ONTARIO ENERGY BOARD

FILE NO.:	**EB-2017-0007**	**Planet Energy (Ontario) Corp.**

VOLUME:	**Volume 6**	
DATE:	**January 11, 2018**	
BEFORE:	**Christine Long**	**Vice-Chair and Presiding Member**
	Cathy Spoel	**Member**
	Michael Janigan	**Member**

EB-2017-0007

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a Notice of Intention to make an Order for Compliance and Payment of an Administrative Penalty against Planet Energy (Ontario) Corp. (ER-2011-0409) (GM-2013-0269).

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Thursday, January 11, 2018,
commencing at 9:35 a.m.

VOLUME 6

BEFORE:

CHRISTINE LONG	Vice-Chair and Presiding Member
CATHY SPOEL	Member
MICHAEL JANIGAN	Member

A P P E A R A N C E S

IAN RICHLER	Board Counsel
MICHAEL BELL	Board Staff
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Wednesday, January 11, 2018

--- On commencing at 9:35 a.m.

MS. LONG: Please be seated.

Good morning, everyone. The Panel is sitting today in EB-2017-007, an enforcement action against Planet Energy. The allegations against Planet Energy are set out in the notice of intention issued on February 9th, 2017 and revised on November 27th, 2017. By letter dated February 23rd, 2017 Planet Energy requested that the OEB hold a hearing in this matter. Oral evidence was heard from the enforcement team and Planet Energy on November 14th, 16th, 17th, 27th, and 28th, 2017.

We are here this morning to hear final argument from the enforcement team and from Planet Energy. Before we begin I understand there are a few preliminary matters we need to deal with. Ms. Gonsalves?

PRELIMINARY MATTERS:

MS. GONSALVES: Thank you, Madam Chair, and good morning.

So just to begin with some housekeeping matters, firstly, in terms of the materials that have been filed after the evidence stage of this hearing concluded, and that you'll want to have handy for you -- or with you this morning for our submissions, the staff -- Board Staff have filed submissions -- closing submissions and book of authorities as one bound volume with a white cover. You should find a copy of that nearby.

We also filed a -- oh, and this has just been handed

up this morning, a supplementary book of authorities. You will also want to have handy the brief of legislation which was filed at the very beginning of this hearing, again a white --

MS. LONG: I'm sorry, just before we go any further, can we mark those closing submissions? Were you thinking that you were going to mark those as exhibits?

MS. GONSALVES: I'm in the Panel's hands. There isn't any new evidence in them, but if it's easiest for --

MS. LONG: I think it's just easier for us to refer to it if we can just do some exhibit numbers. So first your closing submissions and book of authorities. Mr. Richler?

MR. RICHLER: Madam Chair, we can mark that as K6.1.

EXHIBIT NO. K6.1: COMPLIANCE COUNSEL CLOSING SUBMISSIONS AND BOOK OF AUTHORITIES.

MS. LONG: K6.1? Thank you. And then your supplementary book of authorities K6.2. Thank you.

EXHIBIT NO. K6.2: COMPLIANCE COUNSEL SUPPLEMENTARY BOOK OF AUTHORITIES.

MS. GONSALVES: And then we have filed -- this is the big one -- a compendium. It's a large binder which contains sort of in a repackaged form evidence that has already been filed but that has been referred to in our submissions. So if we referred to an extract from the evidence in our submissions in a footnote, you'll find it in this binder. And in the index we've mapped the tabs in this binder to where they can be found in the record, so to the precise exhibit number and tab.

MS. LONG: Okay. So that's K6.3.

EXHIBIT NO. K6.3: COMPLIANCE COUNSEL EVIDENCE COMPENDIUM.

MS. GONSALVES: Thank you. On -- for my friend's part, they have filed closing submissions with a book of authorities, which should have a green cover if I'm not mistaken.

MS. LONG: Okay. Are we up to K6.4?

MS. GONSALVES: That's what I've got, yes.

EXHIBIT NO. K6.4: PLANET ENERGY CLOSING SUBMISSIONS.

MS. LONG: Supplemental authorities at K6.5.

EXHIBIT NO. K6.5: PLANET ENERGY SUPPLEMENTAL AUTHORITIES.

MS. GONSALVES: Thank you.

MS. LONG: And a compendium as well, Mr. Zacher? K6.6?

MR. ZACHER: That's correct.

MS. LONG: Thank you.

EXHIBIT NO. K6.6: PLANET ENERGY EVIDENCE COMPENDIUM.

MS. GONSALVES: I believe that takes care of all the additional filings, and on our part we're hopeful that we won't have to take you to any hard-copy materials other than those items in our submissions today.

I did just want to point out for the benefit of the Panel, the brief of legislation that we had previously filed -- and this is entirely on my side, the blame for this -- it contained a version of the Energy Consumer Protection Act and Regulation 389/10 that are current to

today that contain some amendments that were not in effect at the time of the events in issue. And so our supplementary book of authorities now contains the pre-amendment version of both the ECPA and the regulation at tabs 10 and 11.

MS. LONG: Okay. Thank you for that.

MS. GONSALVES: The other item of housekeeping -- and I've had discussions with Mr. Zacher about this, and Mr. Bell and Mr. Richler are aware. There are some errors in the transcript, essentially typographical errors, spelling mistakes, that sort of thing, that both sides feel should be corrected, and we intend to do that. We have left it aside to deal with after oral argument today, but I did just want to put on the record that the parties will work together to make those corrections to the transcripts.

MS. LONG: That's fine. Mr. Zacher?

MR. ZACHER: Yes.

MS. LONG: Good. Thank you.

MS. GONSALVES: So if that takes -- from my perspective anyway that takes care of the preliminary matters. I'm happy to give the Panel an idea of how we intend to use the time today in a brief road map before launching into oral submissions, but I'm not sure if my friend has any other preliminaries?

MR. ZACHER: Just one other thing for me, Madam Chair, and it's in part an apology. When we put our closing argument together on the 22nd, we were struggling a little bit at the last minute, and I think we had a little

difficulty with the document control, and somehow I noticed in reading through our closing submissions that we lost some references to the evidence and to my friend's closing submissions, effectively footnotes, and I apologize for that, and what I would propose to do, not make any substantive changes, but just provide my friend and the Panel with a blackline of our closing argument with the correct evidence citations so that you're not struggling to find the proper references when it comes to preparing your reasons. And we'll get that done, if not by the end of the day tomorrow, very early next week.

MS. LONG: Okay. That's fine. Thank you.

MS. GONSALVES: So we have got a half day today. I discussed with Mr. Zacher, each side is intending to use about an hour and a half, subject to the Panel's guidance on that. For our side our intention is to go about an hour and 15 minutes, reserving 15 minutes for reply. Mr. Safayeni and myself will be dividing our principal submissions. We intend to use our time first and foremost to answer questions from the Panel, secondly as an opportunity to reply to our friend's written submissions, because we did not put in a written response, and thirdly to really highlight the key aspects of our argument. We don't intend to simply rehash everything. Both sides have delivered quite detailed, comprehensive written submissions, and obviously we don't want to lose the benefit of that.

MS. LONG: You should know, counsel, that we have read

your materials. Thank you for filing them in advance. That's very helpful for us. So we have read through them.

MS. GONSALVES: Thank you. We appreciate that.

SUBMISSIONS BY MS. GONSALVES:

I will be dealing with the first allegation concerning false and misleading information in respect of allegation 1. I really have three points I want to highlight. The first is witness credibility. The second is replying to my friend's arguments about the proper interpretation of the deeming provision in section 10(2)(b) of the ECPA. And thirdly, the question of whether there ought to be findings of contraventions concerning the large volume consumers under the code, the Electricity Retailer Code of Conduct.

MS. LONG: Just before you begin, Ms. Gonsalves, I would like to you spend some time on the administrative monetary penalty, and specifics on how that amount was derived. I think the Panel would find that very helpful.

MS. GONSALVES: Certainly, and that was one of the topics we understand is important and are intending to cover. It would be Mr. Safayeni that deals principally with that, but we will devote a good chunk of our time to that.

I will also be dealing with allegations 2 and 3 concerning the training and testing of Mr. MacArthur and Mr. Nahid. I have two primary points to cover there. Firstly, a proper understanding of these allegations makes clear staff that is not advancing an attack on Planet

Energy's entire training program systematically, but rather combined to these two agents. And secondly, that the previous complaints inspections are ultimately irrelevant to what this Panel has to decide.

In addition to the proper monetary penalty, Mr. Safayeni will be covering allegations 4, 5 and 6 with two principal points. The first is whether the contracts are properly considered in-person contracts, and secondly responding to Planet Energy's argument that a supplier's salesperson can also be a consumers' agent. Mr. Safayeni will also deal with the proper approach to restitution.

We don't intend to say anything to add to our written submissions on allegation number 7. You will recall that was the allegation relating to Ms. Andrassin not being given her statutory right to cancel without penalty. Planet Energy admits to that contravention and it's our submission that the Panel must make a finding of contravention on allegation number 7.

I will begin with just one overriding comment on the standard of proof in this case. Of course it is staff that bears the burden of proof and the relevant standard, and I don't believe there is a dispute here, is a balance of probabilities. My friends have given you the FH and McDougall case from the Supreme Court. We agree that is the authority, and it was confirmed by the Divisional Court in the Summitt case, tab 1 of our brief of authorities, that FH and McDougall and the balance of probabilities standard governs proceedings like this one.

But I feel the need to comment on this in my oral submissions because of a statement contained in Planet Energy's written submissions at paragraph 103, where they quote from a 1921 case by the name of the Queen and Clark -- I guess at that time it was the King and Clark -- which they include at tab 3 of their authorities. You don't need to pull up that case, but my friends rely on the Clark case to suggest that staff's burden in this matter is to show that the allegations are, quote, "substantially the most probable of the possible views of the facts."

And I respond to this because that statement may be misinterpreted to place the bar higher than it is as a matter of law. That statement substantially, the most probable of the possible views of the facts, does not appear in FH and McDougall, the governing authority. And in my submission, a clearer statement of the current and correct law is one found at paragraph 49 of the McDougall case.

And in paragraph 49, the Supreme Court says where we're applying the balance of probabilities standard that the trial judge, or in this case the Panel, must scrutinize the relevant evidence with care to determine whether it is more likely than not, more likely than not that an alleged event occurred. That is the standard this Panel must apply, in my submission.

Turning then to the first allegation, and of course this is the allegation that Planet Energy, through the actions of its salespersons Mr. MacArthur and Mr. Nahid,

engaged in unfair practices by way of false and misleading statements in respect of the 41 energy contracts in issue in this case.

Unfair practices by a supplier are prohibited under subsection 10(2) of the ECPA. Unfair practices, of course, is a specific term in the statutory regime here, and so it's defined in section 5 of the regulation. Reminding you that the relevant version of the regulation is now found at tab 11 of our supplementary book of authorities, it is section 5 of the regulation that we're concerned with. Section 5 of the regulation lists various acts or omissions of a supplier that are prescribed as an unfair practice, and in issue in this case specifically are paragraphs 4, 5 and 14 of section 5. Just for the Panel's reference, after today our written submissions on this point begin at section 75 of our written submissions.

And because of paragraph 14 of section 5 of the regulation, we're also bringing in the codes of conduct, and specifically section 1.1 of part B of the codes. So those are the operative provisions that we're concerned with for allegation number one.

And staff allege that those provisions are contravened as a result of evidence you heard that we're asking you to accept as true and credible regarding the conduct of the salespersons, Mr. MacArthur and Mr. Nahid, in their interactions with consumers.

It's our submission that the principal facts that you can rely on to make findings of contraventions under

allegation 1 are not in dispute. I don't intend to use my time today to repeat the evidence. It's exhaustively and carefully footnoted in our written submissions. But I will summarize it in a nutshell.

The evidence is as follows: In respect of all 41 contracts, Mr. MacArthur and Mr. Nahid made false and misleading statements that consumers would save money by enrolling with Planet Energy. They believed this to be true, at least in Mr. MacArthur's case initially. He subsequently came to a different understanding, but continued to tell customers that they would save money. Mr. MacArthur showed all customers a misleading before and after bill. You will recall that from the evidence, showing what a customer paid before moving to Planet Energy and after. And this was false and misleading because the after bill was based on a credit that Mr. MacArthur was not aware of and didn't point out to customers, and because it represent -- it was in fact a customer switching from one retailer to another rather than from the RPP to Planet Energy.

You heard evidence that both Mr. MacArthur and Mr. Nahid sold these contracts without mentioning the global adjustment prior to enrolment.

For some of their customers who raised questions about why their bills had in fact gone up after they switched to Planet Energy, they then gave false and misleading information about the global adjustment after enrolment, saying that it would average out, goes up and down, but it

would average out to about 5 cents or that it would never go above 9.99 cents.

Both salespersons testified that they did not mention cancellation fees or the consumer's cancellation rights prior to enrolment. And they did not mention additional fees and charges that were required to be disclosed. And it's our submission that Planet Energy, through its salesperson, was obliged to tell customers about the utility registration fee, the administration fee, and the forecasted balance and credit or charge that applied on all of its bills.

Those charges are required to be included in the price comparison document that the Board mandates suppliers give to their customers. And they're included in the price comparison document for a reason. They are part of the price to be paid under the contract for a supply of electricity or gas.

And so it's our position that those charges had to be disclosed to customers, and they were not. And our submissions on that point are at paragraphs 100 and 101.

For the most part, Planet Energy does not challenge these facts or the evidence, other than to say that Mr. MacArthur was not a credible witness. On our understanding of their submissions, that's what their response on this allegation boils down to. They didn't call competing evidence, remember, from anyone with direct knowledge of the interactions between the two salespersons and the customers.

The Panel will have to do credibility assessments of the witnesses in this case. And in our supplementary book of authorities we have provided you with tools that we hope will assist you in that exercise.

The law requires panels to look at a number of factors in assessing the credibility of witnesses. At tab 1 of our supplementary book of authorities we've given you a case from the Divisional Court. It's an old case, 1985, but it is still good law. Re: Pitts v. Director of Family Benefits Branch of the Ministry of Community and Social Services. And Pitts is used by many administrative tribunals as guidance on the factors that should go into a proper credibility assessment.

Unfortunately this version of the case doesn't have page numbers, but I've highlighted in the last sort of four pages of the decision here the relevant section where the Divisional Court describes the factors that you should consider. Of course, appearance and demeanour are relevant, but we have to be cautious not to put undue emphasis on appearance and demeanour. You should use your good common sense and your knowledge of human nature.

Consider the witnesses' opportunity to observe the matter in question, and obviously Mr. MacArthur and Mr. Nahid, as well as Ms. Andrassin and Mr. Hawkins, were the ones right there. They were involved in the interaction so they had the best opportunity to observe.

Consider the internal coherence of their testimony. Does what they say from the beginning, middle, and end of

their testimony hang together as a whole? But also how does it fit with other evidence you've heard, with the documents and with other witnesses?

At tab 2 of our supplementary authorities I've given you the National Judicial Institute's model jury instructions. This is what judges are recommended by their governing body to give to juries to help them with credibility assessments, and so again, in my submission, this is the best law, the best guidance, on how the Panel should go about its credibility assessment.

Taking into account this comprehensive credibility assessment, I'll begin with Ms. Andrassin. In my submission, there is no doubt she was a highly credible witness. Her evidence about what Mr. Nahid said and did in the lead-up to her enrolment was unchallenged in cross-examination.

She testified in a clear, forthright manner. She had a good memory of the events, consistent with the documents and other evidence. She gave a compelling account, you'll remember at the end of her testimony-in-chief, of the effect this experience has had on her and her family. She took time from her job to help the Board by giving evidence. There was no exaggeration in the way she testified, and there cannot possibly (sic) any suggestion of collusion or that she was tailoring her evidence. Indeed, my friends do not suggest that she was untruthful in any way. And her testimony, in my submission, proves the false and misleading statements that were made that led

to her enrolling with Planet Energy.

Mr. Nahid, in my submission, was also highly credible. His evidence was hardly challenged under cross-examination. He too made no exaggeration, testified in a clear and forthright manner. He was upfront about what he did and did not remember. He had nothing to gain from coming to testify.

He took time from the business he is running to give evidence and, indeed, he gave evidence in a very candid manner that cast himself in an unfavourable light. He did not exaggerate, he did not minimize his own behaviour. He had no axe to grind, no motive to be untruthful.

And his evidence of the statements he made to his customers lined up with Ms. Andrassin's evidence, notwithstanding the witness exclusion order made by the Panel.

I then come to Mr. Hawkins, who in my submission was also a credible witness. Despite my friend's cross-examination his evidence on the key points was not undermined. He was consistent on the key aspects of his testimony, what Mr. MacArthur did and did not say to him, leading him to agree to be enrolled.

He gave a clear, honest, and credible explanation for the difference between the information he gave to Board Staff during the inspection and his testimony. You can find that at Volume 4 of the transcript, pages 15 and 16.

And his evidence of the kinds of statements that Mr. MacArthur made to him during the sales process are

strikingly similar on key points to Ms. Andrassin's testimony, even though they've never met.

So Mr. MacArthur ends up being the only witness that my friends try to take a serious run at, in terms of credibility. And I urge the Panel to consider very carefully his evidence in its own right, and also how it hangs together with the evidence of the other witnesses. He sold these contracts over a period of years, so his own sales routine is very familiar to him. He has every reason to remember it, and he testified clearly and credibly about the core fact.

Like Mr. Nahid, he candidly gave evidence that paints himself in a negative fact at no gain to himself. In fact, if anything, there is the risk that he will lose commissions if the contracts that he enrolled customers in are deemed void by this Panel. He was not he evasive; he was not argumentative under cross-examination.

Point number 8 in that model jury instruction calls for assessing the consistency of the witness's testimony with other witnesses. Again, on core facts, Mr. MacArthur's testimony was consistent with the evidence of Mr. Hawkins. His testimony, though, was also consistent and his experience was also consistent with that of Mr. Nahid, again someone that he had never met. And it's my submission that if you find Mr. Nahid's evidence credible, and if you believe Mr. Hawkins, you can use that to bolster the credibility, to have more confidence in the evidence of Mr. MacArthur.

The primary basis that my friends rely on to say Mr. MacArthur is not a credible witness was his own testimony that he was dishonest in the past during his sales activities, a time when he was not under oath and when he was motivated to make the sale. In my submission, there is a difference between being dishonest when trying to make a sale and being untruthful under oath. He had no reason to lie in this hearing about making misrepresentations in a sales context. In fact, his candour under oath in admitting to his earlier misrepresentations strengthens his credibility. He didn't try to minimize his prior behaviour.

Planet Energy is sucking and whistling here. They want you to believe Mr. MacArthur when he says he was untruthful in the past, so that you can find him to be an unreliable witness. But they're also saying don't believe him when he says he was untruthful in his interactions with customers. You can't use that evidence to prove he made misleading statements. I say that's simply too much of a stretch, keeping in mind that the credibility assessment is about looking at what's common sense what's human nature. And I ask you to consider what is most plausible. The most plausible explanation is that Mr. MacArthur testified truthfully when he said I misrepresented facts to my customers. That evidence has the ring of truth and should be accepted.

To find no contravention on allegation number one, you would need to find that all four witnesses were not

credible. And Planet Energy is asking you to reject the evidence of all four witnesses without any competing evidence, no evidence as to what else might have happened in those sales interactions.

The four witnesses' testimony is bolstered by confirmatory evidence, including the deficiencies in how these agents were trained and tested, which I'm going to come to, and Planet Energy's failure to adequately supervise its sales agents. All of that makes it more likely what these witnesses testified about did in fact occur.

I want to reply to my friend's argument that staff somehow hasn't met its burden on this allegation because it didn't call any consumers other than Mr. Hawkins or Ms. Andrassin. We didn't need to hear evidence from every consumer that was entered into a contract by these two agents. Unlike the Summitt case, where the Board's Case -- or staff's case, excuse me, consisted entirely of the consumers.

We had the agents testify. The agents testified to their own misconduct, and that's enough to meet staff's burden. In the Summitt case, all the consumers had to testify about their own encounters because they were confronted with sales agents testifying for Summitt Energy who said I didn't say that. So the panel had to decide between competing witness testimony. You don't have that problem here. Hearing from all customers would have unnecessarily lengthened this hearing at cost and

inconvenience to the Board, the parties, and the witnesses without enhancing your ability to decide the case.

Planet Energy also launches an attack on the adequacy of Board Staff's inspection prior to the issuance of the notice. They allege that Board Staff failed to properly corroborate the accounts of the four witnesses. Well, my response to that is it is entirely irrelevant what other evidence might have been called, or what other facts staff might have obtained during the inspection. The Panel is called upon to decide the case based on the evidence you heard; nothing more, nothing less.

Finally on this allegation, Planet Energy says at paragraph 155 of its submissions, without reference to law or any statutory analysis, that there is no obligation in the ECPA or the codes for salespersons to mention the global assessment cancellation fees or other charges to customers. In my submission, that is simply wrong.

Section 5 of the regulation, paragraphs 4 and 5, and the definition in section 2 of the regulation on additional energy charges, make it clear that suppliers must disclose, must tell their customers about all charges with respect to the supply or delivery of electricity or gas, except for certain enumerated ones. And it's my submission that clearly includes the global adjustment.

I'll direct you to the Summitt decision from the Board. It's in our book of authorities at tab 4, paragraphs 35 and 73. I'm not going to quote from it right now. I just want to give you those two paragraph

references from the Board's decision. My submission is that the effect of those two paragraphs is that the Board in Summitt found that salespersons are required to accurately describe and represent to their consumers, to their customers, the global adjustment, what was the provincial benefit at the time of Summitt, and the effect that the global adjustment is expected to have on the customer's bill.

So paragraphs 35 and 73 of the Board's decision, in my submission, answer my friend's arguments on this point. And the evidence here of course is that Mr. MacArthur and Mr. Nahid did not do that. If you accept the evidence of Mr. MacArthur and Mr. Nahid about what they did and did not say to their customers, our submission is that allegation number 1 is proven.

Now, my friends make an argument that -- they don't dispute that these two sales agents are in fact salespersons under the Act. But they say that Planet Energy should not wear the misconduct of its salespersons. And this hinges on the proper interpretation of section 10(2) of the ECPA. This is the deeming provision, okay? Under that section a supplier is deemed to be engaging in an unfair practice if its salesperson engages in an unfair practice.

The Divisional Court in the Summitt case already rejected the suggestion that a supplier in Planet Energy's shoes could raise a due diligence defence to this kind of allegation. Remember, in Summitt the Board found that the

contraventions at issue were offences, strict liability offences subject to a due diligence defence.

And the Divisional Court overturned on that point. They said, no, these are not offences, and no due diligence defence is available. These are compliance proceedings, and compliance proceedings are not subject to due diligence defences.

In the interests of time I won't take you to the specific words of the Divisional Court. But please, I urge you to read carefully the Divisional Court on this point, beginning at paragraph 64, all the way through to paragraph 72.

At paragraph 67 the Divisional Court emphasizes in saying these are not offences, that these are proceedings that are private, domestic, or disciplinary matters that are regulatory, protective, or corrective, primarily intended to maintain discipline or to regulate conduct within a limited private sphere of activity. That's what we're talking about.

And at paragraph 72 the Divisional Court says this is not a quasi-criminal standard of proof, and no such defence -- that is, a due diligence defence -- is available for compliance proceedings such as this.

And they don't elaborate on that point in the Summitt case. But in my supplementary book of authorities I've given you the case that the Divisional Court referenced in footnote 16. That's the Gordon Capital case, where the same court -- this is tab 5 of my supplementary book -- in

Gordon Capital the Divisional Court goes on at some length to explain why a due diligence defence is not available in compliance proceedings. You see the same thing in the Shooters case that I've given you at tab 6 of my supplementary book.

It's my submission that the law already determining that Planet Energy has no due diligence defence is a complete answer to Planet's argument that by deeming the unfair practices of the agents to be the unfair practices of Planet Energy, that Planet Energy can somehow rebut that, that that's a presumption that Planet Energy can rebut. I say no.

The deeming provision in section 10(2)(b) of the ECPA is what we call a conclusive deeming provision. If you find that the salespersons engaged in unfair practices as a matter of law you are required to find that Planet Energy engaged in unfair practices.

I do not dispute that there are two kinds of deeming provisions, some that are conclusive, some are rebuttable. That's what the St. Peter's case that my friend relies on tells us. Of course, in St. Peter's the Supreme Court found the deeming provision at issue to be conclusive, consistent with what our position is.

Ruth Sullivan, of course, is the leading Canadian scholar on statutory interpretation. Her full -- the full section from her book on deeming provisions is contained at tab 3 of our supplementary book of authorities. And she says there are various kinds of deeming provisions, those

that create a legal fiction, deeming something to be the case as a matter of law, even though that's not the case in fact. Those are not rebuttable, those are conclusive. Deeming provisions that create a rule by attaching legal consequences to a set of facts. Again, not rebuttable. And deeming provisions that do create rebuttable presumptions.

To determine what kind of deeming provision you're examining, the law says you've got to look at the full statutory context, consider the statutory objective and what interpretation best meets that objective, and consider the consequences that would flow if the deeming provision were conclusive or if it were rebuttable.

This legislation is consumer protection legislation. The consumer protection regime we're dealing with here is designed to allow the Board to regulate the energy industry in Ontario so as to protect consumers.

As the supporting Minister said in the Hansards, in the debates at tab 7 of our book of authorities, page 3:

> "The objective of this legislation is to empower consumers, protect their interests, and ensure that the Ontario energy market is fair and transparent."

The Talon case at tab 5 of our book of authorities, paragraph 63, says that consumer protection legislation must be interpreted generously in favour of the consumer and in a way that best implements the consumer protection objectives, paragraph 63 of Talon.

Interpreting this legislation in its full context and considering the consequences that would flow if this deeming provision were rebuttable, in my submission there is only one way to look at this. My friend's submissions would allow a supplier to escape liability by subcontracting salespersons, by washing its hands and offloading training and supervision on a non-licensee like ACN.

I'll refer you to paragraph 64 of our submissions, where we quote from the Hansards, reflecting that this is the very kind of mischief that the ECPA was designed to prevent.

Without this deeming provision being conclusive, the Board would not be able to effectively regulate by holding the supplier, the only licensee, accountable. ACN doesn't hold a licence, salespersons don't hold licences. There is no parallel compliance mechanism for salespersons.

A conclusive vicarious liability for the supplier is the only way to ensure a regulatory response for agent misconduct. There is nothing absurd about this.

Planet Energy interacts with customers through its salespersons, and it benefits financially when customers are entered into contracts as a result of salesperson misconduct. So it is proper to hold Planet Energy liable without giving it an opportunity to rebut the presumption, which is a due diligence defence. They're trying to do an end-run around the Summitt case in this argument.

My friend suggests in paragraph 110 of his submissions

that it would somehow diminish the role of this Board to make this deeming provision conclusive rather than rebuttable. My answer to that is no. This was a deliberate legislative choice designed to ensure that the statutory objective of consumer protection is served. The supplier wants to do business in this highly regulated area where consumer protection is paramount; it must be prepared to accept responsibility for any and all actions of its salespersons for those acting in its name.

This Board is still the one empowered to determine whether the salesperson committed an unfair practice and what the appropriate penalty is to remedy the non-compliance. And that's where these arguments about due diligence, about how we might rebut the presumption, that's where those arguments as a matter of law may come into play as potential mitigation of penalty.

So you have my submission on that point. But even if Planet Energy could rebut this deeming provision, they don't ultimately point to any evidence that would rebut the presumption. They appear to rely primarily, if not exclusively, on the quality assurance calls made to Mr. MacArthur's customers. Those were done, of course, on a random basis, and there is no evidence of any quality assurance calls made to Mr. Nahid's customers; I point that out. It puts too much reliance on those after-the-fact quality assurance calls, which are not a Board-approved or Board-mandated process or script.

I'll refer you to the Divisional Court's decision in

Summitt at paragraphs 40 and 41, where the Divisional Court spoke about the limited utility of these kinds of after-the-fact measures -- sorry, paragraphs 40 to 41 of the Board's decision, not the Divisional Court's decision in Summitt.

I note there was no monitoring by Summitt or -- sorry, Planet Energy or ACN of IP addresses used to enroll customers, and the deficiencies in the training and testing that I will come to momentarily, the lack of monitoring the training, the lack of in-field reviews, all of that taken together along with the risks inherent in the ACN relationship and multi-level marketing model created fertile ground for the misconduct that materialized in this case. So there simply is not the evidence to rebut the provision, if it were as a matter of law rebuttable.

In respect of the allegations under the Electricity Retailer Code of Conduct concerning large volume consumers, on the face of the codes, unfair practices as set out in the code, the obligations for fair marketing practices apply equally whether a supplier is retailing to low volume consumers or large volume consumers. My friends don't dispute that that is the right interpretation of the codes. They can't.

They simply assert that you should not find any contraventions with respect to the four large volume consumers under the code because, according to counsel's assertion, Board Staff has previously made a policy choice not to engage in compliance proceedings concerning

relationships between suppliers and commercial customers.

My answer to that is that the alleged contraventions of the codes, the electricity retailer code concerning large volume consumers is before the Panel in this hearing, and therefore you are duty-bound to interpret and apply the code to the evidence you've heard. You cannot refuse to apply the plain language of the code because of some alleged policy choice to not include these kinds of contraventions in other compliance proceedings in the past.

The only conceivable legal argument that Planet Energy might be making here is some sort of legitimate expectations argument, although it doesn't use those words. I've given you, in our supplementary book of authorities at tab 9, an extract from the leading case on administrative law and judicial review that speaks about the doctrine of legitimate expectations. And that doctrine is problematic in this case for three reasons.

The doctrine provides that a consistent past procedural practice could lead to a party having a legitimate expectation that a statutory body would follow the same procedural practice in the future. But here are the problems with applying that doctrine in this case. First off, we have no evidence of any past practice concerning large volume consumers. A past practice must be proven on a clear, unambiguous and unqualified basis. You don't have that evidence. You just have a counsel's letter asserting that that's past practice.

Secondly, you have no evidence from Planet Energy that

it had a legitimate expectation that staff would not pursue claims in respect of its low volume consumers. Any such expectation cannot be legitimate in the face of the clear language of the code.

Thirdly and most importantly, the legitimate expectations doctrine is a matter of procedure not substance. The Brown and Evans extract makes this clear at pages 25 to 26. A past practice cannot create substantive rights that would prevent this Panel from making substantive findings on the merits. At best, it leads to enhanced procedural rights. And Planet Energy hasn't argued it's been deprived of some procedural fairness right with respect to the allegations for large volume customers.

Turning then to the training and testing allegations -- and I apologize. This is taking me a little longer than I expected, but I want to ensure I'm being clear. The precise deficiencies that were -- sorry?

MS. SPOEL: You won't cut into Mr. Zacher's time, though?

MS. GONSALVES: I do not intend to, no, absolutely not. The precise deficiencies that we're relying -- I may cut into Mr. Safayeni's time.

MS. SPOEL: There are penalties, so don't.

MS. GONSALVES: Understood. I will truncate what I want to say about training and testing. We rely, of course, on our written submissions, paragraphs 104 to 159.

The Summitt case involved somewhat similar allegations

about deficient training, and I'll start there. In the Summitt case there was a required training program, but Summitt itself as the licensee only provided the written materials. The actual in-person training was done by the subcontractor.

And the Board found, paragraph 16 and 17 of the Board's decision, that a few hours of such training was not enough. Here, of course, there was no in-person training at all. There was simply that one document, the so-called training manual, that an IBO could click on and then close without reading or studying. And it demonstrates the point made at paragraph 68 of the Board's decision in Summitt, where on paper the materials may have seemed inadequate, but the training was left to these subcontractors.

And there was no evidence taken of steps taken by the supplier to monitor the effectiveness of the training by observing the training sessions -- here, of course, there were none to observe -- or conducting in-field reviews. Planet relied exclusively on the attestation and the test, which are flawed for their own reasons.

The Energhx case also involved allegations of inadequate training. And I refer you to the Board's findings on the training of sales representatives at pages 20 and 21 of Energhx at tab 3 of our authorities.

There was a specific finding in Energhx that the training was inadequate with respect to consumer cancellation rights that, in my submission, applies equally here.

Now, in my submission, Planet Energy misconstrues the nature of the allegations concerning training and testing. We are not alleging and we do not need to prove systemic deficiencies or inadequacies. We are not launching a systemic attack.

When you read the allegations in the notice on their face, the allegation is that Planet Energy failed to ensure that the training and testing of its salespersons, James MacArthur and Kayvan Nahid, was inadequate and inaccurate.

So it's about the training and testing provided to these two sales agents. We are not asking you to make a finding that Planet Energy's training and testing are systematically deficient or that all of its salespersons have been improperly trained and tested.

I note that Summitt Energy tried to make similar arguments on its appeal to the Divisional Court: Oh, this was a systemic attack. And the Divisional Court responds to that, rejects it at paragraph 74, saying the Board did not unreasonably put Summitt's training and compliance programs as a whole on trial. Rather, the Board considered Summitt's general program and related it to the individual infractions that had been established. Paragraph 74.

So we're not asking you to take the evidence of what Mr. MacArthur did and what Mr. Nahid did and extrapolate back from that, infer from that, that all of Planet Energy's training is inadequate. Here is what we're asking to you look at: First of all, begin by looking at Planet Energy's own training and testing materials. Consider Mr.

Silvestri's own testimony, principally his admissions under cross-examination, and then look at the evidence of Mr. MacArthur and Mr. Nahid about their own training and testing, their own experiences. All of that evidence demonstrates not only that the training program was deficient on its face but also that the way it was delivered did not inform these sales agents of what they needed to know to start selling contracts.

The testing did not assess their actual state of knowledge about important information. They passed the test while lacking fundamental knowledge about the global adjustment, cancellation rights, how to read an energy bill in Mr. MacArthur's case. They did not study the training manual. They did not respect the attestation. Mr. MacArthur didn't answer the test questions at all. They both did the test with another IBO present. They enrolled customers on their own. All of that demonstrates that they were not properly trained, they were not properly tested. And that is enough that these two were not properly trained or tested, that is enough for you to find that allegations 2 and 3 are proven. You do not need to go further.

Finally, before handing it over to Mr. Safayeni I want to respond to the argument that somehow the previous compliance inspections of the Board absolved Planet Energy in respect of its training and testing program. And I note that a similar argument again was made in Summitt as a very useful precedent for this case.

Paragraph 93 of the Divisional Court's decision,

Divisional Court says:

> "Earlier proceedings did not and could not limit the Board's ability to seek compliance proceedings or the ability of a dually constituted hearing panel -- just like this one -- to make findings in that regard."

The fact that no notice was issued in the past is not conclusive of anything. You again have these allegations in evidence before you now. In the 2015 inspection Board Staff was given incomplete information, and that's set out at paragraph 131 of our submissions.

It's a similar kind of legitimate expectations type of argument: You didn't make any non-compliance allegations in the past, so you shouldn't be able to prove them in this case, notwithstanding the evidence. Again, that would be a substantive application of legitimate expectations, which is not available as a matter of law. At best it's a consideration that might bear on penalty.

And I note that staff is not seeking a specific additional penalty amount for these allegations under our approach to the proper penalty.

And with that, subject to any questions, I would like to hand it over to Mr. Safayeni.

SUBMISSIONS BY MR. SAFAYENI:

MR. SAFAYENI: Thank you. So I'm going to focus on allegations at paragraphs 4, 5, and 6 of the notice. And I'm also going to discuss penalty, and I know that the Panel is interested in that.

So in terms of the allegations at 4, 5, and 6, the underlying facts of these allegations, Staff submits, have clearly been proven, and in fact, the key facts are not subject to any real dispute. In particular, the evidence of how these two salespersons interacted with consumers in terms of not providing them with a copy of the contract, the disclosure statement, or the price comparison prior to enrolment, not having consumers sign anything, and enrolling consumers on their own without those consumers being present stands uncontradicted.

And as Ms. Gonsalves explained, the evidence that was given at the hearing from Staff's witnesses on these points is credible, and it should be accepted.

It's also clear that Planet Energy didn't make any verification calls. So the dispute on these allegations doesn't arise because Planet can reasonably contest the facts, and indeed it doesn't really try to do so. It arises because of a newly-formed legal theory that's being asserted by Planet that its own salespersons can sign consumers up online on their own without those consumers being present, without the consumer seeing any of the required documents, and that this amounts to a permissible internet contract under the consumer protection regime because it's not subject to the protections that is would otherwise apply for in-person transactions.

And I say newly formed legal theory because if you look at Planet's 2011 legal memo to the Board on the issue of when in-person protections should apply, it's an

entirely different view of the world than what we see now in the submissions. There, Planet acknowledges that if an agent, quote, takes all the customer data and simply hands the iPad to the customer to accept the contract, this contract, while technically being an internet agreement, would likely warrant the protections for in-person agreements. That was the position in 2011 and in fact, Mr. Silvestri confirmed that was still Planet's position today, yet we see an entirely different theory being advanced now. It's also contradicted by Planet's training materials, which of course described an agent being in the room as a very serious offence.

Before I get into whether these are internet agreements or not, I want to be absolutely clear on what allegations are impacted by this debate. They are the allegations in paragraph 4 sub C of the notice, that's the failure to provide copies of the contract and disclosure statement before a contract is entered into and failure to provide signed copies of those documents afterwards, the allegation in paragraph 4 sub D, which relates to failure to make verification calls, and the allegation in paragraph 5, which is a failure to have consumers sign the contract disclosure statement and price comparison.

These allegations are premised on the fact that the contracts were in-person transactions. If the Panel disagrees and concludes that the contracts were internet agreements, which is the terminology we see in the ECPA, then the allegation in paragraph 4D can't be made out.

If the Panel concludes that these were contracts entered into over the internet, which is the slightly different language we see in the regulation, then the allegations in paragraphs 4C and paragraph 5 can't be made out. And there's a subtle distinction between those two turns of phrase, which I'll come to momentarily.

But I want to be clear that the allegations in paragraphs 4A and 4B of the notice stand, regardless of what you conclude on this issue and have been proven regardless of what you conclude. Those issues deal with the failure of salespersons to provide business cards and display identification badges.

At paragraph 158 of its written submissions, Planet suggests if you conclude these were internet agreements, then somehow those allegations would fall away as well, and I want to be clear that that's simply not true, in my submission. Under the regulation, the requirement to offer business cards and display identification badges applies whenever, quote, a person acting on behalf of a supplier calls on a consumer in person.

That's in the regulation and we see similar language in the codes. Whenever someone is retailing to a low volume consumer at a place other than the retailer's place of business the ID badge and the business card requirement apply. And the evidence is absolutely clear that both Mr. MacArthur and Mr. Nahid were calling on consumers in person and were retailing to them at their homes or places of business. So whatever you may conclude on how the

contracts should be characterized -- internet agreements, contracts entered into over the internet, or in-person transactions -- those allegations still stand.

On the issue of whether these contracts are in-person transactions, it's probably useful to start with the relevant provisions which require that the consumer -- or for allegations in paragraphs 4C and 5 of the notice, their agent actually completes the internet transaction. As I'll explain in a moment, a salesperson for the supplier cannot perform that function.

I'm also going to address the consumer protection purpose of the legislative scheme, which would be seriously undermined if a consumer were deprived of in-person protections simply because salesperson, after making an in-person pitch to a consumer and after the consumer has communicated their willingness to be signed-up in person, does the final consummation through a click online rather than having the consumer sign a document.

In terms of the text of the provisions, there are two different sets that are important here. The first is part 4 of the Consumer Protection Act 2002, which defines the term "internet agreements." This is important because up to January 1, 2017, section 17(1)(3) of the ECPA set out that internet agreements as defined in the Consumer Protection Act were exempt from verification call requirements.

I'm not going to take you there, but I've included the relevant provisions of the CPA of tab 12 of our

supplementary BOA. If you look at those relevant provisions together, what you need for an internet agreement under part 4 of the CPA is really two things: an agreement over the internet between a supplier and a consumer who isn't acting for business purposes. And if you look at the context of the CPA, it reinforces this conclusion that the consumer -- it's the consumer that actually has to be involved in a transaction for it to qualify as an internet agreement.

I think the most efficient way of doing this might be to have you turn to paragraph 173 of our written closing. I'm going to try to stick to this document, if I can. This reproduces section 38, which is under part 4 of the CPA, and if we look at section 38, it talks about before a consumer enters into an internet agreement they have to be -- they have to have certain prescribed information disclosed to them. The consumer has to be provided with an opportunity to accept or decline, and it has to unfold in a way that ensures the consumer has accessed the required information.

Provisions like this wouldn't make sense if a retailer's own salesperson is the person entering into the contract through the online system. But of course as we know, that's exactly what happened here. None of the contracts in this case involved an agreement between Planet Energy and a consumer on the other end of that online transaction. That did not happen. The evidence is absolutely uncontradicted that consumers had nothing to do

with the online enrolment process. They didn't do it themselves, they didn't participate, they didn't even watch. The process was done entirely by the salespeople on their own.

In effect, these were agreements entered into by Planet Energy on one side of the online transaction and Planet Energy's salesperson on the other side. And that simply does not qualify as an internet agreement under the CPA.

If we look at the second set of legislative provisions that are engaged by this debate, they're found in the regulation, not in the CPA. And it's interesting that the regulation doesn't use the term internet agreements in any of the relevant sections. Instead, what we see in section 9 and in section 10(2) is the phrase if a consumer enters into a contract over the internet. Elsewhere in the regulation, we do see the words "Internet agreement", but not in these sections.

And again, if you look at the legislative text, particularly section 9, which, if you have our submissions still open in front of you you'll see just further down on the same page at paragraph 174 at page 50 of our written submissions, again, you'll see that the scheme is premised on the account holder, the consumer, or their agent entering into a contract over the Internet.

It's all about the consumer being reminded, the consumer understanding, the consumer checking off boxes, the consumer being requested to review documents.

And I make the same submission that I make when I took you to section 38 of the CPA. None of this makes sense if it's supplier's own salesperson that's entering into the contract.

I would add that -- I'm not going to belabour the point. I know the Panel is well aware of the statutory interpretation principles relating to consumer protection legislation. But just to be clear, it does not favour consumers to conclude that contracts enrolled by a supplier's own salespersons online without any participation from the consumer after they've agreed in person to the enrolment are exempt from the consumer protection rules for in-person transactions.

Far from being generous or liberal in favour of consumers, far from achieving a consumer protection purpose, this kind of highly strained and, frankly, artificial view of what amounts to an Internet agreement is one that puts form over substance at the expense of consumers' interests.

And that takes me from text to the purpose of the legislation. The Panel members will be aware that this Board has long recognized the consumer protection dangers associated with selling energy through in-person transactions. And I won't take you there, but it's something that actually the Panel comments on in the Summitt decision.

When you have a salesperson there physically in front of you, there's a certain amount of inherent pressure to

make the deal and sign up. And that is precisely why there are stringent requirements governing these kinds of transactions, culminating most recently in a ban on door-to-door sales.

The consumer protection regime treats Internet contracts differently than in-person transactions. And this is not about having one set of consumers subject to lesser protections than other consumers, as Planet suggests in its submissions at paragraphs 164 and following. It's about recognizing that not every situation calls for precisely the same measures to be in place in order to achieve consumer protection.

And there is a sensible rationale for having Internet contracts subject to a different set of rules. If someone is reviewing material on their own independently at their own leisure without a salesperson being present, without any salesperson influence or pressure, they're in a better position to make a considered and informed decision.

But again, that's not what happened for any of the contracts in this case. From the consumer's perspective, every single substantive and meaningful aspect of these transactions happened in person. The salespeople showed up in person, they spoke to the consumers and made statements to the consumers, misleading ones at that, in person, and they got the consumers' agreement in person.

But if Planet's interpretation is correct, then the protections for in-person transactions could be avoided by suppliers by having consumers enrolled at the very end of a

process that is done entirely in person. Such a conclusion would be totally at odds with the objective of consumer protection.

In circumstances like this, in-person protections must apply to ensure consumers know what they're getting into before they sign up. In cross-examination Mr. Silvestri conceded that when consumers don't enroll themselves on the portal they're deprived of the opportunity to review the documents, statements, and acknowledgments that would allow them to make an informed decision about whether to switch to Planet Energy before making that decision.

That's a critical point. I mean, it amounts to a concession that consumers are being deprived of the very thing that justifies Internet agreements being treated differently than in-person transactions.

MS. LONG: Mr. Safayeni, you're running out of time. So I do want to ask you if, given what you've just spoken about, in-person transactions, how that squares with I guess the submissions that you make with respect to restitution at paragraphs 292.

And so is it Board Staff's position that if we determine these are in-person sales then there is no discretion, that the contracts are voided, and the, I guess the relief that you seek here under restitution is not discretionary?

MR. SAFAYENI: That is Board Staff's position, Madam Chair, and I can address that point now if it would give the Panel some comfort to make sure I don't run out of

time.

MS. LONG: I would like you to address that.

MR. SAFAYENI: Yes. I'm happy to. So, yes, I mean, on the issue of restitution, if you conclude that these are in-person transactions and so those provisions have not been complied with, restitution is a consequence that must follow under the act.

And I would go further than that and add that not only is the fact of restitution an inescapable consequence mandated by the scheme, but the calculation is equally non-discretionary and mandated by the scheme.

And I would add a third point, which is that even if you do not agree that these are in-person transactions, as you know, we've made an in-the-alternative argument that even if these are Internet agreements or contracts entered into (sic) the Internet, they are still not satisfied, the requirements of the scheme.

Even in that world the consumers still have not provided the necessary acknowledgments and signatures. Those acknowledgments and signatures in the world of Internet contracts occur electronically, they don't occur in the same paper format.

But there is no rational reason to treat Internet contracts with their electronic signatures and acknowledgments through check boxes, et cetera, different than paper ones.

So if you accept our in-the-alternative argument, I think the same consequence in terms of restitution still

has to apply.

While I'm on the point of restitution and before I lose that thread, let me just say something quickly about the issue of calculation, okay, because the statutory language -- and I won't take you there in the interests of time, but you know the key phrase from reading our submissions is that the refund has to be the money paid by the consumer under the contract. And I've provided you in the written submissions with Staff's exact submissions as to what's included and what isn't in there.

Nothing in the statutory text allows for Planet's proposed calculation. Planet has suggested a formula invented, frankly, from whole cloth, with not a word to ground it in the statute that it should be the difference between what's paid under the contract to Planet and what might otherwise have been paid to a local distribution utility. And that is simply not something that can find a foundation in the statute.

To be fair, Planet relies partially on the Summitt decision to support this approach. And I think it's fair to say that Summitt did apply a very similar approach when they were calculating restitution.

But the critical point is that Summitt was not decided under this legislative regime, right? Summitt -- one of the biggest points of dispute in Summitt was whether the Board could make that restitution order under section 112.3(1), which gives the Board kind of a general authority to make such orders as it considers necessary in light of

the contraventions.

It was the exercise of that general discretionary order that resulted in the Board applying the formula that it applied in Summitt. We didn't have any of the mandatory legislative text that we're relying on in this case. So really Summitt is of absolutely no assistance when you're looking at how to calculate the penalty in this case. We're operating under a different -- sorry, the restitution in this case.

MS. LONG: Thank you, Mr. Safayeni. Because I've already interrupted you, I'm going to interrupt you again and ask you -- I want to make sure we cover off our questions.

MR. SAFAYENI: Yes, no, please, Madam Chair. I'm happy.

MS. LONG: That is most important to us. When you get to look at your paragraph 284, where you state, "Taken together, these considerations led staff to seek an AMP of $10,000 for each of these 36 transactions," are you able to shed any light for us on how the different considerations -- I guess how that $10,000 is broken down?

I mean, if we decide that some of the allegations have not been -- we don't accept them, how do we break down that $10,000?

MR. SAFAYENI: Thank you for the question, Madam Chair. I don't -- I mean, to be completely frank with you, I don't have a per allegation breakdown ready for you. And that's not how staff approached this, to be quite candid.

MS. LONG: I want to understand the approach.

MR. SAFAYENI: Staff's approach was these transactions all share key features in common. And when you look at the global impact of those features, in terms of the statutory criteria and the two additional criteria we mention in our submissions, this is an appropriate amount when you look at it globally per contract. Not all of them are 10,000; some are more, some are less, but most are 10,000.

What I will say, though, that hopefully will be of some assistance to the Panel, is that there's a helpful passage in the Energhx decision. It's at tab 3 -- if you still have our written submissions in front of you, it's at tab 3 and it may be useful, given the Panel's interest to actually take you there.

At page 27 of that decision at tab 3 of staff's written submissions, you'll see a paragraph at the bottom where the Board notes:

> "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."

And that's something that staff certainly endorses.

So while I don't have a precise dollar figure

breakdown per alleged contravention, I think it is fair to say that staff views those types of allegations, the allegations relating to inadequate training, not providing consumers with accurate information before they enter into the contract, and the false and misleading statements -- obviously that weren't at issue in Energhx, but are re Summitt, we know are a very, very serious category of contraventions. We consider those to be towards the more serious end, comprising the bulk of the per transaction penalty being sought.

In this case, we know that because the interactions were mostly with people that the salespeople knew, friends and family and so on, the failure to show business cards and badges, for example, would not be of the same degree of concern as what's being described in the Energhx decision. And I think that applies applicably in this case.

I would just add as a -- I am happy to take any further questions, and I think I am out of time because we want to save a little bit of time for reply. But I would just add that no matter how you slice and dice the AMP amount, whether you do it on the per contract, what we call the per transaction approach, or whether you do it per contravention per transaction, which was kind of the more detailed approach taken in the Summitt decision, or whether you do it some other way, the ultimate question is whether the final amount is fair and proportionate, and I think our written submissions set out the reasons why we believe it is.

Unless there are further questions from the Panel, I'm going to have to rely on my written submissions for the reasons why we don't believe salespersons can act as agents and for why we believe our in the alternative contravention has already -- has also been made out on the evidence.

But subject to any further questions the Panel may have and comments we may have in reply, those are staff's submissions.

MS. LONG: Thank you. Thank you, Mr. Safayeni and Ms. Gonsalves. The Panel has no further questions.

I think, Mr. Zacher, what we'll do is take fifteen minutes, and then we'll come back and hear from you.

MR. ZACHER: Thank you.

--- Recess taken at 11:12 a.m.

--- On resuming at 11:29 a.m.

MS. LONG: Mr. Zacher, are you ready to proceed?

SUBMISSIONS BY MR. ZACHER:

MR. ZACHER: I am, thank you.

Good morning, Madam Chair, Panel members. In my submissions I intend to respond to some of the points that my friend made and to go over some of the principal issues, but before I do that, if I could just step back for a moment and revisit some of the themes that we addressed in our opening statement and which are largely repeated in the overview to our written submissions.

You will recall, Madam Chair, at the beginning of this case we said this is really an extraordinary case, because it is very much premised on a broad indictment of Planet

Energy's training and testing systems and processes and its form of MLM marketing.

And I pause there for a moment, because my friend in her submissions sort of tried to pull back on that, but that is clearly a foundational element of Staff's case. My friend said in her opening -- and this is at page 20 of volume 1 of the transcript -- that at the end of this case enforcement staff will ask you to find on the basis of the evidence you have -- that you hear that Planet Energy has contravened various requirements under the ECPA, the regs, and the codes of conduct as alleged in the notice of intention as a result of the deficiencies in Planet Energy's training program, both in the design and how it was carried out, through the conduct of its agents, and through the manner in which its consumers were enrolled. And that is really the central element of the case.

My friends have said in their written submissions that Planet Energy's training and testing program was wholly deficient, both in terms of its content and the manner in which it was delivered and that its MLM scheme of marketing was a high-risk model. And it's on that basis that my friend attributes the contraventions to those alleged deficiencies.

And yet I said that in the evidence that Staff had put forward there was no evidence proffered of any sort of investigation of Planet's systems and processes, any systemic deficiencies identified, any sort of general inquiry of Planet Energy's IBO sales force or its

customers.

I secondly, Madam Chair, said that the evidence from Planet would by contrast show that in the past seven years that it has been exclusively marketing to consumers through the MLM -- its MLM marketing process that there were no systemic problems, that it has a very good record, no history of complaints, no history of any sort of enforcement action.

And lastly, I cautioned the Panel that in this case where Staff was quote-unquote putting all of its evidentiary eggs in one basket by relying almost entirely on the evidence of Mr. Nahid and Mr. MacArthur, that it was very important to scrutinize that evidence and make sure that Staff had satisfied the burden of proof.

And my submission is that the evidence in this case has entirely borne out the promise I say that we made -- or rather those representations that we made as part of our opening statements. Staff's lead investigator or inspector, Ms. Armstrong, who candidly admitted she had no experience as -- in compliance and as an inspector before she was handed this case in, I guess, June of 2016, had no familiarity with Planet Energy or past compliance inspections or audits of Planet Energy, and she admitted, We did no inspection of Planet Energy on a broad scale. We relied only on the two complaints and the two IBOs. And Staff's inspection of Planet Energy's training and testing program and its MLM marketing program was based exclusively on Staff's interviews of these two IBOs. That's it.

And Staff didn't contact a single customer outside of Mr. Hawkins or Ms. Andrassin to corroborate any of this, did not undertake any follow-up inquiry with Planet Energy. There was a single letter sent to Planet Energy asking for information, which Planet Energy responded to. And did not ask Planet Energy if there were any past complaints, anything of a similar nature. No attempt -- and this was put right to Ms. Armstrong -- any attempt to determine whether the allegations that were being provided to staff by Mr. MacArthur and Mr. Nahid were broadly representative of Planet Energy's IBOs or its business practices generally, nothing just the two IBOs.

And by contrast, what the evidence from Planet Energy showed is that it selected this form of marketing back in 2010. It did so for the purpose of avoiding problems that had been associated with in-person marketing. And its model limited its IBOs to simply introducing consumers to Planet's products among the other products that they marketed through ACN and leaving it to consumers to go online and make the -- learn more and make the decision whether to enroll.

And in the seven years prior to this case Planet has had no enforcement action of any kind taken by the Board. Mr. Silvestri said he had not -- that Planet had not received any complaints of a similar nature. And in fact, there have been, as I'll allude to in more detail, inspections and audits done by the Board in the past of the very matters that are at issue in this case, that found

Planet's processes were compliant.

And so my submission is there is simply no grounds for the allegation that there are any sort of systemic problems in Planet's business practices, specifically its training and testing, and that these have caused or will cause, potentially will cause any sort of widespread harm.

In terms of the individual contraventions, even if the case is limited in that fashion, I submit that the evidence, at least insofar as Mr. MacArthur is concerned, is not reliable, and I'm going to address that in more detail.

Mr. MacArthur made false statements. He changed his story. Staff again called not a single customer other than Mr. Hawkins to corroborate Mr. MacArthur's account, and what evidence there is from Mr. MacArthur's customers in the form of nine or ten recorded telephone calls is contrary to Mr. MacArthur's account.

In my submission, Staff's case at its highest is that a single IBO, Mr. Nahid, amongst 6- to 7,000 that you heard marketed Planet products over the seven-year period says he contravened Planet's rules and requirements, including the rules regarding the enrolment of customers, and that his alleged misconduct generated a grand total of one customer complaint, that being from Ms. Andrassin, or perhaps three, if you include the two other complainants who surfaced after the Board commenced its inspection. All three of those individuals Planet allowed out of their contracts without penalty when they did complain.

I appreciate, of course, the issues Ms. Andrassin had to go through, and that is not excusable. But that is not evidence of any systemic problems or resultant potential harm, nor is it evidence of even violations or infractions that warrant administrative penalty or any kind of compliance action.

That, Madam Chair and Panel members, is my position or our position in a nutshell. But I thought, having listened to my friend's submissions that it might be helpful -- I was going to get into the case law a little bit later in my submissions. But it might be helpful, just to put things in context, to contrast the sort of case where there are issues raised in evidence of real systemic problems or real actual consumer complaints and harm that warrant an administrative penalty, with this case which I say does not.

The Summitt case is a good comparator. It is really the only other case that's come before the Board that's been a major compliance action that's been contested by the supplier. And in that case, the Board assessed a penalty, an administrative penalty of $234,000, which is roughly half of what staff initially sought and is still a significant amount below the $383,000 they're seeking today.

In that case, the Board made an order of actual restitution. It was the difference between what people paid to the supplier and what they would have paid had they remained on standard supply, which again is significantly

less than what is being sought here.

But really, the important point is that the subject contraventions and the evidence in Summitt couldn't contrast more starkly with what is at issue in this case. Summitt centred on 19 transactions. The allegations concerned five agents, all of whom conducted door-to-door sales which was Summitt's sales model.

The compliance proceedings arose because customers, as the Board said, on their own motion, paragraph 10 of the decision, came forward to complain, and in fact there was more than 19. And where the complainants didn't come forward and actually give evidence at the hearing -- a number of them didn't -- the Board dismissed those complaints.

And notably, there were 23 customer witnesses who came forward to complain against -- to complain about the agents. I should say that in our closing submission at paragraph 207, we said there were 19. That's a mistake; there were 23. And between three to seven customer witnesses testified against each of the agents. And the Board favourably compared the specific recollection of the customers about the individual transactions and about what the agents were alleged to have done with the evidence of the agents, which was generic as to what they habitually did, usually did. Which I pause to say is in the nature of the evidence led by staff from Mr. MacArthur and Mr. Nahid.

Again notably, all of these 23 customers said they were harmed. They came forward on their own. They had a

complaint. They said we've been harmed, and we want the harm remedied. All the customers gave similar or uniform evidence about the conduct of the agents, which was informative for the Board in making a determination that Summitt's training and testing procedures were systematically problematic and were not sufficient. And the contraventions alleged and found to have been committed in Summitt were in order -- were of an order of magnitude that is not comparable to this case.

Every single one of the five agents was alleged and found to have fraudulently impersonated the local distribution utility, the Ontario Energy Board, or Hydro One. They were all found, based on the specific evidence of customers, to have made misleading and deceptive statements. There were findings that Summitt had intentionally misled customers on reaffirmation calls, which was required because these were in-person contracts. And there were other contraventions alleged and found to have been committed.

Notably, the Board found that all of these contraventions fell in the moderate category. At the time, the regulation had a sort of table high, moderate, low, and attracted administrative penalties of $9,000 per infraction, with the exception of a couple that were found to attract a higher penalty. But the lion's share, $9,000, which of course is much less than the 10 to 15,000 dollars which is being sought in this case.

This case isn't in the same universe as Summitt.

There is no evidence from a substantive substantial number of IBOs and customers, with the customers giving specific evidence as to the similarity or uniformity of the allegations. There is no evidence of harm, other than Ms. Andrassin, whose allegation, whose alleged harm principally related to failure to cancel her contract. It doesn't go to the matters that are really central to the Board's case. And Mr. Hawkins, who again had an allegation that centred on early termination penalties, penalties which the Board actually determined were appropriately charged and didn't form part of the notice in this case and, I submit, Mr. Hawkins' evidence was not particularly reliable.

MS. LONG: Mr. Zacher, let me ask you this. Is it Planet's position that misconduct did not occur if harm is not reported?

MR. ZACHER: No, no. And actually, that's an excellent point, time to address that question because I think what Summitt illustrates -- and unfortunately, the Board doesn't have guidelines that says this is the basis upon which we take enforcement action, it has to meet -- or there has to be this many contraventions, or it has to reach this level, and this is how we go about calculating penalties. But you can draw -- you can certainly draw principles from other areas and from the existing cases like Summitt.

I think what Summitt shows is that in order for compliance action to be warranted, because it's not warranted in every case. We've got cases that we've

included in our brief that indicate that all systems human beings create and companies employ are necessarily fallible, and there will be errors.

But where compliance action may be merited, where an administrative penalty may be merited is where there are actual complaints from consumers. That's the purpose of the Energy Consumer Protection Act, to address complaints that consumers have where there is evidence of harm. It's not to be abstractly enforced, and/or where there is evidence that a supplier's business practices or systems are substantially deficient in some way where even though there may not be evidence of harm, it's pretty easy to determine that this poses a real risk.

Summitt met both of those requirements in spades. You had 23 customers, all who came forward on their own complaining, proved the contraventions, proved they were harmed. You had that, and you also had similar evidence from all of these people about the conduct by the agents which led the Board to conclude that Summitt's training and testing and sales model was deficient. Both requirements met in Summitt; I submit neither met in this case.

With that overview or backdrop let me explain how I plan to proceed. I don't intend to go through my closing submissions in detail. You have those. I will respond to some of my friend's points, not all of them.

What I really want to do is address what I think are three or four important issues that have been addressed in our closing submissions, but I want to address them in more

detail.

Number one is the allegations regarding the deficient training, testing, and MLM marketing because, as I said, that, in my submission, lies at the very heart of this case and is the basis for the very large administrative penalty and restitutionary relief that's sought.

Two, I want to address Mr. MacArthur and to a lesser extent Mr. Hawkins' evidence, which is related, because, as you know, it is our submission that his evidence should be disregarded in its entirety and all of the contraventions attributed to him should be dismissed.

Alternatively, even if that's not the case, as I'll explain, there is reason for not holding Planet liable for those.

Three, I want to touch on the vicarious liability point, the interpretation of the word "deem", and finally, conclude with our position on how the Panel should dispose of this case and what our position is with regards to what's been sought by Staff.

And of course, if there's any other issues that you want me to address, I will.

So let me turn to the enforcement team's allegations with regards to training and testing. It's, I believe, count 2 and 3 in the notice. The Staff has said that training and testing was wholly inadequate both with respect to the content of the training materials and the manner in which the training and testing was delivered, and that related to this was Planet's high-risk -- very high-

risk multi-level marketing model.

The evidence, in my submission, does not sustain either of those allegations, and in fact the evidence shows, in my submission, that Planet conducted a relatively low-risk sales model compared to other retailers and marketers and it designed training and testing that was appropriate for that model. And the evidence is, notwithstanding the what I characterize as conjecture by Staff, the evidence is it has worked.

And I should just say that I'm not going to follow my closing argument, but this, what I'll say expands on what's contained at paragraphs 41 to 67 and 115 to 120 in our submissions.

So Mr. Silvestri explained that in 2010 Planet made the decision to adopt the MLM model of marketing its products exclusively through ACN's network of IBOs, and Planet did this for the purpose of avoiding what up to that point had been significant problems, which the Panel will be aware of, with regards to door-to-door in particular and other in-person marketing. And Mr. Silvestri identified what he said were the benefits of this model.

Number one, no cold-calling was permitted. IBOs were limited to reaching out to their warm network of friends, family, and acquaintances, and neither Mr. MacArthur or Mr. Nahid's evidence is anything to the contrary on that. The view was that IBOs would be more careful and were encouraged to act in a compliant manner when you're dealing with friends and family.

Second, a very important feature, IBOs were prohibited from selling. They were not allowed to consummate sales. And that was made clear in all of the training materials. IBOs were simply permitted to highlight the potential benefits of Planet's products amongst the other products that they marketed on behalf of ACN and refer customers to Planet's enrolment portal and website.

And as Mr. Silvestri said, the benefits of that was to avoid the sort of high-pressure sales practices that had been associated with door-to-door marketing. And notably, Mr. Silvestri -- and this goes to the training and testing point -- said this was seen as being realistic in terms of what was expected of marketing representatives, that Planet Energy didn't expect IBOs to become experts in the energy sector and simply to have a sufficient working knowledge of it.

And this echoes to some extent what this Board said in Summitt. Paragraph 17 is the reference, where the Board said that the energy market in Ontario is notoriously complex, containing many somewhat obscure elements. And that's undoubtedly true, certainly with regards to electricity.

And so Planet adopted a model that had IBOs promote Planet's potential benefits and then refer customers to the website, and the website enrolment portal which we went through during the hearing has all of the prescribed requirements. It's been reviewed by the OEB on multiple occasions, and it contains all of the necessary disclosure

statements, price comparison forms, terms and conditions. It has -- requires that customers download these things, that they acknowledge having reviewed them. There is information on cancellation rights, the global adjustment, other energy charges, et cetera. And that was the point. Let customers ultimately be the own arbiters of their purchase decisions.

And I submit that it's against this model that Planet's training and testing processes and systems need to be assessed. And an error, I submit, in Staff's approach is not to have done that but to have viewed all sales and marketing models as if a one-size-fits-all approach is appropriate, and that's not what the ECPA or the codes require. There is no absolute requirements.

What the code -- applicable code provisions say -- and section 5.2, I believe, is the provision, at least in the electricity retailer's code -- provides that training be done in regards to the requirements applicable to the services or products being sold or marketed by retailers or marketers and that training materials be adequate, adequate and accurate.

And that's consistent with what the Board has said in Summitt. It's consistent with what the Board said in Energhx, the other case my friends referred to, which is that ultimately an assessment of the sufficiency of training and testing is a subjective exercise that requires consideration of what's adequate in the circumstances. I believe Energhx at paragraph 70 makes that point.

And so Planet designed its training and testing in light of the sales model that it employed, which was -- which precluded IBOs from concluding sales and which was based entirely on online enrolment.

And again I would say, because my friends rely on Summitt, at paragraphs 17 and 67 of the Summitt decision there is a statement which -- where the Board says Summitt's training and testing was not an adequate foundation for someone who was expected to go into homes to sell these very significant contracts to relatively uninformed consumers on the basis of price comparisons or promises of lower gains.

And that's a fair statement, given the door-to-door marketing that Summitt agents were engaging in. But it is not applicable to what Planet was doing.

Let me address the specific allegations in the notice. As I said at -- this is page 4 of the notice, paragraph 2, it is alleged that - (b), that Planet's training materials didn't adequately and accurately cover the following areas, and those areas are enumerated. That's not the case.

If you look at Planet's training manual, which is contained at tab 7 of our compendium -- and I will not belabour the point by going through each of these in detail, but if you turn up page -- I thought they had the page numbers in the original exhibit, but they don't. There's no page numbers, but if you go about two thirds of the way through, or half the way through, you'll see the page that says "Part B, Ontario natural gas and electricity

training", and you'll see after that there is a table of contents.

And it's not necessary, but every single one of these topics that is enumerated in the notice corresponds to matters that are addressed in the table of contents and are addressed. There's three pages on cancellation rights.

The manual also addresses -- this is not alleged as a deficiency in the notice, but importantly this manual addresses the requirements for IBO training and testing. That is addressed three or four times in the manual. It addresses more than once the prohibition on IBOs selling Planet products, or being present when customers enroll. It specifically prohibits any guarantees of savings and it addresses the global adjustment.

This was the same -- these were the same training materials that were reviewed by the Board as part of the 2011 Ernst & Young audit, and that were again reviewed as part of an actual compliance inspection in 2015. And the very purpose, or the central purpose of those two inspections or audits was to look at Planet's training materials and its processes for training and testing agents.

And what my friends say -- and I don't think it's necessary to turn it up, but at paragraphs, for example, 119 through 122 of their closing submissions, are to say these materials are deficient because they don't include the $15,000 kilowatt-hour threshold for imposition of higher cancellation fees. There is only one slide on the

global adjustment. The disclosure statement or price comparison are insufficiently dealt with.

These are content criticisms. This content was looked at as part of a focused review of Planet's materials twice. Ms. Armstrong said even though allegations of deficient training and testing are a centrepiece of the notice, staff didn't do any inspection or investigation of Planet's training and testing. They didn't ask for any information. They didn't attempt to redo or do in a different way what had twice before been done by the panel, by the Board. And this, in my submission, is just an after-the-fact paper review parsing by counsel.

And it's not a question simply of reasonable expectations. This is the regulator and the regulator can't, having done a comprehensive and focused inspection of training and testing, found these very same materials to have been compliant, come back now not having done any sort of inspection or audit and now suggest that there are deficiencies that weren't caught the first time. It's unfair.

Paragraph 3 takes issue with the manner in which training and testing was delivered. And you will recall the criticisms with the fact that training and testing was online, and IBO testing was online and unsupervised. section 5.5 of the code contemplates and allows for online training and testing. It makes reference to E-training. This was brought to the Ernst & Young -- Ernst & Young's attention and the Board's attention in 2011, 2015, and was

reviewed. And in fact, Ernst & Young in its initial report identified online testing as being a potential issue. The report went to the Board; the Board made the determination that wasn't a deficiency.

And again at paragraphs 141 to 145 of my friend's submissions, there's another enumerated list of here are the problems with the way in which the training and testing was delivered, there's too many multiple choice questions, some questions were too easy, questions are randomly drawn, people can get the same questions -- again, this was there to be seen at the time. This is a paper review that's being done by counsel now after the fact. It wasn't part of the inspection that Ms. Armstrong and her staff did and it's unfair, it's inconsistent with the earlier inspections and audits that were done by the Board. And it's unfair to raise them now.

MS. LONG: Mr. Zacher, can I just get your position on this? Obviously, Board Staff doing a compliance review is different than this Panel. We're not involved in that. So is the position that barring a more thorough review in this proceeding, that we as a Panel are precluded from saying anything about testing and training?

MR. ZACHER: I would not go that far to say that, no. Your authority is not fettered in any way. I think what I would say is what you have to take into account is that the very regulator that's responsible for the retailer's -- monitoring compliance by retailers and marketers has done these comprehensive reviews twice, found compliance, and

now Staff are suggesting, having not done a comprehensive review, that there are problems. And there is a significant fairness issue involved in that. And I say this Panel has to take that into account.

The other point -- and I don't want to leave this -- is that my friends suggest, well, notwithstanding -- and this is, I submit, how they try to get around the fact of these earlier reviews -- is that notwithstanding there were paper reviews done -- and they call them paper reviews -- that it depends on how these training and testing and MLM sales processes are being implemented and working in practice. And there is a suggestion that they're not.

Staff has -- if that's Staff's submission, they have the onus to establish that it's not working in practice. And in my submission, it's not sufficient to suggest there are some systemic problems in the manner in which Planet's training and testing is being implemented by reference to the evidence of two IBOs, one of whom I submit evidence should be discounted in its entirety.

But even if Mr. MacArthur's evidence was not, that is not evidence that these practices are not working. There would have had to have been the sort of inspection and audit and review of Planet's practices of a larger number of IBOs, of other customers, the sort of thing that Ms. Armstrong says was not done. None of that was done.

It's starkly different from what was done in Summitt, where you actually had a critical mass of agents, a critical mass of customers, and there was evidence that

Summitt's training and testing wasn't working. That's not this case.

Moreover, the only evidence, I submit, as to whether Planet's training and testing and its other business practices, including its compliance monitoring, identification, and addressing of any issues, the only evidence of whether it's working is actually the evidence that's been put before it by Planet.

And Mr. Silvestri referenced the quality assurance measures that Planet employs. Those include random calls to 25 percent of customers, they include quality assurance calls to any IBOs who have been flagged for any reason. He referenced the purpose of confirmation e-mails and welcome letters, other automated processes.

And Mr. Silvestri -- my friends disparage this, but Mr. Silvestri remarked on, and he went through, all of the requirements that IBOs have to go through in order to become authorized to sell Planet Energy products through their IBO back office and through the training and testing requirements, which require them to acknowledge and attest to the fact that they're complying with various requirements, won't represent savings, won't enroll customers on their own, won't share answers on tests, and my friends in their submission mock and disparage this as just tick boxes and the quote-unquote honour system.

Well, Planet's expectation is that IBOs who go through these processes take those attestations and acknowledgments seriously, that people don't simply flout legal

undertakings, and the evidence is that it's working, because if it wasn't working, then Planet wouldn't have had seven years with no similar complaints, no enforcement action by the Board, wouldn't by the Board's own statistics be acknowledged as having a lower -- a relatively low industry complaint ratio.

The actual evidence of systemic -- of whether Planet's processes are working indicate they are. And I'll just close on this point to say that the Energhx case is somewhat instructive. That actually followed the Ernst & Young audit, so Energhx was one of, I think, the only -- maybe one or two suppliers that was audited that did not accept a sanction. It was a contested hearing.

And what the Board found was that there were blatant deficiencies in Energhx's training and testing materials. They didn't include basic information on cancellation rights, they allowed people to take the test twice and only get a mark of 70 or 75 percent. They didn't have any compliance monitoring at all.

And what the Board did was to consider all of that together not on a transaction-by-transaction basis but just take all of the training and testing deficiencies together. They found critically -- and this is at paragraphs 63, 92, and 95 of the decision -- that the two Board witnesses who had been called hadn't provided any evidence as to how these deficiencies could be expected to actually pose harm to consumers. That was completely absent, as I say it is in this case, and on that basis the Board determined that

the administrative penalty that should be assigned in respect of the potential for consumer harm was at the very lowest end of the spectrum. At that time there was a mandatory penalty of $1,000, and the Board assigned a $5,000 penalty in respect of training and testing.

The reason I think -- I suggest you have to read the decision, it was, $1,000 was that the Board said the potential harm to customers having not been proven is at the very, very lowest end, which was 1,000. However, the deviations from the actual training requirements was at the high end, and so when you took the high and the low, put them together on the matrix, you got 5,000.

In this case I submit there are no deficiencies with the training materials. All of the content requirements are met, all of the delivery methods are met, and there has been simply no proof at all that this poses any risk, because there hasn't been any harm. So I say it should attract nothing. There are no minimum penalties under the current regulation.

Subject to any questions on that, I would like to now address the evidence of Mr. MacArthur. And I say this is, as you know, an important issue to address because, leaving aside the issue of systemic problems that have been alleged, it is Planet's position that Staff has failed to prove the individual contraventions attributed to Mr. MacArthur and all of these should be dismissed.

Staff, as you know, has the onus of proving the contraventions. It is on a balance of probability

standard, I agree with my friend, and it requires Staff to provide clear, convincing, and cogent evidence that the facts that they allege are more likely than not as my friend said.

Staff hasn't met that burden with regards to Mr. MacArthur. And it is very important. Mr. MacArthur's evidence is very important, because there is, in effect, no other evidence to corroborate Mr. MacArthur's evidence, notwithstanding what my friend said.

Ms. Armstrong said that the case is entirely built on the two IBOs, to a lesser extent Mr. Hawkins, who is Mr. MacArthur's customer. As I said, no follow-up inquiries with Planet. No telephone calls to any of Mr. MacArthur's customers, let alone call any of them as witnesses to actually corroborate what he said. Again, a stark contrast from Summitt.

And Staff didn't lead any evidence from Mr. MacArthur about what the specifics were of all of the, I think 21 transactions, or I may have the number wrong, that he is alleged to have entered into, save for Mr. Hawkins.

And Ms. Armstrong said even though staff was well aware prior to the notice of inconsistencies with Mr. MacArthur's evidence and the fact that he had admitted to acting improperly as an IBO, including counselling his customers to lie, that staff, in Ms. Armstrong's words, took his word for it.

So Mr. MacArthur's evidence is singularly important and it is our position that the Panel cannot rely on, or

accept Mr. MacArthur's evidence that he personally enrolled customers on his own, or that he made the alleged misrepresentations. And I said that because, first, Mr. MacArthur has shown himself to be untruthful generally and with regards to the matters at issue in this case. He admitted to twice cheating on Planet Energy's test. He knew he wasn't allowed to sign up customers, but did it anyway. He knew he was required to wear a badge, but ignored the requirement. And as I've said, he coached his own customers in the event they received quality assurance calls from Planet Energy to lie to Planet Energy.

He also -- second, Mr. MacArthur has shown himself willing to change his story when it suits his interests and motivations. When Mr. Hawkins threatened to add early termination charges to Mr. MacArthur's rent, he made attempts with Planet Energy to get the charges relieved. He sent an email to Planet Energy, which is at tab 14, page 838 of our compendium, in which he said Mr. Hawkins enrolled on his own. I wasn't present. Mr. Hawkins also said that to Planet Energy, you will recall, in the quality assurance call that Planet made to Mr. Hawkins several days after he enrolled.

When that didn't work, Mr. MacArthur then told the OEB and others that that in fact wasn't the case, and that he had enrolled Mr. MacArthur -- sorry Mr. MacArthur had enrolled Mr. Hawkins. And of course, Mr. MacArthur was well aware that that would serve his and Mr. Hawkins' purpose by encouraging the OEB to take actions against

Planet Energy which could result in the termination fees being waived.

Mr. Hawkins -- sorry, Mr. MacArthur and Mr. Hawkins also told the OEB that they were not aware that customers, including Mr. Hawkins, could be subject to early termination fees. That is belied by the quality assurance call, which is at tab 21 of our compendium, which Planet Energy made to get to Mr. Hawkins and which Mr. MacArthur was present when Mr. Hawkins specifically asked about early termination charges and was told that he could be exposed to them.

There's other frailties, and that may be putting it mildly, in Mr. MacArthur's evidence about his alleged unfamiliarity with the global adjustment and other charges, notwithstanding that he had been an IBO for a number of years and by his own admission, had gone through the enrolment portal approximately 25 times where all this information was set out.

He had his own sales binder with information on the global adjustment, information on early termination charges and on other issues. I'm not going to go through that ad nauseum; it's in our written submissions. But I will say that what makes Mr. MacArthur's evidence particularly problematic is that against his assertion that he enrolled all his customers on his own, without them being present, there is in the record before you recorded telephone calls with the large majority of his customers, nine of them, in which Planet Energy asked every single one of them did you

enter into this contract, did you enter into it on your own, did you enroll on your own without Mr. MacArthur being present, and every single one of them said yes, they did it on their own.

So you have as against Mr. MacArthur's say-so, which I say is suspect for all the other reasons I've indicated, the evidence, albeit hearsay evidence, but it's in a recorded telephone call of nine of his customers.

Staff was aware of the quality assurance call with Mr. Hawkins, where Mr. Hawkins said this. Staff didn't call any of Mr. MacArthur's customers to resolve this issue. And my friend suggested in her submissions that there should be some expectation on Planet to have done this. That's not right. The onus is on staff to prove its case. They're relying importantly on the evidence of Mr. MacArthur. His evidence is patently, on its face, unreliable and this issue is not resolved.

MR JANIGAN: Mr. Zacher, if I can ask you a question on this MacArthur evidence. The position of Planet Energy is Mr. MacArthur's evidence is unreliable and that he's capable of misrepresentation.

Does that not increase the probability that in fact Mr. MacArthur exercised the same kind of unreliability and misrepresentation when he was acting as an IBO, and that it's more likely than not that he did not adhere to the provisions of ECPA or the rules of Planet Energy?

MR. ZACHER: Yes, I'd put that in the category of the evidence that he's a bad guy, so if he is a bad guy, maybe

he acted badly. But that's, Member Janigan --

MR. JANIGAN: I think it goes further than that. I think in his own words, he testified to the fact that he would do anything to make a sale, or words to that effect.

MR. ZACHER: He said -- and I think we excerpted it in our written submissions. There is a point where my friend in re-examination asked him -- he said you're aware that you weren't supposed to guarantee savings, you did it anyway and the conclusion of that line of cross-examination was when you do sales, you say a lot of things.

So absolutely Mr. MacArthur comes across as, at the very least, unethical, if not having acted unlawfully. But it can't be the case that staff, which is bringing very serious allegations against my client and under -- admittedly says we have myopically focused on the evidence of these two IBOs. I take -- we take Mr. MacArthur's word for it.

To have all these problems and throw it before the Board and say, you know, he looks like a bad guy, so therefore you should conclude he probably did this as a salesperson. That can't be. Staff can't be seen as having satisfied their onus or obligation in that circumstance, especially it shouldn't be the case in any prosecution, but it absolutely shouldn't be the case in this one, where all the red flags were there before the notice was issued.

Staff knew that Mr. MacArthur had admitted to counselling his own customers to lie. They knew there were inconsistencies in his evidence and Mr. Hawkins' evidence.

They knew he was motivated by a desire to get Mr. Hawkins out of the early termination charges.

Did they ask Mr. MacArthur to produce his relevant documents? No, we did. We brought a motion and got that.

Did they make a telephone call to any of Mr. MacArthur's other customers and ask is what Mr. MacArthur telling us true? No.

Did they say to Mr. MacArthur you've alluded to 6 or 7 unidentified people in your four witness statements, who you say are friends and IBOs and who told you all this stuff is okay. Can you provide us with the names of those people so we can contact them and we can verify what you're telling us? No. That is not sufficient. It's not sufficient to bring a prosecution against a licensee based on that kind of evidence.

And I'll just say in the alternative if Mr. MacArthur's evidence and Mr. Hawkins' evidence, who I say conspired with him, were to be accepted, and it shouldn't, for all the reasons I've just addressed, but if it is, Planet cannot be held liable in any event for any of the contraventions attributed to Mr. MacArthur, and the reason is that Planet had a good system in place. It said we called 25 percent -- do random calls to 25 percent of customers, and where IBOs have been flagged for anything we call more of their customers.

That was the case with Mr. MacArthur. They called 60 percent of his customers and they asked him -- they asked the customers, did Mr. MacArthur -- or did you enroll

on your own in the absence of Mr. MacArthur, and they all said yes.

So in order to accept the veracity of Mr. MacArthur's evidence it's necessary to disbelieve the evidence of the nine customers that were called and whose evidence is contained in those recorded telephone calls. Planet can't be held liable.

The uncontroverted evidence from Mr. Silvestri is that if those people had told the truth, if the very customers that they're trying to protect had told the truth and said, No, Mr. MacArthur enrolled me, Planet would have called every single one of his customers, not just the nine, but every one of them, and said, Do you want out of the contract, and they would have terminated Mr. MacArthur.

In other words, the compliance and customer care processes that Planet had set up would have worked as they were designed to work. And Planet can't be held liable where the very customers it tries to protect lie to it.

So whether you accept -- whether you disregard Mr. MacArthur's evidence in entirety or whether you accept it, I submit the result is the same. Planet can't be held liable. It would just be completely unfair on either -- in either case.

MS. LONG: Mr. Zacher, what do we make of the fact that Mr. MacArthur had been red-flagged by Planet and was subjected to his customers --

MR. ZACHER: I mean, what --

MS. LONG: -- two more quality assurance calls?

MR. ZACHER: I don't have the -- I can get it at a break or what-have-you, but I don't -- I can't recall exactly, but what Mr. Silvestri said was that there was a -- he was flagged because there was an enrolment by someone, I think it was the son in the case of a parent who had deceased -- who's deceased, enrolled the estate, and then subsequently the sister complained.

And so there wasn't a concern that there had been any kind of unauthorized enrolment --

MS. LONG: I see.

MR. ZACHER: -- the son had the authority to enroll the estate -- to enroll the estate. But as Mr. Silvestri said, you know, they flagged it anyway. And it just shows that it's a system that works. And the only reason it didn't work, if Mr. MacArthur is telling the truth, is because he told nine customers to lie and they conspired with him to lie.

I'll now address the vicarious liability point. This is really the only legal issue that I'll touch on, unless there's others that you want me to address. This is covered at paragraphs 108 to 112 of our written closing submissions. I'm going to try and touch on this briefly. And I just preface it by saying I don't believe a lot turns on it, whether you agree with me or you agree with my friend, and I'll explain that.

Our position is that the provisions in the Energy Consumer Protection Act that deem Planet to be liable for the -- or any supplier to be liable for the acts of their

agents is not determinative. It's not a conclusive deeming. And as my friend fairly put it, there are cases that say that. And in every case you have to look at the entire statutory context in order to construe whether deem is meant to be conclusive or rebuttable. And courts have gone both ways, as you can imagine, depending on the particular statutory language.

Our position is that if, you know, if the legislature had intended it to be conclusive, it wouldn't say deem, it would say suppliers are liable. And this Board has in fact interpreted it in that fashion in the Summitt case.

My friend is right that that was in the context of whether the principles under the Supreme Court of Canada Sault Ste. Marie case apply, you know, was it absolute liability, strict liability, you know, if it's strict liability is there a due diligence defence, et cetera, and that's the issue that went up to the Divisional Court, and the Divisional Court, as my friend again correctly said, said, no, that scheme doesn't actually apply to the compliance proceeding before this Board.

But that doesn't take away from the fact that the Board, the Panel, like in every case where it's applying a statute, still has to interpret the statute. So leaving aside this whole Sault Ste. Marie analysis, you still have to decide is the word "deem" intended to be conclusive or not.

And there is a case in our supplementary brief of authorities. It's called R. v. Croft. It can be found at

tab 3. And I would just point out that in that case, paragraph 2 -- I don't think it's necessary to take you there, but at the very end of paragraph 2 of that case the Nova Scotia Court of Appeal said in a case where they were construing the meaning of the word "deem" in a statute that they dismissed the appeal of the underlying decision with regards to whether the Sault Ste. Marie strict absolute liability regime applied, but the court then went on and said, but that doesn't abdicate this court from the obligation that it still has to interpret the meaning of the word "deem".

And so it still remains a live issue. And what I submit is that this Board's earlier decision in Summitt is still important. The Board in that case said it doesn't -- it would be unreasonable in construing this language to automatically make a supplier liable for the acts or omissions of its agents without any defence, without any ability to rebut it.

And so the Board interpreted it that way. I say that's a fair way to interpret it, and really what I heard my friend saying was because this is a consumer protection statute you have to automatically construe it in a way that is most favourable to consumers.

That, in my submission, doesn't make a lot of sense. The Board has been constituted as the tribunal in this province that is responsible for administering the Energy Consumer Protection Act and the related regulations and codes.

And it would be to entirely diminish the role of the Board to say there's this automatic deeming. And really, what my friend's submissions amount to is that there will be less consumer protection afforded if there's discretion in the Board to make a determination whether in the circumstances of each case there should be vicarious liability or not, and I submit that doesn't make sense.

There is no loss of consumer protection. It simply provides the Board with the authority and the discretion that it should have to make a determination whether in the circumstances of a particular case, a supplier should be vicariously liable for the acts of their agent. And in most cases, I suspect they would be. But the point is there is still discretion in the Board.

The reason I say not a lot turns on it is because whether there is an automatic attribution of liability to the supplier for any act or omission of an agent -- or in this case, an IBO -- matters of due diligence, past compliance history, all of these other circumstances still go to determination of what if any compliance action is warranted, including an administrative penalty.

So you could certainly find, if you accept my friend's submission, that technically Planet is liable for any infractions committed by Mr. Nahid. You could equally and consistently find that because these were isolated Infractions, there is no evidence of systemic wrongdoing. Planet has a very good compliance record, the Board has reviewed and endorsed Planet's training and testing, et

cetera, in the past, that because of all those circumstances, notwithstanding a finding of liability, that no penalty is required. And this Panel, this Board in Energhx and Summitt have made it very clear that the determination as to whether any kind of penalty is warranted is a discretionary one for the Board. It doesn't automatically follow from a finding of liability.

A lot was packed into that. I don't know if you have any questions, but if not, I'll turn to the next -- to my final point. I'll try not to be too redundant.

The final point I want to address is Planet's proposed disposition, Planet's submission on how this Panel should dispose of this case in response to the administrative penalty and restitutionary order which has been recommended by staff.

First, dealing with how Planet says the Panel should dispose of the case, it's our submission that again the heart of the enforcement team's case, which is that there are systemic problems in training and testing and MLM marketing, and this is all responsible for these contraventions and this poses grave harm, that has simply not been proven. And I can't express that in the strongest -- I have to express that in the strongest of terms.

I also say staff has not proved any of the contraventions attributed to Mr. MacArthur or, for the reasons I've indicated, even if Mr. MacArthur's evidence is accepted, none of those contraventions should be laid at the doorstep of Planet given quality assurance measures it

undertook.

That leaves the ten customers enrolled by Mr. Nahid. With the exception of Ms. Andrassin, no customers complained prior to the Board commencing this inspection. No customers were called, gave evidence they had complaints that they had been harmed. And there were two additional customers that complained, two doctors, after the Board commenced its inspection and Planet allowed both of those persons out of their contracts without penalty.

Mr. Nahid didn't provide evidence about the specific transactions at issue and what he said or didn't say about global adjustment, or early termination charges, et cetera. And just one quick response point on that. My friend said the codes and Energy Consumer Protection Act regs, et cetera, absolutely require that all additional charges, including the global adjustment, be conveyed to customers. That, I submit, is not the case. The provisions are clear that only when -- and even the Summitt case, the paragraphs my friend referred to, those only have to be disclosed where the agent is making representations about price. It's only in that context they have to. And there is no specific evidence from Mr. Nahid about what he said in the ten transactions that he says he entered into. His evidence was at best generic.

MR. JANIGAN: Mr. Zacher, can I ask you a question about the issue of complaints and the complaints received?

As I understand it, under the multi-level marketing practices that Planet Energy engaged in, that in fact the

individuals that were contacted and entered into contracts would either be friends or relatives of the IBO.

What impact might that have on whether complaints by the Board were received?

MR. ZACHER: I don't believe there is any evidence on that point, so I don't know. I think, as Mr. Silvestri said -- and I hear what you're saying that on balance, Planet believed this was a preferable scheme, a preferable model to others because it would encourage people to treat their friends, family, and acquaintances in a more compliant matter. I don't know the answer to that.

MR. JANIGAN: And possibly vice versa?

MR. ZACHER: Perhaps, but I would have to say -- you know, again, if that is -- there'd need to be some evidence on that.

MR. JANIGAN: I agree. The issue was rattling around in my head, and I thought I would ask you to address it in any event.

MR. ZACHER: I would be engaging in speculation if I tried to answer that.

I submit that what this Panel is really left with are the ten customers enrolled by Mr. Nahid. And again Mr. Nahid, one IBO out of 6 to 7,000, and his contracts represent one out of, I think Mr. Silvestri said, 120,000 or thereabouts that have been enrolled over seven years. And my submission is -- and I don't take issue, I don't suggest that Mr. Nahid was not a reliable witness. But Mr. Nahid's evidence is that -- his evidence is also that it's

not that he didn't understand he wasn't allowed to enroll customers, or it's not that he didn't go through the training and sign the acknowledgments and affirmations. He simply didn't do it. He didn't comply.

And it's one IBO -- however his evidence is treated, these handful of contraventions, in my submission, do not warrant the attraction of an administrative penalty or any sort of restitutionary order. And as I'm sure you're aware, and this was covered to some extent during the hearing, complaints that don't get resolved with suppliers, are typically in the ordinary course, once elevated to the Board, addressed through the Board's consumer complaint process, the CCR process. My submission is that but for staff's unsubstantiated theory that Mr. Nahid and Mr. MacArthur's evidence together were indicative of more deeper and more systemic problems, Mr. Nahid's complaints would have been dealt with in that way.

And with regards to -- I just want to pause and deal with Ms. Andrassin. Planet admitted it made a mistake by giving Ms. Andrassin incorrect information when she initially sought to cancel. Planet regrets and apologizes for that. It did cancel Ms. Andrassin's contract almost a year before the notice was issued. And as stated in our written submission, Planet would be willing to certainly recompense Ms. Andrassin for any difference, if any, between what she paid to Planet and what she would have paid under standard supply.

But Staff's proposal that Ms. Andrassin's complaint

should attract a $15,000 penalty is way out of proportion. The instances of fraud in Summitt attracted penalties of $9,000. Everyone can sympathize with Ms. Andrassin who has had a terrible customer-service experience, with dealing with their airline or their cable company or their cell-phone company. But not every bad customer-service experience warrants compliance action.

And notwithstanding Ms. Andrassin's very genuine sentiments, which I take no issue with, it is not something that in and of itself warrants any sort of penalty. There is a single case before you of Planet having made a mistake in giving a customer incorrect information about his or her cancellation rights and the unfortunate aggravation that that customer had to go through until they resolved the matter, but it's not deserving of any sort of compliance action.

And I want to make, given the gulf in the position between Planet and the enforcement team, I want to, for illustrative purposes, make one last point. I included in our supplemental authorities a very recent decision involving Hydro One. And this is, I think, illustrative because it is a situation that will be familiar to the Panel and to most people.

You will recall -- this was a -- it's at tab 1, Hydro -- Bennett v. Hydro One. This was an application to certify a case against Hydro One as a class action. And it stemmed from circumstances I think you will recall, which was several years ago Hydro One experienced problems with

its customer information system. And the decision of Justice Perell in this case which refused certification, refresh and summarize what that was about.

And in short, as Justice Perell notes, paragraph 1:

> "Hydro One's negligent implementation and administration of its CIS system resulted in 1.3 million of its customers being improperly charged."

This was a huge public-relations disaster. It was front-page news at the time. Hydro One commissioned PwC to do an audit. PwC confirmed Hydro One's negligence and errors. This is all explained in paragraphs 31 through 41. The Ontario Ombudsman became involved and issued a scathing report and noted among other things that the problem was exacerbated by improperly trained Hydro One call centre employees.

And if you go back to paragraph 11 to 13, and also 23 to 26 of the decision, I can just summarize, but one of the reasons for not certifying the decision was the alternative remedy, the preferable remedy, that was afforded to customers under -- by making -- through the Ontario Energy Board.

And as Justice Perell noted, Hydro One's customer contracts were governed by the Distribution System Code, Retail Settlement Code, which established minimum customer standards, and the Board had the authority to take compliance action against Hydro One for breaching enforceable provisions, which the provisions in those two

codes constituted, and imposing administrative penalties or other remedies if complaints are not resolved between the consumer and Hydro One.

To my knowledge -- and I don't believe there is anything public on the OEB's enforcement or compliance portion of the website, but I understand Hydro One may have agreed to some kind of a compliance action plan. I just say that. I don't know if that's the case, but I understand that may have been the case.

But I do not believe any administrative penalties have ever been assessed against Hydro One, notwithstanding clear findings of negligence, the report of this negligence by its own auditors, the ill-trained call centre staff identified in the Ombudsman's report, and the widespread damage that this systemic problem caused by Hydro One to over a million of its customers.

And I raise this simply to make the point that not every violation or infraction by a Board licensee warrants the heavy hand of enforcement. And I submit that in some cases retailers and marketers may be dealt with in a different way. There is an entire regulatory framework under the Energy Consumer Protection Act, the regulations and codes, that was effectively constructed to deal with what was at one time very bad behaviour by a number of retailers and marketers.

And there is nothing improper with having done that. It was a problem that needed to be addressed. But the fact that the Energy Consumer Protection Act affords such broad

and powerful tools of enforcement doesn't mean that those tools should be automatically utilized or employed every single time there is -- there are errors or infractions. They should be used judiciously to address the kind of problems that the Energy Consumer Protection Act was designed to address, the kinds of issues in Summitt where there was actually evidence of real consumer harm and by a number of consumers, or where there is evidence of real systemic problems, which is not the case here.

And there's a saying, which is that, you know, when you have a hammer every problem is a nail. And that, I submit, is the approach that guided the issuance of the notice in this case. There was not -- Planet's inspection -- sorry, training and testing and its MLM marketing processes have been impugned as being deficient, notwithstanding there was no inspection or investigation of those, and there is really no evidence, like in the case of Summitt, of actual consumers who are complaining and who say they have been harmed.

So it is our submission, Madam Chair, Board members, that this is not a case that warrants any administrative penalty or any restitutionary order.

You have -- I'm mindful of the time. You have our written submissions on what I submit are other criticisms of Staff's assessment of administrative penalty and restitution, but I will leave you to rely on our written submissions unless you have any questions.

MS. LONG: We have no further questions. Thank you,

Mr. Zacher.

Ms. Gonsalves, you have a few minutes for reply if --

MS. GONSALVES: I would like to keep myself to five minutes in reply, and I am better assured the ability to do that if I could have a brief few moments to just sort of organize my notes, if the Panel would give me the --

MS. LONG: Sure. How long do you need?

MS. GONSALVES: Five minutes.

MS. LONG: Five minutes? Okay. We'll go into the conferring room for five minutes and then we'll be back, thanks.

--- Recess taken at 12:59 p.m.

--- On resuming at 1:09 p.m.

MS. LONG: Ms. Gonsalves, just before you do your reply, Member Spoel has a question that she'd like to ask now, and then we'll allow you, Mr. Zacher, to address it as well. It's something that has come up, and we'd like to address it. I think that's probably the best way to do it, and then you can do your reply after.

MS. SPOEL: Throughout the submissions and in fact most of the case, there has been a lot of discussion about the electricity contracts and the lack of information about global adjustment and the price comparisons, I think that some of the questions that are subject to these -- not charges, whatever, complaints are gas contracts. I think not the majority of them, but there are a number of gas contracts.

And I just wondered -- we haven't heard -- I don't

think we've really heard any evidence from most of the witnesses about the gas contracts. We certainly haven't heard any submissions about the gas contracts. So I just wondered what staff's position is with respect to the gas contracts. Are we to simply to apply the same -- look at them in the same way as the electricity contracts, or is there any distinction to be drawn between the two?

MS. GONSALVES: Thank you, Member Spoel. Yes, our position is that unless there is some basis in the codes or in the legislation to treat the gas contracts differently -- and in a couple of respects, there are and I'll speak to that in a moment. Our arguments, our position in the evidence would apply equally to both, okay.

Where I think there is a difference is in two respects relating, both of them relating to allegation number one. The global adjustment obviously is an electricity charge issue. So to the extent that the Panel is of the view there have been false and misleading statements, either by failing to mention the global adjustment so false and misleading by omission, or as we explain starting at paragraph 94 of our submissions, after enrolment, Mr. MacArthur and Mr. Nahid provided some inaccurate information to certain customers about the global adjustment, that wouldn't apply to electricity contracts -- excuse me, gas contracts. In all other respects, the allegations remain the same.

The only other way in which in theory it could matter is that there is one difference between the codes, the

electricity retailers code and the gas marketers code, and that goes to the comments I made this morning about large volume consumers. In this case, it's a difference with a distinction. But the Electricity Retailer Code of Conduct encompasses both low volume consumers and large volume consumers in respect of the fair marketing practices section.

For whatever reason, the gas marketers code of conduct in respect of fair marketing practices is specific to low volume customers. Now in this case, the evidence is that the four large volume contracts at issue were all electricity contracts, so it doesn't matter beyond that. But it is important to note there is that slight difference in the regime.

MS. SPOEL: That's helpful. Mr. Zacher, do you want to add anything?

MR. ZACHER: I wouldn't add much. Just to be clear, the price comparisons and disclosures for all of the customers, this is part of the agreed statements of facts, were sent to all the customers. They were sent; they included all the information. I just want to make sure you weren't under the illusion that they weren't delivered and didn't include the required information. They did.

MS. LONG: Option. Thank you. We'll switch gears and, Ms. Gonsalves, your reply, please.

REPLY SUBMISSIONS BY MS. GONSALVES:

MS. GONSALVES: I'll just begin with one sort of broad overarching point of reply, which is that I caution the

Panel not to be induced by my friend's strawman arguments to decide anything on the evidence you have heard. And I say that respect of his submissions about Ms. Armstrong's lack of experience and whatever other evidence they may have gone out to find during the inspection. You are duty bound to consider the evidence that was before you and whether that proves the allegations.

Secondly, my friend said in his submissions at a couple of points that there had been previous findings that Planet Energy's training and testing material were compliant, and that is not the evidence. All that we have heard, all that is available on the documents is that there has been no prior compliance action in respect of the training materials. That does not mean that there was a finding that they were adequate. It is just the lack of a finding that they were noncompliant.

My friend made submissions to the effect that the Summitt case was far more serious than the evidence and allegations in this case, and when you compare --

MR. ZACHER: I don't know if this is reply, Madam Chair. We addressed the Summitt case in detail in our written submissions. My friend had an opportunity to address this as part of her submissions this morning.

I'm not sure that -- in my submission, it's not proper reply.

MS. GONSALVES: I'll say simply read the Summitt case carefully because in our position, this one is more serious, more complainants -- excuse me, more contracts at

issue.

My friend suggested that the court's decision in Summitt means that the Board should only act if there had been consumer complaints. And I say to that there is nothing in the Summitt case, there is nothing in the ECPA, there is nothing in the entire regulatory regime that says that the Board can or should act only if there has been consumer complaints.

Staff, the Board have an independent mandate, an independent duty to enforce the legislation and to act if, in their view, there has been misconduct by a supplier or its agents. So the fact that more customers didn't complain is irrelevant to the job this Panel has to do.

The effect of my friend's arguments regarding training and testing and Planet Energy's chosen business model is essentially to say that the obligations that Planet has and that its salespersons have should be reduced, because it felt that it had chosen a business model where the information was up on the website and all that the agents had do was direct customers there. So somehow that relieves them from knowing as much as other salespersons might have to know, and I say that is dangerous game.

Salespersons' obligations to know the industry, to know the information that's enumerated in the codes of conduct, must be the same regardless of a retailers chosen business model. And I say this because of the very problems between expectations and reality that have borne out in this case.

You cannot lessen the obligations on salespersons because a supplier has somehow designed a model that it believes is a safe one, or its intention is that it should operate in a certain way. The salespersons' obligation to properly inform customers have to be consistent because of the very risk that materialized here of design not matching delivery.

Mr. Zacher took you to the training manual, where he says look all these topics are covered --

MR. ZACHER: Madam Chair, this is -- none of this is appropriate reply. We addressed in our written closing, in great detail, the nature of Planet's MLM marketing model and the nature of the training that was set up in order to be tailored to that model.

This is just rearguing the same point that my friend has had the opportunity to argue in her submissions in-chief. This is not reply.

MS. GONSALVES: Of course nothing in the training manual matters if they can pass the test without reading it.

I will end on this point in respect of penalty. The regulation that this Panel has to apply in arriving at an appropriate administrative monetary penalty is a new regime. It's not the one that applied in the Summitt case, and it's one that puts in your hands increased discretion. It gives you a list of factors to take into account. But there are others. And one of those factors is the potential for harm, "potential" being a very important word

there --

MS. LONG: I'm not sure that --

MR. ZACHER: I am sorry --

MS. LONG: -- this is something that Mr. Zacher dealt with, so I think you might be straying a bit --

MS. GONSALVES: In fact, Madam Chair, I apologize, but he specifically said -- his words were there is no evidence of harm here, and he related that to, there ought not be a monetary penalty. And it's my submission that it's about the potential for harm, and general deterrence is one of the most important and longest accepted principles of penalty. It's --

MR. ZACHER: Madam Chair, I'm sorry, but, I mean, the basis for the administrative penalty that's being proposed is front and centre in Staff's case and their obligation. I mean, yourself and Member Spoel asked at the very outset, We want to hear about how you came up with the penalty. Mr. Safayeni, who was addressing that point, had all the opportunity in the world to explain, and it's not for them to now, after we've made our submissions, to finally explain how they came up with it.

You'll remember during the hearing we asked that the memo be produced that was sent to -- I guess addressed by Ms. Armstrong or whoever as to the recommendation and how the penalty was come up with. That memo wasn't produced. Privilege was claimed over it. This is not something that my friend can address in reply.

MS. GONSALVES: The problem I'm left here is that if

it's something that we said before my friend is saying you can't repeat yourself and if it's something that isn't direct reply to what he said he's saying you can't raise it for the first time now.

I need to make this point because Internet contracts in this industry are on the rise. This is the future of this industry. And this Panel in this case has an opportunity to send a message to the industry through a penalty that as one of its objectives realizes general deterrence by telling the industry we have a concern.

MS. LONG: I'm going to stop you there.

MS. SPOEL: Sorry, we didn't hear any evidence in this hearing about --

MS. GONSALVES: It's not about --

MS. SPOEL: -- Internet contracts or the fact they're on the rise. So I don't think that's something that we can take into account in this case because we didn't hear any evidence on that point. We heard no evidence about general deterrence and we heard no evidence about specific deterrence.

So I don't -- we heard nothing from anybody saying why this was important as a general deterrence, that this case had anything to do with general deterrence, and I don't think you can start telling us now, Ms. Gonsalves, that Internet contracts are on the rise. I don't know that. I haven't been told -- nobody in this room has told us that Internet contracts are on the rise. This is the first time we've heard that particular piece of non-evidence.

MS. GONSALVES: If I could explain the basis for it, though, Member Spoel, it's not about evidence, it's about the fact that as a result of the amendments to the ECPA -- so this is a point of law -- as a result of amendments to the ECPA the in-person sales can't happen any more, and so --

MS. SPOEL: That doesn't mean there will be more Internet ones. Maybe people won't buy contracts at all. I'm sorry, you're making an allegation -- you're making inferences here that there was no evidentiary basis in this hearing for you to make, and I really don't think -- and Mr. Zacher has no opportunity to respond, because this is your reply, and I don't think that anything he has said takes you there.

MS. GONSALVES: I appreciate that. I will -- I will --

MS. SPOEL: And we did specifically ask you to address how you came up with your recommendations on penalty, and not one -- there wasn't one comment from Mr. Safayeni about either specific or general deterrence.

MS. GONSALVES: It is in our written submissions, though, in fairness, it is in our written submissions, and general deterrence is not a matter of evidence. It is a matter of argument, and a Panel being concerned about the implications of its decision --

MS. LONG: I think, Ms. Gonsalves, we have what we need on penalty. I mean, Mr. Safayeni went through the considerations when I asked him about it. I think we're

clear on what Board Staff's position -- and I think we're very clear on Mr. Zacher's position that there should be no penalty. So I think we're good there.

MS. GONSALVES: That's where I'm ready to wrap it up. Thank you.

MS. LONG: That being said, we are -- if there is nothing else to deal with, we are adjourned for the day, and this is the end of the case, so we will get you our decision in due course. Thank you.

Oh, I'm sorry, Mr. Richler, you had a procedural issue you wanted to deal with.

PROCEDURAL MATTERS:

MR. RICHLER: Thanks, Madam Chair. Sorry to make everyone take their seats again.

But just very briefly, the Panel will recall that at the end of the last day of the hearing it was agreed that the case management team would take a look at the transcripts and have them -- ensure that any personal information of non-parties was scrubbed before those transcripts were placed on the public website, and that's still in progress.

But on a similar vein, it occurred to me during the course of argument today I noticed that there was at least one bit of personal information in a document that you were taken to. It was the transcript of one of the telephone calls, and that is the type of -- so it included, for example, an email address of someone and a home address, and so that's the type of information that normally the

Board would not have -- would not post on the public website.

So all I wanted to say is that if it would please the Panel Mr. Bell and I would be happy to work with counsel for both parties to just have another look at all the -- these materials to make sure that nothing that shouldn't be put on the public website is put there. And if we needed any further directions from the Panel we would seek them, but I don't anticipate that we would at this point.

MS. LONG: All right. So as I understand it, you're working through the previous material, and it would be this new material that will not be posted until such time as you and counsel have worked together to make sure that there is no personal information contained therein?

MR. RICHLER: That's right.

MS. LONG: Counsel? Fine with that? Okay. Good. Yes, if you could undertake that, Mr. Bell and Mr. Richler, we would appreciate it.

MR. RICHLER: Thank you.

MS. LONG: Thank you.

--- Whereupon the hearing concluded at 1:26 p.m.