

**THE 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 Reliance Comfort Limited Partnership.

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
October 15, 2013	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 58

**THE COMMISSIONER OF COMPETITION**

Applicant

- AND -

**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

---

**SUPPLEMENTARY REPLY OF NATIONAL ENERGY CORPORATION  
TO RESPONSES TO REQUEST FOR LEAVE TO INTERVENE**

---

**A. Overview**

1. National Energy Corporation ("**National**") provides these supplementary submissions in reply to the Supplementary Response of Reliance Comfort Limited Partnership ("**Reliance**") to the Request for Leave to Intervene of National dated October 9, 2013. These supplementary submissions follow the

cross-examination of Mr. Gord Potter, the Chief Operating Officer of National, on his affidavit filed in support of National's Request for Leave to Intervene.

2. Reliance consents to leave to intervene being granted to National. As is evident from the materials filed by Reliance on this motion, Reliance recognizes that National meets the test for leave to intervene. National is directly affected by this proceeding and brings a unique and distinct perspective that will assist the Tribunal in determining the issues raised by the Commissioner's Application.
3. In its Supplementary Response, Reliance objects to National's request for leave in respect of three issues. In doing so, Reliance seeks to significantly and unfairly restrict National's ability to participate effectively in this proceeding. As set out below, there is no basis for imposing any of these restrictions on National.

**B. National's Unique and Distinct Perspective as a Participant in the Industry on the Appropriate Definition of the Product and Geographic Markets**

4. National seeks leave to intervene with respect to ten Proposed Topics, which are listed in paragraph 27 of National's Request for Leave to Intervene. One of the Proposed Topics in respect of which National seeks leave to intervene is National's perspective as a participant in the industry on the appropriate definition of the relevant product and geographic markets.
5. Reliance objects to this Proposed Topic on the basis that National does not offer a unique or distinct perspective to the Tribunal's consideration of the geographic market. Notably, Reliance fails to address or even refer to Mr. Potter's evidence on cross-examination regarding the appropriate definition of the relevant product market. Mr. Potter's testimony demonstrates that National will provide a unique and distinct perspective on the issue of the relevant product market. In this regard, National would define the relevant product market as the supply of water heater rentals to customers who "historically and currently rent" water heaters.<sup>1</sup>

---

<sup>1</sup> Transcript of the cross-examination of Gord Potter dated October 1, 2013 ("**Potter Transcript**"), pp. 50-52, qq. 180-185.

In contrast, the Commissioner's definition of the relevant product market appears to include all natural gas and electric water heaters, whether rented or purchased.<sup>2</sup> For this reason alone, Reliance's objection to this Proposed Topic is without merit.

6. In any event, even with respect to the issue of the relevant geographic market, Reliance's objection is without merit because it ignores the evidence of Mr. Potter and is not supported by the relevant authorities.
7. The evidence on this motion establishes that National's perspective as a participant in the industry is unique and distinct from that of the Commissioner. Specifically, as an active participant in the industry and one of Reliance's largest competitors, National has knowledge that is directly relevant to the appropriate definition of the relevant geographic market, including: the range of suppliers that National considers when determining prices for water heater rental services and the geographic regions that can be competitively served by a water heater rental service provider.
8. Reliance argues that National should be denied leave to intervene on the topic of the relevant geographic market as National's position on this issue is the same as that of the Commissioner. As explained in detail in paragraphs 29 to 37 of National's Reply, National is not required to have a different legal position from the Commissioner on this Proposed Topic or any other Proposed Topic in order to meet the test for leave to intervene. Rather, the jurisprudence of this Tribunal establishes that National must offer a unique and distinct perspective on the Proposed Topic (which it clearly does for the reasons set out above).
9. Although not required, it appears at this early stage of the proceeding that there are, in fact, differences in the positions of National and the Commissioner on the definition of the relevant geographic market. As Mr. Potter explained in cross-examination, he defines the relevant geographic market as the area that has

---

<sup>2</sup> Notice of Application filed by the Commissioner on December 20, 2012 ("**Notice of Application**"), paras 1 and 29.

"historically been developed and defined as generally the Union Gas service territory".<sup>3</sup>

10. The Commissioner appears to take a slightly different view, defining the relevant geographic market as (i) the local markets of Ontario where Union Gas distributes natural gas, and (ii) certain other local rural markets of Ontario.<sup>4</sup>
11. Contrary to the allegation in paragraph 5 of Reliance's Supplementary Response, the Tribunal's decision in *Southam Inc. v Canada (Competition Act, Director of Investigation and Research)* is of no assistance to Reliance.<sup>5</sup> In *Southam*, the Tribunal denied leave to intervene on the basis that the interest of the proposed intervenor and Southam were "entirely the same". As the Tribunal acknowledged, the circumstances in *Southam* were "indeed most unusual". The proposed intervenor had an "agreement in principle" with Southam to acquire the assets to be divested. It is hardly surprising that leave to intervene was denied in this unusual case given that the proposed intervenor and Southam were two parties to the same proposed transaction, thus sharing the same perspective and the same legal position.<sup>6</sup>
12. The unusual facts of *Southam* bear no resemblance to the facts of this case, where, as explained above, National has a very distinct perspective from the Commissioner, as well as different positions on how the Relevant Market should be defined.
13. The Tribunal's decision in *The Commissioner of Competition v The Canadian Real Estate Association* is equally of no assistance to Reliance.<sup>7</sup> In *CREA*, the Tribunal denied leave because it was not satisfied that the proposed intervenor

---

<sup>3</sup> Potter Transcript, p. 28, q. 86.

<sup>4</sup> Notice of Application, para 31.

<sup>5</sup> [1997] CCTD No 47 [*Southam*]; National's Brief of Authorities ("**National's Authorities**"), Tab 17.

<sup>6</sup> *Ibid* at paras 5 and 12.

<sup>7</sup> [2010] CCTD No 11; Reliance's Supplementary Brief of Authorities, Tab 2.

had any unique or distinct perspective that would assist the Tribunal.<sup>8</sup> In contrast, in this case National has a very distinct perspective from the Commissioner, as well as different positions on the issues of the relevant market, the scope of the anti-competitive conduct and the appropriate remedies to be issued.

14. The decisions of the Federal Court and Federal Court of Appeal relied on by Reliance are also of no assistance. Contrary to the submissions in paragraphs 7 and 8 of Reliance's Supplementary Response, the test for leave to intervene before this Tribunal is different from the test for leave to intervene applicable in actions before the Federal Courts.<sup>9</sup>
15. The authority to seek leave before the Tribunal is set out in the *Competition Tribunal Act* (the "**Act**"). Section 9(3) of the Act provides that any person may, with leave of the Tribunal, intervene in any proceedings "to make representations relevant to those proceedings in respect of any matter that affects that person". Section 9(3) of the Act reflects Parliament's intent to permit interventions before the Competition Tribunal in circumstances where parties are directly affected by the outcome of the proceeding and where such parties can offer a distinct perspective that is useful to the Tribunal.
16. Different considerations apply in interventions before the Federal Courts, which often involve litigation between private parties. As set out in the authorities relied on by Reliance, the Federal Courts test has three elements: (1) the proposed intervenor must have "an interest in the outcome"; (2) the rights of the Applicant must be "seriously affected by the outcome of the litigation"; and (3) the Applicant must bring a different perspective to the proceedings, although this perspective need not be unique.<sup>10</sup>

---

<sup>8</sup> *Ibid* at para 13.

<sup>9</sup> *Abbott v Canada*, [2000] 3 FC 482 at paras 5-6 [*Abbott*]; Reliance's Supplementary Brief of Authorities, Tab 3.

<sup>10</sup> *Abbott*, *supra*, paras 5 and 14.

17. Because the authority and test for granting leave to intervene in proceedings before the Federal Courts are different than the authority and test applicable in proceedings before the Tribunal, the decisions referred to by Reliance are of little or no value to the Tribunal. Indeed, National is not aware of any recent Tribunal decision that applies the test established by the Federal Court for leave to intervene.
18. In any event, in the *Abbott* case cited by Reliance, the proposed intervenor was granted leave to intervene in the proceedings on the basis that it could bring a different perspective that was useful to the court. The other two cases cited by Reliance – *Li v Canada (Minister of Citizenship and Immigration)* and *Ferroequus Railway Co. v Canadian National Railway Co.* – are readily distinguishable from the present case as the proposed intervenors in both cases sought leave to intervene in appeal proceedings. Specifically, the proposed intervenors sought to introduce written argument, adduce new evidence and make oral submissions in ongoing appeals before the Federal Court of Appeal.
19. Further, in both *Li* and *Ferroequus Railway Co.*, the proposed intervenors were merely proposing to "repeat" or "reiterate" the positions of the parties. Unlike National, the proposed intervenors in the Federal Court decisions did not have a unique and distinct perspective to offer. Rather, the proposed intervenors in both *Li* and *Ferroequus Railway Co.* were in the same position as the proposed intervenor in *Southam*, discussed above, in that they shared the same perspectives as one of the parties to the action.
20. For these reasons, National submits that the topic of the appropriate definition of the relevant market should remain within the scope of National's intervention.

**C. National's Correspondence with the Commissioner is Irrelevant**

21. Contrary to the allegations of Reliance in paragraphs 10 to 15 of the Supplementary Response, any communications between National and the Commissioner in the period prior to the commencement of this proceeding are

not at all relevant to the matters at issue on this motion. The relevant issue on this motion is whether National can provide a distinct perspective that is useful to the Tribunal. National has clearly discharged this burden. In addition to what is set out above, Mr. Potter provided extensive evidence in paragraphs 50 to 63 of his affidavit regarding how National will bring a unique and distinct perspective to this proceeding. Significantly, his evidence in this regard is unchallenged by Reliance.

22. In any event, a motion for leave to intervene is not the appropriate forum for parties to make requests for production of documents. As set out in paragraph 41 of National's Request for Leave to Intervene, National has agreed to produce an affidavit of relevant documents based on the topics for which National is granted leave to intervene. If Reliance has concerns about the scope of documents that is ultimately produced by National (assuming leave to intervene is granted), Reliance will have an opportunity to challenge the scope of National's production at the documentary discovery stage of this proceeding. It is premature for the Tribunal to make orders with respect to the scope of documentary discovery in circumstances where National has not been granted leave and the topics on which it might intervene have not been settled.

**D. National's Unique and Distinct Perspective Concerning Customers or Potential Customers**

23. One of the Proposed Topics in respect of which National seeks leave to intervene is the impact of Reliance's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers.
24. Reliance objects to this Proposed Topic on the basis that National proposes to "speak for customers". In this regard, Reliance appears to wholly misunderstand National's position.
25. As explained in greater detail in paragraphs 24 to 27 of National's Reply, National does not intend to "speak for customers", as suggested by Reliance. Instead,

National proposes to offer this Tribunal its own perspective based on its first-hand and direct knowledge of how Reliance's anti-competitive conduct impacts on customers or potential customers. Indeed, during his cross-examination, Mr. Potter explained that National proposes that National would offer its own perspectives on how Reliance's anti-competitive conduct impacts on customers or potential customers based on its entire – or aggregate – experience with customers.<sup>11</sup>

26. Contrary to the allegation in paragraph 17 of Reliance's Supplementary Response, National's dealings or ratings with the Better Business Bureau are utterly irrelevant to the issue of whether National has a distinct perspective to offer this Tribunal concerning the impact of Reliance's anti-competitive acts on customers or potential customers. In fact, as Mr. Potter testified during his cross-examination, Reliance has an alert on the Better Business Bureau website and "actually has more BBB complaints than National".<sup>12</sup> These irrelevant allegations should be wholly disregarded.
27. For these reasons, National submits that it should be granted leave to offer this Tribunal its unique and distinct perspective on the impact of Reliance's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers.

---

<sup>11</sup> Potter Transcript, pp. 91-93, qq. 351-355.

<sup>12</sup> Potter Transcript, p. 94, q. 362.



DATED at Toronto, Ontario, this 15th day of October, 2013.



---

Adam Fanaki

**DAVIES WARD PHILLIPS & VINEBERG LLP**

155 Wellington Street West

Toronto, Ontario M5V 3J7

Tel: (416) 863-5564

Fax: (416) 863-0871

Counsel for National Energy Corporation

TO: **DEPARTMENT OF JUSTICE CANADA**

**Competition Bureau Legal Services**

50 Victoria Street, 22<sup>nd</sup> Floor

Gatineau, Quebec

K1A 0C9

**David R. Wingfield**

**Jonathan Hood**

**Parul Shah**

Tel: (819) 994-7714

Fax: (819) 953-9267

Counsel for the Commissioner of Competition

AND TO: **BORDEN LADNER GERVAIS LLP**

Barristers and Solicitors

Scotia Plaza, 40 King Street West

Toronto, Ontario M5H 3Y4

**Robert S. Russell (LSUC #25529R)**

**Brendan Y.B. Wong (LSUC No51464A)**

**Renai E. Williams (LSUC No57798C)**

**Denes Rothschild (LSUC No56640R)**

**Zirjan Derwa (LSUC No61461T)**

Tel: (416) 367-6256

Fax: (416) 361-7060

Counsel for the Respondent, Reliance Comfort Limited Partnership

AND TO: **The Registrar**  
**Competition Tribunal**  
Thomas D'Arcy McGee Building  
90 Sparks Street, Suite 600  
Ottawa, Ontario K1P 5B

**THE COMPETITION TRIBUNAL**

**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.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

---

**SUPPLEMENTARY REPLY OF NATIONAL  
ENERGY CORPORATION TO RESPONSES TO  
REQUEST FOR LEAVE TO INTERVENE**

---

**Davies Ward Phillips & Vineberg LLP**

155 Wellington Street West  
Toronto, Ontario M5V 3J7

**Adam Fanaki** (LSUC #38208L)

Tel: 416.863.0900

Fax: 416.863.0871

Counsel to National Energy Corporation