Competition Tribunal | Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Direct Energy Marketing Limited*, 2014 Comp. Trib. 18
File No.: CT-2012-003
Registry Document No.: 104

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 Direct Energy Marketing Limited.

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Direct Energy Marketing Limited
(respondent)

and

National Energy Corporation
(intervener)

Date of Hearing: October 22, 2014
Before Judicial Member: Rennie J. (Chairperson)
Date of Reasons and Order: October 31, 2014

REASONS FOR ORDER AND ORDER REGARDING COMMISSIONER'S MOTION

[1] The Commissioner of Competition (the "Commissioner") moves for an order that the Tribunal hear the Commissioner's application brought against Direct Energy Marketing Limited ("Direct Energy") (CT-2012-003) together with the application filed against Reliance Comfort Limited Partnership ("Reliance") (CT-2012-002). For the reasons that follow, the Commissioner's motion is denied.

[2] The Commissioner submits that both applications raise common questions of law and fact and that hearing them together will save time and expenses for the Tribunal, the intervener, and the Commissioner. He estimates that the total length of hearing time will be reduced by a week and a half. He adds that the Respondents could be compensated for potential increased costs resulting from consolidation through a cost award, to the extent of their success.

[3] Reliance and Direct Energy oppose the Commissioner's motion. They submit that he has failed to meet the onus, established by the jurisprudence, whereby the moving party must establish (i) that separate hearings will result in prejudice to the moving party and (ii) that the responding parties will not suffer prejudice if the applications were to be heard together. Further, they argue that they are competitors with unaligned interests and that hearing the applications together will decrease efficiency and expediency because the risk of disputes surrounding procedural matters will increase. Counsel for Direct Energy gave various examples of possible disputes at the hearing of the motion.

[4] Direct Energy also submits that it may be tarred with evidence that is specific to the conduct of Reliance and points to the fact that the Commissioner, in his Third Party Summary, relies on 15 witness statements from customers relating to alleged conduct by Reliance, as compared to only 2 witness statements from customers in respect of Direct Energy. It adds that the fact that there are similarities between the applications increases the risk of prejudice in hearing the applications together.

[5] Reliance asserts that despite some common issues, the applications are distinctive in that they define distinct product and geographic markets for each of the Respondents, and rely on different facts.

[6] Applying Rule 34 of the *Competition Tribunal Rules*, SOR/2008-141, I refer to Rule 105 of the *Federal Courts Rules*, SOR/98-106, which provides that a Tribunal *may* order that two or more proceedings be heard together or heard one immediately after the other.

[7] In this case, after considering all the relevant factors, including common questions of law and fact, the alleged prejudice to the Respondents, the circumstances and considerations of fairness, expediency and the interests of justice, I conclude that the Commissioner has failed to persuade me that these applications should be heard together (see: s. 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.); *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 55 C.P.R. (3d) 429; *Halifax (Regional Municipality) v. Canada (Public Works & Government Services)*, 2008 FC 1159; *Sanofi-Aventis Canada Inc. v. Novopharm Ltd.*, 2009 FC 1285).

[8] I agree with Direct Energy and Reliance that hearing the applications together will increase the risk of disputes regarding procedural issues such as the disclosure of confidential information, the conduct of cross-examinations, and complexities surrounding admissibility. For example, counsel for Direct Energy has indicated that he may seek leave of the Tribunal to cross-examine witnesses called by Reliance if they will refer to the conduct of Direct Energy. Direct Energy and Reliance are competitors and they are also opposing parties in proceedings before the Superior Court of Justice. The types of procedural issues raised would negate the time and cost benefits advanced by the Commissioner.

[9] Also, at this time, it is difficult to predict all the procedural difficulties that may arise when hearing these applications together.

[10] Separate hearings will also ensure two separate records. This will allow each Respondent to clearly identify and understand the evidence brought against *it* and will permit it to properly analyze the evidence and prepare its defence.

[11] As explained above, the Commissioner argues that hearing the applications together will save time and expenses for the Tribunal, the intervener, and the Commissioner. However, hearing the applications concurrently will undoubtedly result in more expense for each of the Respondents who will have to attend the consolidated hearing. To prefer the cost and time savings of one party and intervener over that of other parties, with the caveat that a later cost

award can always address the imbalance, without further elaboration, is not an argument that I can accept.

[12] Where there are two separate applications involving industry competitors with unaligned interests, and different factual matrices, and where there is a serious risk that a consolidated hearing will raise serious questions of a procedural nature, the Tribunal will be cautious before ordering that the applications be heard together without substantial countervailing factors. Arguments that are couched primarily in terms of convenience are not sufficient (see: *Mon-Oil Ltd. v. Canada* (1989), 26 C.P.R. (3d) 379; *Sanofi-Aventis Canada Inc. v. Novopharm Ltd.*, 2009 FC 1285).

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[13] The Commissioner's motion is denied. Costs will be in the cause.

DATED at Vancouver, this 31st day of October, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES

For the applicant:

The Commissioner of Competition

Jonathan Hood

For the respondent:

Direct Energy Marketing Limited

Donald B. Houston
Christine Wadsworth

For the intervener:

National Energy Corporation

Derek D. Ricci
Michael Finley