

COMPETITION TRIBUNAL

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

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:

<p>COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE</p> <p>FILED / PRODUIT October 29, 2014 CT-2014-003</p> <p>Jos LaRose for / pour REGISTRAR / REGISTRAIRE</p>	<p>THE COMMISSIONER OF COMPETITION</p>	<p>Applicant</p>
	<p>- and -</p>	
	<p>DIRECT ENERGY MARKETING LIMITED</p>	<p>Respondent</p>
<p>OTTAWA, ONT</p>	<p># 102</p>	
	<p>- and -</p>	
	<p>NATIONAL ENERGY CORPORATION</p>	<p>Intervenor</p>

NOTICE OF MOTION

TAKE NOTICE THAT the Applicant, the Commissioner of Competition (“**Commissioner**”), will make a motion to the Competition Tribunal (“**Tribunal**”) at such date and time as may be set by the Tribunal.

THE MOTION IS FOR:

1. A preliminary determination of the following questions of law:
 - a. whether the Tribunal can make an order under paragraph 79(1)(a) of the *Competition Act*, and

- b. whether the Tribunal can make an order under subsection 79(3.3) of the *Competition Act*,

in each case where, after an application has been commenced but before the application is decided, the respondent has exited the relevant market;

2. Costs of this motion, payable forthwith; and
3. Such further and other relief as counsel may request and the Tribunal may permit.

THE GROUNDS FOR THE MOTION ARE:

1. On December 20, 2012, the Commissioner applied to this Tribunal for an order, among other things, prohibiting Direct Energy Marketing Limited (“**Direct Energy**”) from abusing its dominant position by imposing exclusionary water heater return policies and procedures, and for an administrative monetary penalty in the amount of \$15 million.
2. The Commissioner alleges in the application that the relevant market is the supply of natural gas water heaters and related services to residential consumers in those local markets of Ontario where Enbridge distributes natural gas (“**Relevant Market**”). In particular, the Commissioner alleges in the application that Direct Energy has, since February 21, 2012, preserved and enhanced its market power in the Relevant Market by imposing water heater return policies and procedures that impose significant costs on competitors and prevent customers from switching to those competitors.
3. When the application was filed, Direct Energy rented water heaters to customers in the Relevant Market. The water heaters that Direct Energy rented were co-owned by EnerCare Inc. (“**EnerCare**”). Pursuant to the co-ownership agreement between Direct Energy and EnerCare, Direct Energy provided services and managed the customer relationships in return for 35% of the rental revenue.

4. On July 24, 2014, Direct Energy entered an asset purchase agreement with EnerCare (the “**Agreement**”). Pursuant to the Agreement, Direct Energy sold to EnerCare its home and small commercial services business in Ontario for \$550 million. This business included the water heaters that Direct Energy rented to customers in Ontario.
5. The Agreement closed on October 20, 2014. With the Agreement closed, Direct Energy no longer operates in the Relevant Market.
6. The Commissioner seeks an answer to the two legal questions of whether the Tribunal can make an order against a respondent, such as Direct Energy, under sections 79(1)(a) and 79(3.3), notwithstanding that the respondent no longer operates in the relevant market.
7. The Tribunal’s answer to these two questions will save time and money by either bringing the application against Direct Energy to a speedier conclusion or simplifying the litigation going forward.
8. The *Federal Court Rules*, Rule 220; *Competition Tribunal Rules*, Rules 2 and 34(1).
9. Such further or other grounds as counsel may advise and the Tribunal may permit.

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

1. A statement of facts to be agreed upon by the parties; and
2. Such further or other material as counsel may advise and the Tribunal may permit.

DATED AT GATINEAU, QUÉBEC, this 28th day of October, 2014.



SIGNED BY:

Jonathan Hood
Antonio Di Domenico

Counsel to the Commissioner of Competition

TO: Direct Energy Marketing Limited

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