

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 CT-2012-002 September 26, 2013	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 25

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

DIRECT ENERGY MARKETING LIMITED

Respondent

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

A. Overview

1. National Energy Corporation ("National") provides these submissions in reply to the Responses to its Motion for Leave to Intervene delivered by the Commissioner of Competition (the "Commissioner") and the Respondent, Direct Energy Marketing Limited ("Direct Energy"), respectively, on September 19, 2013.

2. Direct Energy opposes National's request for leave to intervene and argues that National should have no role whatsoever in this proceeding, despite acknowledging that National is directly affected by this matter. The crux of Direct Energy's position is that the Tribunal should decide important issues relating to the Ontario water heater industry that will have a significant impact on National's business in the absence of National's unique perspective, without the benefit of National's participation and without regard to the ramifications of this case upon National. Direct Energy's position should be rejected.
3. As outlined below, Direct Energy's position is based on a test for intervention that is overly restrictive and not supported by the authorities. Specifically, Direct Energy's attempt to portray National's perspective as being identical to that of the Commissioner is contrary to the evidence and confuses a unique and distinct perspective (which is a requirement for an intervention) with the adoption of a different legal position (which is not a requirement for intervention).
4. Further, Direct Energy's position on the appropriate scope of National's participation in this proceeding, should National be granted leave to intervene, is unreasonably restrictive, entirely inconsistent with prior decisions of the Tribunal and, if adopted, would have the effect of wholly denying National the opportunity to meaningfully participate in this proceeding.
5. The purposes of allowing an intervention in Tribunal proceedings include the protection of the interests of non-parties and ensuring that the Tribunal is fully informed of the issues in the proceeding and the consequences of any decision that the Tribunal makes. Allowing National to intervene in the manner requested will fulfill all of these purposes. On the other hand, refusing National's request to intervene will place the Tribunal in the undesirable position of having to decide important issues without regard to all of the relevant perspectives and consequences.
6. The Commissioner does not oppose National's request for leave to intervene, but seeks modifications to the rights of participation of National in the event that

leave to intervene is granted. In all respects, the Commissioner's position in this matter is the same as that set out in the Commissioner's Response filed in *Commissioner of Competition v Reliance Comfort Limited Partnership* (File No. CT-2012-002) (the "Reliance Proceeding"). Rather than repeating the submissions in its Reply to the Commissioner's Response in the Reliance Proceeding, National adopts and relies upon those submissions for the purpose of the within proceeding. As a consequence, the Commissioner's Response will not be discussed further herein.

B. Leave to Intervene Should Be Granted

7. In opposing National's request for leave to intervene, Direct Energy makes three principal allegations:
 - (a) "National has failed to establish that it has a unique or distinct perspective on the issues raised by the Commissioner";
 - (b) National is seeking leave to intervene to somehow "use the Competition Tribunal as a forum to advance its private litigation against Direct Energy"; and
 - (c) "National is attempting to raise new issues and broaden the issues raised in the Application".
8. As outlined below, these allegations are contradicted by the evidence before the Tribunal and do not constitute a legitimate or recognized basis for denying leave to intervene to National. Each of Direct Energy's allegations is addressed in turn below.

(a) National Has a Unique or Distinct Perspective

9. Direct Energy argues that National has failed to establish that it has a unique or distinct perspective. In support of its position, Direct Energy incorrectly submits at paragraph 15 of its Response that the "jurisprudence is clear that an intervenor

cannot intervene on issues where its position is the same as the position of one of the parties” [emphasis added].

10. Direct Energy confuses a unique and distinct perspective (which is a requirement for an intervention) with the adoption of a different legal position (which is not a requirement for an intervention).
11. The issue is not whether National has a different legal position on the matters in dispute, but whether National can offer a unique and distinct perspective on these issues. As Mckeown J. stated in *Canada (Competition Act, Director of Investigation and Research) v The D & B Companies of Canada Ltd.* when discussing the role and purpose of the intervenor, Information Resources (“IRI”):

“IRI was granted leave to intervene to make representations in part because its involvement in the industry means that it has a unique perspective, different from that of the Director, that makes its representations particularly useful”.

Canada (Competition Act, Director of Investigation and Research) v The D & B Companies of Canada Ltd., [1995] CCTD No 20 at 57 [*D & B Companies*]; National’s Brief of Authorities (“National’s Authorities”), Tab 8

12. Indeed, the Tribunal has frequently granted leave to intervene to competitors that are harmed, or may be harmed, by the anti-competitive conduct of a respondent, notwithstanding that the position of the intervenor and the Commissioner are generally aligned.
13. For example, in *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc.*, the Tribunal granted leave to intervene to White and NDAP/DAC, two potential competitors of Tele-Direct, even though their positions were generally aligned with the position of the Director:

We accept that as a publisher of telephone directories, White is directly affected by these proceedings. The same is true for NDAP/DAC as a competitor or potential competitor to Tele-Direct in the provision of advertising services. We also

accept that both intervenors have special knowledge and expertise that may assist the Tribunal and that, although they support the Director's position generally, their business interests are different from his public interest mandate. [emphasis added]

Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc., [1995] CCTD No 4 at 3 [*Tele-Direct*]; National's Authorities, Tab 3

14. There are numerous other examples of cases where the Tribunal has granted leave to intervene to competitors or potential competitors of a respondent that had positions that were aligned with the positions of the Commissioner, including:

- *Canada (Director of Investigation and Research, Competition Act) v A.C. Nielsen Company of Canada Limited*: the Tribunal granted leave to intervene to Information Resources, Inc. ("IRI"), a potential competitor to A.C. Nielsen who, like the Director, proposed to argue that the anti-competitive conduct of A.C. Nielsen had prevented it from entering into the relevant market;

Canada (Director of Investigation and Research, Competition Act) v A.C. Nielsen Company of Canada Limited, [1994] CCTD No 2 (Request for Leave to Intervene of IRI: File No. CT-94/01); National's Authorities, Tab 2

- *Canada (Commissioner of Competition) v Air Canada* (2001): the Tribunal granted leave to intervene to WestJet Airlines, a competitor to Air Canada that was the target of the anti-competitive acts alleged by the Commissioner in the application against Air Canada;

Canada (Commissioner of Competition) v Air Canada (2001), [2001] CCTD No 5 [*Air Canada (2001)*]; National's Authorities, Tab 4

- *Canada (Commissioner of Competition) v Toronto Real Estate Board*: the Tribunal granted leave to intervene to RealtySellers, a new company that intended to expand into the relevant market, but was allegedly prevented from entering as a result of the conduct of the respondent; and

Canada (Commissioner of Competition) v Toronto Real Estate Board, [2011] CCTD No 22 [*TREB*]; National's Authorities, Tab 5

- *Canada (Commissioner of Competition) v Air Canada* (2011): the Tribunal granted leave to intervene to WestJet in its capacity as a competitor or potential competitor to Air Canada on a number of the routes that were the subject of the impugned arrangement.

Canada (Commissioner of Competition) v Air Canada (2011), [2011] CCTD No 21 [*Air Canada (2011)*]; National's Authorities, Tab 6

15. There was no suggestion in the above cases that the proposed intervenors would adopt a different legal position from the Commissioner. Rather, in each of those cases, leave to intervene was granted by the Tribunal because as industry participants and competitors to the respondent, the proposed intervenors had distinct perspectives on the matters at issue.
16. Indeed, limiting interventions to only those cases where the proposed intervenor adopts a different legal position from the parties would severely restrict the scope of interventions before the Tribunal. The legal position taken by an intervenor will almost always be consistent with either the Commissioner or the respondent.
17. In advancing this argument, Direct Energy relies on the Tribunal's decision in *Southam Inc. v Canada (Competition Act, Director of Investigation and Research)* (1997), where the Tribunal denied leave to intervene on the basis that the interests of the proposed intervenor and Southam were "entirely the same". As the Tribunal acknowledged, the circumstances in *Southam* were "indeed most unusual". In particular, the proposed intervenor had an "agreement in principle" with Southam Inc. to acquire the assets to be divested. That leave to intervene was denied is not surprising considering that the proposed intervenor and Southam were the two parties to the same proposed transaction and thus shared the same perspective, as well as precisely the same position.

Southam Inc. v Canada (Competition Act, Director of Investigation and Research), [1997] CCTD No 47 at paras 5 and 12; National's Authorities, Tab 17

18. The unusual circumstances considered by the Tribunal in *Southam* are readily distinguishable from the present matter. In the instant case, it is evident that National's interest and perspective are distinct from the Commissioner's and will be useful to the Tribunal.
19. As outlined in greater detail in National's Request for Leave to Intervene, unlike the Commissioner, National is a participant in the industry and one of Direct Energy's largest competitors. Further, National entered into the Relevant Market at a time when Direct Energy was still subject to the Consent Order issued by the Tribunal, but has also attempted to expand in the Relevant Market since the expiry of the Consent Order. National is also a target of Direct Energy's anti-competitive conduct and will be directly affected by the outcome of this proceeding. Finally, as described in greater detail at paragraph 53 of the Affidavit of Gord Potter (the "Potter Affidavit") filed in support of National's Request for Leave to Intervene, National has knowledge that is directly relevant to the topics in respect of which it seeks leave to intervene.
20. Although National is not required to have a different legal position from those of the parties to this proceeding, it is worth noting that National has, in fact, identified topics on which the positions of the Commissioner and National appear to differ at this early stage of the proceeding. As discussed more fully below, these include the adequacy of the remedies sought by the Commissioner and the full scope of Direct Energy's anti-competitive conduct.
21. At paragraph 16 of its Response, Direct Energy appears to attach significant weight to the fact that "National itself acknowledges that it intends to support the position of the Commissioner generally".
22. However, supporting the position of a party cannot be a proper ground for refusing an intervention request since Rule 43(2)(e) of the *Competition Tribunal*

Rules requires a proposed intervenor to set out the name of the party whose position that person intends to support. Supporting the position taken by the Commissioner does not disqualify National from intervening, provided that National brings a distinct perspective that will assist the Tribunal, which it does.

23. Despite acknowledging that National is directly affected by the outcome of the Commissioner's Application, Direct Energy argues that National should have no role whatsoever in this proceeding. Direct Energy's position is that the Tribunal should decide important issues relating to the Ontario water heater industry that will have a significant impact on National's business without the benefit of National's participation and without regard to the ramifications of this case upon National. Direct Energy's position should be rejected. Permitting National to intervene in the manner requested will provide the Tribunal with the benefit of all of the relevant perspectives, including National's distinct perspective, and ensure that the Tribunal is fully informed of the issues in the proceeding and the consequences of any decision that the Tribunal makes.

(b) No Basis for Allegation that National is Attempting to Further Private Litigation

24. At paragraph 19 of its Response, Direct Energy states that "[i]t is evident that National seeks to intervene in this case in order to advance and further its private litigation agenda against Direct Energy" [emphasis added]. Direct Energy fails to provide any support for this bald allegation or to otherwise identify how National's participation in this proceeding will or could advance any ongoing private litigation between the parties.
25. If the suggestion is that National will improperly use confidential information obtained from the Tribunal's process in private litigation, it is notable that the Tribunal has repeatedly recognized an implied undertaking against the use of documents and information obtained through the Tribunal's discovery process in unrelated proceedings. For example, in *Southam*, Reed J. found that the documents and information obtained from a party on discovery in a proceeding

before the Tribunal “must not be used for purposes other than the conduct of the litigation for which they are required to be produced”.

Canada (Director of Investigation and Research, Competition Act) v Southam Inc., [1991] CCTD No 15 at 4; National’s Authorities, Tab 18

Canada (Competition Act, Director of Investigation and Research) v A.C. Nielsen Company of Canada Limited, [1994] CCTD No 11 at 7-8; National’s Authorities, Tab 19

Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd., [1997] CCTD No 24 at 3-5; National’s Authorities, Tab 20

26. Further, in the event that National is granted leave to intervene, National would be bound by the terms of any Confidentiality Order issued by the Tribunal. In all recent proceedings, the Tribunal has issued confidentiality orders that, among other things, prevent the improper use or disclosure of confidential documents and other information by the parties and intervenors, other than for the purpose of the proceeding at hand.
27. National has already agreed to be subject to the terms of such a Confidentiality Order in the event that leave to intervene is granted. Specifically, at paragraph 40(a) of National’s Request for Leave to Intervene, National has requested the right 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”. [emphasis added]
28. Direct Energy also alleges in paragraph 19 of its Response that National’s participation as an intervenor will “unnecessarily lengthen and complicate the proceedings”. No basis or support is provided for this objection and it is without merit.
29. In any event, even if allowing National’s intervention may add some time or complexity to the proceeding (which it will not), this is not a legitimate or recognized basis for denying leave to intervene. The requirement in section 9(2)

of the *Competition Tribunal Act* to deal with proceedings expeditiously has to be balanced against the considerations of fairness also mandated by that provision and the right in section 9(3) of any intervenor to make representations relevant to the proceedings in respect of any matter that affects it. As the Federal Court of Appeal held in *American Airlines, Inc. v Canada (Competition Tribunal)*:

"Fairness is a relevant consideration because s. 9(2) of the Competition Tribunal Act expressly requires that the proceedings before the Tribunal be dealt with as informally and as expeditiously as the circumstances and *fairness* allow. This point of fairness also answers the concern raised by Strayer J. that a wider role for intervenors will prolong and complicate proceedings before and thereby delay decisions of the Tribunal. But, if a wider role for intervenors does lead to longer or more complex proceedings before the Tribunal, surely that is a necessary price to pay in the interests of fairness, which is expressly required under s. 9(2)".
[underlining added, italics in original]

American Airlines, Inc. v Canada (Competition Tribunal), 54 DLR (4th) 741 at 749 (FCA) [*American Airlines*]; National's Authorities, Tab 1

30. Further, to be clear, National has no interest in lengthening or prolonging these proceedings. Given that National's ability to effectively compete and expand in the Relevant Market depends upon the outcome of this proceeding, National will support all efforts to ensure that the Commissioner's Application is heard and determined in the most expeditious manner possible.
31. In contrast, Direct Energy has sought and obtained an extension of the deadline for the filing of its Response that has already delayed this proceeding for over six months.

See: "Order Extending the Time to Serve and File a Response" dated February 1, 2013 and "Order Amending the Order Extending the Time to Serve and File a Response" dated March 28, 2013

32. Finally, the allegation at paragraph 22 of Direct Energy's Response that "part of National's business strategy is to advance unfounded allegations of

anticompetitive conduct and other wrongdoing against Direct Energy” is without merit and is based on an incomplete review of the history of litigation between the parties.

33. In this regard, it is notable that Direct Energy has omitted from its carefully selected excerpts of prior litigation any references to proceedings where findings were made against Direct Energy. For example, although Direct Energy referred to the decision made in a 2012 arbitration between Direct Energy and National, it fails to refer to an earlier decision made by the same arbitrator. Specifically, in a decision dated August 10, 2009, the arbitrator considered nine separate claims advanced by Direct Energy against National. Following a review of the evidence, the arbitrator dismissed all nine of Direct Energy’s claims on the basis that the evidence failed to support any of its allegations.

Arbitration Decision (2009) between Direct Energy Marketing Limited and National Energy Corporation [Arbitrator: William Kaplan]; National’s Authorities, Tab 21

34. Further, it is difficult to conceive of how National's participation as an intervenor in the within proceeding could assist National in any ongoing litigation with Direct Energy. As Direct Energy notes, National has commenced a proceeding before the Federal Court against Direct Energy and EnerCare Inc. (the co-owner of Direct Energy's water heater portfolio) and other defendants. The Federal Court proceeding is not related to the issues raised by the Commissioner’s Application. Specifically, the Federal Court proceeding relates to allegations of misleading advertising and other allegations in connection with the activities of an agent, Ecosmart Energy Savings Corporation (“Ecosmart”), including the following:
 - (a) Ecosmart surreptitiously installed global positioning system (“GPS”) tracking devices on several of National’s vehicles in order to track on a daily basis the areas being canvassed by National. Using information from the tracking devices, Direct Energy or EnerCare representatives would target homeowners that had been visited by National; and

(b) Ecosmart surreptitiously caused audio listening devices to be installed in National's offices for the purpose of obtaining confidential business information. The devices were planted by persons posing as job applicants for potential employment with National.

35. Far from being "unfounded allegations", National has already sought and obtained an Anton Piller order from the Ontario Superior Court of Justice permitting it to enter the premises and seize documents from EnerCare and other defendants in that proceeding relevant to the allegations outlined above.

National Energy Corporation et al v Enercare Inc. et al, CV-12-457352; National's Authorities, Tab 22

36. There is no basis for Direct Energy's allegation that by intervening before the Tribunal, National is somehow attempting to advance the Federal Court proceeding or otherwise "exploit" the Tribunal's process. Rather, National seeks leave to intervene on the basis that National is directly affected by the Commissioner's Application and brings a unique or distinct perspective that will assist the Tribunal in deciding the relevant issues.

(c) National is Not Attempting to Raise Irrelevant Issues

37. Direct Energy argues in paragraph 9 of its Response that National should be denied leave to intervene on the basis that it "seeks to broaden the scope of issues and remedies through its request to intervene".

38. As the cases referenced above make clear, although National is not required to present a different legal position from the parties to this proceeding, National has, in fact, identified topics on which the position of the Commissioner and National differ. As outlined in paragraph 30 of National's Request for Leave to Intervene and in paragraph 54 of the Potter Affidavit, these topics include the adequacy of the remedies sought by the Commissioner and the scope of the Reliance's anti-competitive conduct.

39. Contrary to the allegation of Direct Energy in paragraph 10 of its Response, by citing these examples, National is not “attempting to broaden the scope of the Application”. The issue of the remedies required to address Direct Energy’s anti-competitive conduct is an issue that is within the scope of the Application and a topic on which National can provide a useful perspective.
40. Indeed, the Tribunal has frequently permitted intervenors to address the adequacy of the remedies sought by the Commissioner in a proceeding. For example, in *Canada (Competition Act, Director of Investigation and Research) v The D & B Companies of Canada Ltd.*, the Tribunal granted leave to intervene to the Canadian Council of Grocery Distributors (“CCGD”) to make submissions on the issue of nature, scope and effect of the orders sought by the Director. As McKeown J. stated:

“We are also satisfied that the representations to be made by CCGD will be of assistance to the Tribunal, should we be required to consider the question of appropriate remedies. Because it represents the retailers, CCGD has a perspective different from the parties that it can bring to bear on the issue”.

Canada (Competition Act, Director of Investigation and Research) v The D & B Companies of Canada Ltd., [1994] CCTD No 19 at 3; National’s Authorities, Tab 23

41. Similarly, in *Canada (Commissioner of Competition) v United Grain Growers Ltd.*, the Tribunal granted leave to intervene to the Canadian Wheat Board to assist in the consideration of the remedies proposed by the Commissioner:

“I am of the view that the CWB has demonstrated that its request for leave to intervene satisfies the test stated above. In particular, CWB’s extensive involvement in the grain industry with producers clearly places it in a unique position to assist the Tribunal in its consideration of the effectiveness of the remedies that are proposed”.

Canada (Commissioner of Competition) v United Grain Growers Ltd., [2002] CCTD No 18 at para 13 [*United Grain Growers*]; National’s Authorities, Tab 24

42. In any event, even if the Tribunal were to conclude that National should not be permitted to assist the Tribunal with respect to the topics of the appropriate remedies to be granted or the full scope of Direct Energy's anti-competitive conduct, this would not provide a legitimate basis for denying National leave to intervene. Rather, this objection by Direct Energy goes only to the question of the appropriate scope of National's intervention in the event that leave to intervene is granted.
43. Indeed, in both of the cases relied upon by Direct Energy as authority for this objection – *Tele-Direct* and *Canada (Commissioner of Competition) v Visa Canada Corp.* – the proposed intervenors were granted leave to intervene in the proceeding. In these cases, the issue of whether the intervenors should be permitted to make representations on issues that were alleged to fall outside of the Commissioner's Application was relevant only to the question of the appropriate scope of the permitted interventions.

Tele-Direct, supra; National's Authorities, Tab 3

Canada (Commissioner of Competition) v Visa Canada Corp., [2011] CCTD No 2 [*Visa/MasterCard*]; National's Authorities, Tab 10

44. In this regard, as noted in paragraphs 19 and 20 of National's Reply in the Reliance Proceeding, to the extent that the Tribunal determines that it is necessary, National has proposed a modification to the scope of its proposed intervention to permit it to address the anti-competitive acts specifically alleged in the Commissioner's Application.

C. Scope of Intervention

45. National seeks leave to intervene with respect to ten topics that are directly relevant to the issues raised by the Commissioner's Application (the "Proposed Topics"). The Proposed Topics are listed in subparagraphs 26(a) to (j) of National's Request for Leave to Intervene.

46. The Potter Affidavit and National's Request for Leave to Intervene set out in detail how National will provide a unique and distinct perspective on each of the Proposed Topics that will assist the Tribunal in determining the matters at issue in this proceeding.
47. As set out more fully below, Direct Energy objects to seven of the Proposed Topics and (assuming National receives leave to intervene) does not object to three of the Proposed Topics, with minor modifications. The three topics that Direct Energy does not oppose are described as follows in paragraph 24 of Direct Energy's Response:
 - (a) the impact of Direct Energy's water heater return policies and procedures and other alleged anti-competitive conduct as raised in the Commission's *[sic]* Application on National's ability to effectively compete and expand;
 - (b) National's interactions with Direct Energy with respect to the matters at issue in the proceeding; and
 - (c) the statements made and conclusions drawn by Direct Energy concerning National in the Response of Direct Energy filed in this proceeding."
48. The above generally correspond to the Proposed Topics found in subparagraphs (b), (d) and (i) of National's Request for Leave to Intervene.
49. Direct Energy argues that Tribunal should decline to grant leave to intervene to National in respect of the seven remaining Proposed Topics. Direct Energy's objection to the remaining Proposed Topics is without merit. On this issue, National adopts and relies upon the submissions made by it with respect to each Proposed Topic in its Request for Leave to Intervene filed in this matter and in paragraphs 8 to 15 and 21 to 60 of the Reply filed by National in the Reliance Proceeding. As outlined in greater detail in that Reply, each of the Proposed Topics is directly relevant to the issues raised by the Commissioner's Application and is a topic on which National can provide a distinct perspective that will be useful to the Tribunal.

50. At paragraph 25 of its Response, Direct Energy asserts that National's scope of intervention "must be limited to ensure that National is not simply repeating the Commissioner's case". This is not a legitimate basis for seeking to severely restrict National's participation in this proceeding.
51. Under the terms proposed for National's intervention, National will only be permitted to adduce non-repetitive *viva voce* evidence and to conduct non-repetitive examinations and cross-examinations of witnesses in respect of the topics for which National has been granted leave to intervene. In addition, National's participation as an intervenor in this proceeding remains subject to the overall supervision of the Tribunal.
52. In light of the above and given that National has a unique and useful perspective on each of the Proposed Topics, National respectfully requests that the Tribunal grant leave to intervene with respect to each of the Proposed Topics identified by National.

D. Terms of Participation

53. Direct Energy seeks through its Response to impose significant and unprecedented restrictions on National's ability to participate effectively in this proceeding. As set out more fully below, these restrictions are inappropriate, not supported by the authorities and, most importantly, would substantially impair National's ability to assist the Tribunal in determining the matters at issue in this proceeding.
54. Direct Energy seeks to severely limit National's participation in the proceeding. In particular, Direct Energy argues that National should only be permitted to call a single witness and should not have the right to cross-examine any witnesses, call any expert evidence or participate in closing argument.
55. If granted intervenor status, National is entitled to an effective and meaningful intervention, subject to the overall supervision of the Tribunal. As Iacobucci C.J. (as he then was) recognized in *American Airlines, supra*, intervenors are not

limited to merely participating in the proceeding, but must be allowed to participate in an effective and meaningful manner:

“It is evident from the purpose clause [of the *Competition Act*] that the effects of anti-competitive behaviour, such as a merger that has the result of substantially lessening competition, can be widespread and of great interest to many persons. 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 proceedings 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 subsection 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.” [emphasis added]

American Airlines, supra at 748-49; National’s Authorities, Tab 1

56. Iacobucci C.J. also explicitly acknowledged that the right to lead evidence and to cross-examine witnesses will lead to a more effective and efficient intervention and further, that broader rights of participation for intervenors were consistent with the Tribunal’s obligation under section 9(2) of the *Competition Tribunal Act* to treat intervenors fairly:

“At issue in the case before us is, among other things, an order for dissolution, pursuant to s. 64 of the *Competition Act*, of the merger of computer reservation systems in the airline business. Section 65 lists various factors that the Tribunal may consider in deciding whether to issue such an order. These factors are fairly broad and it would seem reasonable to assume that persons attaining intervenor status under s. 9(3) could be well-positioned to provide insights concerning them through argument and reasons based on facts. Moreover they arguably could more effectively and efficiently prove these facts if they have the ability to lead evidence or cross-examine witnesses depending on the issue involved and the circumstances of the particular case.

It seems to me that permitting intervenors to play a role wider than simply presenting argument is also a fairer way of treating them. Although the Director is supporting the wider interpretation before us, it is not difficult to envision future situations where the Director and an intervenor might disagree on some matter of fact or evidence of which the Tribunal should be apprised. It is therefore not only logical to give the Tribunal the jurisdiction to decide the issue rather than simply leaving it to the Director to decide in each case, but it is also fair". [emphasis added]

American Airlines, supra at 749; National's Authorities, Tab 1

57. An effective and meaningful intervention requires that National be permitted to make non-repetitive submissions and to adduce non-repetitive evidence on all issues before the Tribunal that directly affect National. The imposition of the unprecedented restrictions advocated by Direct Energy should be rejected because they would effectively deny National the ability to participate in a meaningful way in this proceeding.
58. National's request regarding its permitted scope of intervention as set out in paragraph 40 of its Request for Leave to Intervene is fair, reasonable and consistent with the rights of intervention granted by the Tribunal in other cases. In particular:
 - (a) the Tribunal has routinely allowed intervenors to tender non-repetitive fact evidence within the scope of their interventions by calling multiple witnesses. See, for example, *Air Canada (2011)* (WestJet was permitted to call three fact witnesses, with the potential of additional witnesses with leave of the Tribunal) and *Visa/Mastercard* (TD Bank was permitted to call three witnesses). In other cases, such as *Air Canada (2001)* and *Tele-Direct* the Tribunal did not impose any limit on the number of witnesses that the intervenor could call;

Air Canada (2011), supra at para 6(d); National's Authorities, Tab 6

Visa/MasterCard, *supra* at para 53(vi); National's Authorities, Tab 10

Air Canada (2001), *supra* at para 17(b); National's Authorities, Tab 4

Tele-Direct, *supra* at 7; National's Authorities, Tab 3

- (b) the Tribunal has consistently permitted intervenors to cross-examine witnesses within the scope of their interventions, as long as the examinations were not repetitive. See, for example, *United Grain Growers*, *Air Canada (2011)* and *Visa/MasterCard*. In each of those cases, the Tribunal permitted the intervenor to conduct non-repetitive cross-examinations within the scope of their interventions;

"The Canadian Wheat Board shall be allowed to participate in the proceedings and is permitted: ... (c) to cross-examine witnesses at the hearing of the application to the extent that it is not repetitive of the cross-examination of the parties to the application;"

United Grain Growers, *supra* at para 17(c); National's Authorities, Tab 24

"Regarding procedure, WestJet is: ... (e) Permitted to conduct non-repetitive examinations and cross-examination of witnesses on the WestJet Topics;"

Air Canada (2011), *supra* at para 6(e); National's Authorities, Tab 6

"At the hearing, the intervenors' counsel may cross-examine the Commissioner's witnesses only on the topics of their respective interventions. When cross-examining, counsel may not repeat questions already asked by any other counsel".

Visa/MasterCard, *supra* at para 53(vii); National's Authorities, Tab 10

- (c) the Tribunal routinely permits intervenors to file expert evidence within the scope of their intervention: for instance, see the Tribunal's decisions in *Tele-Direct*, *Air Canada (2001)* and *United Grain Growers*;

“White and NDAP/DAC shall have the participation rights set out in subsection 32(1) of the Competition Tribunal Rules and, in addition: ... (c) They shall be permitted to introduce relevant expert evidence which is within the scope of their intervention in accordance with the procedure set out in the Competition Tribunal Rules;”

Tele-Direct, supra at 7; National’s Authorities, Tab 3

“WestJet Airlines Ltd. shall be allowed to participate in the proceedings and permitted: ... (d) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Rules and case management;”

Air Canada (2001), supra at para 17(d); National’s Authorities, Tab 4

“The Canadian Wheat Board shall be allowed to participate in the proceedings and is permitted: ... (e) to introduce expert evidence which is within the scope of its intervention in accordance with the procedure set out in the Competition Tribunal Rules, SOR/94-290, and case management.”

United Grain Growers, supra at para 17(e); National’s Authorities, Tab 24

- (d) the Tribunal also routinely permits intervenors to participate in closing arguments: for example, see the Tribunal’s decisions in *Visa/MasterCard, Air Canada (2011)* and *Air Canada (2001)*.

“Intervenors may make written and oral argument which is not repetitive.”

Visa/MasterCard, supra at para 53(viii); National’s Authorities, Tab 10

“Regarding procedure, WestJet is: ... (g) Permitted to make non-repetitive written and oral argument dealing with the WestJet Topics;”

Air Canada (2011), supra at para 6(g); National’s Authorities, Tab 6

“WestJet Airlines Ltd. shall be allowed to participate in the proceedings and permitted: ... (e) to submit legal argument

at the hearing of the application that are non-repetitive in nature. ...”

Air Canada (2001), *supra* at para 17(e); National’s Authorities, Tab 4

59. Direct Energy cites no authority in support of the restricted rights of participation that it seeks to impose on National and offers no valid explanation as to why National should be denied the usual rights of participation granted to intervenors in Tribunal proceedings. Consistent with the decisions cited above, National should be granted those rights of participation.
60. In contrast to the restricted rights of participation that Direct Energy seeks to impose on National, Direct Energy seeks a broad right of oral and documentary discovery of National. Specifically, Direct Energy seeks oral and documentary discovery as against National on the “issues as defined by the pleadings”, as opposed to the issues that are within the scope of National’s intervention.
61. It is surprising that Direct Energy seeks a broad discovery of National, considering Direct Energy’s position that National has nothing of value to offer in this proceeding.
62. Again, Direct Energy’s attempt to secure expansive discovery rights as against National is completely at odds with the established practice in Tribunal proceedings. In many cases, the Tribunal has not granted *any* oral or documentary discovery of intervenors. For example, in *Air Canada (2001)*, the terms of participation on which WestJet was granted leave to intervene included the right to review the discovery transcripts of the parties to the proceeding but did not permit either oral or documentary discovery of WestJet by the parties. Similarly, in *Tele-Direct* the terms of participation on which White and NDAP/DAC were granted leave to intervene included the right to access the transcripts of the examination for discovery and the right to inspect and make copies of the documents listed in the affidavits of documents of the parties, but did not provide for any form of oral or documentary discovery of either NDAP/DAC or White by the parties.

Air Canada (2001), *supra* at para 17; National's Authorities, Tab 4

Tele-Direct, *supra* at 7; National's Authorities, Tab 3

63. Further, in those few cases where oral and documentary discovery of an intervenor has been permitted, discovery has been limited to issues that are within the scope of the permitted intervention. For example, in *Visa/MasterCard*, the Tribunal permitted discovery of the intervenors, but properly limited the scope and duration discovery:

"The intervenors are to produce the documents relevant to the topics of their respective interventions and deliver affidavits of documents on or before August 15, 2011.

...

If the Commissioner wishes to discover a representative of each of the intervenors, she may do so. However, her right to discovery is limited to the topics on which each has been given leave to intervene and is also limited in time to three (3) hours for the representative of the TD Bank and two (2) hours for the Association representative".

Visa/MasterCard, *supra* at para 53(iii) and (v); National's Authorities, Tab 10

64. As the Tribunal observed in *Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd.*, the purpose of permitting discovery of an intervenor is to avoid surprises at the hearing. In the event that National is granted leave to intervene, its participation in the proceeding will be limited to those matters that are within the scope of its permitted intervention. For this reason, it is entirely appropriate that any discovery of National be similarly limited both in terms of scope and duration.

Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd., [1997] CCTD No 14 at para 23; National's Authorities, Tab 25

65. To subject National to the broad discovery sought by Direct Energy, even though National's participation is limited to the scope of its intervention, would not only be contrary to the established practice of this Tribunal, but also manifestly unfair.

E. Hearing Request

66. As Direct Energy has objected to National's proposed intervention, National respectfully requests an oral hearing.

DATED at Toronto, Ontario, this 26th day of September, 2013.



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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

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

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