



**EB-2010-0368**  
**EB-2010-0369**

**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.

By delegation, before: Jennifer Lea

## **DECISION AND ORDER**

### **1 BACKGROUND**

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.

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.

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.

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**

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.

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.

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.

In addition, Summitt was subject to an enforcement order by the Board on November 18, 2010 (Board File No. EB-2010-0221). 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.

[REDACTED]

[REDACTED] 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**

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

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**

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. [REDACTED]

[REDACTED]

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**

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. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This evidence, in my view, may indicate a problem in Summitt's management of agent conduct.

In response to Board staff interrogatory No. 6, Summitt listed a number of processes and compliance monitoring programs it has initiated with respect to the conduct of its sales agents and provided statistical figures to show the effectiveness of those initiatives and programs.

[REDACTED]

[REDACTED]

[REDACTED] Nevertheless, it is important to maintain consumer confidence in the electricity and the gas market facilitated through the Board's licensing regime. [REDACTED]

[REDACTED] 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.

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.

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

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.

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.

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

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.

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.

### 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.

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