

THE COMPETITION TRIBUNAL

CT-2012-003

IN THE MATTER OF the *Competition Act*, RSC. 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 10, 2013
CT-2012-03

Jos LaRose for / pour
REGISTRAR / REGISTRARE

OTTAWA, ONT

29

THE COMMISSIONER OF COMPETITION

Applicant

AND

DIRECT ENERGY MARKETING LIMITED

Respondent

**SUPPLEMENTARY RESPONSE OF DIRECT ENERGY
MARKETING LIMITED TO REQUEST FOR LEAVE TO
INTERVENE OF NATIONAL ENERGY CORPORATION**

PART I – OVERVIEW

1. The respondent Direct Energy Marketing Limited (“**Direct Energy**”) provides these further submissions in response to National Energy Corporation’s (“**National**”) request for leave to intervene, following the cross-examination of Mr. Gordon Potter on his affidavit sworn September 4, 2013 (the “**Affidavit**”).

2. The cross-examination of Mr. Potter clarified the following with respect to National’s request to intervene:

- (a) Mr. Potter has very little knowledge of the issues in the Application, indicating that National will be of little assistance to the Tribunal;
- (b) National has overstated its position as to how it may be affected by these proceedings; and
- (c) while it is apparent that National has been a driving force behind the Commissioner’s Application, National refused to answer any questions about its communications with the Commissioner. As such, National cannot discharge its burden of establishing that it could bring a unique or distinct perspective to the Commissioner’s Application.

PART II - ARGUMENT

National Will Provide Little Assistance to the Tribunal

3. Mr. Potter has very little knowledge of the matters at issue in this Application, and in fact, has very little knowledge about the matters to which he swore in the Affidavit.

4. For example, Mr. Potter was unable to answer questions relating to:
- (a) which of Direct Energy's competitors, for example Sears, operate in several regions throughout Ontario;¹
 - (b) National's Terms & Conditions for water heater rentals;²
 - (c) communications between National and the Commissioner in 2010 relating to Direct Energy, and specifically paragraph 32 of his Affidavit, which Mr. Potter explained was hearsay;³
 - (d) the communications from National that gave rise to, and followed the letter marked as Exhibit B to his Affidavit, and in particular that the letter from Mr. Frost which is Exhibit B to the Affidavit was in fact written in response to a threat from National to dispose of Direct Energy's property;⁴
 - (e) when the current protocol with National for returning Direct Energy water tanks was established;⁵
 - (f) whether Direct Energy has permitted National's agents to join in on calls with customers attempting to obtain a RAN since May 1, 2012;⁶

¹ Cross-Examination of Gordon Potter, October 1, 2013 at p. 9, qq. 18-19 [Potter Examination].

² Potter Examination, pp. 15-22, qq. 38-70. The Terms and Conditions put to Mr. Potter on his cross-examination were taken from National's website on September 30, 2013. They are appended to his Transcript as Appendix A. In Mr. Potter's answers to undertakings, questions taken under advisement, and refusals (attached as Exhibit "A"), he provided a different version of the Terms and Conditions (attached as Exhibit "B"). The language referred to during Mr. Potter's cross-examination is substantively the same as that contained in the different version of the Terms and Conditions.

³ Potter Examination, pp. 28-29, qq. 84-91.

⁴ Potter Examination, pp. 34-38, qq. 107-116.

⁵ Potter Examination, pp. 39-40, qq. 118-122.

⁶ Potter Examination, pp. 42-43, qq. 131-136.

- (g) approximately how many tanks National has returned to Direct Energy under the current process since the spring of 2012;⁷
- (h) Whether National has an agreement with Enbridge whereby National can communicate a dispute to Enbridge if a customer is being billed by Direct Energy after National has removed the Direct Energy tank from the customer's house, and Enbridge will remove the Direct Energy charges from the Enbridge bill;⁸
- (i) whether prior to February 2012, National returned approximately 80 per cent of Direct Energy tanks to the Oshawa depot and approximately 18 to 19 per cent of tanks to the Ottawa depot (both of which continue to accept tanks from National) and seldom did it return tanks to any other Direct Energy depot;⁹ and
- (j) how many of Direct Energy's return depots accept the return of multiple tanks and what the hours or "restrictions" are for returning multiple tanks to those depots.¹⁰

5. A person is given intervenor status in order to assist the Tribunal. It is clear that Mr. Potter has very little knowledge of the matters at issue and can be of very little assistance to the Tribunal. Assuming National put forward its most knowledgeable person to demonstrate why National should be given intervenor status, it is unlikely that National would be of much assistance to the Tribunal as an intervenor.

⁷ Potter Examination, pp. 4-41, qq. 126-128.

⁸ Potter Examination, pp. 44-46, qq. 138-143.

⁹ Potter Examination, pp. 48-49, qq. 150-151.

¹⁰ Potter Examination, p. 50, qq. 156-157.

National Has Overstated the Effect of Direct Energy's Policies on National

6. National states in its Request that it is "directly and significantly affected by the outcome of this proceeding". This significantly overstates the effect of Direct Energy's policies on National.

7. Mr. Potter acknowledged:

(a) that National installed 37,000 new water heaters in the year ended March 31, 2013 and 40,000 new water heaters in the year ended March 31, 2012. It also added an additional 26,000 water heaters in 2013 through the acquisition of morEnergy Services Inc. National's total installed customer base (which includes water heaters, furnaces and air conditioners) increased 42% from the year ended March 31, 2012 to the year ended March 31, 2013. It is clear that Direct Energy's revised return policies (in effect since February, 2012) have not impeded National from growing its business;¹¹

(b) that the current protocol with National for returning Direct Energy's water heaters, which has been in place since shortly after the RAN process was implemented in February, 2012, does not require pre-authorization from Direct Energy (i.e. the protocol does not require the customer to contact Direct Energy prior to the removal of the water tank, thereby permitting National to avoid Direct Energy's RAN policy.);¹²

¹¹ Potter Examination, pp. 11-13, qq. 27-35.

¹² Potter Examination, pp. 30-41, qq. 93-129.

- (c) that before and after February, 2012, National has predominately used Direct Energy's Oshawa and Ottawa depots to return tanks, and that those depots have remained open for tank returns by National;¹³
- (d) that the 550 tanks which National is currently storing and "has not been able to return to Direct Energy" are really just the number of Direct Energy tanks that National was storing as of September 4, 2013, and that Direct Energy has not prevented their return, except insofar as the current return process as agreed to between Direct Energy and National takes some time;¹⁴
- (e) that although National recently expanded its warehouse facility where it stores Direct Energy tanks, as stated in paragraph 41 of the Affidavit, this warehouse facility is primarily used as a standard distribution warehouse that National operates out of and where it stores its own tanks;¹⁵ and
- (f) that although Mr. Potter does not know the specific terms, National has a mechanism in place with Enbridge which allows it to dispute Direct Energy charges on customers' bills.¹⁶

8. Notably, it was also revealed at Mr. Potter's cross-examination that National itself engages in the very practices that it (and the Commissioner) seek to label as anti-competitive:

¹³ Potter Examination, pp. 47, q. 148.

¹⁴ Potter Examination, pp. 51-53, qq. 162-168.

¹⁵ Potter Examination, pp. 53-54, qq. 169-174.

¹⁶ Potter Examination, p. 44, q. 141.

- (a) National's water heater rental terms and conditions prohibit removal of a National water heater by anyone other than National (Mr. Potter claimed that this term is not enforced);¹⁷ and
- (b) National requires customers who terminate their contracts with it within 5 years to pay significant monetary penalties.¹⁸

National Does Not Bring a Unique or Distinct Perspective to the Commissioner's Application

9. In the carefully worded paragraph 21 of his affidavit, Mr. Potter states: "To the best of my knowledge and belief, apart from Reliance, National is the only competitor to Direct Energy for water heater rentals with operations in several regions throughout Ontario and Quebec".

10. In fact, as Mr. Potter acknowledged, there are several other competitors that operate in several regions throughout Ontario.¹⁹ National is not unique in that respect.

11. Further, National's Counsel refused all questions on cross-examination relating to National's communications with the Commissioner, and its role in having this Application brought against Direct Energy.

¹⁷ Potter Examination, pp. 20-22, qq. 59-69. The Terms and Conditions put to Mr. Potter on his cross-examination were taken from National's website on September 30, 2013. They are appended to his Transcript as Appendix A. In Mr. Potter's answers to undertakings, questions taken under advisement, and refusals (attached as Exhibit "A"), he provided a different version of the Terms and Conditions (attached as Exhibit "B"). The language referred to during Mr. Potter's cross-examination is substantively the same as that contained in the different version of the Terms and Conditions.

¹⁸ Potter Examination, pp. 16-20, qq. 43-58. These penalties, which were taken from the Terms and Conditions on National's website on September 30, 2013, were put to Mr. Potter during his cross-examination. They remain substantively the same in the other version of National's Terms and Conditions (attached as Exhibit "B").

¹⁹ Potter Examination, pp. 9-10, qq. 18-21.

12. On Mr. Potter's cross-examination, counsel to National refused to allow him to answer the following questions:

- (a) whether in 2010, National complained to, and provided information to, the Bureau regarding Direct Energy;²⁰
- (b) when National first communicated with the Competition Bureau in regard to Direct Energy's revision to its return policies in 2012;
- (c) to provide written communications between National and the Bureau that relate to Direct Energy;
- (d) when National first received a draft of the Commissioner's Application against Direct Energy; and
- (e) what input National or its counsel provided to the Commissioner in regard to the Application.²¹

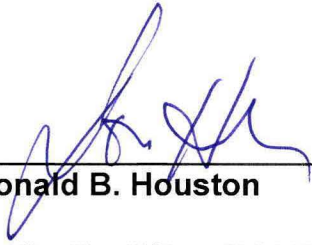
13. Direct Energy submits that having refused to answer any of these questions, National cannot discharge its burden of establishing that it would bring a unique or distinct perspective to the Commissioner's Application. It is apparent that National has already prevailed upon the Commissioner to put forward its perspective on these issues and has nothing to add as an intervenor which cannot be adduced by the Commissioner by calling a representative of National as a witness.

²⁰ Potter Examination, p. 27, q. 83.

²¹ Potter Examination, pp. 54-55, q. 176.

14. Direct Energy respectfully submits that the most unique or distinct aspect about National in this context is that it is engaged in a multitude of private litigation against Direct Energy. That is not a reason to have it intervene in this case.

Dated this 9th day of October, 2013



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EXHIBIT “A”

Commissioner of Competition v. Direct Energy Marketing Limited

Cross-Examination of Gordon Potter (October 1, 2013)

UNDERTAKINGS/QUESTIONS TAKEN UNDER ADVISEMENT/REFUSALS

UNDERTAKINGS

UT	Page	Q #	Undertaking	Answer
1	35	111	To confirm that the email from Saj Khan dated March 23 rd , which is included in Exhibit D for identification, was sent.	Confirmed.
2	37/38	115/117	To confirm that the email string between March 23 rd and April 10 th , 2012, marked as Exhibit D for identification, all goes together.	Confirmed.

ADVISEMENTS

U/A	Page	Q #	Advisement	Answer
1	15	41	Advise if the document marked as Exhibit A for identification is not National's current Terms & Conditions.	The document marked as Exhibit A for identification is not National's current Terms & Conditions. National's current Terms & Conditions applicable in the Relevant Market are attached hereto.
2	30	92	Advise if Exhibit C for identification (a letter dated May 11, 2010) is a letter National sent to Direct Energy on May 11, 2010.	Mr. Potter has no direct knowledge of this letter, but currently has no reason to believe that the letter was not sent to Direct Energy on or about May 11, 2010.

3	36	111	Assuming that it was sent, advise why the email from Saj Khan dated March 23 rd (which is included in Exhibit D for identification) was not included in Mr. Potter's affidavit.	The purpose of attaching Exhibit "B" to the Affidavit of Gord Potter is to provide further particulars of the interim arrangement between Direct Energy and National Home Services referenced in paragraph 37 of the Affidavit. The email from Saj Khan dated March 23, 2012 and additional correspondence are not required to understand the terms of the interim arrangement and not otherwise relevant to the matters at issue on the motion for leave to intervene. Further, as explained during the course of the cross-examination of Mr. Potter, the content of the March 23, 2012 email is contained in the letter dated February 28, 2012 attached as Exhibit "A" to the Affidavit and is also summarized at the outset of the email attached as Exhibit "B".
4	45	142	<ol style="list-style-type: none">1. Confirm that National did in fact enter into an agreement with Enbridge in or around July 2012 pursuant to which it disputes charges on behalf of customers;2. Produce a copy of the agreement described above; and3. Confirm that through that agreement and through acting as agent for a customer, when National communicates the dispute to Enbridge in circumstances where they have removed a water heater from Direct Energy, the effect of that dispute is to remove the Direct Energy charges from the customer's bill.	<ol style="list-style-type: none">1. Based on the inquiries Mr. Potter has made to date, Mr. Potter does not believe that National has entered into any such agreement with Enbridge. In any event, Mr. Potter does not believe that disputing charges with Enbridge on behalf of customers provides a practical solution to the double-billing engaged in by Direct Energy. Specifically, Direct Energy continues to bill customers even in circumstances where Direct Energy is aware that the customer has elected to switch to National. Mr. Potter's understanding is that 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

				<p>the double billing caused by Direct Energy continuing to bill after the customer switched to National.</p> <p>2. See above.</p> <p>3. See above.</p>
5	46	143	<p>Confirm that under the agreement between National and Enbridge, if National does remove a Direct Energy customer's tank and Direct Energy continues to bill the homeowner, because for example they are not aware of this, that National has the ability to have that charge removed from the customer's bill.</p>	<p>See Mr. Potter's response to advisement number 4 above.</p>

REFUSALS

R	Page	Q #	Refusal	Answer
1	27	83	Advise whether in 2010 National complained to and provided information to the Bureau.	Refusal maintained on the basis that the question is not relevant to any issue in dispute on the motion for leave to intervene and seeks disclosure of information that is protected by public interest privilege.
2	36	112	Advise whether Mr. Potter or anyone at National informed the Commissioner's office that the email from Jason Frost in the affidavit was a response to a threat from National to dispose of Direct Energy's property.	Refusal maintained on the basis that the question is not relevant to any issue in dispute on the motion for leave to intervene and seeks disclosure of information that is protected by public interest privilege.
3	54	176	<ol style="list-style-type: none">1. Advise as to when National first communicated with the Competition Bureau in regard to Direct Energy's revision to its return policies in 2012.2. Provide written communications between National and the Competition Bureau from whenever the time of National's first communication to the Bureau was re: Direct Energy to now.3. Advise as to when Potter or counsel first received a draft of the Commissioner's application against Direct Energy.4. Advise as to what input National or its counsel provided to the Commissioner in regard to the application.	Refusal maintained on the basis that the questions are not relevant to any issue in dispute on the motion for leave to intervene and seek disclosure of information that is protected by public interest privilege.

EXHIBIT “B”

TERMS & CONDITIONS

1. Installation: I understand that under the terms of my Residential Water Heater Rental Agreement ("Agreement"), National Home Services, a division of National Energy Corporation ("National") will install a hot water heater ("Water Heater") and/or a Smart SI thermostat ("Thermostat") and related equipment with specifications identified on the Agreement (the Water Heater and Thermostat are hereinafter referred to collectively as the "Equipment") in a good and workmanlike manner in accordance with the good professional practices applicable to the industry and that the Equipment will be installed by National in my residence ("Residence") as close to the scheduled installation date specified on the Agreement as possible and no later than thirty (30) days from that date unless I otherwise agree. The date on which the Equipment is installed shall be the "Installation Date".

2. Term and Payments: This Agreement is conditional upon National's acceptance of it, and National's acceptance depends, in part, on whether I am creditworthy. I agree to rent the Equipment from National effective from the date this Agreement is signed and for the useful life of the Equipment (the "Term"). I understand that I will be billed the monthly payment amount specified on Page 1 which may also include, if applicable, an additional hard water charge also specified on Page 1 (with scheduled increases described below) in accordance with the biller's billing schedule and that in most instances, this will mean one (1) payment per month, billed on my monthly gas bill. Unless otherwise specified on Page 1, the first periodic payment will be billed on my gas bill in the first eligible billing period following my Installation Date. I understand that within the first 90 days of each calendar year my monthly payment is limited to an annual increase of 3.5% payable in the preceding year, unless I am otherwise notified. Thus, if my monthly rental rate is \$12.00 in 2013 then my monthly rate may increase to \$12.42 in 2014.

3. National's Preventive Maintenance Program: (A) I understand that subject to Section 3 (B) below, at any time in the year following each of the 5th and 10th anniversary dates of the Installation Date, I may contact National to arrange for one of its technicians to conduct a preventive maintenance inspection of the Equipment and that all labour and materials required to carry out the inspection and to make all necessary repairs will be provided by National at no additional cost to me. Maintenance of natural gas Water Heaters will include (i) drain/flush the water heater; (ii) clean and inspect ventor motor and burner assembly, and the flame rod and pilot; (iii) check and adjust manifold pressure; (iv) check the integrity and operation of the venting system; (v) take a carbon monoxide reading; and (vi) ensure the unit is operating to manufacturer's specifications. Maintenance of electric tank Water Heaters will include (i) drain/flush the water heater (ii) check the integrity and operation of the venting system and (iii) ensure the unit is operating to manufacturer's specifications. (B) I also understand that all installation, maintenance and repairs to the Equipment must be performed by National or an authorized National technician and that should any other individual attempt to install, remove (except as may be permitted in Section 9(F)), modify, repair or tamper with the Equipment, the preventive maintenance inspection described above will be void, and National may terminate the Agreement and/or charge me for the costs of any labour and materials related to any repairs, servicing or maintenance required to be carried out, as determined by National, acting reasonably. A service fee may be charged to my account if a service call is not related to the Equipment (\$99) or if no one is home when National's contractor arrives for a scheduled service call (\$50).

4. Thermostat Terms of Use: (A) Savings Under this Agreement: Upon installation of the Thermostat I will establish a desired program to manage the use of the heating and cooling systems in my home within my desired parameters, and National will work with me to develop and enhance this program to maximize efficiency and savings (the "Smart Home Program"). I may choose to not follow the Program; however doing so will negate my eligibility for a Guaranteed Savings Rebate as outlined below. National will calculate weather-adjusted savings under this Agreement annually using information from the Thermostat as well as from my utility account information to determine if I have saved money as a direct result of the Thermostat. Savings will be calculated by estimating the change in HVAC system runtime resulting from the Thermostat, the design throughout my HVAC system, historical utility bill information, measured weather in my area, temperature set points used with the Thermostat, my compliance with the Program, and the applicable energy price used for my billing period so that National can accurately assess whether I have saved money as a direct result of the Thermostat (the "Savings"); provided that circumstances where my consumption behaviour or commodity costs change due to factors other than the Thermostat (including but not limited to, home renovations, new HVAC appliances, pool installation, fundamental changes to my energy load, and National and affiliates energy saving solutions) will be considered in the calculation of Savings under this Agreement. I confirm my home currently has both a furnace and central air conditioner and I am currently spending greater than \$700 on my annual energy consumption. (B) Guaranteed Savings Rebate: I will be entitled to a Guaranteed Savings Rebate after the first anniversary of the beginning of my Term, and every anniversary thereafter, should my Savings for the applicable year not exceed the sum of my Thermostat monthly rental charge of \$6.95 multiplied by 12. For example, where 12 months of monthly rental charges are \$83.40, should my annual Savings not exceed \$83.40 then National will provide me a rebate for at least the difference between my Savings and \$83.40. This Guaranteed Savings Rebate will be applied to my future monthly bills by up to \$5 per month until the Guaranteed Savings Rebate is paid in full. To qualify for the Guaranteed Savings Rebate I must comply with the Program, and I must contact National's call center within thirty (30) days of the anniversary of the Term and request the Guaranteed Savings Rebate. Upon requesting my Guaranteed Savings Rebate I must provide complete electricity and natural gas account data in order to analyze my Savings and calculate the potential Guaranteed Savings Rebate. (C) I agree to use the Thermostat only pursuant to this Agreement. I may not sell, lease, abandon or give away the Thermostat during the Term. I may not permit any other provider of energy management or demand reduction services to use the Thermostat during the Term. I agree to keep the Thermostat connected, and my Internet connection active, at all times. Whether a thermostat, gateway/router, or other device is owned by me or National, National has the unrestricted right, but not the obligation, to upgrade or change the firmware in these devices remotely or at the Residence at any time that National determines it necessary or desirable in order to provide services to me in accordance with National's specifications and requirements. (D) When regional grid operators or utilities anticipate blackouts or brownouts due to high electricity demand, they notify participating customers of the scheduled time and duration of the "Demand Response Event." At the appointed time, participating customers agree to curtail their consumption by, for example, dimming lights, adjusting HVAC set points, or shutting down non-critical Thermostat. I agree that National can change my comfort settings and limit my thermostat consumption and/or adjust my HVAC system (heating, ventilating, and air conditioning) and that I will have the option to override this adjustment.

5. Ownership and Interest: I understand that National is and shall remain the owner of the Equipment at all times and that National is not transferring title to me. I agree that the Equipment will remain National's personal property even though it may become affixed to my Residence and I will keep the Equipment free of all liens, security interests, mortgages and other claims. National may register, at its own expense, its interest in the Equipment against me and/or against title to the Residence. To the extent permitted by law, I hereby waive any right to receive a copy of such registration and appoint National as my lawful attorney for the purpose of doing any such registrations. I also agree that National may sell, assign, concurrently lease or otherwise dispose of, or grant a security interest in, all or part of its right, title and interest in the Equipment or this Agreement to anyone else, without my notice or consent. I will keep the Equipment at my Residence. National will own any carbon offsets or carbon credit rights that vest as a result of the Equipment or services performed hereunder, and I hereby assign any such carbon offsets or carbon credit rights to National and agree to execute any additional documentation required to confirm that assignment.

6. My Commitments and Assurances: I have authority to enter into this Agreement because I am either the owner of the Residence or have been authorized by the owner to sign this Agreement on their behalf. If anyone else is named on the front of my energy bill, then each of us will be responsible for all obligations in this Agreement. I understand that this Agreement is binding upon and will enure to my heirs, personal representatives and successors and permitted assigns and agree that: (A) Commencing on the Installation Date, I will make all of the payments due under this Agreement to National, including taxes, and other charges, in a timely manner and will pay interest on any late payments at interest rates that the biller may set, acting reasonably. I acknowledge that amounts payable under this Agreement will appear on my natural gas bill and that during the Term the biller may be Enbridge Gas Distribution, National, or a service provider; (B) I will use the Equipment safely and responsibly and, in particular, will ensure that: (i) no combustible, hazardous or flammable materials are used or stored near the Equipment; (ii) the Equipment will not be confined in a location where it is difficult to service or remove or where there is inadequate ventilation; (iii) the vents and openings are kept clear and clean; and (iv) I will provide National with access to the Equipment whenever reasonably required for purposes of inspection, repair or removal. I understand that it is my responsibility to ensure that the Equipment is located in an area with sufficient drainage in the vicinity and that the drainage is open and unrestricted and I will not (subject to the provisions of Section 12 below), hold National responsible for damage caused if the Equipment leaks. I will be responsible for any damage to the Equipment if caused by me or unauthorized third parties or by fire, flood, accident or other insurable risks. (C) National is hereby authorized as my agent and lawful attorney to take all actions required to arrange for and complete the return of my old tank (the "old tank") to its owner as identified on the Agreement (the "owner") and I hereby assign to National any cause of action I may have against the owner arising from or relating to the return of the old tank including but not limited to any charges imposed by the owner relating to the return of the old tank. I also authorize National to contact Enbridge Gas Distribution, as my agent, to ensure timely termination of my present billing arrangement by the owner and to dispute any improper charges levied against me by the owner as a result of the termination of the account and return of the old tank. I acknowledge that this authorization and assignment in no way makes National responsible or liable for any charges imposed by the owner relating to the return of the old tank.

7. Assignment by National: National may, at any time during the Term of this Agreement, assign all of its rights, title, obligations and entitlements under this Agreement and upon such assignment, National shall be relieved of any further obligations to me under this Agreement subsequent to the date of such assignment.

8. Sale of the Residence: I understand that if I sell my Residence during the Term, I will personally, or through my real estate agent, inform the purchaser that the Equipment is rented pursuant to this Agreement. You have agreed to release me from my obligations under this Agreement, effective from the date of sale, so long as: (i) the purchaser is notified in the agreement of purchase and sale that the Equipment is rented; (ii) I have notified National in advance of the purchaser's name and the intended date of sale; (iii) the purchaser agrees in writing or by conduct to rent the Equipment on these terms and conditions; and (iv) I have paid to National all other amounts owing under this Agreement. I hereby authorize National to respond to information requests relating to my account with National made by or on behalf of the purchaser of my Residence for the purposes of affecting the transfer of the rental Equipment.

9. Termination: (A) End of Term: At the end of the useful life of the Equipment, this Agreement will automatically terminate and I will pay National an amount equal to the sum of: (i) any periodic payments due on or before termination

that have not already been paid or waived, together with the interest owing on overdue amounts; (ii) any expenses incurred by National for the removal of the Equipment from my possession, as described in Section 9(C) and subject to Section 9(F) below; and (iii) Any charge for unreasonable or excessive wear or use of the Equipment, which charge will be calculated based on industry standards and rates as required to bring the Equipment into proper serviceable condition as would be expected of similar equipment. (B)(1) Early termination: I understand that I may contact National by telephone at any time prior to the end of the Term and, upon thirty (30) days notice, terminate this Agreement and arrange for the removal of the Equipment from my possession by National's technician and pay the amounts described in Section 9(C) below. (B)(2) Buyout: At any time prior to end of Term, I may terminate this Agreement by purchasing the Equipment at any time by paying National an amount equal to the then depreciated value of the Equipment determined on a straight-line basis over a 15 year period for a water heater and over a 10 year period for a thermostat in accordance with generally accepted accounting principles. The buy-out price is set out in my customer portal at <https://www.nationalhomeservices.ca/buyoutportal.aspx>. My Application # and Work Order # required to log onto the website are found on the front page of this Agreement. I may also contact National in writing or by calling 1-877-673-5373 to receive my Application # and Work Order #, to discuss my option to purchase and obtain my buyout price, and to exercise my option to purchase the Equipment. C) Expenses for removal: The costs of removing the Equipment from my possession (including removal of any venting installed by National) shall be based upon hourly rates then charged by National. Estimated time for travel to and from National's warehouse and the disconnection and retrieval of the Equipment will, for an electric tank be approximately 2.5 hours, for a conventional water tank approximately 2.5 hours, for a power-vented tank approximately 3.5 hours, and in the case of a Thermostat, approximately 1 hour for removal and reinstallation of the old thermostat. By way of reference, National's costs in 2013 for labour for one technician and one helper and transportation is \$135 per hour. (D) I understand that National may terminate this Agreement at any time if I am in breach of any of my obligations contained herein, in which case all applicable charges listed in Section 9(A) of this Section will apply. National's right to terminate is in addition to any other remedy available at law or equity. (E) I understand and agree that if this Agreement is terminated prior to the end of the Term that only National may retrieve the Equipment from my possession in accordance with this paragraph. (F) At the end of the Term, and only with National's prior consent, I may arrange for the removal of the Equipment through another licensed technician, and return of the Equipment to National's closest warehouse, at my expense. I understand that if I terminate the rental of the Water Heater I will not automatically terminate the rental of the Thermostat, and vice versa.

10. Installation and Other Charges: I understand that on the signing of this Agreement, I have the option either: (A) to pay the Installation and Other Charges listed on the Agreement (plus applicable taxes) and in that case the full amount of those charges and applicable taxes will be owing on the Installation Date and will be billed to my utility account as of that date; or (B) to defer payment of the Installation and Other Charges listed on the Agreement (plus applicable taxes) as an unconditional interest-free advance, until the earlier of: (a) the fifth (5th) anniversary of the Installation Date at which time the Installation and Other Charges (plus applicable taxes) will be waived by National entirely if the account is in good standing at such time; or (b) if this Agreement is terminated before the fifth (5th) anniversary of the Installation Date under Section 9(B)(1) or (B)(2), then the entire amount of the Installation and Other Charges (plus applicable taxes) will be billed to the utility account without interest on the date of termination.

11. Anti-Scald Device: I acknowledge having been informed by National that the Ontario Building Code (OBC) requires that when a new water heater is installed, steps must be taken to reduce the potential risk of scalding due to high water temperatures by ensuring that the hot water temperature flowing to faucets and showerheads does not exceed 49 degrees Celsius. I understand that it is my obligation to ensure that my residential plumbing system, including my water heater, complies with the OBC and that I should choose the most appropriate compliance option to serve my interests and requirements. I have been advised by National that the following options are available to me at my cost in order to comply with the OBC: (a) by having an anti-scald mixing valve installed at the outlet of the water heater by National or by another qualified contractor of my choosing at a later date. If I decide to have an anti-scald valve installed, then I understand that I may wish at a later date to use a licensed plumber to install a separate hot water line to my dishwasher and/or clothes washer as these appliances are exempt from the OBC requirement and I may desire higher water temperatures for them; or (b) by having a thermostatic mixing valve installed at each hot water faucet and showerhead by a qualified contractor and if I choose this option, I understand that National will not be responsible for insuring that my new water heater complies with the OBC and that I should engage a qualified contractor to perform the work. Should I choose to not have National install an anti-scald mixing valve at the outlet of the water heater, I understand that it is my responsibility to comply with the OBC, and I assume all risk and liability for any damages that may result from my decision.

12. Liability: I understand that National is not the manufacturer of the Equipment and therefore makes no representations, warranties or conditions as to the performance of the Equipment, software or services that I elect to use in connection with the Equipment, except of those which are given by statute and which cannot be waived. National will not be liable for any loss, damage or injury of any type arising out of or related to this Agreement or caused or contributed to in any way by the use and operation of the Equipment or any indirect, incidental, special or consequential damages, even if reasonably foreseeable. If National is unable to perform any of its obligations under this Agreement because of circumstances or events beyond its control, it shall be excused from the performance of such obligations for the duration of such circumstances or events and it shall not be liable to you for such failure to perform. I will indemnify National from any loss or damage to the Equipment for any reason (other than normal wear and tear) and all claims, losses and costs that National may suffer or pay or may be required to pay, including legal expenses, in connection with the Equipment, this Agreement or the use and operation of the Equipment, including any claims against it for any injury or death to individuals or damage to property. Notwithstanding anything to the contrary in this Section 12 or any other provision hereof, National agrees that it will promptly reimburse me for all reasonable damage to my home and contents caused by an Equipment leak the costs of which are not covered by my home insurance (including any deductible up to \$1,000.00) provided that: (a) I report the occurrence to National within 24 hours of my becoming aware of the leak; (b) I have maintained the Equipment in accordance with the provisions of Section 3 above; and (c) I am not in breach of any of my commitments and assurances in Section 6 above.

13. Miscellaneous: This Agreement is the entire agreement between me and National. It is governed by the laws of the Province of Ontario and the laws of Canada applicable therein. Should any of the terms and conditions in this Agreement be held invalid for any reason by a Court or regulatory body of competent jurisdiction, then such terms or conditions shall be deemed severed from this Agreement and the remaining terms and conditions shall continue in full force and effect. Neither the failure nor delay of National to exercise any right or to enforce any term of this Agreement shall be construed as a waiver of such right or term, or of any other right or term hereunder. The contents of National's marketing materials do not form part of the Agreement and I did not rely on them.

14. Privacy Policy: I understand that my personal information included with the application form and my account, credit and billing history will be collected, used and maintained for the purposes of managing my account with National, and in accordance with National's privacy policy which is available at http://www.nationalhomeservices.ca/privacy_policy.html. I understand that National may provide my credit history and personal information to its lenders or a credit bureau for the purpose of managing its or its lenders' risk. I understand that National may disclose my personal information if this Agreement is transferred or assigned, as otherwise required to collect a payment owed by me, or as required by law. I will be provided with the opportunity to receive offers from National's affiliates and/or its business partners, and can opt out of receiving these offers at any time.

15. Your Rights Under the Consumer Protection Act, 2002:

You may cancel this agreement at any time during the period that ends ten (10) days after the day you receive a written copy of the agreement. You do not need to give the supplier a reason for cancelling during this 10-day period. If the supplier does not make delivery within 30 days after the delivery date specified in this agreement or if the supplier does not begin performance of his, her or its obligations within 30 days after the commencement date specified in this agreement, you may cancel this agreement at any time before delivery or commencement of performance. You lose the right to cancel if, after the 30-day period has expired, you agree to accept delivery or authorize commencement of performance. If the delivery date or commencement date is not specified in this agreement and the supplier does not deliver or commence performance within 30 days after the date this agreement is entered into, you may cancel this agreement at any time before delivery or commencement of performance. You lose the right to cancel if, after the 30-day period has expired, you agree to accept delivery or authorize commencement of performance. In addition, there are other grounds that allow you to cancel this agreement. You may also have other rights, duties and remedies at law. For more information, you may contact the Ministry of Consumer and Business Services. To cancel this agreement, you must give notice of cancellation to the supplier, at the address set out in the agreement, by any means that allows you to prove the date on which you gave notice. If no address is set out in the agreement, use any address of the supplier that is on record with the Government of Ontario or the Government of Canada or is known by you. If you cancel this agreement, the supplier has fifteen (15) days to refund any payment you have made and return to you all goods delivered under a trade-in arrangement (or refund an amount equal to the trade-in allowance). However, if you cancel this agreement after having solicited the goods or services from the supplier and having requested that delivery be made or performance be commenced within ten (10) days after the date this agreement is entered into, the supplier is entitled to reasonable compensation for the goods and services that you received before the earlier of the 11th day after the date this agreement was entered into and the date on which you gave notice of cancellation to the supplier, except goods that can be repossessed by or returned to the supplier.

CT-2012-003

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

**RESPONSE OF THE RESPONDENT DIRECT
ENERGY MARKETING LIMITED TO THE MOTION
OF NATIONAL ENERGY CORPORATION R FOR
LEAVE TO INTERVENE**

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