Competition Tribunal | Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Reliance Comfort Limited Partnership,* 2013 Comp. Trib. 18
File No.: CT-2012-002
Registry Document No.: 072

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

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Reliance Comfort Limited Partnership
(respondent)

and

National Energy Corporation
(intervener)

Date of teleconference: 20131121
Before Judicial Member: Rennie J. (Chairperson)
Date of Order: November 27, 2013
Order signed by: Justice Donald J. Rennie

SCHEDULING ORDER

[1] On December 20, 2012, the Commissioner of Competition (the "Commissioner") filed separate Notices of Application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, against the respondent Reliance Comfort Limited Partnership ("Reliance") and Direct Energy Marketing Limited. These reasons and this Order governing pre-hearing scheduling apply in respect of each application.

[2] By way of background, interlocutory proceedings with respect to the adequacy of the Commissioner's Notice of Application concluded with the dismissal by the Supreme Court of Canada of an application for leave to appeal from a decision of the Federal Court of Appeal on October 31, 2013. The intervention of National Energy Corporation ("National") was contested, in part, and on November 6, 2013 National was granted leave to intervene. Contemporaneous with the Order granting National leave, the parties were asked to agree on a timetable for the disposition of the Commissioner's applications.

[3] The parties could not agree on a schedule for the steps necessary to bring these matters to a final hearing on the merits, necessitating a case management conference on November 21, 2013. The main point of contention concerned when a motion for summary disposition, as proposed by Reliance, would be heard. The parties advanced various, inconsistent schedules. Reliance urged that a motion for summary disposition be heard before the production of documents, examinations for discovery and preparation of expert reports commenced. Other parties expressed the view that the motion would be more effectively heard after discovery, and the Commissioner said that it was simply not an appropriate motion.

[4] Subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, requires that proceedings before the Tribunal "shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit." The delays proposed in some of the schedules are inconsistent with this objective, as is the suggestion that proceedings be stayed while Reliance prepared a motion for summary disposition. On one of the schedules proposed, a

final hearing on the merits would take place over 32 months after commencement of the proceedings.

[5] I note that at this stage, the motion for summary disposition is but a proposal. The nature of the question that it would raise and how the answer to that question would effectively dispose of all or some of the case, remain undefined. To the extent that the proposed motion has been defined, the issue to which it would relate, the question of market dominance, requires an extensive factual record which, as of yet, does not exist. The motion for summary disposition, as described, would require affidavit evidence, both factual and expert, on an issue that is usually addressed in the context of a hearing on the merits. Counsel correctly in my view, foreshadowed cross-examinations and challenges to the adequacy of the factual record on which the motion would be based, necessitating further delay.

[6] Given these considerations, the overall efficient and fair conduct of these proceedings is furthered by directing that this proposed motion, should it materialize, be heard after discovery on an appropriate record. Should Reliance bring a motion, and is successful, it can make an application to be compensated in costs for the additional legal expenses it has occurred. Scheduling the motion to follow discoveries ensures that the proceedings are not brought to a standstill in the interim. It also avoids the prospect that, should the motion fail, considerable time would have been lost. Hearing the motion after discoveries is also consistent with the purpose of the rule providing for summary disposition of cases. If successful, the motion could eliminate or abbreviate the need for a lengthy hearing. In making these observations, I do not constrain the discretion of a judicial member of the Tribunal in considering the hearing, merits and disposition of any motion for summary disposition.

[7] A second issue at this case management teleconference concerned whether the Commissioner had an obligation to produce documents in its possession that were obtained from the intervener, National, following the execution of a search warrant. It was contended that National is subject to the obligation to produce an affidavit of relevant documents in accordance

with the Tribunal's Order granting it leave (*The Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2013 Comp. Trib. 17) and the *Competition Tribunal Rules*, SOR/2008-141. In consequence, to require production by the Commissioner would serve no useful purpose.

[8] It is sufficient, at this stage, to note that the issues on which National has been granted leave do not overlap completely with the issues raised by the Commissioner. To defer production of National's documents to National alone could, in theory, result in lack of disclosure. The Tribunal is hopeful that the parties will agree to avoid unnecessary duplication of documents. The Tribunal also notes the reference made by counsel to terabytes of information, including audio-files of conversations with customers, which need to be transcribed and produced. Without expressing a view, one way or another on the relevancy of such information, the Tribunal reminds counsel of the principle of proportionality, which informs the relevancy inquiry.

[9] The parties have indicated that, with the Tribunal's guidance, they may reach consensus on the timing of various pre-hearing steps. The Tribunal will therefore order that they file a timetable, on consent, by no later than Thursday, December 5, 2013. The timetable shall comply with the following:

1) The service of affidavits of documents and delivery of documents by all parties shall be scheduled for March 28, 2014.

2) The hearings of the applications shall be scheduled to commence on February 23, 2015.

[10] If the parties cannot agree on a timetable, each party shall serve and file a proposed timetable on Friday, December 6, 2013. The Tribunal expects that the parties and intervener will

continue preparation of their respective affidavits of documents while attempting to reach an agreement on the timetable.

THE TRIBUNAL ORDERS THAT the parties will file a timetable, on consent, by no later than Thursday, December 5, 2013, failing which, the Tribunal will fix a schedule after having the parties' respective schedules by Friday, December 6, 2013. The timetable shall comply with the following:

1) The service of affidavits of documents and delivery of documents by all parties shall be completed by March 28, 2014.

2) The hearing of these applications shall commence on February 23, 2015.

DATED at Ottawa, this 27th day of November, 2013.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES:

For the applicant:

The Commissioner of Competition

Jonathan Hood
Parul Shah

For the respondents:

Reliance Comfort Limited Partnership

Robert S. Russell
Brendan Wong

Direct Energy Marketing Limited

Donald Houston

For the intervener:

National Energy Corporation

Adam Fanaki
Derek D. Ricci