

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 Direct Energy Marketing Limited.

BETWEEN:

| | |
|--|------|
| COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE FILED / PRODUIT October 15, 2013 Jos LaRose for / pour REGISTRAR / REGISTRAIRE | |
| OTTAWA, ONT | # 34 |

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

DIRECT ENERGY MARKETING LIMITED

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 Direct Energy Marketing Limited ("**Direct Energy**") 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. In an effort to distract from the substantive merits of National's Request for Leave to Intervene, the Supplementary Response of Direct Energy engages in a highly improper and unfounded attack on Mr. Potter. As explained in detail below, Direct Energy seeks, unfairly, to impugn the credibility of Mr. Potter based on questions he was not asked, peripheral issues, irrelevant operational minutia and his understandable lack of intimate knowledge of the details of certain documents and meetings that predate his employment with National.
3. Direct Energy seeks to undermine Mr. Potter's extensive knowledge of the matters set out in his affidavit even though he was asked questions pertaining to only 7 paragraphs of his 57 paragraph affidavit. A substantial majority of Mr. Potter's affidavit was not the subject of any questions on cross-examination and, as a result, remains entirely unchallenged. Moreover, Mr. Potter was not asked a single question about many key issues addressed in his affidavit, including for example his sworn evidence that "National's ability to effectively compete and operate successfully in the Relevant Market is dependent on the outcome of this proceeding".¹
4. Further, the fact is that Direct Energy has not established that a single word of Mr. Potter's affidavit is inaccurate. Indeed, Direct Energy does not even suggest in its Supplementary Response that any statement in Mr. Potter's affidavit is inaccurate. Mr. Potter's affidavit makes it clear that National meets the test for leave to intervene. The transcript of his cross-examination, when read as a whole, provides even greater support for National's Request for Leave to Intervene.
5. For these reasons, National submits that the Tribunal should disregard the Supplementary Response of Direct Energy and the unfair attacks on Mr. Potter

¹ Affidavit of Gord Potter sworn September 4, 2013 ("**Potter Affidavit**"), para 26.

set out therein, and instead focus on the substance of Mr. Potter's substantially unchallenged affidavit evidence and the merits of National's Request for Leave to Intervene.

B. Mr. Potter's Knowledge of the Matters at Issue

6. There is no basis for the suggestion in the Supplementary Response of Direct Energy that Mr. Potter has very little knowledge of the matters at issue in this Application or the matters to which he swore in his affidavit. The attacks on Mr. Potter's knowledge set out in paragraph 4 of the Supplementary Response are based on questions Mr. Potter was never asked, peripheral or irrelevant issues and his entirely understandable lack of intimate knowledge of the details of certain documents and meetings that predate his employment with National.
7. Because of the seriousness of the attacks on Mr. Potter, each of the allegations set out in paragraph 4 of the Supplementary Response of Direct Energy is addressed below:
 - (a) **Direct Energy's competitors.** Direct Energy suggests that Mr. Potter was unable to answer questions relating to which of Direct Energy's competitors operate in several regions throughout Ontario. This suggestion is baseless given that Mr. Potter was not asked to identify other competitors that operate in Ontario. Instead, Mr. Potter was asked whether such competitors exist and he was easily able to confirm that they do, although he was "not privy to *how many* different areas they have" throughout Ontario.²
 - (b) **National's Terms & Conditions.** Direct Energy's suggestion that Mr. Potter was unable to answer questions relating to National's Terms & Conditions for water heater rentals defies credulity. Mr. Potter answered over 30 questions about the Terms & Conditions, including detailed

² Transcript of the cross-examination of Gord Potter dated October 1, 2013 ("**Potter Transcript**"), pp. 9-10, qq. 18-21.

questions concerning installation charges, termination provisions and the removal of water heaters. His answers were specific, responsive and thorough.³ The only question he could not answer on-the-spot was whether the Terms & Conditions presented to him for the first time during his cross-examination were "word for word" the same as the current Terms & Conditions of National.⁴ After having an opportunity to conduct a comparison, Mr. Potter confirmed that the Terms & Conditions presented by Direct Energy were not the current Terms & Conditions. Following the cross-examination, National provided its current Terms & Conditions to Direct Energy, even though it was not asked to do so.

- (c) **Communications from 2010 pertaining to the Commissioner's investigation of Direct Energy.** Mr. Potter's lack of direct knowledge of the Commissioner's investigation of Direct Energy in 2010 (and National's correspondence to the Commissioner pertaining thereto) is entirely understandable given that he was not employed by National at the time. Although Mr. Potter fairly conceded that he did not have direct knowledge of this investigation (and communications pertaining to it that predate his employment with National), he confirmed in re-examination his understanding that the Competition Bureau had conducted an investigation, following which Direct Energy suspended its RAN return policy.⁵
- (d) **Emails pertaining to Exhibit "B" to Mr. Potter's affidavit.** Mr. Potter was not asked any substantive questions pertaining to the emails that predated or followed the email found at Exhibit "B" to his affidavit. Accordingly, Mr. Potter was not given an opportunity to explain his understanding of the emails. Instead, Mr. Potter was asked a series of questions pertaining to the authenticity of the emails, such as to confirm

³ Potter Transcript, pp. 15-23, qq. 38-70.

⁴ Potter Transcript, p. 15, qq. 38-40.

⁵ Potter Transcript, p. 56, qq. 177-178.

that the emails were sent as indicated on the face of the document and that the email string "all goes together". Mr. Potter could not address the authenticity of the emails given that he did not send or receive them.⁶ Mr. Potter did, however, explain through his answers to undertakings why the additional emails were not relevant to the matters at issue in this motion. Notably, Direct Energy has omitted this explanation in its Supplementary Response.

- (e) **When the current interim protocol with National for returning Direct Energy water tanks was established.** While Mr. Potter explained that he was aware of the interim protocol currently in place, he could not confirm whether the protocol was put in place during a meeting on April 12, 2012 because he did not attend that particular meeting. It is hardly surprising that Mr. Potter could not confirm what happened at a meeting he did not attend. It is also completely irrelevant to the matters at issue on this motion, particularly given that Mr. Potter answered every substantive question asked of him concerning the interim protocol and its negative impact on National.⁷ Mr. Potter also discussed the protocol in his affidavit, and these statements were not challenged by Direct Energy.⁸
- (f) **Whether Direct Energy has permitted National's agents to join in on calls with customers since May 1, 2012.** With respect to this issue, Direct Energy has taken Mr. Potter's answer out of context. Mr. Potter explained that he was confused by the question, given his testimony that there was no need for such calls with customers under the interim protocol in place between Direct Energy and National. In any event, Mr. Potter made it clear that he was knowledgeable about this issue, confirming that National has "dozens and dozens" of examples where Direct Energy has

⁶ Potter Transcript, pp. 33-39, qq. 103-117.

⁷ Potter Transcript, p. 40, qq. 123-125.

⁸ Potter Affidavit, paras 37-39.

refused to permit National agents to join in on calls with customers. He simply could not confirm on-the-spot the precise date range of such calls.⁹

- (g) **How many tanks National has returned to Direct Energy under the current protocol since the spring of 2012.** It is irrelevant that Mr. Potter did not know the precise number of tanks that National has returned to Direct Energy under the current protocol. This is information that is clearly within the knowledge of National that can be shared with Direct Energy and the Tribunal through the discovery process, if and when National is granted leave to intervene and assuming that such information is relevant.
- (h) **Whether National has an agreement with Enbridge pursuant to which National can dispute double billing charges on behalf of customers.** Mr. Potter was challenged on cross-examination for not knowing the details of an alleged agreement entered into between National and Enbridge. Mr. Potter's lack of understanding of the details of this alleged agreement is understandable given that it was never entered into. Nonetheless, Mr. Potter demonstrated his comprehensive understanding of issues pertaining to the double billing by Direct Energy of National's customers and why addressing these issues through Enbridge is not a practical alternative in his affidavit, during his cross-examination and through his answers to undertakings.¹⁰
- (i) **Whether National returned Direct Energy tanks to the Oshawa and Ottawa depots.** Direct Energy's allegations on this issue ignore the evidence actually given by Mr. Potter during his cross-examination. While Mr. Potter indicated that he could not cite a specific example from memory where National returned tanks to locations other than Oshawa and Ottawa before 2012, he also explained that "Direct Energy closed locations which forced us to change the way we distribute or collect those tanks and

⁹ Potter Transcript, pp. 42-43, qq. 133-136.

¹⁰ Potter Affidavit, paras 42-43; Potter Transcript, pp. 57-59, q. 180.

where we drop them", resulting in higher transportation costs for National.¹¹

- (j) **How many Direct Energy return depots accept the return of multiple tanks and the particulars of the restrictions in place at each of those depots.** It is irrelevant that Mr. Potter did not know the precise number of Direct Energy return depots that accept returns or the details of the restrictions imposed at those depots. Mr. Potter confirmed he was aware that Direct Energy has depots in Ontario that accept returns. He also confirmed his belief that there are "restrictions on which days you can return...and a requirement for an appointment if you are returning multiple tanks or more than three tanks".¹² The precise details of where the return depots are located and the restrictions imposed on National at these depots are clearly within the knowledge of National and can be shared with Direct Energy and the Tribunal through the discovery process, if and when National is granted leave to intervene and assuming that such information is relevant.

8. For all of these reasons, Direct Energy's suggestion that National – and Mr. Potter in particular – would not be of much assistance to the Tribunal as an intervenor is without merit and should be disregarded. In reality, the vast majority of Mr. Potter's affidavit was not the subject of any questions on cross-examination and, as a result, remains entirely unchallenged. As described in Mr. Potter's affidavit, National has substantial knowledge and expertise that is directly relevant to the topics in respect of which it seeks leave to intervene.

¹¹ Potter Transcript, pp. 47-48, qq. 148-151.

¹² Potter Transcript, p. 50, q. 157.

C. The Substantial Negative Effect of Direct Energy's Policies on National

9. Contrary to the allegations in paragraphs 6 and 7 of the Supplementary Response of Direct Energy, National has not overstated how it is directly and significantly affected by the outcome of this proceeding.
10. Mr. Potter explained in detail in paragraphs 25 to 46 of his affidavit how National is directly and significantly affected by the outcome of this proceeding. Through cross-examination, Direct Energy was not able to establish that even a single statement in these paragraphs is inaccurate in any way. Indeed, Direct Energy did not even cross-examine Mr. Potter on many of these paragraphs, including most significantly the following statement from Mr. Potter's affidavit:

"As described below, National's ability to effectively compete and operate successfully in the Relevant Market is dependent upon the outcome of this proceeding".¹³

11. Having elected not to challenge this important evidence, Direct Energy cannot now argue before the Tribunal that National has somehow overstated how significantly and directly it is affected by the outcome of this proceeding.
12. In any event, Mr. Potter did not overstate the effect of Direct Energy's policies on National. Each of the alleged overstatements set out in paragraph 7 of Direct Energy's Supplementary Response is addressed below:
- (a) Direct Energy alleges that National is not directly affected by the outcome of this proceeding on the basis that Direct Energy's revised return policies (in effect since February 2012) have not prevented National from growing its business. The issue is not whether Direct Energy's anti-competitive conduct is preventing National from growing at all, but whether in the absence of such anti-competitive conduct, National would be able to more effectively compete and expand in the Relevant Market. Mr. Potter's clear and unchallenged evidence is that National's ability to compete and

¹³ Potter Affidavit, para 26.

operate successfully in the Relevant Market is dependent upon the outcome of this proceeding.¹⁴ Further, in making this argument, Direct Energy fails to note that it has agreed to temporarily suspend part of its anti-competitive return policies. Among the evidence of Mr. Potter that was not challenged during cross-examination was the statement at paragraph 38 of Mr. Potter's affidavit that "in the event that the Tribunal does not issue a remedy, Direct Energy will require National to strictly comply with the RAN and other policies of Direct Energy, thereby constraining or impeding National's ability to compete".

- (b) While it is true that the protocol currently in place between Direct Energy and National does not require pre-authorization from Direct Energy, as noted above, this is merely an interim protocol. Further, the pre-authorization is only one aspect of Direct Energy's current protocol to which National objects. As Mr. Potter explained during re-examination, National also objects to the following aspects of the interim protocol:

"Well, the process itself, although interim, is not a process that we'd see as a workable process. The process that we don't like is that we have to aggregate the tanks, put them on a spreadsheet, wait for 10, 20, 30 days to get a RAN back. We store them in the meantime. That whole process, although different than, and I would say better than, their previous process of forcing customers to call is still not an efficient process and still costs us money.

We should be able to go in, service a customer at their convenience, remove the tank and drop it off at Direct. So although it's a temporary process they put in place, there's still the delays of how long it takes you to get the RAN, the fact that we still have to store the tanks and the fact that the customers continue to get billed until those tanks get returned."¹⁵

¹⁴ Potter Affidavit, para 26.

¹⁵ Potter Transcript, pp. 57-59, q. 180.

- (c) Direct Energy argues that National has predominantly used two of Direct Energy's return depots and so the closure of other return depots has not impacted National. In fact, Mr. Potter's uncontroverted evidence on this issue was that the closure of a number of Direct Energy's return depots forced National to change its return procedures and continues to cause National to incur significant expenses. As Mr. Potter stated during his cross-examination:

"What I can confirm is that we've consolidated our return process through the east end because of the closures previously, is what I'm aware of, and that's caused us to change and take on the expense of having to try to transport those tanks regardless of where they are into that location in order to return it to that depot because of changes to what was at the time Direct Energy locations as well as days and times to be served."¹⁶

- (d) Direct Energy argues that it has not "prevented" the return of water heater tanks, although it recognizes that returning tanks to Direct Energy "takes some time". The fact that Direct Energy's anti-competitive return policies create a delay in the return of the more than 500 Direct Energy tanks is precisely the point. That National is storing over 500 tanks and incurring significant costs due solely to Direct Energy's anti-competitive conduct is simply unacceptable. As Mr. Potter explained during cross-examination, National would return all of these tanks immediately if it was not facing the restrictions imposed by Direct Energy:

"We would return them as soon as we could. The only thing that stops us from returning them is the hours and the requirement for the appointment with the warehouse and the time it takes for us to get the RAN from Direct Energy. There's nothing else that impedes the return of the tank."¹⁷

¹⁶ Potter Transcript, p. 48, q. 150.

¹⁷ Potter Transcript, pp. 52-53, q. 166.

- (e) Although National uses some of its new warehouse facilities for purposes other than storing Direct Energy tanks, the fact remains that Direct Energy's restrictions on the return of water heater tanks required National to expand its warehouse facilities to store these tanks. Mr. Potter's evidence in this regard remains unchallenged.¹⁸
 - (f) Contrary to the allegations of Direct Energy, National does not have a practical mechanism in place with Enbridge that allows it to dispute Direct Energy charges on customers' bills. As Mr. Potter explained in his answers to undertakings, Direct Energy continues to improperly and unfairly bill customers even in circumstances where Direct Energy is aware that the customer has elected to switch to National. To dispute such charges with Enbridge, National must submit an individual application on behalf of each homeowner that is subject to double-billing. Resolving such billing disputes through Enbridge can take up to 90 days and requires additional information and continued involvement by the homeowner in the dispute resolution process. Further, the homeowner may remain liable for the additional charges incurred during the dispute resolution process. As a consequence, National has no practical alternative but to reimburse the homeowner for the double billing caused by Direct Energy continuing to bill after the customer switched to National.
13. Contrary to the allegations in paragraph 8 of the Supplementary Response, National does not engage in any of the any-competitive conduct it complains of in this proceeding. As Mr. Potter made clear during his cross-examination, National allows its customers to disconnect and return tanks themselves or using third parties at any one of ten return depots operated by National.¹⁹

¹⁸ Potter Affidavit, para 41.

¹⁹ Potter Transcript, pp. 20-22, qq. 60-67 and pp. 46-47, qq. 144-146.

D. National's Unique and Distinct Perspective

14. Contrary to the allegations of Direct Energy, National has clearly discharged its burden of establishing that it has a unique or distinct perspective that will be useful to the Tribunal. Mr. Potter explains why he believes National will bring a unique and distinct perspective to this proceeding in paragraphs 53 to 56 of this affidavit. His evidence in this regard is unchallenged, given that Direct Energy elected not to question Mr. Potter on any of these paragraphs.
15. There is no merit to Direct Energy's submission that National has "prevailed upon the Commissioner to put forward its perspective". While National and the Commissioner appear to agree that the conduct of Direct Energy is anti-competitive, National has its own unique and distinct perspective on the issues in this proceeding. Unlike the Commissioner, National is a participant in the industry and one of Direct Energy's largest competitors. Also unlike the Commissioner, National is the target of Direct Energy's anti-competitive conduct and it will be directly affected by the outcome of this proceeding.
16. In addition, as explained in detail in the Reply of National, National and the Commissioner do not agree on every issue. For example, National appears to have a different position on the scope of Direct Energy's anti-competitive conduct and the appropriate remedies that should be imposed in this proceeding.
17. Contrary to the allegations of Direct Energy, 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. Rather, the relevant issue is whether National can provide a distinct perspective that is useful to the Tribunal, which it clearly does. National has clearly discharged its burden of establishing that it would bring a unique or distinct perspective to these issues.
18. Section 9(3) of the *Competition Tribunal Act* entitles firms that are directly affected by the proceedings to participate in an effective and meaningful manner.

Direct Energy's position that the Tribunal should decide important issues that will have a significant impact on National's business without the benefit of National's participation and without regard to the impact on National should be rejected.

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, 22nd 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: **MCCARTHY TÉTRAULT LLP**
Barristers and Solicitors
P.O. Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, Ontario
M5K 1E6

Donald B. Houston
Helen Burnett
Tel: (416) 601-7506
Fax: (416) 868-0873

Counsel for Direct Energy Marketing Limited

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 Direct Energy Marketing Limited.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

DIRECT ENERGY MARKETING LIMITED

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