintaining salesperson and verification representative records for a period of one year; contrary to section 5.10 of the Codes.

**E. Business cards**

**25** Section 5 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that every person acting on behalf of the licensee offer a business card at every meeting in person with a low volume consumer. That business card must comply with the requirements set out in section 5 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.1 and 2.2 of the Codes address requirements for business cards.

**26** The Notice indicates that, during the inspection, Energhx confirmed that all business cards issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the electricity and gas business card requirements as follows:

> 17. During the inspection it was observed that the business card does not state the electricity and gas licence numbers issued to Energhx under the Act nor does it state Energhx's toll-free telephone number; contrary to section 5 of Ontario Regulation 90/99 and section 2.2(a) and (d) of the Codes.
>
> 18. As the content of the business cards provided by Energhx are in breach of section 2.2(a) and (d) of the Codes, it is likely that the use of such business cards by Energhx salespersons in their current form will result in a breach of section 5(6)(ii) of Ontario

Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes.

**F. Identification badges**

**27** Section 6 of Ontario Regulation 90/99 states that it is a condition of every electricity retailer and gas marketer licence that the licensee issue a photo identification badge ("ID badge") to every person who meets in person with a low volume consumer while acting on behalf of the licensee, and that the person at all times prominently display that ID badge. That ID badge must comply with the requirements set out in section 6 of Ontario Regulation 90/99 and with any other requirement as may be set out in a code, rule or order of the Board. Sections 2.3 to 2.5 of the Codes address requirements for ID badges.

**28** The Notice indicates that, during the inspection, Energhx confirmed that ID badges issued to salespersons who meet in person with low volume consumers are in the same format and contain the same content. The Notice alleges that Energhx has contravened the following in relation to the electricity and gas ID badge requirements:

19. During the inspection, it was noted that the ID badge does not state that the salesperson is (a) not associated with any electricity or gas distributor or government, contrary to section 6 of Ontario Regulation 90/99; and (b) not a representative of the consumer's electricity or gas distributor and is not associated with the Ontario Energy Board or the Government of Ontario. It was also observed that the ID badge does not state an expiry date. This is contrary to section 2.4(a) and (g) of the Codes.

20. As the content of the ID badges provided by Energhx are in breach of section 2.4(a) and (g) of the Codes, it is likely that the use of such ID badges by Energhx salespersons in their current form will result in a breach of section 5(6)(i) of Ontario Regulation 389/10 and sections 1.1(c) and 2.3 of the Codes.

**G. Contract content requirements for new contracts**

**29** Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, contain the information prescribed by regulation. The information required to be contained in a contract is listed in section 7 of Ontario Regulation 389/10.

**30** The Notice indicates that one transaction for electricity and one transaction for gas were reviewed. In respect of both transactions, the Notice alleges that Energhx contravened the following content requirements in relation to electricity and gas contracts:

21. The contract fails to include a statement that if the consumer cancels the contract within the 10-day period, the consumer is entitled to a full refund of all amounts paid under the contract; contrary to section 12 of the ECPA and section 7(1)9 of Ontario Regulation 389/10.

22. The contract fails to include a description of any other circumstances in which the consumer or Energhx is entitled to cancel the contract with or without notice or cost or penalty, the length of any notice period, the manner in which notice can be given and the amount of any cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.

23. The contract fails to include the applicable conditions/rights under section 21(a), (b) &

(e) of Ontario Regulation 389/10 which provide that the consumer can cancel the contract without cost or penalty; contrary to section 12 of the ECPA and section 7(1)13 of Ontario Regulation 389/10.

24. The signature and printed name of the consumer, or the account holder's agent signing the contract on behalf of the consumer, and of the person signing the contract on behalf of Energhx, is contained below the acknowledgment to be signed and dated by the consumer or account holder's agent that he or she has received a text based copy of the contract. The signature of the person signing on behalf of Energhx and the acknowledgement of the consumer are therefore in the reverse order to the specified requirements in Ontario Regulation 389/10; contrary to section 12 of the ECPA and section 7(1)17 & section 7(1)18 of Ontario Regulation 389/10.

**H. Completion of price comparisons for new contracts**

**31** Section 12 of the ECPA states that a contract with a low volume consumer must, among other things, be accompanied by the information or documents prescribed by regulation or required by a code, rule or order of the Board. Under section 8(3) of Ontario Regulation 389/10, a price comparison that complies with the requirements of a code, rule or order of the Board must accompany the disclosure statement that itself is required to accompany a contract. Sections 4.6 to 4.9 of the Codes address requirements for price comparisons, including the requirement that a price comparison be completed using the template approved by the Board and in accordance with the instructions contained in that template.

**32** The Notice alleges as follows:

25. Energhx advised that it has one five-year contract offer available to residential and non-residential electricity and gas consumers. Board staff observed that the price comparison had been completed accurately according to the template instructions with the exception of the document control number box which also includes a date which is not in accordance with instruction number 8; contrary to section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10, and section 4.6(b) of the Codes.

**I. Verification call (use of the applicable Board-approved script)**

**33** Subject to certain exceptions, under section 15 of the ECPA a contract with a low volume consumer must be verified within the time and in the manner required by the ECPA, Ontario Regulation 389/10 and any applicable code, rule or order of the Board. Sections 4.10 to 4.12 of the Codes address requirements for verification, notably the obligation to use a Board-approved script.

**34** The Notice indicates that Energhx had only conducted one verification call during the period covered by the inspection (January 1 to February 28, 2011), and that this was a dual fuel verification call to verify both electricity and gas contracts. The Notice alleges that Energhx contravened the following requirements and deviated from the Board-approved script in the following areas:

26. The verification representative did not introduce her name to the consumer and did not identify herself as calling on behalf of Energhx; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/ 10, and section 4.10 and section 4.11(a) of the Codes.

27. The verification representative did confirm the consumer's name but did not confirm if

she was speaking to the account holder or the account holder's agent; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

28. The verification representative did not ask if the customer was comfortable to proceed with the call in English; contrary to section 15 of the ECPA, section 13(2) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

29. The verification representative did not advise the consumer that the call was being recorded; contrary to section 15 of the ECPA, section 13(2) and section 13(3) of Ontario Regulation 389/10, and section 4.10 and section 4.11(a) of the Codes.

**J. Compliance monitoring and quality assurance program**

**35** Sections 7.4 and 7.5 of the Codes require that a retailer maintain a compliance monitoring and quality assurance program that enables the retailer or marketer to monitor compliance with the Act, the ECPA, the regulations and all applicable regulatory requirements in relation to retailing or marketing to low volume consumers and to identify any need for remedial action. Such a program must meet the minimum requirements specified in the Code.

**36** The Notice alleges that Energhx contravened the requirement as follows:

30. During the inspection, Energhx confirmed that it does not maintain a compliance monitoring and quality assurance program as required by section 7.4 and section 7.5 of the Codes.

**III. BOARD FINDINGS ON ISSUES BEFORE THE BOARD OTHER THAN THE SPECIFIC ALLEGATIONS**

**37** The following issues emerged during the oral hearing and in written submissions.

**Certificates of Compliance**

**38** On December 15, 2010, Energhx filed Certificates of Compliance in the form required, certifying to a variety of matters regarding compliance with "all applicable legal and regulatory requirements" in respect of all sales channels that Energhx indicated it intended to use as of January 1, 2011.[9]

**39** In its submissions, Energhx characterized its certification as follows:

> *The Certificates of Compliance confirm Energhx's obligation to comply with the stated retailing activities, relating to the retailing/marketing channels, recruitment, training and conduct of salespersons, contracts, verification, handling of cancellations, complaints and retractions. These are statements of* ***intentions*** *and not* ***actions****. For example, the certification confirms retailing/marketing activities as "...channels that the gas marketer/retailer intends to use..*"[10]

**40** The Board is of the view that the Certificates of Compliance, by their terms, attest to the state of compliance by the signing retailer or marketer, and do not represent "statements of intentions". For example, the Certificates of Compliance refer to salespersons having undergone training and testing in accordance with all applicable legal and regulatory requirements, to contracts having been revised as required to comply with all applicable legal and regulatory requirements and to the company using only compliant contracts on and after the "Effective Certification Date" (being the later of the date of signature of the Certificate and January 1, 2011). Execution by Energhx of the Certificates of

Compliance certified Energhx's compliance with those requirements. The Board agrees with the submission of Compliance counsel that Ontario Regulation 90/99 and the Certificates of Compliance make it clear that Energhx was subject to all applicable legal and regulatory requirements.[11]

**41** All retailers and marketers doing business in Ontario must understand and abide by the statutory and regulatory requirements regardless of whether they are new businesses or established sector participants. The Board notes that the legal and regulatory requirements should have been known and understood by all marketers and retailers in advance of the January 1, 2011 implementation date. The ECPA was tabled in Bill form on December 8, 2009 and received Royal Assent on May 18, 2010. Proposed drafts of Ontario Regulation 389/10 and of the amendments to Ontario Regulation 90/99 were posted for comment on July 2, 2010, and final versions were filed on October 13, 2010. The two Codes, as restated, were issued on November 17, 2010 following a notice and comment process that commenced in August of that year.

**42** As will be discussed in detail later in this Decision, the evidence shows that Energhx was not in full compliance with the ECPA, the relevant regulations and the Codes during the period covered by the compliance inspection. While the evidence also indicates that Energhx later addressed these deficiencies,[12] which is reassuring to the Board, it does not mitigate the fact that at the time of the inspection a number of infractions of the ECPA, the relevant regulations and the Codes were noted.

**Standard of proof**

**43** Compliance counsel acknowledges that it bears the burden of proving the allegations set out in the Notice and that this is a civil standard, often referred to as a "balance of probabilities".[13] The Supreme Court of Canada has described the applicable test as "whether it is more likely than not that an alleged event occurred".[14]

**44** Energhx did not comment on who bears the burden of proving the allegations set out in the Notice or on the standard of proof.

**45** There is no dispute, and the Board agrees, that the onus of proving the allegations rests with Compliance counsel, and that the standard is "whether it is more likely than not that an alleged event occurred".

**Prescriptive nature of legal and regulatory requirements**

**46** Compliance counsel submits that the Act, the ECPA, the relevant regulations and the Codes are highly detailed and prescriptive and thus provide little room for discretion on the part of retailers and marketers.[15] Furthermore, Compliance counsel submits that it is incumbent on the Board to give full effect to the legal and regulatory scheme and to require full compliance with its requirements.[16]

**47** Energhx did not comment on Compliance counsel's submissions as to the prescriptive nature of the legal and regulatory scheme.

**48** The Board agrees that the requirements of the ECPA, the relevant regulations and the Board's Codes are highly prescriptive and detailed, leaving little room for discretion for retailers and marketers. Nonetheless, the Board must consider whether the burden of proof has been met in relation to each allegation, and must then also consider in each case the appropriate enforcement action to be taken.

**Interim licence versus extension of existing licences**

**49** During oral testimony, the Energhx witness spoke to the issue of licence extensions versus interim licences.[17] In its written submissions, Energhx submits that, without an "interim licence", it could not commence its general public offering of its electricity retailing and gas marketing services during the period covered by the compliance inspection.[18]

**50** Compliance counsel submits that, even if there is a distinction between an "interim licence" and an extension of an existing licence, it is irrelevant to the question of whether Energhx was bound to follow the various legislative and regulatory requirements set out in the Notice.[19]

**51** The Board also notes that the record of the Licence Applications proceeding clearly shows that Energhx's existing Licences were extended, which allowed it to continue with any marketing and retailing activities in accordance with those Licences. It is also clear that the Licences issued to Energhx do not themselves contain limitations on the nature of the retailing or marketing activities that can be carried out by Energhx, beyond those that apply by operation of law or that devolve from the Codes. Contrary to the position taken by Energhx, an "interim licence" issued under section 59 of the Act does not inherently confer any additional benefits on the licensee relative to licences issued in the normal course under section 57 of the Act as far as permitted activities go.

**52** In any event, the Board agrees with Compliance counsel that the distinction between an interim licence and a licence extension, if any, is not in any way relevant to the issue of the obligation on Energhx to comply with applicable legal and regulatory requirements.

**Whether Energhx engaged in retailing and marketing activities**

**53** Compliance counsel submits that Energhx was engaged in "retailing" and "marketing" to "consumers", as those terms are defined in the Codes and the ECPA.[20] In particular, Compliance counsel relies on the following facts, all of which were admitted by Energhx in the course of the proceeding:

(a) Energhx representatives interacted with "acquaintances" and "friends" in order to offer them the opportunity to become Energhx "associates" -- which later was understood by the Board to be a synonym for consumer;

(b) A single verification call was made by Energhx; and

(c) At the time of the compliance inspection, Energhx had approximately 10 customers, three of whom were not affiliated with Energhx as employees or sales agents.[21]

**54** During the oral hearing and in its submissions, Energhx submits that it has consistently set its focus on developing a unique supply service which would be marketed as the Green Energy Credit[TM]. According to Energhx, the Green Energy Credit[TM] was submitted for patent protection in December 2010, and there was a lag in time to market caused by technical development and administrative setup procedures.[22] Energhx asserts that, in the absence of an interim licence, it could not commence its electricity retailing and gas marketing services during the period covered by the compliance inspection, and that it was constrained to "limit its activities to the training of associates, using their accounts for setup implementation procedures".[23]

**55** The Board finds the evidence of Energhx internally contradictory with respect to the degree of retailing and marketing that it carried out during the period covered by the compliance inspection.[24] On the one hand, the witness insisted that Energhx only dealt with "associates", but on the other hand it was clear that a verification call was made and that at least three customers were signed up for the Energhx offer who were not affiliated with the company,[25] and it is not clear how those customers came to be enrolled with Energhx in the absence of some type of sales activity.

**56** It was, however, evident that at the time of the compliance inspection the company was in a start-up phase and it appears that no marketing and retailing was undertaken beyond friends, family or company employees.[26] The testimony of Energhx's witness to that effect was not challenged by Compliance counsel. However, the Board is mindful that the statutory and regulatory requirements apply in relation to retailing and marketing to all low volume consumers, even those that are friends, family or company employees. There is nothing in the legal and regulatory framework governing the activities of retailers and marketers that diminishes or eliminates the entitlement of friends, family or company employees to the protections that form part of that framework. As a general proposition then, the legal and regulatory

framework does not provide for greater tolerance simply because the consumer may be in some way affiliated or associated with the marketer or retailer.

**Administrative penalties**

**57** Energhx submits that the administrative penalty assessed against a person under section 112.5 of the Act "is designed to follow the Board's Cost Assessment Model".[27] The Board understands Energhx's argument in this regard to be that, in determining the amount of any administrative penalty, the Board should apply the principles of the Cost Assessment Model ("CAM") and consider Energhx as a start up business with no significant record of sales (few electricity customers and no gas customers enrolled during the period covered by the compliance inspection).

**58** Energhx appears to misunderstand the applicability of the CAM. The CAM is the methodology that the Board uses to apportion its costs amongst the persons or classes of persons who pay cost assessments under section 26 of the Act. These persons and classes of persons are identified in Ontario Regulation 16/08 (Assessment of Expenses and Expenditures), and include licensed retailers and marketers. The CAM has nothing to do with the assessment of administrative penalties, in respect of which Ontario Regulation 331/03 (Administrative Penalties) applies.

**59** Energhx also submits that the Board has unjustly imposed a "high-handed barrier to fair competition in the deregulated energy market" and that the administrative penalty "represents an undue burden against new technology-driven competition".[28] The Board does not agree with this characterization.

**60** Compliance counsel submits that any purported benefit Energhx presents to the market in terms of advancing competition or green energy technology as a start up business is irrelevant for the purposes of setting an administrative penalty.[29] The Board agrees.

**61** The Board notes that a number of the allegations set out in the Notice relate to the same underlying subject matter or transaction. For example, four allegations of non-compliance are associated with a single verification call, and 12 allegations are associated with the same training materials. Compliance counsel acknowledges that "the presentation of certain allegations as 'distinct' contraventions may be more a matter of style than substance".[30] Although Compliance counsel submits that, once proven, it is appropriate to consider each allegation as a distinct contravention for the purposes of calculating the appropriate administrative penalty as long as the allegation cites a breach of a unique requirement, Compliance counsel also concedes that the Board may consider at least some of the allegations as a single contravention.[31] For the reasons discussed later in this Decision, the Board believes that this is an appropriate case in which to assess administrative penalties on a transaction-by-transaction basis rather than on the basis of each allegation individually.

**62** The Board also notes that the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. Specifically, section 112.5(1) of the Act states that, "if the Board is satisfied that a person has contravened an enforceable provision, the Board *may*, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order..." (emphasis added). Where the Board considers it appropriate to impose an administrative penalty, the amount of that penalty must be determined in accordance with the rules set out in Ontario Regulation 331/03 (Administrative Penalties), which sets the minimum penalty at $1,000.

## IV. BOARD FINDINGS ON SPECIFIC ALLEGATIONS

**63** During the oral hearing and in its written submissions, Compliance counsel reviewed in detail each allegation in the Notice. The focus of the evidence and hearing was on the compliance inspection of Energhx during the two month period from the beginning of January to the end of February, 2011 and the allegations arising from that inspection. Of interest to the Board however was also to understand the compliance process following the inspection. The two witnesses who were presented were not able to provide evidence of that process or to address the assessment of the severity of the allegations[32]. In cases such as these, the Board expects witnesses who are familiar with the *entire*

compliance process, not just the inspection phase, to be available to provide evidence to the Board.

**64** In Energhx's written submissions, comments on the specific allegations were largely restricted to the alleged deficiencies of its training program.[33]

**65** The Board's findings with respect to the specific allegations are set out below.

**A. Training of Sales Representatives -- Allegations 1 to 8**

**66** The Notice contains eight allegations of inadequate training of sales representatives. Deficiencies in the training materials identified by Compliance counsel were presented relative to the power point presentation provided by Energhx to its trainees.

**67** Allegation 1 pertains to training regarding how to complete a contract application, allegation 5 pertains to training regarding price comparisons and allegation 7 pertains to training regarding renewals and extensions. The power point presentation did not contain any information in relation to these topics. The Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in this respect, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

**68** Allegations 2, 3, 4, 6 and 8 pertain to training regarding the use of business cards, the use of ID badges, disclosure statements, consumer cancellation rights and persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. These topics are referred to in the power point presentation. In the opinion of Compliance counsel, however, they are not addressed in sufficient detail, and the training material is not adequate in terms of thoroughness.

**69** In his testimony, Dr. Ogedengbe stated that the power point presentation was augmented by an "in-classroom" session for sales representatives.[34] However, in the Board's view, the Code requirement for "adequate and accurate material" that covers certain topics is a requirement for written material. As such, while an oral component may usefully supplement written materials, it is not a substitute for them.

**70** Gauging the adequacy of training materials is necessarily a subjective exercise. The references to the topics referred to in allegations 2, 3, 4, and 8 in the power point presentation are limited to identifying that it is an unfair practice for a retailer or marketer to be in non-compliance with requirements relating to those topics. The Board notes that the Codes require training material on "behavior that constitutes an unfair practice" separate and apart from material on the use of business cards, the use of ID badges, disclosure statements and the persons with whom a retailer or marketer may enter into, verify, renew or extend a contract. With respect to allegation 6, the reference in the power point presentation to consumer cancellation rights is limited to noting the 10-day cooling off period and the "reaffirmation option". The ECPA and Ontario Regulation 389/10 include cancellation rights beyond the 10-day cooling off period, refer to verification and not "reaffirmation", and make it clear that a contract that is not verified as and where required is void. The Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in respect of the topics referred to in allegations 2, 3, 4, 6 and 8, and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly

**B. Training of Verification Representatives -- Allegations 9 to 12**

**71** The training material used by Energhx for verification representatives consists of the same power point presentation as that used for sales representatives. The allegations of inadequate training of verification representatives are therefore similarly based on Compliance counsel's assessment of that power point presentation.

**72** Allegation 10 pertains to the absence of training material on the topic of price comparisons, and allegations 9, 11 and 12 pertain to the inadequacy of training material on the topics of disclosure statements, consumer cancellation rights and the persons with whom a marketer or retailer may enter into, verify, renew or extend a contract. For the reasons noted above, the Board finds that Energhx's training materials were non-compliant with section 5.2 of the Codes in

respect of these topics and that there has been a contravention of section 7 of Ontario Regulation 90/99 accordingly.

**C. Training test -- Allegations 13 and 14**

**73** Energhx admits that it initially required a passing score of 75% on the training test, contrary to the Code requirement.[35] Energhx also admits that a person was allowed to take the training test twice, scoring 70% on both attempts.[36] As noted by Compliance counsel, there was no evidence that the person re-took the training program.[37] The Board finds that Energhx contravened section 5.6(c) and section 5.6(d) of the Codes.

**D. Record retention - Allegations 15 and 16**

**74** The Board finds that Energhx has contravened section 5.10(g) of the Codes in relation to the records required to be maintained in relation to salespersons and verification representatives, as set out in allegation 15.

**75** Energhx admits that it advised Ernst & Young that Energhx plans on maintaining records pertaining to salespersons and verification representatives.[38] It is understood that the Codes require that such records be maintained for a period of two years. The Board notes, however, that at the time of the compliance inspection the two-year period had not yet elapsed. As such, a finding of a contravention would necessarily be prospective (i.e., that Energhx is likely to contravene this requirement of the Code). Allegation 16 is not cast in such terms.

**76** The Board notes that it may, under section 112.3 of the Act, make an order requiring a person to comply with an enforceable provision and to take such action as the Board may specify to prevent a contravention in circumstances where the Board is satisfied that a contravention is likely. However, administrative penalties may only be levied where the Board is satisfied that a contravention has occurred.

**77** As noted earlier in this Decision, the evidence indicates that Energhx has addressed this deficiency (as well as all others identified in the Notice).[39] The Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 16.

**E. Business cards -- Allegations 17 and 18**

**78** At the time of the Board's compliance inspection, the business cards issued to Energhx salespersons who meet in person with low-volume consumers did not include the numbers of the Licences issued to Energhx, as required by section 5 of Ontario Regulation 90/99 and section 2.2 of the Codes. The business cards also did not include a toll-free number for Energhx, as required by section 2.2 of the Codes. While it is arguable that a toll-free number (i.e., a "1-800" number) should not be required for a company only doing business in one area code, it is a requirement of the Codes. Accordingly, the Board finds there have been breaches of the Codes and of Ontario Regulation 90/99, as set out in allegation 17.

**79** Allegation 18 alleges that the business card deficiencies noted above will result in a breach of section 5(6)(ii) of Ontario Regulation 389/10 and sections 1.1(b) and 2.1 of the Codes. These sections pertain to the use of business cards that fail to meet the requirements of the Codes and Ontario Regulation 90/99. Compliance counsel argues that, given the deficiencies in the business cards, Energhx is likely to contravene these sections, and that the Board may take action accordingly under section 112.3 of the Act.[40]

**80** The evidence indicates that Energhx has addressed the deficiencies in its business cards,[41] and the Board therefore does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 18.

**F. Identification badges (ID badges) -- Allegations 19 and 20**

**81** As with the business cards, it was not disputed that the ID badges did not conform with section 6 of Ontario

Regulation 90/99 and sections 2.4(a) and (g) of the Codes. The Board therefore finds that Energhx was in contravention of those sections, as set out in allegation 19.

**82** With respect to allegation 20, for the same reason as noted in relation to business cards the Board does not believe that it is necessary to further consider the issuance of an order to comply under section 112.3 of the Act in relation to allegation 20.

**G. Contract content requirements for new contracts -- Allegations 21 to 24**

**83** Energhx did not refute the allegations regarding the format or content of the contracts at issue in the transactions reviewed during the compliance inspection. The Board finds that Energhx's contracts were non-compliant as set out in allegations 21 to 24, and that there have been contraventions of the legal and regulatory requirements set out in those allegations.

**H. Completion of price comparisons for new contracts -- Allegation 25**

**84** The Board notes that, with one exception, the price comparison document used by Energhx is fully compliant with the legal and regulatory requirements. The exception, which Energhx did not refute, is that a date has been included in the place that has been set aside for a document control number. As noted earlier in this Decision, the legal and regulatory framework is highly prescriptive and leaves little room for discretion on the part of retailers and marketers. The Board finds that Energhx has failed to comply with the Board's instructions for completing the price comparison, and that there has been a violation of section 12 of the ECPA, section 8(3) of Ontario Regulation 389/10 and section 4.6(b) of the Codes accordingly.

**I. Verification call (use of the applicable Board-approved script) -- Allegations 26 to 29**

**85** Allegations 26 to 29 all pertain to the same verification call. Dr. Ogedengbe confirmed during oral testimony that this one verification call was to a family friend.[42] As noted previously, the Board is of the view that all low volume consumers, including persons that are friends with or the family of the retailer or marketer, are entitled to the same protections under the legal and regulatory framework that is currently in place. Although the verification script may not lend itself as well to circumstances where the consumer is a friend of or related to the retailer or marketer, the fact remains that strict adherence to the script is required. Allegations 26 to 29 are therefore upheld, and the Board finds that there were contraventions of the legal and regulatory requirements as set out in those allegations.

**J. Compliance monitoring and quality assurance program -- Allegation 30**

**86** The Board finds that Energhx contravened sections 7.4 and 7.5 of the Codes in failing to maintain a compliance monitoring program. This was not disputed.

**Administrative Penalties**

**87** As also noted earlier in this Decision, the imposition of an administrative penalty in respect of any given instance of non-compliance is a matter for the discretion of the Board. The Board believes that it is appropriate in this case to refrain from imposing an administrative penalty in respect of the contraventions pertaining to the training test, record retention, business cards, ID badges, completion of price comparisons, verification call and compliance monitoring. The evidence is that Energhx has come into compliance in respect of all of these items; that the company had a very limited number of customers at the relevant time and was not offering its product to the public on a widespread basis; that the one salesperson cited with a failing score of 70% did not engage in any sales activities until she achieved a pass score of 90%;[43] and that a sole verification call was made.

**88** The Board emphasizes that its decision not to impose an administrative penalty in this case should not be misunderstood as indicative of a view that violations of these legal and regulatory requirements are unimportant or

trivial. The Board also emphasizes that it expects Energhx to take whatever steps are necessary to ensure that it has a comprehensive and accurate understanding of all applicable legal and regulatory requirements and remains fully compliant with them if it intends to continue business operations as a retailer and/or marketer.

**89** Where the Board intends to impose an administrative penalty, the Board must do so in accordance with Ontario Regulation 331/03 (Administrative Penalties). Ontario Regulation 331/03 requires that the Board first determine the following: (a) whether the contravention was a minor, moderate or major deviation from the requirements of the enforceable provision; and (b) whether the contravention had a minor, moderate or major potential to adversely affect consumers, other licensees or other persons. The determination on these two questions then establishes the range of administrative penalties that applies, as set out in the Schedule to Ontario Regulation 331/03. In selecting the appropriate amount from within that range, the analysis involves a consideration of the extent of mitigation by the person that committed the contravention; whether that person is a repeat offender; whether that person derived any economic benefit from the contravention; and any other criteria the Board considers relevant.

**90** The range of administrative penalties for contraventions as per Ontario Regulation 331/03 are shown below.

| | Deviation from the requirements of the enforceable provision that was contravened | | | |
|---|---|---|---|---|
| Potential to adversely affect consumers, persons licensed under the Act or other persons | | Major | Moderate | Minor |
| | Major | $15,000 - $20,000 | $10,000 - $15,000 | $5,000 - $10,000 |
| | Moderate | $10,000 - $15,000 | $5,000 - $10,000 | $2,000 - $5,000 |
| | Minor | $5,000 - $10,000 | $2,000 - $5,000 | $1,000 - $2,000 |

**91** Compliance counsel submits that, at least for certain of the allegations, the appropriate range is from "major" to "moderate" in terms of deviation from the requirement and/or potential adverse affect as set out in Ontario Regulation 331/03.[44]

**92** The onus is on compliance staff to satisfy the Board of the contraventions and the factors leading to the level of administrative penalty proposed. In this case, the Board was not presented with any evidence upon which it could make a determination as to the potential of the contravention to adversely affect consumers. For this reason, the Board finds the potential to adversely affect consumers to be minor. This does not undermine the importance of these contraventions or their impact -- the matter is simply one of lack of evidence.

**93** In assessing the administrative penalties the Board also took into consideration that Energhx did not appear to derive any economic benefit from these contraventions and the very limited marketing and retailing that was undertaken beyond friends, family or company employees. It also reflects that Energhx has brought itself into subsequent compliance with all issues as indicated by the Board's letter of September 2011.

**94** The ECPA is designed to protect energy consumers by ensuring that retailers and marketers follow fair business practices, have been adequately trained and that consumers are provided with essential information before they sign energy contracts. Contraventions of the legal and regulatory framework that derogate from these requirements are, in the Board's view, matters of particular concern.

**95** As noted earlier in this Decision, the Board has discretion to consider multiple allegations associated with the

same transaction or subject matter as one contravention for the purposes of determining the level of administrative penalties to be imposed. The Board believes that it is appropriate to do so in this case, including consolidating all 12 allegations pertaining to training 1 to 8 being in relation to salespersons and 9 to 12 being in relation to verification representatives. In the context of these 12 violations, the Board finds the deviations in training from the requirements of the enforceable provisions that were contravened to be major and because of the lack of evidence as to the potential adverse affect on consumers, a default of "minor adverse impact" is will be used. An administrative penalty of $5,000 is therefore imposed.

**96** The contraventions pertaining to the contract content are considered in this case to be major deviations from the requirements of the enforceable provisions that were contravened but with minor potential adverse effect on consumers, due to the lack of evidence supporting any other finding. It is also noted that there were only 3 customers unaffiliated with the company who had signed contracts during this period, and that marketing and retailing was not undertaken to the general public. The administrative penalty is therefore $5,000.

**97** The Board fixes the amount of the administrative penalties at $10,000.

**Costs**

**98** Although Compliance counsel submits that this is an appropriate case in which to seek costs against Energhx, Compliance counsel has decided not to do so.[45] The Board makes no order as to costs in this proceeding.

**99 THE BOARD ORDERS THAT:**

1. Energhx shall, by December 31, 2012, pay to the Ontario Energy Board an administrative penalty in the amount of $10,000.

**ISSUED** at Toronto, March 26, 2012

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli
Board Secretary

qp/e/qlspi

1 The statutory and other references noted in this excerpt from the Notice are as follows: Ontario Regulation 90/99 (Licence Requirements -- Electricity Retailers and Gas Marketers) made under the Act, as most recently amended by Ontario Regulation 390/10 filed on October 13, 2010 and effective January 1, 2011; Ontario Regulation 389/10 (General) made under the *Energy Consumer Protection Act, 2010*, also filed on October 13, 2010 and effective January 1, 2011; the *Energy Consumer Protection Act, 2010*, S.O. 2010, c. 8, in force on January 1, 2011; Ontario Energy Board *Electricity Retailer Code of Conduct*, as restated November 17, 2010 and in force January 1, 2011; and Ontario Energy Board *Code of Conduct for Gas Marketers*, as restated November 17, 2010 and in force effective January 1, 2011.

2 A "low volume" consumer is, in the case of gas, a consumer that annually uses less than 50,000 cubic meters of gas and, in the case of electricity, a consumer that annually uses less than 150,000 kilowatt hours of electricity. The Board's Code of Conduct for Gas Marketers applies on in relation to low-volume consumers, while the Board's Electricity Retailer Code of Conduct contains provisions that apply only in relation to low volume consumers and others that apply in relation to all consumers.

3 EB-2010-0236 and EB-2010-0237.

4 Decision and Procedural Order No. 1 issued in respect of the Licence Applications on October 1, 2010.

5 Decision and Procedural Order No. 3 issued in respect of the Licence Applications on January 28, 2011.

6 Decision and Order issued in respect of the Licence Applications on March 24, 2011.

7 Decision and Order issued in respect of the Licence Applications on October 31, 2011.

8 Transcript of the oral hearing, page 2, lines 17 to 23.

9 In the Certificates of Compliance, Energhx indicated that it did not intend to use certain sales channels (Energhx's place of business, internet and telephone renewals). The Certificates of Compliance are available for viewing on the Board's website at: http://www.ontarioenergyboard.ca/OEB/Cons umers/Consumer+Protection/Retail+Energy+Contracts/List+of+Retail ers+and+Marketers

10 Energhx written submissions dated February 16, 2012, at page 6.

11 Compliance counsel written submissions dated February 10, 2012, at pages 9-10.

12 Letter dated September 9, 2011, Exhibit K, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

13 Compliance counsel written submissions dated February 10, 2012, at page 11.

14 *F.H. v. McDougall*, [2008] S.C.R. 41 at para. 49.

15 Compliance counsel written submissions dated February 10, 2012, at page 11.

16 *Ibid*.

17 Transcript of the oral hearing, page 117, line 16 to page 120, line 8; and page 142, line 18 to page 144, line 14.

18 Energhx written submissions dated February 16, 2012, at pages 2-3.

19 Compliance counsel written submissions dated February 10, 2012, at page 10.

20 *Ibid*, at page 12.

21 *Ibid*, at page 13, referring to various portions of the transcript of the oral hearing.

22 Energhx written submissions dated February 16, 2012, at page 2.

23 *Ibid*., at page 3.

24 Transcript of the oral hearing, page 120, line 15 to page 124, line 1.

25 Transcript of the oral hearing, page 138, line 25 to page 139, line 10.

26 Transcript of the oral hearing, page 145, line 20 to page 147, line 14.

27 Energhx written submissions dated February 16, 2012, at page 6.

28 *Ibid*., at pages 1 and 4.

29 Compliance counsel written submissions dated February 10, 2012, at page 40.

30 *Ibid*, at page 34.

31 *Ibid*, at page 35.

32 Transcript of the oral hearing, page 111, lines 12 to 20.

33 Energhx written submissions dated February 16, 2012, at pages 4-5.

34 Transcript of the oral hearing, page 140, lines 7 to 10.

35 Admitted Fact #4, Document Binder, Exhibit K1 at Tab 6.

36 Admitted Fact #5, Document Binder, Exhibit K1 at Tab 6.

37 Compliance counsel written submissions dated February 10, 2012, at page 25.

38 Admitted Fact #7, Document Binder, Exhibit K1, Tab 6.

39 Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

40 Compliance counsel written submissions dated February 10, 2012, at pages 27-28.

41 Letter dated September 9, 2011, Exhibit K4, in which it was acknowledged that Energhx "provided Board staff with evidence to support that [Energhx has] remedied the issues of alleged non-compliance set out in the Notice".

42 Transcript of the oral hearing, page 134, lines 7 to 8.

43 *Ibid*, pages 141 to 142, lines 27 to 29 and 1 to 3.

44 Compliance counsel written submissions dated February 10, 2012, at pages 36 to 39.

45 *Ibid*, at page 41.

Français

# Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

**Consolidation Period:** From July 1, 2016 to the e-Laws currency date.

Last amendment: 2016, c. 10, Sched. 2, s. 11-16.

Legislative History: 1999, c. 6, s. 48; 2000, c. 26, Sched. D, s. 2; 2001, c. 9, Sched. F, s. 2; 2002, c. 1, Sched. B (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2012); 2002, c. 17, Sched. F, Table; 2002, c. 23, s. 4; 2003, c. 3, s. 2-90; 2003, c. 8; 2004, c. 8, s. 46, Table; 2004, c. 17, s. 32; 2004, c. 23, Sched. B (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2014); 2005, c. 5, s. 51; 2006, c. 3, Sched. C; 2006, c. 21, Sched. F, s. 136 (1); 2006, c. 32, Sched. C, s. 42; 2006, c. 33, Sched. X; 2006, c. 35, Sched. C, s. 98; 2007, c. 8, s. 222; 2009, c. 12, Sched. D; 2009, c. 33, Sched. 2, s. 51; 2009, c. 33, Sched. 6, s. 77; 2009, c. 33, Sched. 18, s. 21; 2010, c. 8, s. 38; 2010, c. 26, Sched. 13, s. 17; 2011, c. 1, Sched. 4; 2011, c. 9, Sched. 27, s. 34; See: Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* - December 31, 2011; 2014, c. 7, Sched. 23; 2015, c. 20, Sched. 31; 2015, c. 29, s. 7-20; CTS 16 MR 10 - 3; 2016, c. 10, Sched. 2, s. 11-16.

## PART I
## GENERAL

**Board objectives, electricity**

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

1.1 To promote the education of consumers.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

4. To facilitate the implementation of a smart grid in Ontario.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1; 2015, c. 29, s. 7.

(2) REPEALED: 2016, c. 10, Sched. 2, s. 11.

**Section Amendments with date in force (d/m/y)**

2002, c. 23, s. 4 (1) - 09/12/2002

2003, c. 3, s. 2- 01/08/2003

2004, c. 23, Sched. B, s. 1 - 01/01/2005

2009, c. 12, Sched. D, s. 1 - 09/09/2009

2015, c. 29, s. 7 - 04/03/2016

2016, c. 10, Sched. 2, s. 11 - 01/07/2016

**Board objectives, gas**

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.
4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2.

**Section Amendments with date in force (d/m/y)**

2002, c. 23, s. 4 (2) - 09/12/2002

2003, c. 3, s. 3 - 01/08/2003

2004, c. 23, Sched. B, s. 2 - 01/01/2005

2009, c. 12, Sched. D, s. 2 - 09/09/2009

*Case Name:*

# Blue Power Distributed Energy Corp. (Re)

**IN THE MATTER OF the Ontario Energy Board Act, 1998,
S.O. 1998, c. 15, Schedule B;
AND IN THE MATTER OF an application
by Blue Power Distributed Energy
Corporation to renew its electricity retailer licence.**

2012 LNONOEB 131

No. EB-2010-0335

Ontario Energy Board

**Panel: Jennifer Lea, Counsel, Special Projects (By Delegation)**

Decision: March 30, 2012.

(11 paras.)

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## DECISION AND ORDER

### Background

**1** Blue Power Distributed Energy Corporation ("Blue Power") filed an application dated November 8, 2010 with the Ontario Energy Board under section 60 of the *Ontario Energy Board Act, 1998* to renew its electricity retailer licence. Blue Power filed supplementary information to complete the application on January 10, 2011.

**2** The Board issued a Notice of Application and Written Hearing for the application on February 25, 2011. Bluewater Distribution Corporation ("Bluewater Distribution"), an electricity distributor, filed a submission dated March 17, 2011 raising issues regarding the similarity of the name and logos of the applicant and the distributor. Blue Power responded to the submission on March 28, 2011.

**3** Before the application was determined, on August 25, 2011, the Board issued a Notice of Intention to make an order for compliance and impose an administrative penalty on Blue Power for contraventions of various provisions of consumer protection legislation and codes of the Board. Blue Power provided a written Assurance of Voluntary Compliance, which was accepted by the Board on September 12, 2011, and paid an administrative penalty.

**4** Board staff asked the Board to make provision for interrogatories and submissions with respect to the application

on September 9, 2011. Board staff and Bluewater Distribution filed interrogatories, and Blue Power responded to the interrogatories. Board staff and Bluewater Distribution filed submissions on the application. During the time that the record was being completed and the application considered, the Board issued a series of decisions extending the term of Blue Power's electricity retailer licence.

**Board Findings**

**5** The Board's review of an electricity retailer licence application includes consideration of the technical capability, financial position and the conduct of the applicant. In this application, no issues were raised regarding the applicant's technical capability. The concerns raised by Board Staff in its interrogatories with respect to financial matters have been addressed by the applicant. However, the record discloses two sources of concern regarding the conduct of the applicant.

**6** As stated above, Blue Power was the subject of a compliance proceeding before the Board. Some of the contraventions, admitted to by Blue Power in its Assurance of Voluntary Compliance, were serious, as they involved providing incomplete information to consumers, or information that could mislead consumers. However, with respect to all deficiencies identified in the compliance proceeding (except in two cases where the allegations were withdrawn), the Assurance indicates that Board staff were satisfied that the deficiencies had been remedied. I will therefore grant the application for an electricity retailer licence, with the standard term of five years.

**7** I note that according to the Assurance, Blue Power admitted that at the time of the inspection that led to the compliance proceeding, no compliance monitoring and quality assurance program existed that satisfied the requirements of sections 7.4 and 7.5 of the Board's Electricity Retailer Code of Conduct. However, in the Assurance, Blue Power committed itself to ensuring that "effective as of the date of this Assurance [September 12, 2011] the compliance monitoring and quality assurance program to monitor compliance meets the requirements set out in section 7.4 and 7.5 of the Codes". In the Assurance it was noted that Board staff agreed that the deficiency had been remedied.

**8** I find that it would be helpful to the Board in monitoring Blue Power's compliance with its licence and legislative and regulatory requirements to receive information regarding the results of Blue Power's compliance monitoring and quality assurance program. Maintaining consumer confidence in the electricity market, and protecting consumers in that market, is an important part of the Board's mandate. The imposition of licence conditions on electricity retailers, where appropriate, can facilitate this mandate.

**9** Blue Power will be required to file with the Board, no later than December 31, 2012, the following information:

* A description of Blue Power's compliance monitoring and quality assurance program, including a description of the specific protocols for testing the performance of all salespersons and verification representatives in relation to compliance with applicable statutes, regulations and regulatory requirements;

* A summary of the results of the program, indicating trends in compliance and quality assurance over the period September 12, 2011 to December 1, 2012; and

* A description of Blue Power's strategy for continuous improvement in legislative and regulatory compliance, demonstrating the link between the results of the program to date and measures to be implemented in the future.

**10** As indicated earlier in the summary of the application above, Bluewater Distribution filed interrogatories and submissions raising issues regarding the similarity of the name and logos of the applicant and the distributor. Bluewater Distribution submitted that the similarity in names and logos creates an implicit assumption in the minds of consumers

that the retailer is the distributor. In its final submission, Bluewater Distribution asked that Blue Power be restricted from marketing electricity in the whole of Lambton County through a licence condition that would prohibit Blue Power from marketing electricity in that county. Although Hydro One Networks Inc. is the licensed electricity distributor for some consumers in Lambton County, Bluewater Distribution submitted that residents of the county may have a difficult time distinguishing between the two distributors, and that therefore the confusion between distributor and retailer could occur throughout the county.

**11** I will not impose a special condition regarding the marketing of electricity by Blue Power in Lambton County. If I were to consider such a condition, I accept Blue Power's argument that any such restriction should apply only to the service area of Bluewater Distribution, not to the service area of another distributor. Further, I note that the record indicates that Blue Power is not marketing electricity in Bluewater Distribution's service area, as no Retail Service Agreement exists between the two entities. Should a Retail Service Agreement be signed between Blue Power and Bluewater Distribution, there exist both legislative and regulatory requirements that electricity retailer salespeople clearly identify themselves and specifically differentiate themselves from distribution companies. While noting Bluewater Distribution's concerns regarding the possibility of customer confusion due to the similarity of the names of the distributor and the retailer, I am not prepared to impose any special condition in this regard on the basis of the record before me at this time.

**IT IS THEREFORE ORDERED THAT:**

1. The electricity retailer licence is granted for a period of five years.

2. In addition to the terms and conditions of the standard electricity retailer licence, the licensee shall abide by the special conditions contained in Schedule 2 to the licence.

**DATED** at Toronto, March 30, 2012

**ONTARIO ENERGY BOARD**

*Original signed by*

Jennifer Lea
Counsel, Special Projects

qp/e/qlspi

# THE LAW OF EVIDENCE IN CANADA

## FOURTH EDITION

Sidney N. Lederman
Superior Court of Justice
for Ontario

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for Ontario

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of such words in the provincial legislation, it could be said that such statements would be admitted and any circumstances of motivation should be left to the question of weight. But, again, given the principled approach, one could argue that motivation could affect admissibility.[291]

**§6.237** In *R. v. Palma*,[292] it was held that police reports containing allegations of indecent assault constituted records made in the course of an investigation and were, therefore, inadmissible under s. 30(10) of the *Canada Evidence Act*.

*(h) Business Records Subject to Other Exclusionary Rules*

**§6.238** The *Canada Evidence Act* in s. 30(10)(a) specifically preserves a right to assert privilege in respect of the matters contained in the record.[293] Moreover, if the record was made by or alludes to someone who would not be competent and compellable as a witness to disclose the matters contained in the record, then such record will not be received.[294]

**§6.239** Although provincial legislation contains no such provision, it is logical to believe that there would be exclusion for these reasons as well.

*(i) Negative Inferences from Records*

**§6.240** Section 30(2) of the *Canada Evidence Act* expressly provides for a negative inference which the court can draw from the absence of relevant information in the record: the court may conclude that the matter which was not recorded did not occur or exist. In *R. v. Garofoli*,[295] the Ontario Court of Appeal suggested that resort to this provision is the appropriate way of leading evidence of this fact, rather than merely calling a witness to testify that he could not find

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by a police force as part of its normal business. Yet in *R. v. Sunila* (1986), 73 N.S.R. (2d) 308, [1986] N.S.J. No. 51 (N.S.T.D.), it was held that records which set out details of the surveillance of ships suspected of transporting drugs were inadmissible since the surveillance constituted an investigation.

291 Police records of an investigation were admissible as a business record under the Saskatchewan *Evidence Act* in the context of an order for permanent committal of two children into the care of social services in *L. (B.) v. Saskatchewan (Ministry of Social Services)* (2012), 393 Sask. R. 57, [2012] S.J. No. 201, at para. 29 (Sask. C.A.).

292 (2000), 149 C.C.C. (3d) 169, [2000] O.J. No. 5817 (Ont. S.C.J.). This problem was avoided in *R. v. Crate* (2012), 285 C.C.C. (3d) 431, 522 A.R. 239, [2012] A.J. No. 465 (Alta. C.A.), wherein the Court acknowledged the exception under the *Evidence Act*, but admitted photographs of the accused taken during his arrest that showed identifying tattoos pursuant to the common law business records exception to the hearsay rule.

293 See *R. v. McLarty (No. 3)* (1978), 45 C.C.C. (2d) 184, at 187, [1978] O.J. No. 3736 (Ont. Ct. G.S.P.); *R. v. Sanghi* (1971), 3 N.S.R. (2d) 70, [1971] N.S.J. No. 131 (N.S.C.A.).

294 See *R. v. Heilman* (1983), 22 Man. R. (2d) 173, [1983] M.J. No. 390 (Man. Co. Ct.).

295 (1988), 27 O.A.C. 1, at 39-40, [1988] O.J. No. 365 (Ont. C.A.), revd on other grounds [1990] 2 S.C.R. 1421, [1990] S.C.J. No. 115 (S.C.C.). See also *R. v. Gould* (1990), 57 C.C.C. (3d) 500, [1990] B.C.J. No. 1564 (B.C.C.A.).

any relevant entry in the record. In that case, the Court stated that such a witness who testified that he personally examined customs records to see whether any cars had been imported by the accused, would be stating non-admissible hearsay. The Court said the proper method of adducing such evidence was to utilize s. 30(2) of the *Canada Evidence Act* and produce the custom records, thus giving rise to the inference of the non-occurrence of the importation from the fact that there was no entry of it in the records.

**§6.241** No similar provision is contained in provincial legislation, but it appears that there is nothing to prevent a trial judge from drawing such an inference.

*(j) Computer Printouts*

**§6.242** Computer printouts are now a part of everyday business life. Such methods of record-keeping were not contemplated when the business records legislation originated. Courts have permitted the introduction of computer bank records under s. 29 of the *Canada Evidence Act*, but have required, as a condition of admissibility, that a foundation be established to demonstrate the general reliability of the input of entries, storage of information and its retrieval and presentation.[296] In *R. v. Bicknell*,[297] a computer printout of telephone calls was held to be a "record" within the meaning of s. 30 and not merely a copy of the record. Some courts have accepted the reliability of computers without stipulating any preconditions to the admissibility of their printouts under s. 30.[298] To admit them, however, would require acknowledgement that double or multiple hearsay would not be a bar to the application of s. 30.[299] Moreover, there would have to be some relaxation of the strict interpretation of the double-duty test. But a hard copy of computer printouts of business records would be admissible under s. 30(3) of the *Canada Evidence Act* if supported by affidavits that explain why it is not practicable to produce the original record and that attests to the copy's authenticity.

**§6.243** As stated by Bull J.A., in *R. v. Vanlerberghe*:

> [Section 30] clearly covers mechanical as well as manual bookkeeping records and the keeping of records, and the flow-out or printout of that bookkeeping

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[296] See *R. v. McMullen* (1979), 25 O.R. (2d) 301, 47 C.C.C. (2d) 499, at 506, [1979] O.J. No. 4300 (Ont. C.A.). The admissibility of banking records under this provision is discussed in detail in J.D. Ewart, *Documentary Evidence in Canada* (Toronto: Carswell, 1983), Chapter 4.

[297] (1988), 41 C.C.C. (3d) 545, [1988] B.C.J. No. 577 (B.C.C.A.).

[298] *R. v. Vanlerberghe* (1976), 6 C.R. (3d) 222, [1976] B.C.J. No. 728 (B.C.C.A.); *R. v. Sanghi* (1971), 3 N.S.R. (2d) 70, [1971] N.S.J. No. 131 (N.S.C.A.). Under s. 31.2(2) of the *Canada Evidence Act*, computer printouts satisfy the best evidence rule if they have been manifestly or consistently relied on for the information set out therein.

[299] See this chapter, §§ 6.224-6.226. See also and Chapter 11, Similar Fact Evidence.

Rosenberg J.A. stated that perceptions of guilt based on demeanour are too subjective to be meaningful and should not be part of the jury's consideration.

**§6.441** By the same logic, after-the-fact conduct, which is reasonably capable of supporting an inference *favourable* to the accused, should be received unless its probative value is substantially outweighed by its potential prejudicial effect. Though such conduct is not tantamount to an admission, but more in the form of prior consistent conduct,[632] the Ontario Court of Appeal, in *R. v. B. (S.C.)*,[633] held that consciousness-of-innocence conduct was admissible, stating:

> We are unaware of any evidentiary rule or theory of relevance which would admit evidence that an accused ran away when confronted by the police as evidence of guilt, but would exclude evidence that an accused effectively turned himself over to the police for whatever investigative purposes they desired, as evidence supporting an inference that the accused did not commit the crime.[634]

*(d) Implied Admissions*

(i) Silence

**§6.442** Mere silence *per se* does not constitute an admission or an adoption of liability, but such silence, when coupled with material loss or prejudice to the party who should have been informed that liability was not accepted, will operate as such.[635] Silence can also be taken as an admission where a denial

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D.L.R. (4th) 580, 249 C.C.C. (3d) 296, [2009] A.J. No. 1116 (Alta. C.A.), affd [2010] 2 S.C.R. 648, 260 C.C.C. (3d) 129, [2010] S.C.J. No. 42 (S.C.C.) (in addition to lack of remorse, the offender's post-offence conduct, which included taking the victim's property after his death, was relevant to whether the murder was planned and deliberate so as to constitute first degree murder). See also *R. v. Cudjoe* (2009), 251 O.A.C. 163, 68 C.R. (6th) 86. [2009] O.J. No. 2761 (Ont. C.A.), where the accused's post-offence conduct was held to be admissible as going to the issue of reduced culpability, which issue was raised by the accused.

632 See Chapter 7, Self-Serving Evidence. In *The Report of the Commission on Proceedings Involving Guy Paul Morin* (Queen's Printer, Ontario, 1998), Commissioner Fred Kaufman recommended that prior consistent statements of an accused be admissible at the instance of the defence, where the accused testifies at trial, as they demonstrate the accused's state of mind when originally confronted with the allegation of crime.

633 (1997), 119 C.C.C. (3d) 530, [1997] O.J. No. 4183 (Ont. C.A). See also *R. v. C. (G.)* (1997), 8 C.R. (5th) 49, at 54-58, [1997] O.J. No. 1818 (Ont. Gen. Div.). But see *R. v. Richards* (1997), 6 C.R. (5th) 154, [1997] B.C.J. No. 339 (B.C.C.A.), where the Court held that the accused's offer of a blood sample and polygraph test was of trifling probative value as consciousness of innocence as compared to the risk of unnecessarily complicating the trial and was therefore inadmissible.

634 *R. v. B. (S.C.)*, *ibid.*, at 543 (C.C.C.). See also *R. v. Edgar* (2010), 101 O.R. (3d) 161, 260 C.C.C. (3d) 1, [2010] O.J. No. 3152 (Ont. C.A.), leave to appeal refused [2010] S.C.C.A. No. 466 (S.C.C.).

635 *Dominion Bank v. Ewing* (1904), 35 S.C.R. 133, [1904] S.C.J. No. 42 (S.C.C.), leave to appeal refused [1904] A.C. 806 (P.C.).

would be the only reasonable course of action expected if that person were not responsible.[636] In *R. v. Baron*,[637] Martin J.A. put the principle as follows:

> The silence of a party will render statements made in his presence evidence against him of their truth if the circumstances are such that he could reasonably have been expected to have replied to them. Silence in such circumstances permits an inference of assent ...[638]

**§6.443** No such assent can be inferred, however, when an accused remains silent in the presence of a police officer conducting an investigation, since to hold otherwise would breach a fundamental right of an accused.[639]

**§6.444** In *R. v. Scott*,[640] the accused remained silent in the face of an accusation by the victim's sister that "he did it". The Manitoba Court of Appeal held that the mere silence of an accused, even where it would be reasonable to expect a denial when confronted with an accusation, will not constitute an admission.

**§6.445** If it would be reasonable to expect a denial in the face of an accusation, then the party's failure to do so could constitute an implied admission against him or her.[641] Much, of course, turns upon the circumstances to determine whether such an expectation is reasonable. Before such conduct can constitute an admission, the court must be satisfied that there is sufficient evidence from which a jury might reasonably find that the conduct amounted to an acknowledgement of responsibility.[642]

**§6.446** Failure to deny an accusation is not the only conduct that may constitute an implied admission. Any conduct, action or demeanour may amount to an acceptance

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636 Compare *Bissell v. Stern* (1877), 46 L.J.C.P. 467 (C.A.), with *Wiedemann v. Walpole*, [1891] 2 Q.B. 534 (C.A.), as to whether silence by a defendant in the face of accusations that he breached his promise to marry constitutes an admission. In *R. v. Eden*, [1970] 2 O.R. 161, [1969] O.J. No. 1570 (Ont. C.A.), it was held that it was not unreasonable for an accused to fail to respond to statements made by his co-accused when they were both sitting in a police cruiser.

637 (1976), 14 O.R. (2d) 173, [1976] O.J. No. 2304 (Ont. C.A.).

638 *Ibid.*, at 187 (O.R.).

639 *R. v. Turcotte*, [2005] 2 S.C.R. 519, [2005] S.C.J. No. 51 (S.C.C.); *R. v. Conlon* (1990), 1 O.R. (3d) 188, [1990] O.J. No. 2264 (Ont. C.A.); *R. v. Eden*, [1970] 3 C.C.C. 280, [1969] O.J. No. 1570 (Ont. C.A.); see Chapter 8, Confessions, §§ 8.35-8.43, 8.243 ff.

640 2013 MBCA 7, [2013] M.J. No. 24, (Man. C.A.). But see *R. v. F. (J.)*, 2011 ONCA 220, [2011] O.J. No. 1577, affd on other grounds 2013 SCC 12, [2013] S.C.J. No. 12 (S.C.C.).

641 *R. v. Christie*, [1914] A.C. 545 (H.L.).

642 *R. v. Robinson*, 2014 ONCA 63, [2014] O.J. No. 272 (Ont. C.A.); *R. v. F. (J.)* , 2011 ONCA 220, [2011] O.J. No. 1577 (Ont. C.A.), affd 2013 SCC 12, [2013] S.C.J. No. 12 (S.C.C.); *R. v. Warner* (1994), 94 C.C.C. (3d) 540, at 549, [1994] O.J. No. 2658 (Ont. C.A.); *R. v. Harrison*, [1946] 3 D.L.R. 690, at 696, [1945] B.C.J. No. 34 (B.C.C.A.); *R. v. Hryn* (1981), 63 C.C.C. (2d) 390, [1981] O.J. No. 3306 (Ont. Ct. G.S.P.).

**PUBLIC VERSION**

STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

| | |
|---|---|
| IN THE MATTER OF THE INVESTIGATION INTO THE MARKETING, ADVERTISING, AND TRADE PRACTICES OF AMERICAN POWER PARTNERS, LLC; BLUE PILOT ENERGY, LLC; MAJOR ENERGY ELECTRIC SERVICES, LLC AND MAJOR ENERGY SERVICES, LLC; AND XOOM ENERGY MARYLAND, LLC | BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND |
| | CASE NO. 9346 |
| **XOOM ENERGY MARYLAND, LLC** | **CASE NO. 9346(a)** |

Issued: October 30, 2015

**PROPOSED ORDER OF PUBLIC UTILITY LAW JUDGE**

**Appearances:**

Brian R. Green, Esquire, and Eric J. Wallace, Esquire, on behalf of XOOM Energy Maryland, LLC.

Jacob M. Ouslander, Esquire, and Molly G. Knoll, Esquire, on behalf of the Maryland Office of People's Counsel.

Kenneth M. Albert, Esquire, and Annette B. Garofalo, Esquire, on behalf of the Technical Staff of the Maryland Public Service Commission.

## I. Background and Procedural History

On April 1, 2014, the Maryland Public Service Commission ("Commission") issued a Show Cause Order to, among others, XOOM Energy Maryland, LLC ("XOOM" or the "Company").[1] On April 22,

[1] *See* Order No. 86274.

2014, XOOM submitted its Response to the Show Cause Order.[2] On December 17, 2014, by Order No. 86768, the Commission delegated the XOOM matter to the Public Utility Law Judge Division.

On February 10, 2015, XOOM filed the Direct Testimony of Patricia Kulesa, the Company's Compliance Officer.[3] On April 20, 2015, the Company filed Ms. Kulesa's rebuttal testimony.[4]

On March 13, 2015, the Maryland Office of People's Counsel ("OPC") filed the Reply Testimony of Barbara R. Alexander, Consumer Affairs Consultant, who testified on behalf of OPC.[5]

Also, on March 13, 2015, Technical Staff of the Commission ("Staff") submitted the Reply Testimony of Kevin D. Mosier, a Wholesale Markets Liaison in the Commission's Energy Analysis and Planning Division.[6]

On June 2 and June 3, 2015, an evidentiary hearing was held in the matter. On July 27, 2015, the parties filed initial briefs; on August 17, 2015, the parties filed reply briefs; and on August 31, 2015, the Company filed its response to OPC's reply briefs.

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[2] XOOM Exhibit ("Ex.") 1A (Public) and 1C (Confidential) ("XOOM Response").

[3] XOOM Ex. 2A (Public) and 2C (Confidential) ("Kulesa Direct").

[4] XOOM Ex. 3A (Public) and 3C (Confidential) ("Kulesa Rebuttal").

[5] OPC Ex. 13A (Public) and 13C (Confidential) ("Alexander Direct").

[6] Staff Ex. 4A (Public) and 4C (Confidential) ("Mosier Direct").

## II. Applicable Law

The Commission has authority to impose a civil penalty on an electricity supplier, revoke or suspend an electricity supplier's license, order a refund or credit to a customer, or impose a moratorium on adding or soliciting additional customers by the electricity supplier, if it finds, among other things, the electricity supplier committed fraud or engaged in deceptive practices; switched or caused to be switched, the electric supply for a customer without first obtaining the customer's permission; violated a Commission regulation or order; or violated a provision of the Public Utilities Article or any other applicable consumer protection law of the State. *See* Pub. Util. Art., § 7-507(k), *Annotated Code of Maryland*.

The Commission may impose a civil penalty of not more than $10,000 for each day a violation continues, but shall consider the number of previous violations of any provision of this division; the gravity of the current violation; and the good faith of the electricity supplier or person charged in attempting to achieve compliance after notification of the violation. *See* Pub. Util. Art., § 7-507(l), *Annotated Code of Maryland*.

The Commission has the same authority over gas suppliers as it does electricity suppliers, including revoking or suspending a license; imposing a moratorium, civil penalty or other remedy; or ordering a refund for or credit to a customer. *See* Pub. Util. Art., § 7-603, *Annotated Code of Maryland*.

A supplier shall provide a residential customer notice of a pending renewal of an evergreen contract 45 days before the automatic renewal, which must include a clear and highlighted statement of any changes in the material terms and conditions of the agreement, inform the customer how to terminate the contract without penalty, and inform the customer that terminating the evergreen contract without selecting another supplier will return the customer to utility commodity service. See COMAR 20.53.07.08C, COMAR 20.59.07.08C.

A supplier may not add a new charge for a new service, existing service, or service option without first obtaining consent from the customer, verifiable to the same extent and using the same methods specified for contracting under COMAR 20.53.07.08. *See* COMAR 20.53.07.05C.

A supplier may not engage in marketing or trade practice that is unfair, false, misleading, or deceptive. *See* COMAR 20.53.07.07A(2); COMAR 20.59.07.07A(2).

A supplier shall post on the Internet readily understandable information about its services, prices, and emission disclosures. *See* COMAR 20.53.07.07C; COMAR 20.59.07.07C.

**Overview of XOOM's Marketing and Solicitation Practices**

XOOM offers both variable and fixed price products as a competitive natural gas and electricity supplier in Maryland.[7]

[7] Kulesa Direct at 2.

XOOM is authorized by the Commission to operate in the service territories of Potomac Electric Power Company ("Pepco"), Washington Gas Light Company ("WGL"), Baltimore Gas and Electric Company ("BGE"), and Delmarva Power & Light Company ("DPL").[8] Its parent corporation, XOOM Energy, LLC, has 19 affiliates which operate in 18 states and the District of Columbia.[9]

To promote its products, XOOM has contracted with several vendors[10] who hire individuals (a so-called "independent representative" or "IR") to promote and market the XOOM product to their friends and families ("warm marketing").[11] An IR must undergo training on the XOOM products and pass a test in order to promote XOOM products.[12] These IRs do not receive compensation directly from XOOM for a customer's enrollment with XOOM; XOOM compensates the vendor and the vendor is responsible for compensating the IRs.[13]

XOOM requires a customer to self-enroll in a XOOM energy product through its website.[14] Ms. Kulesa described the various links to information on XOOM's website designed to educate the consumer about XOOM's energy products, including the difference

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[8] XOOM Ex. 1, Ex. 2.

[9] Alexander Direct at 5.

[10] In Maryland, XOOM uses only one vendor to acquire IRs to promote XOOM and its energy products. XOOM Ex. 1 at 6.

[11] Kulesa Direct at 3.

[12] Kulesa Direct at 4.

[13] Kulesa Rebuttal at 16-17; Transcript ("TR") at 90-91.

[14] Kulesa Direct at 4.

between a fixed rate and a variable rate.[15] Ms. Kulesa noted that the terms and conditions associated with each XOOM product are available to the customer to review prior to entering his/her personal information as well as during the entire enrollment process.[16] Prior to completing the enrollment for a XOOM energy product, the customer must affirm that he/she has read the terms and conditions for the selected rate plan.[17] Additionally, Ms. Kulesa indicated that a customer could access the "Frequently Asked Questions" document link prior to beginning the enrollment process as well as during the process.[18]

## III. Due Process Concerns

In its briefs, XOOM expressed its concerns over the fairness of the proceedings and whether it had been afforded its due process protections. It argued that the Commission has not made any allegations of wrongdoing against XOOM in either the Show Cause Order or the Delegation Order, but initiated the Show Cause proceeding merely due to the increased number of complaints filed with the Commission's Office of External Relations ("OER") during

[15] Kulesa Direct at 5-7. (Copies of two videos that are linked to the XOOM website were admitted into the record: one video analogizes a fixed price to an individual taking a train ride over a smooth uninterrupted track while the individual sits back and enjoys the ride; and the other video describing a variable rate depicts an individual entering a sports car and then driving it on a winding, hilly road and requiring and allowing him to maintain control of the car over this road.)

[16] Kulesa Rebuttal at 25-26.

[17] Kulesa Direct at 7-8.

[18] Kulesa Direct at 5-6.

the Polar Vortices' time periods.[19] It therefore asserted that this failure results in the proceeding being "constitutionally deficient as lacking due process of law." Additionally, XOOM contended that OPC's failure to request any remedy for the allegations that it made of violations of the Maryland law governing competitive suppliers results in a further indices of unfairness. XOOM therefor argued that it has not had sufficient notice as to the allegations against it or the violations charged to be able to defend itself and has not been afforded its due process rights.

In response to XOOM's due process argument, both OPC and Staff asserted that XOOM has been afforded all the procedural protections required under the Due Process Clause and Commission law. Both point to the Show Cause Order to demonstrate that the Commission provided adequate notice that the OER complaints on which it based the Show Cause Order alleged XOOM (as well as the other identified suppliers) "provided false and misleading information about the expected range and nature of (as well as the proves for cancelling) variable rate contracts, advertised to customers that the supplier's variable rate would not exceed the application Standard Offer Service ("SOS")) or Sales Service ("SS") price, and provided inadequate information that customers needed to make an informed choice regarding the purchase of electricity and

[19] XOOM Brief at 7.

natural gas services."[20] OPC and Staff each cited the list of questions that XOOM was required to respond to that focused on specific pricing and marketing practices that the Commission was investigating. OPC noted that the "Show Cause Order made reference to the laws, orders or regulation which had allegedly been violated [footnote omitted], and directed XOOM to not only show cause why the Commission should not find that XOOM had violated those laws, but directed XOOM to answer a series of 14 questions as well."[21]

OPC further concluded that XOOM not only was on notice of the specific allegations contained in the OER complaints, but XOOM has "unique access to all of the relevant evidence necessary to refute the veracity of these allegations ...." Similarly, Staff submitted that "detailed information about the marketing practices that the Commission was investigating was also available to XOOM from the complaints filed against [it]."[22] OPC also argued that XOOM has had a meaningful opportunity to be heard in the matter, and there is nothing in the Maryland law which requires a request for relief to be part of a complaint against a party.

Except for OPC's allegations that XOOM violated the provisions of the Maryland Door-to-Door Solicitations Act ("Act"),[23] I find that, in the context of an administrative proceeding, XOOM was provided adequate notice of the allegations of

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[20] OPC Reply Brief at 5-6.

[21] OPC Reply Brief at 6.

[22] Staff Reply Brief at 3.

[23] *See Md. Ann.*, Comm. Art., § 14-302.

wrongdoing and was afforded a hearing on these allegations and therefore was afforded its due process rights. Although the Commission queried XOOM about door-to-door solicitations as part of the Show Cause Order, XOOM denied engaging in any door-to-door solicitations. Neither Staff's or OPC's pre-filed testimony alleged that XOOM had engaged in door-to-door sales or alleged a misleading or defective trade practice based on failure to comply with the Maryland Door-to-Door Sales Act.

In her testimony, Ms. Alexander stated that "[m]y investigation and analysis was focused on whether XOOM's marketing and trade practices in the sale of electric and gas supply to residential customers complied with Maryland law, *with an emphasis on consumer protection issues*" (emphasis added).[24] She then summarized her findings and conclusions in which she "conclude[d] that XOOM has engaged in a number of unfair and deceptive practices that appear to conflict with Maryland law and regulations, including [followed by five specific allegations]."[25] Ms. Alexander's testimony evidenced her knowledge that XOOM's IRs may have been making "oral representations ... at the door, or over a cup of coffee" to Maryland consumers.[26] Ms. Alexander's testimony also included a copy of the form of the XOOM contract. Other than noting that "as far as XOOM is aware, its agents do not

[24] Alexander Direct at 2.

[25] Alexander Direct at 4-5.

[26] Alexander Direct at 12-13; Exhibit BRA-2 (6), XOOM response to OPC's data request 6-6A.

engage in door-to-door or rely on telemarketing sales channels in the form of calls to unknown individuals,"[27] Ms. Alexander never disputed XOOM's claim that it did not engage in door-to-door sales nor did she allege that XOOM had engaged in an unfair or deceptive trade practice by a failure to abide by any requirement of the Act.

I conclude that, prior to the hearing in this matter, XOOM did not have adequate notice that OPC intended to pursue remedies for misleading and deceptive trade practices based on violations of the Act. Although the interpretation of the Act may lend itself to legal briefing, XOOM may have wished to present more extensive testimony to support its contention that its "warm marketing" was not considered personal solicitation under the Act or to establish the number of enrollments which may have occurred through the personal solicitation of an IR to perhaps mitigate any potential penalties associated with a finding of a violation of the Act. Accordingly, as requested by XOOM, I strike those portions of OPC's brief in which it alleges violations of the Maryland Door-to-Door Sales Act and any requested remedies associated with the allegations, as being beyond the scope of these proceedings.

As to the other allegations of violations of the Maryland law and Commission regulations governing the conduct of a competitive supplier in Maryland, as referenced by OPC and Staff, both the Show Cause Order and the Delegation Order provided XOOM adequate notice of the allegations of the wrongdoing against it as

[27] Alexander Direct at 7.

well as the Maryland laws and Commission regulations it was alleged to have violated. XOOM's response to the Show Cause Order included a listing of each Maryland complaint it had received from January 18, 2013 through March 31, 2014 from which it developed a description of the complaint, actions taken, and resolution, which was in response to one of the 14 questions included in the Show Cause Order. Although the Show Cause Order may have only provided the general allegations of violations of the Maryland law governing competitive suppliers, the complaints to which XOOM had access and which were cited in the Show Cause Order provided specific allegations of wrongdoing. I also find that XOOM is presumed to know the Maryland laws governing the marketing, sales and trade practices of a competitive supplier in Maryland,[28] especially as it is required, as a condition of its licensing, to agree to comply with State consumer protection laws and regulations applicable to competitive suppliers, and was therefore aware of the laws to which it was required to comply. Consequently, I find that the allegations made by the Commission and OPC[29] gave adequate notice to XOOM as to the allegations it was required to defend against in this proceeding.

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[28] *See Benek v. Hatcher*, 358 Md. 507, 532, 750 A.2d 10 (2000) ("... a landlord is presumed to know the law governing habitability of premise, just as a motorist is presumed to know the laws regulating motor vehicles, ...")

[29] Ms. Alexander's testimony also contained more specific allegations of violations of the Maryland consumer protection laws and the Commission's competitive supplier regulations. *See* Alexander Direct at 4-5.

Additionally, XOOM was placed on notice of the possible penalties that the Commission could impose if the evidence was sufficient to sustain the allegations made as to XOOM's marketing and trade practices. Although OPC's recommendations of appropriate remedies may inform my decision, the Public Utilities Article, § 7-507(l)(3), guides my ultimate decision based upon the record before me. Consequently, I find that XOOM had adequate notice of the possible penalties that could be imposed and the factors that would be considered prior to imposing any penalty.

Finally, XOOM and OPC disagree on the standard of proof that must be met in this proceeding to find that a violation indeed occurred. XOOM argues that a higher degree of proof is required, *i.e.* clear and convincing evidence;[30] whereas OPC argues that that standard is preponderance of the evidence.[31] I conclude that the allegations against XOOM for violations of essentially consumer protection laws and regulations do not rise to a level of criminal conduct to warrant a heightened level of proof in this matter. Further, the administrative burden to the Commission would be significant if the standard were "clear and convincing" evidence in these types of proceedings. The higher standard may stymy the Commission's ability to take timely action to prevent unfair and deceptive trade practices of a competitive supplier and therefore eviscerate the Commission's obligation to protect the consumers

[30] XOOM Initial Brief at 5, citing *Travers v. Baltimore Police Dep't*, 115 Md.App. 395, 693 A.2d 378 (1997).

[31] *See* Maryland Court of Appeals decision in *Coleman v. Anne Arundel Co. Police Dept.*, 369 Md. 108 (2002)

from these practice, which may discourage the participation by consumers in competitive supply services. Consequently, I find that standard of proof necessary to be met in this matter is a preponderance of the evidence.

Accordingly, I find that XOOM has been accorded its full due process procedural protections in this proceeding because XOOM (1) had ample information of the allegations against it; (2) had the opportunity to be heard at the hearing; (3) was given a chance to respond to OPC's reply brief in addition to its submittal of an initial brief and reply brief; and (4) has the opportunity to appeal this decision to the Commission as well as to take judicial review of the final order.

## IV. Alleged Violations and Findings

### 1. XOOM's Enrollment and Marketing Practices Resulted in a Significant Number of Unauthorized Enrollments and Resulted in the Inability of Customers to Make an Informed Choice in the Purchase of Electric or Natural Gas Supply.

OPC alleged that XOOM fails to confirm the identity of the customer who is enrolling in its energy product as required by the applicable Commission regulations, which has resulted in a "high incidence of slamming." XOOM argued that its enrollment process verifies the identity of the customer as required by the applicable Commission regulations.

During the XOOM Internet enrollment process, the customer is prompted to enter in an email address and once entered,

the customer is prompted to enter the same email address again.[32] To continue on with the enrollment, the email address is checked that it is valid, *i.e.*, in the appropriate email format xxx@xxx.xxx, and that the two entries match.[33] If the format is valid and the two entries match, then the customer may complete the enrollment.[34] Upon completion of the enrollment, an email is sent to the email address entered during the enrollment process confirming the enrollment with the terms and conditions of the contract attached.[35] In the event the initial email "bounces back," *i.e.*, returned as undeliverable, a telephone call is made to the customer to confirm the email address and/or confirmation of the enrollment and a paper copy of the terms and conditions is sent to the physical service address associated with the customer's account.[36]

Within 24-48 hours of a completed enrollment, an automated call ("robocall") to the telephone number entered during the enrollment is made to confirm the customer's enrollment with XOOM.[37] After the utility processes the enrollment, XOOM sends a welcome letter to the email address entered during enrollment along with a copy of the terms and conditions of the enrolled plan and

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[32] TR at 142.

[33] TR at 143, 190. (According to Ms. Kulesa, if the email is not correct or the customer does not have an email, the enrollment defaults to a manual process.)

[34] TR at 143.

[35] TR at 148.

[36] TR at 149.

[37] Kulesa Rebuttal at 10; TR at 213.

the utility independently sends a notice to the customer of the service switch to XOOM.[38] In its communications with the customer, XOOM provides the customer a contact number in the event the customer has any question about the enrollment.[39]

XOOM also has **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** Additionally, Ms. Kulesa explained that XOOM uses the eIDVerify tool administered by Equifax **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** The tool asks a number of questions that only the customer would know to verify the customer's identity.[43] **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL**

[38] Kulesa Rebuttal at 10.
[39] TR at 148.
[40] Kulesa Rebuttal at 11.
[41] Kulesa Rebuttal at 11.
[42] Kulesa Rebuttal at 10.
[43] Alexander Testimony, Ex. BRA-2, XOOM Resp. to OPC DR Set No. 3.
[44] TR at 99-100.

COMAR 20.53.07.08(3)(a)(i) requires that a supplier that contracts with a customer via the Internet must "confirm the identity of the person making the contract;" however, a supplier may comply with the identity confirmation requirement if it "sends a contract over the Internet to a valid email address of the contracting customer."[45] I conclude that COMAR 20.53.07.08(3)(b) is an alternative method by which a supplier may confirm a customer's identity (or a so-called "safe harbor regulation"). OPC argued that the term "valid" includes verification of the customer's identity to establish that the email address is indeed the customer's. First, I find that "valid" modifies the phrase "email address." The phrase "valid email address" is not a phrase unique to the Commission's regulations. It is generally accepted that a "valid email address" means that it meets the format requirements to allow an email to be sent and received at the address, *i.e.*, the sender will not receive an email indicating that the sent email is "undeliverable" or the email address is "invalid (a so-called "bounce back.").[46] I find no regulatory history that evidences that the Commission intended to define "valid email address" in a manner different than its ordinary meaning. Thus, I find that it is the act of a successful delivery of the contract sent by the supplier to an email address that is provided by the

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[45] *See* COMAR 20.53.07.08B(3)(b); COMAR 20.59.07.08B(3)(b).

[46] *See Report and Recommendation of the United States Magistrate Judge, Selim Nart v. Open Text Corporation*, 2013 WL 442009, fn 4 (W.D. Texas, Austin Division, Feb. 5. 2013).

customer that is deemed equivalent to "confirming the identity of the customer."

Additionally, XOOM does not rely solely on the successful delivery of the contract to the email address provided during the enrollment to confirm the customer in fact authorized the Internet enrollment. XOOM makes a robocall within a 48-hour period to alert the customer of the enrollment and provides the customer a contact number if the customer did not intend to enroll with XOOM. XOOM also has implemented other methods to trigger an investigation of the validity of an email address provided by the customer during enrollment. **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** Although OPC suggests the triggers are too high to ensure that improper enrollments are not initiated, I find the triggers to be adequate to monitor for improper enrollments. Consequently, I find that these additional actions are designed to confirm the identity of the customer. Accordingly, I find that XOOM's enrollment process for contracting with a customer over the Internet complies with COMAR 20.53.07.08B(3) and COMAR 20.59.07.08B(3).

OPC contends that XOOM's enrollment process has resulted in a significant number of unauthorized enrollments. In certain of the OER complaints offered by OPC into the record,[47] OPC claims that the email address used during the enrollment was "clearly" not

[47] *See* OPC 10C.

that of the customer,[48] yet XOOM enrolled the customer.[49] For a number of the OER complaints claiming unauthorized enrollment, XOOM acknowledged that the customer's enrollment was not authorized as alleged, returned the customer to SOS, and refunded the difference in the rate charged by XOOM over the SOS rate during the enrolled period. For other complaints, XOOM processed the customer's request to cancel the enrollment, but did not acknowledge the complaint as a "slam" because of the length of time the customer was enrolled with XOOM or other indices that the customer authorized the enrollment, such as the phone number provided in the enrollment and the phone number listed in the complaint were the same.[50]

Despite OPC's assertion that there was a "high significance of slamming" due to XOOM's acceptance of valid email addresses, without confirming the customer's identity, I conclude that the number of OER complaints alleging unauthorized enrollment submitted into the record[51] as compared to the number of customers enrolled with XOOM during January 2013 and December 2014[52] does not support a finding of a significant number of unauthorized

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[48] I am unaware of any requirement that an individual must use his/her legal name in the creation of an email address or any prohibition of using a pseudonym or alias in the creation of an email address. Consequently, I conclude that an email address that may seem inconsistent with the account holder's name does not necessary "prove" that an unauthorized enrollment may have occurred.

[49] In certain of these OER complaints, the phone number also was not that associated with the customer.

[50] *See* OPC Ex. 7C, OPC Ex. 8C, and OPC Ex. 9C.

[51] Kulesa Rebuttal, PKR-1; OPC Ex. 5C and OPC Ex. 7C.

[52] Kulesa Rebuttal at 5.

enrollments. I also conclude that not every complaint of unauthorized enrollment was legitimate. For example, a customer, who filed an OER complaint alleging unauthorized enrollment, admitted that the IR who enrolled him was his niece, he verbally authorized her to enroll him and assisted her in the enrollment by answering a series of questions relating to his credit history only he would be able to answer.[53]

Further, XOOM has implemented a system that is designed to alert XOOM **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** I conclude that XOOM has safeguards in place to identify possible misconduct of an IR in enrolling a customer without the customer's authorization. Accordingly, I find that XOOM's enrollment process has not resulted in a significant number of unauthorized enrollments.

**2. XOOM's Marketing Misled Residential Customers into Believing that its Variable Rate Would Not Exceed the Standard Offer Service (Electric) or Sales Service (Natural Gas) Price for the Relevant Utility.**

OPC alleged that XOOM's use of a promotional rate to entice a customer to enroll in a XOOM variable rate product is misleading. Further, OPC argued that XOOM trained its IR to tell customers that XOOM's variable rates will be competitive against the SOS or SS rate "when evaluated over time." Ms. Alexander

[53] *See* OPC 2C, Customer Complaint 314195264.

testified that **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** OPC therefore alleged XOOM's disclaimer in its terms and conditions and in its frequently asked questions link failed to disclose that XOOM's rates had not been competitive with the SOS or SS rates when evaluated over time; therefore, XOOM's marketing materials were misleading.

XOOM disputed OPC's characterization that XOOM's website contains misleading information as to the nature of its variable rates and the risk associated with variable rates. It asserted that it only advertised its rates as being lower than the local utility's when its offered rates were actually lower.[55] XOOM also pointed out that the offered rates were available only for a specified limited time, *e.g.*, the customer's first three bills.[56] Since March 2014, Ms. Kulesa stated that XOOM has changed its promotional offers to remove any comparison to the local utility's default rate or to suggest any percentage of savings.[57]

XOOM relied on several court cases in which the variable rates of a competitive supplier were marketed as "competitive rates" and a customer claimed the representations were false and

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[54] Alexander Direct at 24.

[55] Kulesa Rebuttal, PKR-2. (Ms. Kulesa also presented a chart to demonstrate that, in the Pepco service areas, its promotional rates offered during the specified time period were within the percentage of savings advertised on its website.)

[56] XOOM Ex. 1, Ex. 6a at 5, 7 18.

[57] Kulesa Rebuttal at 37.

misleading.[58] In one of the cases, a recent U.S. District Court for the District of Maryland case, the Court dismissed the Maryland Consumer Protection Act and other fraud-based claims finding the "generalized statements that [the competitive supplier's] energy is competitively priced and often costs less than the utility's rates amount to nothing more than vague generalities and puffery, particularly because the statements are qualified by [the competitive supplier] explicitly stating its rates may be higher than the utility's rates."[59] XOOM argued that its marketing language and the terms and conditions include similar or the same language that the Court found to be "vague generalities and puffery."[60]

XOOM's Terms and Conditions for its variable rate plans include the disclosure in the "price" provision that:

> You agree and understand that the price can fluctuate from month-to-month and could be higher or lower than your Local Utility's standard offer rate in any given month, and XOOM cannot guarantee savings over your Local

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[58] *See Faistl v. Energy Plus Holdings, LLC*, Civil Action No. 12-2879, 2012 WL 3835815 (D. N.J. Sept. 4, 2013) ("Faistl"); Memorandum to Counsel re: *Henry Daniyan v. Viridian Energy LLC*, Civil Action No. GLR-14-2715 (D. Md. June 30, 2015) ("*Viridian*") (granting motion to dismiss.)

[59] *Viridian* at 2.

[60] XOOM also argues that the Commission's dismissal of a Show Cause Order against U.S. Gas & Electric and Energy Service Providers, Inc. D/B/A Maryland Gas & Electric ("MDG&E") demonstrates that the Commission found language similar to XOOM's variable rate disclosure to be in compliance with existing law and not to be misleading. In review of the Commission's Order in the matter, I find no discussion or analysis of MDG&E's variable rate price product disclosure. Further, the confidential version of MDG&E's response to the Show Cause Order is not publicly available. Finally, there was not an evidentiary hearing in the matter. Therefore I cannot determine what other facts and circumstances the Commission had before it to decide to dismiss the Show Cause Order, and give no weight to this portion of XOOM's argument.

> Utility's rate for the [sic] any given month or for the entire term of this Agreement.

During the enrollment process, the customer must affirm that it has read the Terms and Conditions prior to completing the enrollment. Further, the customer enrolling in a variable rate plan must confirm that he/she understands that the price can change each month based on market conditions before he/she is able to complete the enrollment.

Although OPC presented evidence that during **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL**, I conclude that XOOM's statements that its rates will be "competitive when evaluated over time" is extremely vague and does not discuss the period of time for the evaluation. Further, XOOM's website provides adequate and sufficient disclosures to ensure that the customer is aware of the volatility of the variable rate and the lack of a guarantee that the variable rate would be lower than the utility rate, once the promotional rate expired. I find that XOOM's promotion rate offers were not misleading and that its website contains adequate information on the differences between a fixed rate and a variable rate as well as the nature of and risks associated with a variable rate, which includes the disclaimer that the variable rate may be higher or lower than the local utility's rate.

Additionally, OPC argued that, in a number of OER complaints, the customer alleged that the IR guaranteed the

variable rate would be lower than the default rate.[61] OER characterized these types of misrepresentations as being a pattern[62] and that XOOM's disclaimers on its website cannot cure these misrepresentations. XOOM argued that it emphasizes in the IR's training that the IR is prohibited from guaranteeing savings and asserted that there is no evidence that the practice is widespread.

I conclude that XOOM's training modules provide sufficient guidance to the IR that guaranteeing or promising savings or a lower rate than the utility's is not permitted.[63] Although a number of the OER complaints in the record allege misrepresentations of savings, I will not assume that the percentage of these complaints to the overall number of complaints is indicative of the overall number of incidents of misrepresentations by XOOM's IRs. Further, although a customer may have perceived or interpreted the IR's presentation to guarantee or promise savings, without being able to independently judge whether the customer's interpretation was reasonable under the circumstances, I will not accept as "true" that the IR engaged in the conduct alleged. Thus, I find no credible evidence in the record that XOOM's IRs engaged in a pattern of misrepresentations during "warm marketing" which misled or deceived a customer.

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[61] *See* OPC Ex. 6C.

[62] Alexander Direct at 19.

[63] According to the training, however, if XOOM is providing a promotional offer for a variable rate, the IR would be permitted to identify the related savings.

**3. XOOM's advisory notice during the Polar Vortices period was false and misleading.**

OPC also takes exception to XOOM's decision to issue an advisory notice during the Polar Vortices[64] because the notice did not disclose that XOOM's variable price, most likely, would not be competitive during at least the first half of 2014. Further, OPC argued that XOOM's notice contained a blatant falsehood **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL**

In response, XOOM argued that it issued its advisory notice to explain the effect of the Polar Vortices on wholesale market prices and provide options available to customers that might mitigate the impacts of the wholesale price spikes. XOOM denied that the advisory notice was marketing or advertising materials.

The advisory notice sent to variable rate customer stated that **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** As I found the XOOM website to provide adequate and accurate information and disclosure as to the nature and risk of a variable rate, I conclude this statement is sufficient to alert the variable rate customer that the rate may no longer be "competitive."

As OPC argued, I find that the statement of the effect of the Polar Vortices on current Maryland SOS rates or changes in

[64] XOOM Ex. 1, Ex. 7(b), Ex. 7(c).

the rates in the near future was not accurate. Although the statement may have been true in other states in which XOOM's sister companies may operate, it was not accurate for Maryland. I, however, conclude that the statement suggesting **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** is an accurate statement of the option the customer may have to protect himself against the volatile nature of the variable rate. The statement does not suggest that the customer's **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** I find that the overall content of the advisory notice would not reasonably lead a variable rate customer to that conclusion. Nor is there any evidence in the record that any customer was misled by the advisory notice or relied on the advisory notice by either changing or failing to change the manner in which he/she purchased electric or natural gas supply. Consequently, I find insufficient credible evidence that XOOM engaged in an unfair, misleading or deceptive trade practice in issuing its advisory notice.

**4. XOOM's form of renewal notice failed to include the required language set forth in COMAR 20.53.07.08C and COMAR 20.59.07.08C and its practice of defaulting fixed price customers into a variable rate plan was an unfair and deceptive trade practice.**

During the period January 2013 through June 2014, XOOM sent to each fixed term, fixed price customer with a so-called

"evergreen contract,"[65] an email which was entitled "contract expiration notice" ("Pre-June 2014 Notice").[66] A failure to respond to the email during the January 2013 to June 2014 period resulted in the conversion of the contract from a fixed rate, fixed term contract to a variable rate, month-to-month contract. In early June 2014, the title of the email changed to "contract renewal notice" and a failure to respond to the email resulted in a new fixed term and fixed rate ("Post-June 2014 Notice").[67]

These email notices advised the customer that the contract (either with XOOM or Planet Energy) was expiring soon and "because you have been a loyal customer to XOOM for the past [ ] months," XOOM had "created a variety of rate plans for you to choose from when renewing your contract." To review these options, the customer was required to click on a "live link" embedded in the email.[68] In the penultimate paragraph of the Pre-June 2014 notice, XOOM advised the customer that a failure to respond would result in the customer being enrolled in the XOOM Basic Energy plan,[69] which was described as a month-to-month plan and could be terminated by

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[65] The contracts are referred to as "evergreen" because of an automatic renewal provision in the contract, which allows continual renewal of the contract unless terminated either by the customer or the supplier.

[66] Kulesa Rebuttal, PKR-4 and PKR-5.

[67] Kulesa Rebuttal, PKR-6.

[68] Ms. Kulesa testified that the link would take the customer to the XOOM website, which would allow the customer to explore all of the XOOM energy plans, except for the promotional plans that were only available to new customers.

[69] According to Ms. Kulesa, the customer could click on the term "XOOM Basic Energy Plan," which was a "live link" embedded in the email and the customer would be provided a copy of the terms and conditions for the plan. In the terms and conditions, it was disclosed that the XOOM Basic Energy Plan included variable rate pricing.

either the customer or XOOM at any time without penalty.[70] In the final paragraph of both forms of email notices, the customer was provided a contact number for XOOM in the event the customer had any questions regarding the renewal process.

OPC alleged that XOOM violated the Commission's regulations governing renewal notices because the pre-June 2014 Contract Expiration Notice and the Post-June 2014 Notice did not contain the required information for either a termination notice or an evergreen contract renewal notice. OPC also entered into the record a number of OER complaints from XOOM customers who were defaulted from a fixed rate plan into the variable rate plan prior to and/or during the first quarter of 2014 when the XOOM variable rates increased significantly.

XOOM argued that, even though the Pre-June 2014 Notice and the Post-June 2014 Notice may not have been formatted as set forth in the Commission's regulations, each Notice provided adequate and accurate information to allow the customer to renew its relationship with XOOM.[71] XOOM contends that the disclosure in

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[70] In June 2014, the title of the email notice was changed to "Renewal Notice," and a failure to respond to the notice resulted in the customer defaulting to a fixed term, fixed rate plan, which included a cost recovery fee if the customer elected to terminate the plan prior to the expiration of the fixed term.

[71] At the hearing, Ms. Kulesa testified that, during the January 2013 to June 2014 time period, "there was an error that was discovered where the terms and conditions stated that the customer would be renewed to a fixed rate product upon not responding to a renewal notice, whereas the renewal notice itself that was sent out 45 days prior to the customer's expiration of the contract stated that they would be renewed to a variable rate product." TR at 228. Ms. Kulesa also testified that the notice was created by the marketing division, not the legal or regulatory department.

the Pre-June 2014 Notice to the customers that they would default into a different plan was sufficient to identify or highlight that the terms and conditions of the current plan were materially changing. It also argued that the other information that OPC alleged was missing from each of the Notices were in the terms and conditions documents, which were embedded by "live links" in the email, and therefore accessible by the customers.

First, I first I find that converting a customer from a fixed rate to a variable rate, when the existing contract contemplates a renewal to a fixed rate, is a material change to a term or condition of the existing agreement between XOOM and its customer. Further, I find that a customer's ability to access the required regulatory information by clicking "live links" within an electronic notice cannot be considered to be a "clear and concise" statement of or highlight of changes in the material terms and conditions contained "in the notice." XOOM does not argue, nor is there any evidence, if the customer were to click on the "XOOM Basic Energy Plan" link, that the variable pricing provision was "highlighted" or identified in any manner as a provision that contained a "material change in terms" from the customer's existing fixed price contract.[72] Consequently, even if the customer were to click a "live link" in the email, the onus was on the customer to wade through each term and condition to determine the differences

[72] *See* OPC Ex. 11. (In review of the Basic Plan Terms and Conditions, the term "variable price" is not highlighted - the provision entitled "price" is in the second column, and the font is extremely small. The word "variable" first appears in the fourth line of the "price" provision.)

between the "new" plan and the existing plan. Further, the existence of the manner to terminate the "new" plan would not reasonably alert the customer that the same termination process could be used to terminate the existing contract. Thus, clicking a "live link" that merely brings up the full text of the terms and conditions of the contract without any effort to identify the material changes between the new and old contract does not meet the requirements of the language of COMAR 20.53.07.08C and COMAR 20.59.07.08C.

Additionally, in the text of the Pre-June 2014 renewal notice, XOOM elected to highlight two of the three material changes associated with the conversion from the fixed term, fixed rate contract to a variable rate contract, *i.e.*, the new plan was "month-to-month" and could be "cancelled without penalty." Undeniably, of equal importance to a customer with a fixed rate, if not more, was the conversion of the customer's pricing from a fixed rate to a variable rate. In light of the tools touted by Ms. Kulesa on the XOOM website designed to educate a XOOM customer of the difference between a "fixed rate" and a "variable rate," XOOM's failure to highlight or alert the customer that his/her rate would no longer be the "stable" fixed price rate but the more volatile variable rate is indefensible. Thus, XOOM's failure to disclose, in the text of the email renewal notice, one of the most critical material changes while highlighting other material changes, is a violation of COMAR 20.53.07.08C and 20.59.07.08C.

XOOM's argument that the customer could have either called XOOM's customer service to determine how to end the current contract without penalty or read the termination process in the terms and conditions in the new plan is equally unpersuasive and contrary to the requirements set forth in the Commission's regulations. I find that the renewal notice's overall design was to obscure the customer's ability to terminate its relationship with XOOM. Thus, by not adequately disclosing how to terminate the existing contract without penalty and the consequence of terminating the contract without selecting another supplier, XOOM violated the Commission's evergreen renewal contract regulations.

OPC further argued that XOOM's action in defaulting the fixed term, fixed price customers into a variable rate plan was not only in conflict with the evergreen clause in the fixed rate customer's contract,[73] but resulted in the enrollment of the customer into a new plan without the customer's consent. OPC further alleged that XOOM engaged in an unfair, deceptive, misleading or fraudulent trade practice by its conduct.

I find no provision, nor did XOOM point to any such provision, that allowed XOOM to unilaterally convert the customer

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[73] The Planet Energy fixed rate contract's evergreen provision states, in pertinent part, "Customer will have 30 days from receipt of the renewal notice to notify Planet (in writing or by facsimile or email) of Customer's intention to cancel the renewal failing which the Agreement will renew for an additional term at **the Price indicated in Customer's renewal notice.**" (emphasis added). "Price" is defined as "the fixed rate as selected on the Application."

XOOM's fixed rate contract evergreen provisions state "If you decide not to choose a new service plan upon the expiration of the term and do not terminate your Agreement, your Agreement will be renewed under the current plan at the price in place at the time of renewal."

from a fixed rate to a variable rate under the automatic renewal terms of the customer's existing evergreen contract. More importantly, XOOM has not identified the manner in which any of its customers who were defaulted into the variable rate plan could have affirmatively agreed or understood the nature and risk of the variable price as provided in the Basic Energy Plan's terms and conditions.[74] As Ms. Kulesa testified, customers that initially selected a variable rate plan had to verify their understanding and agree to the nature and risk of a variable rate whereas the fixed price customer did not.[75] Therefore, I find XOOM's enrollment of a customer's account from a fixed rate plan to a variable rate plan without the affirmative consent of the customer under one of the methods of contracting with a supplier is in violation of COMAR 20.53.07.05C and COMAR 20.59.07.05C.

I conclude, however, that the record is not sufficient to support a finding that XOOM's apparent breach of its contract with a number of its customers and the lack of required information in the renewal notices in violation of the Commission's regulations is an "unfair, misleading, false or deceptive trade practice." Of the **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** customers who received the renewal notices, **BEGIN CONFIDENTIAL** [redacted] **END**

[74] The "Price" provision in the XOOM Basic Energy Plan terms and conditions, among other things, states that the customer has "agree[d] and understand[s] that the price can fluctuate from month-to-month and could be higher or lower than your Local Utility's standard offer rate in any given month, and XOOM cannot guarantee savings over your Local Utility's rates for any given month or the entire term of this Agreement."

[75] TR at 145.

**CONFIDENTIAL** percent of the customers remain as active customers. During calendar year 2014, a total of approximately 36 complaints were filed with OER by fixed term, fix rate customers that were defaulted into a variable rate plan.[76] Based on my review of the complaints, it appears that a number of the customers may have disregarded the renewal notice because the customer was unaware he/she was enrolled with XOOM for his/her energy supply rather than relying on an existing contract provision that the customer would be defaulted into another fixed term, fixed price contract. Nor, in my review of the Maryland consumer protection laws, do I find any provision to deem XOOM's conduct to be a *per se* false or defective trade practice. Accordingly, I find that the XOOM did not violate COMAR 20.53.07.07A(2) and COMAR 20.59.07.07A(2) by its apparent breach of its contract with certain customers or by its violations of the Commission regulations related to the information that must be contained in an evergreen contract renewal notice.

## VI. Findings of Violations

I therefore find that XOOM violated the following Commission's regulations:

1. XOOM violated COMAR 20.53.07.08C and COMAR 20.59.07.08C by sending evergreen contract renewal notices to **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** customers during the period January 2013 through June 2014 that, in

[76] *See* OPC Ex. 7C, OPC Ex. 8C, OPC Ex. 9C, and OPC Ex. 10C.

the text of the email notice, did not clearly and concisely state or highlight all the material changes in the terms and conditions between the default contract and the customer's existing contract, did not provide the method by which the customer could terminate the existing contract without penalty, and did not advise the customer that a failure to select a new supplier upon termination of the existing contract would return the customer to the utility's default service.

2. XOOM violated COMAR 20.53.07.08C and COMAR 20.59.07.08C by sending evergreen contract renewal notices to **BEGIN CONFIDENTIAL** [redacted] **END CONFIDENTIAL** customers during the period June 2014 through June 2015 that did not contain language in the text of the email on the process by which the customer could terminate the existing contract without penalty and to advise the customer that a failure to select a new supplier upon termination of the existing contract would return the customer to the utility's default service.

3. XOOM violated COMAR 20.53.07.05 and COMAR 20.59.07.05 by enrolling approximately 36 existing fixed rate customers into a variable rate plan without the customer's affirmative consent between January 2013 and December 2014.

**Consideration of Penalties**

Overall, I conclude that XOOM's website provides the consumer sufficient materials, which contain adequate and accurate information, to educate the customer as to the difference between a fixed rate and a variable rate. The materials provide both the rewards and risks of selecting a variable rate. The Frequently Asked Questions link and the Terms and Conditions provide adequate

disclosure that the variable rate may fluctuate on a monthly basis, may be higher or lower than the utility rate in any given month, and no savings are guaranteed in any one month or during the term of the contract. Further, I conclude that XOOM's training modules are designed to prevent an IR from misrepresenting the products or savings that a consumer might receive, if the customer enrolled in a XOOM product.

In my consideration of a civil penalty to impose for XOOM's violations of the Commission regulations associated with its form of evergreen renewal, I will consider that XOOM has modified its evergreen renewal notice to include the required information as set forth in COMAR 20.53.07.08C and COMAR 20.59.07.08C.[77] Further, since early June 2014, it no longer defaults fixed price customers into a variable rate plan.[78] The modified renewal notice also included the fixed rate that will be charged during the term of the contract.[79]

Although the number of customers that received the non-compliant renewal notices is significant, I also take into consideration the number of customers receiving the notices, the number of complaints disputing the excessive rates charged as a result of the customer's default to the variable rate, the number of customers that have migrated from XOOM, and the number of customers that remained with XOOM. I also take into consideration that XOOM

[77] XOOM Ex. 4 and XOOM Ex. 5

[78] Kulesa Rebuttal, PKR-6.

[79] *Id.*

has no prior findings of violations of Commission regulations prior to this proceeding.

I, however, cannot ignore XOOM's decision to automatically renew its fixed price customers into a variable rate plan and omit any mention in the renewal email notice that the default plan would result in the customer assuming the risks associated with a variable rate. Even though the customer may have been able to cancel the plan without any early termination fees, the OER complaints received during and after the Polar Vortices periods evidence that the customers were required to incur the higher variable rate until such time XOOM sent the cancellation notice to the utility and the account was transitioned.[80] Certain language in XOOM's letter responding to these complaints suggests that the customer was at fault for his/her failure to respond to the renewal notice.[81] I also note the use of a standard paragraph in XOOM's responses which states "for customers who wish to have stability in their rates, XOOM does offer fixed price products, and could do the same" for the customer.[82] Inasmuch as the customer expected to be renewed into a "stable fixed price contract," I consider this XOOM's attempt to negate its responsibility for its unilateral decision to breach the customer's contract as an aggravating factor.

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[80] Even when XOOM agreed that the email had "bounced back," it maintained its position that it could enforce the terms of the default variable rate contract. Alexander Testimony (Confidential), Attachments, MPSC#314194107-W.

[81] OPC Ex. 7C, OPC Ex. 8C, and OPC Ex. 9C.

[82] *Id.*

After taking into consideration both the mitigating and aggravating factors found in the record, I find that a civil penalty in the aggregate amount of $40,000 is appropriate and warranted.

To the extent XOOM has not done so, I direct XOOM to compensate each customer who was defaulted from a fixed rate to a variable rate and filed an OER complaint prior to December 2014 by refunding directly to the customer (or to the applicable utility for a credit to the customer's account), the difference for each month during 2014 (or the months in 2014 in which the customer continued as a XOOM customer) that the variable rate billed to the customer exceeded the utility's default rate. I direct XOOM to provide Staff and OPC a report on the status of XOOM's refund efforts, including the OER complaint number associated with the customer, a detailed description of the monthly difference between the rate billed by XOOM and the utility's default rate, and the date the refund or credit was issued, every six months (beginning six months after the date of the final Order in this matter) until all refunds or credits have been made.

I have considered OPC's other requested remedies, *i.e.*, directing XOOM to create a refund pool to be administered by a third party, suspending XOOM's licenses until it comes into compliance with the Maryland law and the Commission's regulations, and requiring XOOM to file a periodic report identifying new customer complaints in Maryland. I find that these remedies are not warranted in light of the violations that I determined, XOOM's

overall compliance with the Maryland laws and Commission regulations, and XOOM's efforts undertaken since the Show Cause Order was issued to come into compliance with the Commission's regulations.

IT IS THEREFORE, this 30th day of October, in the Year Two Thousand Fifteen,

ORDERED: (1) That XOOM Energy Maryland, LLC shall pay a civil penalty in the aggregate amount of $40,000 for the violations of the Commission regulations set forth in this Proposed Order, payable to the "Maryland Public Service Commission" within ten days of the date of the final Order in this matter.

(2) That XOOM Energy Maryland, LLC is directed to compensate each customer who was defaulted from a fixed rate to a variable rate and filed an OER complaint prior to December 2014 by refunding directly to the customer (or to the applicable utility for a credit to the customer's account), the difference for each month during 2014 (or the months in 2014 in which the customer continued as a XOOM customer) that the variable rate billed to the customer exceeded the utility's default rate. XOOM Energy Maryland LLC shall provide Staff and OPC a report on the status of XOOM's refund efforts, including the OER complaint number associated with the customer, a detailed description of the monthly difference between the rate billed by XOOM and the utility's default rate, and the date the refund or credit was issued, every six months (beginning six months after the date of

the final Order in this matter) until all refunds or credits have been made.

(3) That this Proposed Order will become a final order of the Commission on December 1, 2015, unless before that date an appeal is noted with the Commission by any party to this proceeding as provided in § 3-113(d)(2) of the Public Utilities Article, or the Commission modifies or reverses the Proposed Order or initiates further proceedings in this matter as provided in § 3-114(c)(2) of the Public Utilities Article.

Terry J. Romine
Chief Public Utility Law Judge
Public Service Commission of Maryland

**PUBLIC VERSION**

| | | |
|---|---|---|
| IN THE MATTER OF THE INVESTIGATION INTO THE MARKETING, ADVERTISING, AND TRADE PRACTICES OF AMERICAN POWER PARTNERS, LLC; BLUE PILOT ENERGY, LLC; MAJOR ENERGY ELECTRIC SERVICES, LLC AND MAJOR ENERGY SERVICES, LLC; AND XOOM ENERGY MARYLAND, LLC | * * * * * * * * * * | BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND<br><br>CASE NO. 9346 |

# RESPONSE OF XOOM ENERGY MARYLAND, LLC TO ORDER TO SHOW CAUSE

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Counsel for XOOM Energy Maryland, LLC

Dated: April 22, 2014

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efforts to explain to its prospective and current customers, as transparently and plainly as possible, its products and services.

### A. Marketing and Solicitation

XOOM markets in Maryland using direct sellers with independent representatives ("IRs") that promote XOOM products to their friends, family and acquaintances (warm marketing). XOOM partners with ACN, Inc. ("ACN"), to run its direct selling program. ACN's IRs refer the prospective customer to their XOOM website, where the customer can obtain information about XOOM's products and services, and the customer (*not* the IR) self-enrolls.[7] XOOM requires all IRs to be accredited prior to acceptance of enrollments associated with that particular IR. Before becoming accredited, each IR must complete general and state-specific training that addresses issues such as the XOOM platform and XOOM products, including variable priced products and to never guarantee savings. All IRs must score 85% or better on a written test to participate in the program.

XOOM also markets through online advertisements and social media. XOOM does not utilize door-to-door sales in Maryland. XOOM utilized limited telemarketing to solicit Maryland small commercial customers but is not currently telemarketing in Maryland.

### B. Enrollment

#### a. There is significant information available for review on the XOOM website relating to variable priced products.

Customers enroll with XOOM via the XOOM website, which provides detailed information about XOOM's products, including fixed and variable products for natural gas and electricity. After reviewing that information, a customer may select its desired product and

[7] The IR's website mirrors www.xoomenergy.com, but it includes the ACN logo. The substantive energy-related information is the same on each website.

*Case Name:*

# Summitt Energy LP (Re)

**IN THE MATTER OF the Ontario Energy Board Act, 1998,
S.O. 1998, c. 15, Schedule B;
AND IN THE MATTER OF applications by
Summitt Energy Management Inc. on
behalf of Summitt Energy LP to renew
Electricity Retailer Licence
ER-2005-0541 and Gas Marketer Licence GM-2005-0542.**

2011 LNONOEB 176

Nos. EB-2010-0368, EB-2010-0369

Ontario Energy Board

**Panel: Jennifer Lea, Counsel, Special Projects (By Delegation)**

Decision: June 9, 2011.

(24 paras.)

**Tribunal Summary:**

Summitt filed an application with the Board under section 60 of the Act to renew its electricity retailer licence and under section 50 of the Act to renew its gas marketer licence.

The proceeding included the issuance of a Notice of Application and Hearing, filing of interrogatories and interrogatory responses, and submissions.

The Board noted that the main issues considered by the Board in determining gas marketer and electricity retailer licences are the applicant's financial position, technical capability and conduct. In these applications the only issue raised was Board staff's concern with Summitt's past conduct.

The Board considered Summitt's past enforcement history as well as consumer complaints relating to agent conduct. The Panel decided to renew Summitt's licences for a period of two years (note five years is the norm). The Board noted that Summitt's past conduct leaves some doubt as to its ability to comply with all statutory and regulatory requirements in the future and as such a two year terms was deemed appropriate. There was also a decision with respect to confidentiality of certain interrogatory responses.

[Editor's note: The text "[XXX]" indicates that text was blacked out by the Board]

## DECISION AND ORDER

### 1 BACKGROUND

**1** Summitt Energy Management Inc. on behalf of Summitt Energy LP ("Summitt") filed an application with the Ontario Energy Board (the "Board") dated December 3, 2010 under section 60 of the of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "Act") to renew its electricity retailer licence ER-2005-0541. Summitt also filed an application with the Board dated December 3, 2010 under section 50 of the Act to renew its gas marketer licence GM-2005-0542. The Board has assigned the applications file numbers EB-2010-0368 and EB-2010-0369, respectively. On January 19, 2011, Summitt filed additional information to complete the applications.

**2** The Board issued a Notice of Application and Hearing for both proceedings on February 25, 2011, inviting intervention in the hearing and comment. One letter of comment was received by the Board in response to the Notice, but no requests for intervention were received. Summitt replied to the letter of comment on April 13, 2011. On April 19, 2010, the Board issued Procedural Order No. 1 which made provision for interrogatories and submissions.

**3** Board staff filed interrogatories on April 21, 2011 and requested that interrogatories 1, 2, 3 and 4 be treated as confidential. Summitt filed responses to Board staff interrogatories on May 6, 2011 and requested that responses to interrogatories 1, 2, 3, 4, 5 and 6 be treated as confidential. Board Staff filed two sets of submissions on May 16, 2011: a confidential version and a redacted version for the public record. Summitt filed its reply submission on May 25, 2011 in confidence. The confidentiality requests are addressed in this Decision and Order.

**4** While I have considered the full record of these proceedings, I have referred only to those portions of the record that I consider helpful to provide context to my findings.

### 2 ISSUES IN THIS APPLICATION

**5** In determining electricity retailer and gas marketer licence applications, the main issues considered by the Board are the applicant's financial position, technical capability and conduct. In these applications, no concerns were raised with respect to the applicant's financial position or technical capability. However, concerns were raised by Board staff regarding the past conduct of the applicant.

**6** Electricity retailers and gas marketers in Ontario are required to comply with the Act, regulations under the Act, and the Board's regulatory instruments that apply to their licensed business activities.

**7** On December 22, 2008, the Board issued a Notice of Intention to make an Order for an Administrative Penalty against Summitt for contravening certain legal and regulatory requirements, including supplying consumers without valid reaffirmation calls and making false, misleading or deceptive statements to consumers (Board File Number EB-2009-0006). On January 20, 2009, Summitt, rather than requesting a hearing, entered into an Assurance of Voluntary Compliance and later made a voluntary payment to the Board.

**8** In addition, Summitt was subject to an enforcement order by the Board on November 18, 2010 (Board File No. EB-2010-0221, 2010 LNONOEB 304). The order imposed administrative penalties on Summitt for contravention of a number of enforceable provisions, as defined in the Act in respect of 17 incidents of misconduct by five of its sales agents. The contraventions included making false, misleading or deceptive statements to consumers, and not providing consumers with a copy of the terms and conditions of the contract signed with Summitt. Summitt has appealed certain elements of the Board's Decision and Order to the Divisional Court, and the appeal is pending as at the date of this Decision and Order.

**9** [XXX] Board staff further submitted that the outcome of the appeal of the Board's Decision and Order in EB-2010-0221 is relevant to the applicant's conduct and suggested that the Board not make a final decision on the

applications at this time, but make an interim order pending final disposition. Summitt opposed Board staff's submission.

**3 FINDINGS**

**10** For the reasons set out below, Summitt's electricity retailer licence and gas marketer licence will be renewed for two years.

**11** Consistent with the requirements of Ontario Regulation 90/99, in deciding the electricity retailer and gas marketer licence applications, I must consider the applicant's past conduct. The evidence in these proceedings demonstrates that as an electricity retailer and gas marketer, Summitt has had difficulties meeting its legal and regulatory obligations. The evidence also indicates that Summitt has undertaken a number of initiatives to ensure compliance with those obligations that have resulted in some improvement.

***3.1 Contract Management***

**12** As indicated above, in EB-2009-0006, Summitt made a financial payment to the Board in relation to allegations involving, among other matters, supplying consumers without valid reaffirmation calls. In response to Board staff interrogatory No. 4, Summitt listed four changes that it has made to its contract reaffirmation/verification process, and provided statistics to show the effectiveness of those changes. [XXX]

**13** Reaffirmation/verification of energy contracts is a very important element of the contracting process. Any breach of the legal and regulatory standards regarding reaffirmation is a serious matter. I acknowledge Summitt's evidence that shows improvement in this area in the last two years. However, it will be valuable for the Board to have before it evidence demonstrating the success of Summitt's initiatives over a longer period of time. A two year licence term will enable the Board, at the time of a subsequent licence renewal application, to assess whether the improvement has been maintained.

***3.2 Consumer Complaints Relating to Agent Conduct***

**14** Summitt provided customer complaint statistics at Schedule 5 to the applications and in response to Board staff interrogatory No. 5 for the period of Q4, 2008 to Q1, 2011. [XXX] This evidence. in my view, may indicate a problem in Summitt's management of agent conduct.

**15** In response to Board staff interrogatory No. 6, Summitt listed a number of processes and compliance monitoring programs it has initiated with respect the conduct of its sales agents and provided statistical figures to show the effectiveness of those initiatives and programs. [XXX] Nevertheless, it is important to maintain consumer confidence in the electricity and the gas market facilitated through the Board's licensing regime. [XXX] I find that a shorter licence term than the standard term of five years is appropriate, to allow the Board an early review of Summitt's progress.

**16** The findings made by the Board in EB-2010-0221 with respect to contraventions of enforceable provisions by Summitt door-to-door sales agents raise serious concerns with the applicant's past conduct. As noted above, Summitt has appealed this matter to the Divisional Court, and that appeal is pending. The Order has been stayed with respect to monetary payments. However, I do not accept the applicant's assertion that the outcome of the appeal is irrelevant to Summitt's past conduct. Although the conduct found to have occurred by the Board took place under a different regulatory regime and represented a limited number of transactions, it is symptomatic of some inadequacy in the management of sales agents.

**17** I find that the applicant has met the onus of demonstrating that the applications should be granted. I do not accept Board staff's submission that the licences be granted only on an interim basis. However, the evidence of the past conduct of the applicant leaves me in some doubt as to the applicant's ability to comply with all statutory and regulatory requirements in the future. The standard term for gas marketer and electricity retailer licences is five years. In this case,

I find that a licence term of two years is appropriate. At the time of any renewal application for these licences, the Board will have available to it evidence of Summitt's success in complying with statutory and regulatory requirements over that two year period. Such evidence may demonstrate that a standard licence term is warranted at that time.

**4 CONFIDENTIALITY REQUEST**

**18** In filing its responses to interrogatories 1, 2, 3, 4, 5 and 6, Summitt requested the interrogatory answers be held in confidence. Summitt also requested that its entire reply submission be held in confidence. Response to interrogatory No. 7 was not filed in confidence.

**19** In considering the requests for confidentiality, I have reviewed the Board's Practice Direction on Confidential Filings, the exceptions to disclosure listed in the *Freedom of Information and Protection of Privacy Act*, and the Board's forms for applications for electricity retailer and gas marketer licences, for guidance in assessing the degree of confidentiality that should be accorded to the interrogatory responses of the applicant. The Board's policy with regard to confidential filings in applications is stated on page 2 of the Practice Direction:

> The Board's general policy is that all records should be open for inspection by any person. This reflects the Board's view that its proceedings should be open, transparent, and accessible... That being said, the Board relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed, and recognizes that some of that information may be of a confidential nature and should be protected as such.
>
> This Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to protect information that has been properly designated as confidential. The approach that underlies this Practice Direction is that the placing of materials on the public record is the rule, and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.

**20** The Board's form of application for electricity retailer and gas marketer licences states that information provided in response to the requirements of sections 10 through 15 of the application will be maintained in confidence. The treatment of such information is an exception to the general rule of public disclosure of application materials.

**5 FINDINGS ON CONFIDENTIALITY REQUEST**

**21** I find that the information provided in response to Board staff interrogatory 1, 2, 3, 4, 5 and 6 to be similar to that required by sections 12 and 14 of the form of application. On that basis, these interrogatory responses will be held in confidence except for certain information included in response to interrogatories No. 4 and 6 which is available on the public record of other proceedings. Specifically, certain information provided in response to interrogatory No. 4 is already on the record of EB-2009-0006 and certain information provided in response to interrogatory No. 6 is already on the record of EB-2009-0221.

**22** Summitt is directed to prepare and file a revised version of its interrogatory responses, in which the information that has been found in this decision to be confidential is redacted. This version will be placed on the public record. The unredacted interrogatory answers already provided will be held in confidence. Summitt is also directed to prepare and file a version of its submission which redacts any information found in this decision to be confidential. This version will be placed on the public record. The unredacted reply submission already filed by Summitt will be held in confidence. This decision will be issued in two versions: one complete version, to be held in confidence, and one with confidential information redacted, which will be placed on the public record.

**23 IT IS THEREFORE ORDERED THAT:**

1. The electricity retailer licence is granted for a period of two years.

2. The gas marketer licence is granted for a period of two years.

**24** As this decision was made by an employee of the Board, under section 7(1) of the Act this decision may be appealed to the Board within 15 days.

**DATED** at Toronto, June 9, 2011

**ONTARIO ENERGY BOARD**

*Original signed by*

Jennifer Lea
Counsel, Special Projects

qp/e/qlspi/qljxh

# Assurance of Voluntary Compliance

## Pursuant to s. 112.7 of the
## *Ontario Energy Board Act, 1998*

## SUNWAVE GAS & POWER INC.

**ER-2011-0343 and GM-2011-0299**

**EB-2014-0259**

**November 18, 2014**

## I. BACKGROUND

In 2013 and 2014, Board staff conducted two separate inspections of Sunwave Gas & Power Inc. ("Sunwave"), each under the authority of the *Ontario Energy Board Act, 1998* (the "Act").

The first inspection was conducted during the period from November 2013 to April 2014. The inspection was conducted in three phases: Phase I included testing of processes with which Sunwave certified it was compliant; Phase II consisted of transactional testing of verification telephone call recordings ("verification calls") for contract enrollments and cancellations; and, Phase III consisted of transactional testing of verification calls for contract renewals and extensions. During the course of this inspection, Board staff sampled various of Sunwave's contracts, price comparisons, verification calls, contract enrollment processes, and contract cancellation processes.

A second inspection was conducted during the period October 2013 to April 2014. During this inspection, Board staff requested and reviewed the following categories of marketing and promotional materials utilized by Sunwave during the period April 1 to June 30, 2013: sales brochures; product information and data sheets; visual aids used in sales demonstrations (e.g. newspaper clippings, product comparisons, statistics, visual material, etc.); sales scripts (all sales channels); and web content.

The purpose of the inspections was to enable Board staff to review Sunwave's operations and marketing and promotional materials when marketing to low-volume consumers in order to ensure their compliance with various enforceable provisions of the Act; namely certain applicable requirements under the *Energy Consumer Protection Act, 2010* (the "ECPA"), Ontario Regulation 389/10 made

under the ECPA (the "Regulation") and the Electricity Retailer Code of Conduct and Code of Conduct for Gas Marketers (together, the "Codes"); and in order to assess their appropriateness in terms of facilitating and achieving compliance, and to assess their adequacy in terms of identifying any potential need for remedial action.

Representatives of Sunwave and Board staff met to discuss Board staff's Inspection Report, to arrive at a mutual understanding of the nature of the findings, and to establish the terms of this Assurance of Voluntary Compliance.

## II. FINDINGS

### 1. Price Comparisons - incorrect versions accompanied contracts

Board staff performed transaction testing of verification calls for 50 randomly selected contracts (25 for gas and 25 for electricity). Board staff reviewed the corresponding contracts, together with their related disclosure statements and price comparisons. In ten instances, Sunwave did not provide to the consumer a correct version of the price comparison applicable to the period when the contract was entered into.

Board staff also tested Sunwave's online enrolment process. On February 25, 2014, Board staff received, in an email confirmation, an incorrect version of the price comparison. Specifically, a price comparison for the period October 1 to December 31, 2013, was provided instead of the price comparison applicable to the period when the contract was entered into.

Sunwave admits that it contravened section 12(1) of the ECPA, section 8(3) of the Regulation and section 4.6(a) of the Codes in failing to provide correct versions of price comparisons to consumers.

## 2. Verification Calls – not recorded

On November 24, 2013 Sunwave self-reported that it failed to record verification calls for 21 of its contracts. Fourteen of these contracts were enrolled over the internet and therefore did not require verifications calls. However, for the seven other contracts enrolled in person, Sunwave failed to record verification calls as required by law.

Sunwave admits that its failure to record verification calls for its contracts enrolled in person is a breach of section 15(3) of the ECPA and section 13(3) of the Regulation.

## 3. Verification Calls – deviation from Board-approved script

Board staff reviewed the verification calls for 50 randomly selected contracts and found that Sunwave's sales representatives deviated from the Board-approved verification scripts in 22 of the calls. In twelve of the calls, the deviations were technical in nature: namely, they did not verify the correct spelling of the consumer's name or address, failed to provide the OEB's website address and did not ask consumers if they would like a copy of the verification call. However, in 10 of the calls, the deviations were of a materially substantive nature such that they likely would have impacted the consumer's decision to proceed in verifying the contract: namely, by not clearly stating the purpose of the call, by failing to disclose that the consumer is under no obligation to verify the contract, and by failing to elicit a clear "yes" or "no" answer to the question on whether or not the consumer agrees to verify the contract.

Board staff also found that Sunwave conducted verification calls for consumers who enrolled over the internet. While section 17 of the ECPA provides that there is no verification requirement for internet agreements, Board staff found that, in

18 instances, the verification calls conducted for those consumers who enrolled over the internet also deviated from the Board-approved scripts.

Sunwave admits that it contravened section 15(3) of the ECPA, section 13(2) of Ontario Regulation 389/10 and sections 4.10 and 4.11 of the Codes by failing to follow Board-approved verification scripts.

## 4. Contract Enrollment Processing

Board staff reviewed the verification recordings for 50 randomly selected contracts. In four of those recordings, the price verified during the recording and then entered into Sunwave's consumer billing system differed from the price stated in the consumers' contracts.

Following the inspection, under cover of letter to the Board's Vice President of Consumer Services, dated May 28, 2014, Sunwave self-reported and provided additional information on such instances of non-compliance. Sunwave described the issue as "unintentional reaffirmation and process errors resulting from a system calculation error". In total, Sunwave identified 207 consumers who had collectively been overbilled in the amount of $1,221.13 (99 gas contracts totaling $501 and 108 electricity contracts totaling $720.13). Sunwave confirmed to Board staff that in June 2014, Sunwave sent notification letters to all affected consumers and that electricity customers would receive a credit on their July bills, and gas customers would be issued cheques.

Sunwave admits that it contravened section 1.1(h) Part B of the Codes, section 7.2 of the RSC and section 6 of the GDAR by providing misleading and inaccurate pricing information in its verification calls with consumers.

## 5. Cancellations

The terms and conditions of Sunwave's contracts state that customers are only able to cancel their contracts with Sunwave in writing (by email, letter or fax) and that cancellations by telephone are not permitted. When inspecting the "pre-flow" cancellation transactions for 50 randomly selected contracts, Board staff found that, in 27 instances, Sunwave accepted notices of cancellations provided by telephone despite the fact that the contracts' terms and conditions specifically prohibited cancellation by telephone. While Sunwave may have the ability to waive provisions in its contracts if in the favour of consumers, where it accepts a cancellation by telephone, such telephone call should be recorded. In none of the aforementioned 27 instances did Sunwave make a recording of the telephone call.

Sunwave admits that it contravened section 22(4)(a) of the Regulation by failing to record notices of cancellation given by consumers over telephone.

## 6. Marketing and Promotional Materials

Sunwave's sales brochure to consumers for its "depend-a-bill" electricity product states a contract price but fails to disclose additional energy charges relating to that price, specifically for the global adjustment.

Sunwave admits that its promotional and marketing materials for its "depend-a-bill" electricity product fail to disclose that additional energy charges are not included in the contract price and would be payable by the consumer upon entering into the contract, in breach of section 10 of the ECPA, sections 5 1 vi and 5 5 i of the Regulation and section 1.1(h) of the Electricity Retailer Code of Conduct (Part B).

## III. ASSURANCE OF VOLUNTARY COMPLIANCE

Sunwave hereby assures the Board that, effective as of the date of this Assurance, it has voluntarily taken and will continue to take the following steps with respect to each of the findings noted above:

1. As of September 2014 Sunwave ceased offering, and entering into, any new contracts, or renewals of existing contracts, with low-volume residential consumers in Ontario. For the remainder of the terms of Sunwave's electricity retailer licence ER-2011-0343 and gas marketer licence GM-2011-0299 (each of which have an expiry date of June 20, 2017), Sunwave will refrain from entering into any new contracts, or renewals of existing contracts, with low-volume residential consumers in Ontario.

2. Sunwave will continue to service its existing low-volume customers through to the expiry of their contracts.

## IV. ADMINISTRATIVE MONETARY PENALTY

Sunwave agrees to pay an administrative monetary penalty to the Board in the amount of $20,000. The amount of the administrative monetary penalty reflects the nature and number of alleged breaches of enforceable provisions as set out above, and Sunwave's commitment to refrain from contracting with low-volume residential consumers for the remainder of the terms of its current licenses. The payment shall be made no later than two weeks from the date of the filing of this Assurance. The Board will use the funds to support activities related to consumer education, outreach and other activities in the public interest.

## V. CONSUMER RIGHTS

Nothing in this Assurance of Voluntary Compliance affects any rights a consumer may have under his or her contract, or under any applicable laws.

## VI. FAILURE TO COMPLY

This Assurance of Voluntary Compliance has the same force and effect as an order of the Board pursuant to section 112.7(2) of the *Ontario Energy Board Act, 1998* and any failure to comply with its terms shall be deemed to be a breach of an order of the Board.

## VII. EXECUTION OF ASSURANCE

I have the authority to bind Sunwave Gas & Power Inc. to the terms set out in this Assurance of Voluntary Compliance.

Name: ROBERT WEIR

Title: PRESIDENT

Company: SUNWAVE GAS & POWER

Signature: _____

Dated this 18th day of November, 2014.