

**Assurance of Voluntary Compliance  
Pursuant to s. 112.7 of the  
*Ontario Energy board Act, 1998***

**DIRECT ENERGY MARKETING LIMITED**

## **I. BACKGROUND**

Board staff commenced an inspection in 2009 into Direct Energy's ("DE") business practice relating to the methodology employed to calculate early termination fees ("ETFs").

During the course of the investigation, DE determined that the methodology it used to calculate ETFs was at times inconsistent with its contractual terms with customers.

Starting in 2004, DE's contracts provided that DE would calculate a customer's ETF by reference to the customer's "Projected Consumption." The term "Projected Consumption" was defined in DEs contracts as a customer's "average monthly natural gas or electricity consumption, as applicable (based on your most recent 12 months actual consumption as provided by your Utility)."

As developed in 2004, and through 2010, however, DE's ETF calculator determined Projected Consumption by reference to the average annual consumption of DE's residential customers in 2003 (which was the year prior to the implementation of the contractual definition of "Projected Consumption"), for that subset of customers for which it was unable to access actual consumption data.

The result was that not all customers' ETFs were determined in strict adherence to the contractual terms.

Upon being notified by Board staff of this issue, DE developed a process aimed at identifying customers who were overcharged and put in place processes aimed at preventing this issue from re-occurring.

DE and Board staff have been working on a method to review and reconcile each consumer account during the period 2004 and 2010 where a customer paid an ETF in order to terminate their contract with DE. This process commenced in January 2011 and continued to August, 2011. During that period, DE has provided Board staff with weekly status reports with respect to the reconciliations. As a result of this review, which has now been completed, DE has confirmed with Board staff that approximately 14,500 customers paid an ETF during the relevant time period. These customers fall into two categories, specifically:

- Approximately 52% of customers paid an ETF that was higher than the contractual calculation method (the “Overcharged Customers”). The total overcharge to these customers was approximately \$950 thousand. DE has agreed to reimburse all of the Overcharged Customers with interest.
- Approximately 48% of customers paid an ETF that was lower than the contractual calculation method (the “Undercharged Customers”). The total undercharge to these customers was approximately \$2.4 million. DE has confirmed to the Board that it will not be pursuing any recovery from the Undercharged Customers.

In addition, Direct has determined that there may have been approximately 16,000 consumers who were quoted an overcharge for the ETF, with the same approximate number quoted an undercharge. However, those customers did not terminate their contracts and were not charged an ETF and remained on contract with DE.

## **II. ASSURANCE OF VOLUNTARY COMPLIANCE**

DE and the Ontario Energy Board (the "Board") are satisfied that this matter can be resolved with the filing of this Assurance of Voluntary Compliance.

The Board and DE believe that, as of the date of the filing of this Assurance of Voluntary Compliance, the Board's concerns regarding DE's business practice resulting in the use of an incorrect methodology to calculate ETFs during the period 2004-2010 can be resolved as follows:

DE Energy commits to the following:

**I. Operational Processes**

1. DE commits to ensuring that its operational processes are designed to avoid any customer paying an ETF amount that is greater than what is set out in DEs terms and conditions of the contract with that consumer. DE has already implemented a process to accomplish this goal in respect of contracts entered into on or after January 1, 2011. Until such time that a permanent process that accomplishes this goal can be put in place with respect to contracts entered into prior to January 1, 2011, DE will quote those particular customers an ETF amount based only on the administration fee component of ETFs and the associated HST. The new processes will be in place by no later than January 31, 2012. If DE is unable to meet this timeline it will advise the Board by no later than December 31, 2011

2. DE will inform the Board when it has completed its review of the ETF calculator and its associated processes and controls and determine what the appropriate solution or next steps should be. Until such a solution is reached DE will continue with the interim process set out in paragraph 1 above (in respect of pre-January 1, 2011, contracts). DE will immediately inform the Board of any new process it intends to initiate with respect to ETF calculations for these

contracts and will provide to the Board a detailed description of that process and confirmation that that process is designed to avoid any customer paying an ETF greater than what is set out in DEs contract terms and conditions.

## **II. Reimbursement of Consumers**

3. DE commits to reimbursing the Overcharged Customers the amount of the overcharge plus interest accruing from the date of the overcharge using the Post-Judgment interest rates set out in the *Courts of Justice Act*. This reimbursement will commence 8 weeks following the Board's acceptance of this Assurance and will be concluded no later than three months thereafter.

4. Upon the Board's acceptance of this Assurance, DE will use best efforts in locating the Overcharged Customers, including the use of DE's internal database of information as well as searching the National Change of Address dataset.

5. Upon locating the Overcharged Customers, DE will send a letter in the form set out in Appendix A and arrange for payment. For any cheques that are returned to DE and/or eventually pass their stale date, the funds will be aggregated and then made payable to the Board in two installments. First, DE will pay 90% of the aggregated amount within 3 months after the last issued cheque has been stale dated. Within an additional 6 months, DE will pay the Board the remainder of the amount of stale dated cheques at that time. The funds will be directed by the Board to support activities related to consumer education, outreach and other activities in the public interest.

6. DE confirms that it will not be pursuing any recovery from the Undercharged Customers.

7. DE will also review any claims made by consumers who allege that they were quoted an overcharge for the ETF however chose to remain on contract with DE.

8. Nothing in this Assurance of Voluntary Compliance prejudices the legal rights and obligations of DE and its customers with respect to their contracts.

### **III. Administrative Monetary Penalty**

9. DE agrees to pay an administrative monetary penalty to the Board in the amount of \$700,000. The Board will use the funds to support activities related to consumer education, outreach and other activities in the public interest.

10. The payment of the administrative monetary penalty shall be made immediately and no later than 30 days from the date of the Board's acceptance of this Assurance, and shall be in certified funds, or by way of electronic funds transfer.

### **IV. Reporting Requirements**

11. DE shall, on a quarterly basis starting at the end of the first quarter following the Board's acceptance of this Assurance, file a written report of the steps taken by DE in making restitution for the Overcharged Customers and the steps taken with respect to the consumers' referenced in paragraph 7 above. Any such report shall be submitted by an officer of DE and shall be delivered to the attention of the Managing Director, Consumer Protection at the Ontario Energy Board. The report should include:

- a. confirmation of communication to the Overcharged Customers (name, address, account number) and details of the final reconciliations and payments made in accordance with this Assurance of Voluntary Compliance: and,

b. reporting of all communications received from consumers referenced in paragraph 7 above (name, address, account number) and details of the resolution of these consumer files.

## **V. Audits**

12. Within 30 days from the date of the Board's acceptance of this Assurance DE will retain an independent third party auditor who will immediately commence a review the operation and effectiveness of all processes and controls that DE has implemented to ensure that the methodology employed for ETF calculations is designed to avoid any customer paying an ETF that is greater than what is set out in that customer's contract terms and conditions and complies with all legal regulatory obligations.

13. The audit must assess the extent to which (i) those processes and controls are properly documented, (ii) they are consistently applied in operational practice, (iii) they are appropriately monitored, and (iv) they are effective.

14. A second audit is to be conducted approximately six months following the initial audit, or later if required, in order to ensure the permanent processes and controls put in place with respect to the calculation of ETFs are effective.

15. The auditor selected must be able to certify that it is an independent third party auditor that does not have a conflict of interest with either the Board or DE.

16. The audit reports are to be sent to the attention of the Managing Director, Consumer Protection, Ontario Energy Board.

## **VI. Compliance**

17. 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 Act and any failure to comply with its terms shall be deemed to be a breach of an order of the Board.

## VII Posting on Website

For a period of six months from the date of acceptance by the Board, DE will post this Assurance of Voluntary Compliance on its website.

## VIII. Relevant Legal Provisions

The relevant provisions relating to this matter are sections 88.4(1), 88.4 (2) (c) and 88.4 (3) (c) of the *Ontario Energy Board Act, 1998* (the "Act") which provide as follows:

***Ontario Energy Board Act, 1998*** (as it was before being amended January 1, 2011)

Unfair practices

88.4 (1) No gas marketer or retailer of electricity shall engage in an unfair practice. 2002, c. 1, Sched. B, s. 11.

Unfair practices: gas marketers

(2) A gas marketer shall be deemed to be engaging in an unfair practice if,

(a) it engages in any practice prescribed by regulation as an unfair practice or it fails to do anything where such failure constitutes an unfair practice as prescribed by regulation; or

(b) Repealed: 2003, c. 3, s. 57 (1).

- (c) a salesperson acting on behalf of the gas marketer does or fails to do anything that would be an unfair practice if done or if failed to be done by the gas marketer. 2002, c. 1, Sched. B, s. 11; 2003, c. 3, s. 57 (1).

Unfair practices: retailers of electricity

- (3) A retailer of electricity shall be deemed to be engaging in an unfair practice if,
  - (a) it engages in any practice prescribed by regulation as an unfair practice or it fails to do anything where such failure constitutes an unfair practice as prescribed by regulation; or
  - (b) Repealed: 2003, c. 3, s. 57 (2).
  - (c) a salesperson acting on behalf of the retailer of electricity does or fails to do anything that would be an unfair practice if done or if failed to be done by the retailer of electricity. 2002, c. 1, Sched. B, s. 11; 2003, c. 3, s. 57 (2).

**Ontario Regulation 200/02**

2. The following acts or omissions of a retailer of electricity or gas marketer are unfair practices for the purposes of Part V.1 of the Act:

- (1) Making any false, misleading or deceptive statement to the public or to any consumer, including but not limited to a false, misleading or deceptive statement relating to the following:
  - (i) The terms and conditions of any contract.

**IX Execution of Assurance**

Agreed to by Direct Energy Marketing Limited this 20th day of September, 2011  
by its Executive Vice President and General Counsel, who has authority to bind  
the company.



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Adele Malo  
Executive Vice President and General Counsel  
Direct Energy Marketing Limited.

## Appendix "A"

### Form of Notice to be sent to Overcharged Customers

Direct Energy has worked with Ontario Energy Board ("Board") Staff and conducted a review of the early exit fees charged to our customers. During the review the amounts charged to and paid by Direct Energy customers for early termination fees during the period 2004 to 2010 were examined.

As a result of the review it has been determined that Direct Energy made an error in the calculation of the early termination fees charged to you when you terminated your energy contract. Direct Energy is now correcting the error and returning the overpayment where appropriate.

Please find enclosed a refund cheque for the amount of the overcharge, plus prescribed interest. If you have any questions contact Direct Energy using its toll-free number at 1-800-348-2999.

Customer Service Representatives are available to assist you Monday through Friday from 8:30 am until 9:00 pm, and Saturday from 8:30 am until 5:00 pm.

In recognition of the importance of providing accurate information to consumers, Direct Energy has filed an Assurance of Voluntary Compliance with the Ontario Energy Board which addresses its concerns. The Assurance can be found on the Board' website at [www.ontarioenergyboard.ca](http://www.ontarioenergyboard.ca). and on Direct Energy's website at [www.directenergy.com](http://www.directenergy.com).