

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v Direct Energy Marketing Limited*, 2013 Comp. Trib. 16
File No.: CT-2012-003
Registry Document No.: 040

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
(applicant for leave to intervene)



Date of hearing: 20131017
Before Judicial Member: Rennie J. (Chairperson)
Date of Order: November 6, 2013
Order signed by: Justice Donald J. Rennie

ORDER GRANTING NATIONAL ENERGY CORPORATION LEAVE TO INTERVENE

I. INTRODUCTION

[1] National Energy Corporation (“National”), a supplier of natural gas and electric water heaters for rental to Quebec and Ontario homeowners, seeks leave to intervene in these proceedings brought by the Commissioner of Competition (the “Commissioner”) pursuant to the abuse of dominance provision (s. 79) of the *Competition Act*, R.S.C. 1985, c. C-34. The Respondent, Direct Energy Marketing Limited (“Direct Energy”), opposes National’s request. In the alternative, it contends that the scope of National’s intervention ought to be restricted.

II. ANALYSIS

A. The Request for Leave to Intervene

[2] National’s request for leave to intervene is brought pursuant to subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd suppl.), which provides that any person may, with leave of the Tribunal, intervene in a proceeding to make representations that are relevant to the proceeding in respect of any matter that affects that person.

[3] In order to be granted intervener status, the person seeking leave to intervene must meet the following requirements:

- (a) The matter alleged to affect the person seeking leave to intervene must be legitimately within the scope of the Tribunal’s consideration or must be a matter sufficiently relevant to the Tribunal’s mandate (*Director of Investigation and Research v. Air Canada* (1992), 46 C.P.R. (3d) 184 at 187);
- (b) The person seeking leave to intervene must be directly affected. The word “affects” has been interpreted in *Air Canada, ibid.*, to mean “directly affects”;
- (c) All representations made by a person seeking leave to intervene must be relevant to an issue specifically raised by the Commissioner (*Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, 61 C.P.R. (3d) 528);
- (d) Finally, the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it (*Washington v. Director of Investigation and Research*, [1998] C.C.T.D. No. 4 (QL) (Comp. Trib.)).

(The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated, 2011 Comp. Trib. 2; *The Commissioner of Competition v. Canadian Waste Services Holdings*, 2000 Comp. Trib. 9)

[4] Direct Energy conceded at the hearing of National’s motion that National is directly affected by the proceeding, but submitted that National would not bring a unique or distinct perspective that would assist the Tribunal in deciding the issues before it. National, relying in particular on the affidavit of Mr. Gord Potter, National’s Chief Operating Officer, submitted that it does have such a perspective.

[5] Mr. Potter explained in his affidavit that National is a supplier of home services, including the rental of energy efficient water heaters and the supply of HVAC equipment to existing and new homeowners in Ontario and Quebec. He adds that National is one of the largest competitors to Direct Energy for the supply of water heater rental services in the relevant market, but that its attempts to effectively compete and expand in the market have been constrained by the conduct of Direct Energy. It is not contested that National has filed a complaint with the Competition Bureau which led the Bureau to investigate Direct Energy's conduct.

[6] Direct Energy submits that the Tribunal should not grant National leave to intervene because National's evidence can be adduced through the Commissioner, making the participation of National unnecessary. As a result, National will not bring a unique or distinct perspective to the Commissioner's proceedings.

[7] The parties' dispute has its root in their divergent interpretations of requirement (d) of the above test. Direct Energy submits that this element requires National to establish that it has something "to add as an intervener which cannot be adduced by the Commissioner by calling a representative of National as a witness." National opposes this view and submits that the case law does not support such a restrictive interpretation and that Direct Energy confuses the requirement of a unique or distinct perspective with the adoption of a different legal position.

[8] Neither subsection 9(3) of the *Competition Tribunal Act* nor the case law provide that intervener status can only be granted to persons who have established that their evidence and argument cannot be presented by the party whose legal position they support. Direct Energy casts the test too high when it submits that National must establish that its proposed evidence cannot be adduced by the Commissioner. To accede to the argument would set such a high bar that it is doubtful that it could ever be met and would preclude, in all likelihood, any person, who has filed a complaint with the Bureau, from ever playing the role of an intervener in a Tribunal proceeding.

[9] No Competition Tribunal decision has held that such a requirement is necessary and it can certainly not be extrapolated from the Tribunal's decision in *Director of Investigation and Research v. Southam Inc* (1997), 78 C.P.R. (3d) 315, in which the Tribunal held that interveners, by bringing their own and distinct perspective, "...supplement the case of a party...". The Tribunal has often granted complainants or competitors leave to intervene in a proceeding brought by the Commissioner.

[10] Direct Energy's interpretation would also run counter to the principles set out by the Federal Court of Appeal in *American Airlines, Inc. v. Air Canada*, [1989] 2 F.C. 88 (aff'd, [1989] 1 S.C.R. 236):

In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Part VII of the *Competition Act*; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceeding in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those interveners not only to

participate but also to do so effectively. A restrictive interpretation of section 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.

[emphasis added]

[11] The Federal Court of Appeal also held, at page 99, that subsection 9(3) should be examined in light of subsection 9(2):

Fairness is a relevant consideration because subsection 9(2) of the *Competition Tribunal Act* expressly requires that proceedings before the Tribunal be dealt with as informally and as expeditiously as the circumstances and fairness allow.

[12] In this case, the affidavit of Mr. Potter contains detailed evidence explaining why National brings a unique or distinct perspective. I accept that National has special knowledge and expertise that may assist the Tribunal and that, although it supports the Commissioner's position generally, its business interests are different from the Commissioner's public interest mandate (*Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, 61 C.P.R. (3d) 528).

[13] Direct Energy's submission that National seeks to use the Tribunal as a forum to advance its private litigation agenda against Direct Energy should be dismissed. Direct Energy has not established that National is seeking to intervene for improper purposes and the Tribunal notes that certain safeguards exist to address Direct Energy's concerns (see e.g. Rule 62 of the *Competition Tribunal Rules*, SOR/2008-141) and additional safeguards can be put in place if so necessary. At best, the assertion is premature and remains hypothetical.

[14] Subsection 9(3) provides that the intervener may only make representations that are relevant to the proceedings and this means that the representations must be relevant to the proceeding as defined by the pleadings (see *Director of Investigation and Research v. Tele-Direct (Publications) Inc.*, 61 C.P.R. (3d) 528). Direct Energy's submission that National seeks to broaden the issues raised in the Commissioner's application shall be dealt with below when examining the topics on which National seeks leave to intervene.

[15] In the circumstances, National has established that this is a proper case in which leave to intervene should be granted.

B. The Scope of Intervention

[16] Both the Commissioner and Direct Energy oppose some of the terms of National's proposed scope of intervention.

[17] It should be noted that National's motion for leave to intervene was heard on the same day that the Tribunal heard National's motion for leave to intervene in the proceeding brought by the Commissioner against Reliance Comfort Limited Partnership ("Reliance") (CT-2012-002). The two proceedings, which were filed on the same day, are similar and National's proposed topics and terms of participation are identical in both proceedings. The Commissioner's position

with respect to National's request is identical in both proceedings as well. While Reliance did not oppose National's intervention, it did oppose some of the terms of National's proposed scope of intervention.

[18] In the circumstances, it is reasonable for the Tribunal to examine Reliance's objections together with those formulated by Direct Energy.

[19] At the hearing of the motions, counsel for National provided the Tribunal with a table setting out the topics on which it sought leave to intervene and the parties' respective positions with respect to each topic.

	Proposed Topic	Commissioner	Reliance	Direct Energy
A	The development of the Ontario rental water heater industry as it relates to National.	Consent	Consent	Oppose
B	The issue of Reliance's/Direct Energy's anti-competitive acts as they relate to National, including the impact of Reliance's/Direct Energy's exclusionary water heater return policies and procedures and other anti-competitive conduct as alleged in the Commissioner's Application, on the ability of National to effectively compete and expand in the Relevant Market.	Consent	Modify	Consent
C	The impact of Reliance's/Direct Energy's anti-competitive acts on customers or proposed customers of National.	Consent	Modify	Oppose
D	National's interactions with Reliance/Direct Energy with respect to the matters at issue in the proceeding, including dealings with Reliance/Direct Energy regarding the water heater removal and return process.	Consent	Consent	Consent
E	National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets.	Modify	Oppose	Oppose
F	The issue of Reliance's/Direct Energy's dominant position as it affects competition in the Relevant Market generally.	Modify	Oppose	Oppose
G	The issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally.	Modify	Oppose	Oppose
H	Barriers to entry and ease of entry into the Relevant Market, based on National's experience, including whether Reliance's/Direct Energy's conduct creates artificial barriers to entry and expansion for National or raises National's costs.	Consent	Modify	Oppose
I	The statements made and conclusions drawn by Reliance/Direct Energy concerning National in the Response of Reliance/Direct Energy filed in this proceeding.	Modify	Consent	Consent
J	The impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.	Modify	Modify	Modify

[20] With respect to Topic A, I find that it is relevant and that National, given the formulation of the topic, will bring its own distinct or unique perspective. In the circumstances, National shall be allowed to intervene on this topic.

[21] Direct Energy does not oppose Topic B whereas Reliance seeks to modify it so as to confine it explicitly to the “impact” on National and to the alleged anti-competitive acts as set out in the Commissioner’s application. Given the explicit acknowledgement made by counsel for National at the hearing that the “...anti-competitive conduct, which should be the focus of our intervention, must be the anti-competitive conduct which is at issue in the proceeding and as specifically pled by the Commissioner”, the wording of Topic B is acceptable. It cannot be interpreted at a later stage to have broadened the Commissioner’s allegations as set out in his pleadings. It is not necessary to replace the word “issue” with the word “impact”, as was suggested by Reliance.

[22] Direct Energy opposes Topic C and while Reliance, in its written submissions, opposed Topic C, it indicated at the hearing that Topic C would be unnecessary as Topic B already allows National to adduce direct evidence regarding customers. Direct Energy submitted that National seeks to speak on behalf of consumers under this Topic and that it cannot do so.

[23] At the hearing, counsel for National indicated that it has no intention to speak for or on behalf of all consumers, generally. Rather, under this proposed topic, National seeks to describe its direct knowledge of how Direct Energy’s alleged conduct impacts customers or its efforts to attract potential customers, including National’s ability to induce customers to switch suppliers. Given these clarifications made by counsel, this Topic is acceptable and appropriate.

[24] With respect to Topic E, Reliance and Direct Energy submit that National seeks to redefine the issues of product market and geographic market in a manner that is different from that defined by the Commissioner in his pleadings. National, as a market participant, brings its own perspective on the relevant product and geographic markets, based on its experience. It is very possible that its perspective and that of the Commissioner, while they may overlap, may not be identical.

[25] Direct Energy and Reliance object to National having any view on product or geographic market. They base their objection on fairness, and say that they know the case they have to meet, and that is the case as defined by the Commissioner. I agree. The case is defined by the Commissioner and it cannot be re-cast by an intervener. That said, an intervener may have pertinent information and a useful perspective about these issues as framed by the Commissioner. To exclude the intervener from having a role in respect of the nuances and precise contours of these two issues as framed by the Commissioner would render the right of intervention illusory. National can give its perspective as a participant in the industry on the definition of the product and geographic markets as framed by the Commissioner.

[26] Reliance and Direct Energy oppose Topics F and G and note that National does not bring a unique or distinct perspective when it wishes to speak as to competition in the relevant market generally. They note that these Topics strike at the heart of the alleged restrictive trade practice and that it is for the Commissioner to establish the constituent elements of the practice. Counsel

for Reliance indicated at the hearing that Reliance would not object to these Topics if they had been limited to the impact on National. The Commissioner also submits that the Topics should be limited to National.

[27] In the circumstances, I find that these are proper topics with respect to which National brings its own distinct perspective, given its experience in the market place. Any evidence to be presented by National in this regard should be limited to that of National alone.

[28] Direct Energy opposes National’s proposed Topic H and Reliance proposes alternative wording. Whereas Reliance’s initial concerns have now been addressed, I see no reason to prevent National from making representations with respect to this Topic given the express reference and limitation to National’s experience. National brings a unique or distinct perspective in this regard.

[29] Direct Energy and Reliance do not oppose Topic I, but the Commissioner has asked that the Topic be explicitly restricted to National’s “conduct” in the responses filed. The addition of the limitation does add useful precision and will therefore be added.

[30] With respect to Topic J, Reliance, Direct Energy and the Commissioner seek to remove the reference to “on competition in the Relevant Market”. The Tribunal, in previous decisions, has allowed interveners to provide a view of the impact of the proposed remedy (see, e.g., *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 2, where the Tribunal allowed a bank to make representations regarding the impact of the proposed remedy on the payments system). National does bring a unique or distinct perspective on the impact of the proposed remedies on competition in the market in which it participates.

C. Terms of Participation and Costs

[31] National seeks to intervene on the following terms:

A	To review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), but not participate directly in the discovery process.
B	To produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene.
C	To adduce non-repetitive <i>viva voce</i> evidence at the hearing of the Commissioner's Application relating to the topics for which National has been granted leave to intervene.
D	To conduct non-repetitive examinations and cross-examination of witnesses on the topics for which National has been granted leave to intervene.

E	To file expert evidence relating to the topics for which National has been granted leave to intervene within the procedures set out in the <i>Competition Tribunal Rules</i> .
F	To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences.
G	To make written and oral argument relating to the topics for which National has been granted leave to intervene, including submissions on any proposed remedy.

[32] At the hearing, counsel for the Commissioner agreed with the above proposed terms. Both Reliance and Direct Energy object to the wording of some or all of these terms.

[33] With respect to the first Term, Direct Energy has stated in its written submissions as follows :

National should not be permitted to inspect any documents produced by the parties or review discovery transcripts or any exhibits thereto, except in accordance with a confidentiality Order made by the Tribunal that restricts disclosure of such documents and transcripts to: (i) the topics on which National has been permitted to intervene; and (ii) external counsel for National, after having signed an appropriately worded confidentiality agreement, insofar as the information to be disclosed has been determined by the producing party to be competitively sensitive and/or proprietary;

[34] I agree that the review of the transcripts and documents should be limited to the topics on which National has been granted leave to intervene. National has not established why a review of all the discovery transcripts and access to all documents are necessary for the purposes of its intervention. If practical difficulties arise, the parties can work together to address those difficulties, failing which the matter can be addressed at a case management conference.

[35] Contrary to the submissions made by Direct Energy and Reliance, it is not necessary to include in Term B a reference to all correspondence between National and the Commissioner. Any dispute between the parties with respect to relevance and privilege can be dealt with at a later stage in accordance with the normal Tribunal procedure and Rules 60 and 61 of the *Competition Tribunal Rules*.

[36] In the circumstances, it is also appropriate to limit the duration of the examination of discovery of National's representative to three hours. It is not necessary to specify that the questions asked be non-repetitive. The Tribunal proceeds on the assumption that all counsel know, and will abide existing rules of practice.

[37] With respect to Term C, Direct Energy asks that National only be permitted to deliver the relevant, non-repetitive evidence of one witness. It is premature to arbitrarily limit the number of

lay witnesses. However, the Tribunal reserves the right, as part of a future case management proceeding, to limit the number of witnesses to be called by National.

[38] The Tribunal finds that Term D is a proper term and dismisses Direct Energy's submissions that National should not be permitted to cross-examine witnesses at the hearing of the main application. Interveners may have the right to cross-examine witnesses at the hearing and Direct Energy has not provided any convincing reason why National should be precluding from exercising this right (see, e.g., *American Airlines*).

[39] Direct Energy further submits that National should not be allowed to lead expert evidence on the basis that the opinion of the expert would not reflect the unique or distinct perspective of National. Reliance submits that National's expert reports should be confined to National's unique perspective (e.g. functional substitutes that may be available to gas or electric water heaters). Counsel for both parties expressed the view at the hearing that it would be improper for National to lead expert evidence with respect to more general topics such as the relevant markets and the effect of the alleged conduct in the market generally.

[40] Direct Energy has not provided any decision in support of its position that interveners should not be allowed to lead expert evidence. On the contrary, in various decisions, over the last 20 years, the Tribunal has allowed interveners to do precisely that which Direct Energy opposes (see e.g.: *The Commissioner of Competition v. Visa Canada Corporation and MasterCard International Incorporated*, 2011 Comp. Trib. 2; *Commissioner of Competition v. Toronto Real Estate Board*, 2011 Comp. Trib. 22; *Commissioner of Competition v. Air Canada*, 2011 Comp. Trib. 21; *Commissioner of Competition v. Air Canada*, 2001 Comp. Trib. 4; *Director of Investigation and Research v. Canadian Pacific Ltd.* (1997), 74 C.P.R. (3d) 37; *Director of Investigations and Research v. Tele-Direct (Publications) Inc.* (1995), 61 C.P.R. (3d) 528).

[41] Again, it would be premature to place an arbitrary limit on the type and number of expert witnesses National can bring forward. Counsel for National acknowledged at the hearing that it does not yet know what kind of expert evidence it wishes to adduce, if any. However, I note that with respect to presenting such evidence, National should be guided by the principles set forth in subsection 9(2) of the *Competition Tribunal Act*.

[42] With respect to Term F, Reliance submits that it should be confined to instances where National's interests are in issue whereas Direct Energy takes the position that National's representations should be allowed but only to the extent that they are relevant to the issues on which it is permitted to intervene and are not duplicative of the Commissioner's representations.

[43] For practical reasons, given the guidelines set out in subsection 9(2) and given the agreement of counsel at the hearing to work together, I find that it is not necessary, at this time, to restrict Term F any further.

[44] Counsel for National indicated at the hearing that it is willing to include a reference in Term G, so as to confine it to non-repetitive argument, as long as National has the opportunity to review the Commissioner's filing in advance. Counsel for the Commissioner no longer insisted,

at the hearing, on the inclusion of the word “non-repetitive”, but Direct Energy, in its written submissions asked that National’s argument not be duplicative of that of the Commissioner’s.

[45] The Tribunal will not engage in micro-managing the content of National’s factum. As a practical matter, there must be some repetition in order for the intervener to frame its distinct or unique perspective.

[46] Finally, National has indicated that if leave to intervene is granted, it would not seek costs and requests that it not be made liable for the costs of any party or other intervener.

[47] Direct Energy submits that National should be subject to the costs provisions in section 8.1 of the *Competition Tribunal Act* and Reliance argues that it would be premature to order that National will not be liable for costs as this is a decision that should be left to the panel hearing this matter. I agree. I will not fetter the discretion of the panel hearing this matter to award costs as it sees appropriate: *Commissioner of Competition v. Toronto Real Estate Board*, 2011 Comp. Trib. 22, para. 43.

THEREFORE, THE TRIBUNAL ORDERS AS FOLLOWS:

[48] National is granted leave to intervene on the following topics (hereinafter, the “National Energy Topics”):

- a) The development of the Ontario rental water heater industry as it relates to National.
- b) The issue of Direct Energy’s anti-competitive acts as they relate to National, including the impact of Direct Energy’s exclusionary water heater return policies and procedures and other anti-competitive conduct as alleged in the Commissioner’s Application, on the ability of National to effectively compete and expand in the Relevant Market.
- c) The impact of Direct Energy’s anti-competitive acts on customers or proposed customers of National.
- d) National's interactions with Direct Energy with respect to the matters at issue in the proceeding, including dealings with Direct Energy regarding the water heater removal and return process.
- e) National's perspective as a participant in the industry on the definition of the product and geographic markets as framed by the Commissioner.
- f) The issue of Direct Energy’s dominant position as it affects National.
- g) The issue of the substantial lessening or prevention of competition as it relates to National.

- h) Barriers to entry and ease of entry into the Relevant Market, based on National's experience, including whether Direct Energy's conduct creates artificial barriers to entry and expansion for National or raises National's costs.
- i) The statements made and conclusions drawn by Direct Energy concerning National's conduct in the Response of Direct Energy filed in this proceeding.
- j) The impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.

[49] National shall be allowed to participate in the proceedings and be permitted:

- a) To review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), as they relate to the National Energy Topics, but not participate directly in the discovery process.
- b) To produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the National Energy Topics. The discovery shall be limited in time to three (3) hours for Direct Energy.
- c) To adduce *viva voce* evidence at the hearing of the Commissioner's Application relating to the National Energy Topics.
- d) To conduct examinations and cross-examination of witnesses on the National Energy Topics.
- e) To file expert evidence relating to the National Energy Topics within the procedures set out in the *Competition Tribunal Rules*.
- f) To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences.
- g) To make written and oral argument relating to the National Energy Topics, including submissions on any proposed remedy.

[50] When exercising the above rights, National shall follow the guidelines found in subsection 9(2) of the *Competition Tribunal Act*.

[51] The number of lay or expert witnesses to be called by National may be limited at a future case management proceeding.

[52] The parties shall file a proposed timetable for the disposition of the application on or before Wednesday, November 13, 2013. If the parties cannot agree on a timetable, they shall each serve and file a proposed timetable on or before November 13, 2013. The parties shall consult with National in establishing the timelines.

DATED at Ottawa, this 6th 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

For the respondent:

Direct Energy Marketing Limited

Donald B. Houston

Helen Burnett

Justin H. Nasser

For the applicant for leave to intervene:

National Energy Corporation

Adam Fanaki

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