

COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER of certain policies and procedures of Reliance Comfort Limited Partnership.

BETWEEN:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT May 23, 2014 CT-2012-002	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 102

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

- AND -

NATIONAL ENERGY CORPORATION

Intervenor

**RESPONSE OF THE COMMISSIONER OF COMPETITION TO THE RESPONDENT'S
MOTION FOR FURTHER PRODUCTIONS**

**DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES**
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**Counsel to the Commissioner of
Competition**

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1. Response of the Commissioner of Competition to the Respondent's Motion for Further Productions dated May 23, 2014.
2. Affidavit of Jeffrey S. Chamberlain affirmed May 23, 2014.

TAB 1

COMPETITION TRIBUNAL

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PART I. GROUNDS ON WHICH THE MOTION IS OPPOSED

1. The Respondent moves for an order compelling the Commissioner to conduct a reasonable review of all audio files seized from National Energy Corporation (“**National**”), morEnergy Services Inc. (“**morEnergy**”) and Ontario Consumers Home Services (“**OCHS**”) in his possession, power or control, and to produce those which are relevant to this Application.

Applying the principles of proportionality, the Commissioner should not have to review the audio files

2. Given the number of records already produced, the third party summary of information which will be produced, and the marginal probative value of the audio files to this Application, it is impractical and unduly resource intensive to require the Commissioner to review all of the audio files in his possession, power or control, and to produce those that are relevant to this Application.

3. The Respondent has received approximately 144,000 records from the Commissioner that are relevant to this Application. Of these, approximately 23,000 are National records, including approximately 300 audio files, seized pursuant to the search warrants issued by the Honourable Justice Maranger and the supplemental search warrant issued by the Honourable Justice Giovanna Toscano-Roccamo (the “**Search Warrants**”).

4. Consistent with Competition Tribunal guidance, the Respondent will also receive a third party summary of information prior to discovery of the Commissioner’s representative. The third party summary will contain information that informs the Respondent about the facts the Commissioner has gathered during his investigation. This summary includes information both favourable and adverse to the Commissioner’s case.

5. National has produced 69,625 of its own records of which 1,140 are audio files. Pursuant to the order granting National leave to intervene in this Application, the Respondent will also obtain oral discovery of a National representative.

6. Despite production of a significant number of relevant records, the Respondent seeks to have the Commissioner review all the audio files seized pursuant to the Search Warrants. Pursuant to section 6.4 of the Search Warrants, electronic evidence must remain under the control of electronic evidence officers, or anyone under their direction (collectively "**Electronic Evidence Officers**"), until that evidence has been reviewed to ensure that privileged records and records not captured by the Search Warrants are not distributed to anyone else.

7. During the execution of the Search Warrants a total of 227,446 audio files were seized from National, morEnergy and OCHS, representing an aggregate length of approximately 70,000 hours of recordings. It would take one Electronic Evidence Officer approximately 40 years to complete the review of the audio files before they could be released for a relevance review in connection with this Application. In addition, the Commissioner does not have the software to conduct keyword or other searches of the audio files. It would take up to a year to acquire and deploy such software.

8. Even if the Commissioner spent the time and money required to review the audio files, the audio files deemed relevant to the pleadings are of marginal probative value and, in any event, they are relevant only to assessing the alleged misleading conduct of door-to-door water heater sales companies. The Respondent uses this alleged conduct to justify engaging in its own exclusionary water heater return policies and procedures.

9. The Respondent has reviewed a sample of the 1,140 audio files produced by National and admits that approximately 10%, or about 110 files, relate to customer complaints, some of which may relate to misleading conduct by National. Therefore, it would be of little probative value to spend significant additional resources simply to identify more examples of National's customers calling to complain about its conduct.

10. The marginal probative value of the audio files is also demonstrated by the absence of a similar motion by Direct Energy Marketing Limited ("**Direct Energy**") to compel the Commissioner or National to review the audio files seized from National, morEnergy and OCHS in the proceedings against Direct Energy. The application against Direct Energy was filed the same day as the application against Reliance and

contains similar allegations. National has been granted leave to intervene in that application on the same terms. Direct Energy received the same productions from both the Commissioner and National.

11. Through the productions already received, the third party summary of information, and discovery of National and the Commissioner's representatives, the Respondent will obtain significant discovery on all issues in dispute. In these circumstances, applying the principle of proportionality, it is clear that Reliance's request for production of additional audio files would only serve to significantly delay this proceeding and add considerable cost to the parties to produce information that is of marginal probative value to the Application.

12. Subsection 9(2) of the *Competition Tribunal Act*.

13. Such further and other grounds as counsel may advise and the Tribunal may permit.

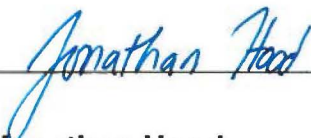
PART II. DOCUMENTARY EVIDENCE TO BE USED AT THE HEARING OF THE MOTION

14. The Commissioner intends to rely on the following documents at the hearing of the motion:

- (a) The affidavit of Jeffrey S. Chamberlain sworn 23 May 2014; and
- (b) such further or other documents as counsel may advise and this Tribunal may permit.

DATED AT TORONTO, ONTARIO, this 23rd day of May, 2014.

SIGNED BY:



Jonathan Hood

Counsel to the Commissioner of Competition

TO: **Reliance Comfort Limited Partnership**

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AND TO: **National Energy Corporation**

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B E T W E E N:

COMMISSIONER OF COMPETITION

(Applicant)

-AND-

RELIANCE COMFORT LIMITED PARTNERSHIP

(Respondents)

-AND-

NATIONAL ENERGY CORPORATION

(Intervenor)

**RESPONSE OF THE COMMISSIONER OF COMPETITION
TO THE RESPONDENT'S MOTION FOR FUTHER
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AFFIDAVIT OF JEFFREY S. CHAMBERLAIN

I, Jeffrey S. Chamberlain of the City of Ottawa, in the Province of Ontario, make oath and say:

1. I am a Competition Law Officer ("**CLO**") and an authorized representative of the Commissioner of Competition under the *Competition Act*, R.S.C. 1985, c. C-34, as amended. Since March 2003, I have been employed as an Electronic Evidence Officer in the Competition Bureau's Electronic Evidence Unit.
2. I have been asked to assess the time it would take to review the sound recordings seized from National Energy Corporation ("**National**"), morEnergy Services Inc. ("**morEnergy**") and Ontario Consumers Home Services ("**OCHS**") pursuant to the

search warrants issued by the Honourable Justice Maranger and the supplement search warrant issued by the Honourable Justice Giovanna Toscano-Roccamo (the "Search Warrants").

3. During the execution of the Search Warrants a total of 227,446 sound recordings were seized from National, morEnergy and OCHS. These sound recordings include approximately 466 gigabytes of data representing an aggregate length of approximately 70,000 hours of sound recordings.

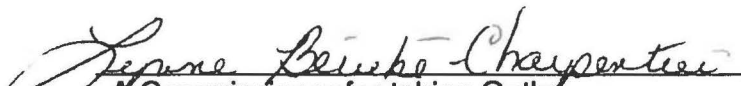
4. There are 250 working days in a calendar year. Based on a 7.0 hour day, it would take approximately 40 years for one CLO working full time to review the sound recordings.


5. A sub set of the sound recordings limited to those over 2 minutes in length and less than 15 minutes in length reduces the total number of sound recordings to 91,586 or 154 gigabytes of data representing an aggregate length of approximately 9,841 hours. It would still take one CLO approximately 8 years working full time to review the sound recordings.

6. At this time, the Electronic Evidence Unit does not have software capable of conducting a phonetic search of sound recordings. The process to acquire and then deploy such a program could take up to a year. In addition to conducting a competitive government process to purchase such software, extensive research before and after purchase is necessary in order to select the appropriate commercially available program, determine the program's effectiveness and, most importantly, determine the programs effects and interactions with the Forensic Software used by the Electronic Evidence Unit.

AFFIRMED before me at the City of Gatineau
in the Province of Quebec
on May 23, 2014




A Commissioner for taking Oaths


Jeffery S. Chamberlain

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AFFIDAVIT OF JEFFERY S. CHAMBERLAIN

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CT-2012-002

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