



Reference: *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp. Trib. 13
File No.: CT-2012-003
Registry Document No.: 066

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)



Decided on the basis of the written record.
Before Judicial Member: Rennie J. (Chairperson)
Date of Order: August 20, 2014
Order signed by: Justice Donald J. Rennie

CONFIDENTIALITY ORDER

[1] FURTHER TO the application filed by the Commissioner of Competition (the “Commissioner”) against the Respondent pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the “Act”) for an order pursuant to subsections 79(1), 79(2) and 79(3.1) of the Act;

[2] AND FURTHER TO the draft confidentiality order filed on consent by the Commissioner, the Respondent and the Intervenor;

THE TRIBUNAL ORDERS THAT:

[3] For purposes of this Order:

(a) “Affiliate” means an affiliated corporation, partnership or sole proprietorship within the meaning of subsection 2(2) of the Act;

(b) “Designated Representatives” means up to two in-house counsel and up to three additional individuals designated by the Respondent as its representatives who will be permitted access to Documents designated as Level B Protected Documents in accordance with the terms of this Order, which designation shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner and outside counsel to the Intervenor. The Commissioner, or the Intervenor may make a motion to the Tribunal objecting to such designation;

(c) “Designated National Representatives” means up to two in-house counsel and up to three additional individuals designated by the Intervenor as its representatives who will be permitted access to Documents that relate to the National Energy Topics and are designated as Level B Protected Documents in accordance with the terms of this Order, which designation shall be made by written notice to the Tribunal, with a copy sent concomitantly to the Commissioner and outside counsel to the Respondent. The Commissioner or the Respondent may make a motion to the Tribunal objecting to such designation;

(d) “Document” means any document whatsoever, whether in physical or electronic form, including the things defined as “records” in subsection 2(1) of the Act;

(e) “Document Review Vendor” means a professional service provider that facilitates the review of documents, both digital and paper, by legal professionals;

(f) “Independent Expert” means an expert retained by a Party or the Intervenor who (i) is not a current employee of the Respondent, the Intervenor or their respective Affiliates, (ii) has not been an employee of the Respondent, the Intervenor or their respective Affiliates within 2 years prior to the date of this Order, (iii) is not a current employee of a competitor of the Respondent, the Intervenor or their respective Affiliates; and (iv) has not been an employee of a competitor of the Respondent, the Intervenor or their respective Affiliates within 2 years prior to the date of this Order;

(g) “National Energy Topics” has the same meaning ascribed to it in the Tribunal’s Order dated November 6, 2013, pursuant to which the Intervenor was granted leave to intervene in this Proceeding;

(h) “Parties” means the Commissioner and the Respondent, and “Party” means the Commissioner or the Respondent;

(i) “Proceeding” means the application filed by the Commissioner against the Respondent (File Number CT-2012-003) for an order pursuant to subsections 79(1), 79(2) and 79(3.1) of the Act;

(j) “Protected Document” means any Document (including the information such Document contains) that is produced in the Proceeding, including documents listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, documents produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits or submissions that:

(i) a Party or the Intervenor producing the Document claims is confidential, or

(ii) the Tribunal has determined is confidential.

[4] Disclosure of Documents containing any of the following types of information could cause specific and direct harm, and such Documents may be designated as Protected Documents:

- (a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives;
- (b) Confidential contractual arrangements between the Respondent and its customers, agents, and/or suppliers, or between the Intervenor and its customers, agents, and/or suppliers;
- (c) Financial data or reports, or financial information relating to the Respondent or the Intervenor, their respective customers, suppliers or other third parties;
- (d) Business plans, marketing plans, strategic plans, budgets, forecasts and other similar information;
- (e) Internal market studies and analyses; and
- (f) Other Documents containing competitively sensitive and/or proprietary information of the Respondent, the Intervenor or third parties.

[5] If information from a Protected Document is incorporated into any other Document, that Document shall be a Protected Document. Any Protected Document shall cease to be a Protected Document if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); or (b) if the Parties and the Intervenor agree that the Document shall cease to be a Protected Document.

[6] Protected Documents will be identified in the following manner for the purpose of this Proceeding:

- (a) A person who claims confidentiality over a Document shall, at the time of production of a Protected Document, mark it with “Confidential – Level A” or

“Confidential – Level B” on the face of each Document and/or on each page that is claimed as confidential;

(b) All Documents designated as Protected Documents shall be treated as a Protected Document, save for determination otherwise by the Tribunal;

(c) If a document originates with or from more than one Party and/or with or from a Party and the Intervenor, the highest level of confidentiality shall universally attach to that document, pending the resolution of any challenge to that claim of confidentiality.

(d) At any point in the Proceeding, the Parties or the Intervenor may challenge a claim of confidentiality or level of confidentiality made by one of the Parties or the Intervenor. The Parties and the Intervenor shall use their best efforts to agree as to whether the Documents (or portions thereof) are to be treated as Protected Documents; and

(e) If agreement cannot be reached, the Parties or the Intervenor may apply to the Tribunal to determine whether the Document or a portion thereof, is a Protected Document.

[7] Subject to a further order of the Tribunal, the consent of the Parties or the Intervenor that produced and claimed confidentiality over the Protected Document, paragraph 9 below or as required by law, Protected Documents marked “Confidential – Level A” (“Level A Protected Documents”) may be disclosed only to:

(a) the Commissioner, Counsel for the Commissioner, and the Commissioner’s staff who are directly involved in the Proceeding;

(b) outside counsel to the Respondent, outside counsel to the Intervenor, and outside counsel’s staff who are directly involved in the Proceeding; and

(c) Independent Experts retained by the Parties and their staff who are directly involved in the Proceeding, who have executed a Confidentiality Undertaking in the form attached as Schedule A; and

(d) Document Review Vendors that have executed a Confidentiality Undertaking in the form attached as Schedule A.

[8] Subject to a further Order of the Tribunal, the consent of the Parties or the Intervenor that produced and claimed confidentiality over the Protected Document, paragraph 10 below or as required by law, Protected Documents marked “Confidential – Level B” (“Level B Protected Documents”) may be disclosed only to:

(a) the individuals described in paragraph 7; and

(b) Designated Representatives of the Respondent who have executed a Confidentiality Undertaking in the form attached as Schedule A.

[9] Only Level A Protected Documents relevant to the National Energy Topics may be disclosed to the Intervenor's Independent Experts and their staff and to the Intervenor's Document Review Vendor, and only after they have executed a Confidentiality Undertaking in the form attached as Schedule A.

[10] Only Level B Protected Documents relevant to the National Energy Topics may be disclosed to the Designated National Representatives, to the Intervenor's Independent Experts and their staff, and to the Intervenor's Document Review Vendor, and only after they have executed a Confidentiality Undertaking in the form attached as Schedule A.

[11] Notwithstanding any provision of this Order, the Commissioner may disclose any Level A Protected Documents or Level B Protected Documents that he has so designated, and that have not been produced in this Proceeding by the Respondent or the Intervenor or otherwise originated from the Respondent or the Intervenor, to any person for the purpose of preparing for the hearing of this application, subject to the limits prescribed by section 29 of the Act.

[12] A Party or the Intervenor may at any time and with prior reasonable notice to the other Parties and the Intervenor re-designate any of its own Level A Protected Documents as Level B Protected Documents or public documents, and/or may re-designate any of its own Level B Protected Documents as public documents. Where another Party or the Intervenor disputes the re-designation, the Tribunal shall determine the proper designation. Documents re-designated as

public shall cease to be Protected Documents and shall form part of the public record if introduced into evidence at the hearing of the Proceeding, unless the Parties and the Intervenor agree otherwise or the Tribunal so orders. If a Party or the Intervenor changes the designation of a Document to confidential, a prior disclosure of it shall not constitute a breach of this Order.

[13] If a Party (or the Intervenor) is required by law to disclose a Protected Document, or if a Party (or the Intervenor) receives written notice from a person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Document, that Party (or the Intervenor) shall give prompt written notice to the Party (or the Intervenor) that claimed confidentiality over the Protected Document so that a protective order or other appropriate remedy may be sought.

[14] Outside Counsel for a Party and his or her staff, outside counsel for the Intervenor and his or her staff, Counsel for the Commissioner, the Commissioner and his staff, and Independent Experts and their staff, may make copies of any Protected Document as they require in connection with the Proceeding.

[15] Nothing in this Order prevents a Party or the Intervenor from having full access to Protected Documents that originated from that Party or the Intervenor, as applicable.

[16] For greater certainty, all persons who obtain access to Documents through this Proceeding are subject to an implied undertaking to keep the Documents and information confidential and to use the Documents and information solely for the purposes of this Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[17] At the hearing of the Proceeding:

- (a) Protected Documents tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with paragraph 6(a), above;
- (b) The Tribunal may determine whether the Document should be treated as a Protected Document;

(c) Protected Documents shall not form part of the public record unless the Party or Parties claiming confidentiality (or the Intervenor to the extent that the Documents are Protected Documents designated by the Intervenor) waive the claim, or the Tribunal determines that the Document is not a Protected Document; and

(d) Documents over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in this Proceeding if introduced into evidence or otherwise placed on the record. Public Documents shall be marked “Public” on the face of the document.

[18] The Parties (and the Intervenor to the extent that the documents are Protected Documents designated by the Intervenor) shall provide the Tribunal with redacted versions of Protected Documents at the time any such Documents are introduced into evidence or otherwise placed on the record, which redacted versions shall be marked “Public” on the face of the document shall form part of the public record in this Proceeding.

[19] The termination of the Proceeding shall not relieve any person to whom Protected Documents were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Documents in accordance with the provisions of this Order and any confidentiality agreement, subject to any further order of the Tribunal.

[20] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Documents and any copies of Protected Documents, with the exception of Protected Documents in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party (or the Intervenor to the extent that the Documents are Protected Documents designated by the Intervenor) that produced them unless the Party (or the Intervenor) that produced the Protected Documents states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Parties, Counsel to the Commissioner and outside counsel to the Intervenor may keep one set of Protected Documents in their files.

[21] This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 20th day of August, 2014

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Donald J. Rennie

SCHEDULE "A":

CONFIDENTIALITY UNDERTAKING

IN CONSIDERATION of being provided with information or documentation in connection with this application over which claims for confidentiality have been advanced ("Protected Documents"),

I, _____, of the city of _____, of the [province/state of] _____, hereby undertake and agree to maintain the confidentiality of any Protected Document that I obtain, and in particular:

1. I will not disclose a Protected Document to any other person, except to a person permitted to receive it under the Confidentiality Order of the Competition Tribunal (the "Tribunal") dated _____, 2014, or such further Order as the Tribunal may make.
2. I will not use the information or documentation so obtained for any purpose other than in connection with the Proceeding (including any application or proceedings to enforce any Order made by the Tribunal in connection with the Proceeding, and any application under section 106 of the Competition Act to vary or rescind any Order made by the Tribunal in connection with the Proceeding), and any related appeals.
3. Upon completion of this Proceeding and any related appeals, I agree that all Protected Documents in my possession shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by Order of the Tribunal. I may retain in my confidential files, subject to the requirements of confidentiality imposed by this undertaking, materials prepared by me, such as my expert report, as well as study results and materials of a general nature which do not replicate any confidential information from a Protected Document.
4. I have read the Confidentiality Order, a copy of which is attached to this undertaking, and agree to be bound by it. I acknowledge that any breach of this undertaking by me will be considered to be a breach of the Confidentiality Order of the Competition Tribunal.

5. I acknowledge and agree that the Party (or National Energy Corporation to the extent that the documents are Protected Documents designated by National Energy Corporation) that claims confidentiality over a Protected Document may not have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this undertaking are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that the Party (or National Energy Corporation to the extent that the documents are Protected Documents designated by National Energy Corporation) that claims confidentiality over a Protected Document shall be entitled to injunctive relief to prevent breaches of this undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.

6. In the event that I am required by law to disclose any Protected Document that is subject to this undertaking, I will provide **[insert name of retaining or employing Party]** with prompt written notice so that the person that claimed confidentiality over such information or documentation may seek a protective Order or other appropriate remedy. In any event, I will furnish only that portion of the Protected Document that is legally required and I will exercise my best efforts to obtain reliable assurance that confidential treatment will be accorded to it.

7. I will promptly, upon the request of the person providing a Protected Document, advise where it is kept by me.

8. I hereby attorn to the jurisdiction of the Competition Tribunal to resolve any disputes arising under this agreement.

SIGNED, SEALED AND DELIVERED before a witness this ____ day of _____,
_____.

Name of Signatory:

Name of Witness:

COUNSEL

For the applicant:

The Commissioner of Competition

Jonathan Hood

For the respondent:

Direct Energy Marketing Limited

Donald B. Houston

Julie Parla

Helen Richards

Justin H. Nasser

For the intervenor:

National Energy Corporation

Adam Fanaki