

THE COMPETITION TRIBUNAL

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

November 25, 2014
CT-2012-003

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

112

THE COMMISSIONER OF COMPETITION

Applicant/Responding Party

- and -

DIRECT ENERGY MARKETING LIMITED

Respondent/Moving Party

- and -

NATIONAL ENERGY CORPORATION

Intervener

NOTICE OF MOTION

TAKE NOTICE THAT THE RESPONDENT, DIRECT ENERGY MARKETING LIMITED (“DIRECT ENERGY”) will make a motion to the Competition Tribunal (“**Tribunal**”) on December 16, 2014, to be heard at the same time as the Commissioner’s motion for a preliminary determination of a question of law.

THE MOTION IS FOR:

1. An Order dismissing the Application on summary disposition;
2. Costs of this motion; and
3. Such further and other relief as counsel may request and the Tribunal may allow.

THE GROUNDS FOR THE MOTION ARE:

Background:

4. On December 20, 2012, the Commissioner of Competition filed a notice of application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, (the “**Application**”) against the respondent Direct Energy. The Commissioner alleges that Direct Energy has a dominant position in the supply of natural gas water heaters and related services to residential consumers (the “**Residential Water Heater Business**”) in certain local markets in Ontario, and that it abused that position by implementing various return policies and procedures.

5. The Commissioner seeks the following relief pursuant to subsections 79(1), 79(2), and 79(3.1):

- (a) An order prohibiting Direct Energy from abusing its allegedly dominant position by imposing exclusionary water heater rental return policies and procedures;
- (b) An order directing Direct Energy to take certain other actions necessary to overcome the effects of its alleged practice of anti-competitive acts; and
- (c) An order directing Direct Energy to pay an administrative monetary penalty in the amount of \$15,000,000.

6. Direct Energy filed its Response to the Application on August 26, 2013. Direct Energy denies all the Commissioner’s allegations and submits, among other things, that it was never dominant in any market, and that its water heater rental return policies were a commercially reasonable response to the ongoing deceptive marketing practices of door-to-door marketers of its competitors.

Sale of Direct Energy's Business

7. At the time the Commissioner filed the Application, Direct Energy operated a rental Residential Water Heater Business in Ontario. The water heaters rented by Direct Energy to consumers were owned by EnerCare Inc. ("**EnerCare**"). Pursuant to a contractual agreement between Direct Energy and EnerCare, Direct Energy provided services and managed the customer relationships in return for 35% of the rental revenue.

8. On July 24, 2014, Direct Energy entered an acquisition agreement with EnerCare for the purchase by EnerCare of Direct Energy's home and small commercial services business (the "**Transaction**"). The Transaction included EnerCare's purchase of Direct Energy's Residential Water Heater Business in Ontario.

9. As part of the Transaction, Direct Energy entered into a non-competition agreement in favour of EnerCare, effectively precluding Direct Energy from re-entering the Residential Water Heater Business in Ontario for a period of • years (the "**Non-Competition Agreement**").

10. The Competition Bureau reviewed the Transaction and on or about September 19, 2014, the Bureau issued a "No-Action Letter" clearing the Transaction.

11. The Transaction closed on October 20, 2014. As a result of the Transaction, Direct Energy no longer operates a Residential Water Heater Business in Ontario (including the areas the Commissioner alleges to be the relevant market). Further, pursuant to the Non-Competition Agreement, Direct Energy is effectively precluded from re-entering the Residential Water Heater Business in Ontario for a period of • years after October 20, 2014.

No Basis for the Relief Sought by the Commissioner

12. In order to succeed in the Application, the Commissioner must prove, pursuant to section 79(1)(a) of the *Competition Act*, that Direct Energy “substantially or completely controls, throughout Canada or any area thereof, a class or species of business”. Having sold its home and small commercial services business to EnerCare, including its Residential Water Heater Business, Direct Energy does not control, substantially, completely, or at all, a Residential Water Heater Business in Ontario. Nor can it control or engage in the Residential Water Heater Business in Ontario for a further period of • years, in accordance with its contractual obligations under the Non-Competition Agreement.

13. Section 79 is intended to be forward-looking. As such, section 79(1)(a) is cast only in the present tense. If the Respondent is not dominant in the relevant market at the time of decision, there can be no basis for an order under section 79(1) or 79(2). Whether or not the Respondent previously held a position of dominance is irrelevant.

14. There is also no basis on which to order that Direct Energy pay an administrative monetary penalty. Section 79(3.1) of the *Competition Act* provides:

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it *may also* order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding \$10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding \$15,000,000.

15. Under the plain language of section 79(3.1), a prerequisite to ordering an administrative monetary penalty is an order under section 79(1) or 79(2). However, before the Tribunal can make an order under section 79(1), or 79(2), the Tribunal must find that the Respondent “substantially or completely controls ... a class or species of business” in accordance with

section 79(1)(a) of the Act. Since Direct Energy has exited the Residential Water Heater Business in Ontario, it cannot substantially or completely control that business in Ontario (i.e., it cannot be dominant in the alleged relevant market), and there is no basis on which an administrative monetary penalty can be ordered against Direct Energy.

16. Accordingly, there is no genuine basis on which, in these circumstances, the Commissioner's Application can succeed.

17. Further, under these circumstances, the relief sought by the Commissioner against Direct Energy is moot and would serve no purpose.

18. First, because Direct Energy no longer operates a Residential Water Heater Business in Ontario, and is effectively precluded from doing so for • years, there is no basis or reason for an Order under section 79(1) prohibiting Direct Energy from imposing water heater rental return policies and procedures, or for an order under section 79(2) directing Direct Energy to take other actions to overcome the effects of allegedly anti-competitive acts.

19. Second, ordering an administrative monetary penalty in these circumstances would be contrary to section 79(3.3), which provides as follows:

(3.3) The purpose of an order made against a person under subsection (3.1) [the order of an administrative monetary penalty] is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person.

20. Section 79(3.3) expressly provides that the purpose of an administrative monetary penalty is to promote certain practices by the Respondent, in this case Direct Energy. As Direct Energy no longer operates a Residential Water Heater Business in Ontario, and is effectively precluded from doing so for • years pursuant to the Non-Competition Agreement, there are no relevant

practices to promote. Accordingly, ordering Direct Energy to pay an administrative monetary penalty in these circumstances would be contrary to section 79(3.3).

21. For these reasons, there is no genuine basis for the Application, and it must be dismissed.

Statutory Grounds

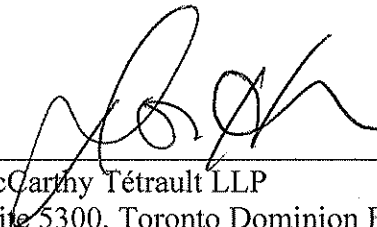
22. Direct Energy relies on:

- (a) The *Competition Tribunal Rules*: Rule 2, Rule 34(1), and, Rule 89
- (b) The *Competition Tribunal Act*: Section 9(4)
- (c) The *Federal Court Rules*: Rule 213, 214, 215
- (d) Such further and other relief as counsel may request and the Tribunal may allow.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Statement of Agreed Facts agreed to by the parties; and
- (b) such further and other evidence as counsel may advise and the Tribunal may allow.

November 24, 2014



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B E T W E E N :

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Applicant

- and -

DIRECT ENERGY MARKETING LIMITED
Respondent

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(Filed this 24th day of November, 2014)

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