

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-2012-003 September 5, 2013	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 18

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

DIRECT ENERGY MARKETING LIMITED

Respondent

AFFIDAVIT OF GORD POTTER
(Sworn September 4, 2013)

I, **GORD POTTER**, of the City of Toronto, in the Province of Ontario, **MAKE OATH AND SAY:**

1. I am the Chief Operating Officer of National Energy Corporation (operating as National Home Services) ("National"). I am responsible for managing all aspects of the

water heater rental operations of National, such as directing and administering all financial plans, overseeing business policies and accounting practices, developing strategic and business plans, providing overall financial oversight and monitoring, managing human resources, and developing and implementing strategies for growing the operations of National and improving financial performance.

2. I have been employed in the position of Chief Operating Officer of National since 2012. Prior to that time, I was employed by Just Energy Group Inc. ("Just Energy"), the parent company of National for more than nine years, in various roles, most recently as the Executive Vice-President, Legal and Regulatory Affairs. In this capacity, I was responsible for, among other things, managing regulatory compliance.

3. I have also played an active role in the design and implementation of rules governing numerous deregulated markets. For example, following the deregulation of the electricity market in Ontario in 2002, I was a member of the Ontario Energy Board Advisory Committee that considered rule changes to support this deregulated market. In 2005, I was appointed to the Alberta Department of Energy's Electricity Utilities Act Steering Committee tasked with the design of rule changes for the deregulated energy market in Alberta. In 1998, I was appointed as the chair of three national working groups operating under the auspices of the Canadian Radio-television Telecommunications Commission (CRTC) tasked with developing customer switching and customer facing processes for deregulated local telephone services.

4. I have read carefully and considered the Notice of Application of the Commissioner of Competition filed in this proceeding (the "Commissioner's Application")

and the Response of Direct Energy Marketing Limited ("Direct Energy") dated August 26, 2013.

5. I have personal knowledge of the facts and matters referred to in this Affidavit, except where stated to be based on information from others, in which case I verily believe such information to be true.

A. Background

(i) National Home Services

6. National is a supplier of home services, including the rental of energy efficient water heaters and the supply of HVAC equipment to existing and new homeowners in Ontario and Quebec.

7. National currently employs approximately 220 people in 23 locations in Ontario and Quebec.

8. As described in greater detail below, National holds a relatively small share of the Relevant Market (as defined in the Commissioner's Application) as compared with Direct Energy's dominant position. However, National is one of Direct Energy's largest competitors for the supply of water heater rental services in the Relevant Market. National has attempted to grow its business and expand its service areas within the Relevant Market, but National's ability to effectively compete and expand has been impeded or constrained as a result of the anti-competitive conduct of Direct Energy.

9. National is a wholly-owned subsidiary of Just Energy, a Canadian public company arranged pursuant to the *Canada Business Corporations Act*. Just Energy's head office is in Mississauga, Ontario and its shares trade on the Toronto Stock Exchange and the New York Stock Exchange.

10. Just Energy supplies natural gas and electricity to residential and commercial customers across Canada. It also has operations in certain parts of the United States and the United Kingdom.

11. National has significant expertise in all aspects of the operation of a water heater rental service, including the negotiation of arrangements with manufacturers for the supply of water heater tanks, the human resource and capital requirements associated with operating a water heater rental service in the Relevant Market, the marketing and promotion of water heater rental services to Ontario homeowners, the terms of water heater rental agreements with homeowners, the procedures for disconnecting and installing water heater tanks, the procedures for returning older tanks, the management of a fleet of licensed contractors and technicians for the installation, removal and maintenance of water heater tanks, and the relevant regulatory framework relating to the supply of water heater rental services in Ontario at the municipal and provincial level. In addition, National has experience with attempts to enter and expand into local regions for the supply of water heater rental services, including the costs and other conditions of entry for a water heater rental service in Ontario.

(ii) National's Entry into the Relevant Market

12. In Ontario, most residential customers rent water heaters. Residential customers who rent a water heater also often obtain related water heater services, such as installation, repair and maintenance.

13. Historically, Ontario's two largest natural gas suppliers, Enbridge Inc. ("Enbridge") and Union Gas Limited ("Union Gas"), each held a regulated monopoly as the sole supplier of natural gas in their respective operating territories. In addition to supplying natural gas, Enbridge and Union Gas also supplied related services to residential and commercial customers, including the rental of water heaters.

14. In 1999, Enbridge transferred its portfolio of water heater rentals to Enbridge Services Inc., which is now Direct Energy Marketing Limited ("Direct Energy"). As a result, Direct Energy acquired a near-monopoly position in the supply of water heater rental services in the territory formerly served by Enbridge.

15. Also, in 1999, Union Gas transferred its portfolio of water heater rentals to Union Energy Inc., which was subsequently acquired by Reliance Comfort Limited Partnership ("Reliance"). Through this acquisition, Reliance acquired a monopoly position in the supply of water heater rental services within the territory formerly served by Union Gas.

16. In 2008, National began to supply water heater rental services to consumers located in the Relevant Market. At that time, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that prohibited Direct Energy from, among other things, preventing competitors from disconnecting and returning water heaters or

engaging in other forms of anti-competitive conduct. In addition, the Consent Order required Direct Energy to operate return depots where competitors could return Direct Energy tanks during normal operating hours.

17. The water heater tank process required under the Consent Order allowed National to return tanks to Direct Energy efficiently with little or no impact on the homeowner.

18. The Consent Order facilitated entry and expansion by National into the Relevant Market by preventing Direct Energy from engaging in anti-competitive conduct that would impede or constrain National's ability to compete in this region.

19. Direct Energy announced changes to its water heater tank return processes and the terms of rental agreements with customers to take effect immediately upon the expiry of the Consent Order on February 21, 2012. As described in greater detail below, these changes to Direct Energy's policies and processes have constrained or impeded the ability of National to effectively compete in the Relevant Market.

20. Since commencing operations in the Relevant Market in 2008, National has secured approximately 170,000 customers or approximately 12% of the approximately 1.4 million available water heater rental customers located in the Relevant Market. Direct Energy does not publicly disclose the number of water heater rental customers it supplies in the Relevant Market. However, to the best of my knowledge and belief, Direct Energy remains the dominant supplier of water heater rentals in the Relevant Market, with approximately 1,100,000 water heater rental customers or approximately 78% of all available water heater rental customers.

21. Although National holds a relatively small share in the Relevant Market, National is one of the largest competitors to Direct Energy for the supply of water heater rental services in the Relevant Market. To 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. Further, National has been operating in the Relevant Market since 2008. This provides National with a unique and distinct perspective that cannot be offered by any of Direct Energy's other competitors.

22. As described below, National has attempted to grow its business and expand its service areas within the Relevant Market, but National's ability to effectively compete and expand in the Relevant Market has been impeded or constrained as a result of the anti-competitive conduct of Direct Energy.

B. Test for Intervention

23. I understand that the test for leave to intervene in this proceeding is as follows:

- (a) the person seeking leave to intervene must be directly affected and will suffer competitive consequences if the relief sought is not granted;
- (b) the matter alleged to affect the person seeking leave to intervene must be within the scope of the Tribunal's consideration or must be a matter sufficiently relevant to the Tribunal's mandate;
- (c) the representations made by a person seeking leave to intervene must be relevant to an issue specifically raised in the proceeding; and

- (d) the person seeking leave to intervene must bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

24. I believe that National satisfies each of the elements for granting leave to intervene. Specifically, as discussed in further detail below:

- (a) National has been and continues to be directly affected by Direct Energy's conduct, including the water heater return policies and other procedures implemented by Direct Energy;
- (b) The matters alleged to affect National are within the scope of the Tribunal's consideration and are matters sufficiently relevant to the Tribunal's mandate;
- (c) The representations to be made by National are relevant to issues specifically raised in the Commissioner's Application; and
- (d) National will bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.

C. National is Directly Affected by the Commissioner's Application and Will Suffer Competitive Consequences if the Relief Sought is Not Granted

25. National is directly affected by the matters identified in the Commissioner's Application.

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

In the absence of an appropriate remedy with respect to Direct Energy's anti-competitive conduct, National will continue to be constrained from effectively competing and expanding in the Relevant Market.

27. National is a competitor to Direct Energy for the rental of natural gas and electric water heaters and the supply of related services to residential customers in the Relevant Market.

28. National has expended considerable resources in the promotion of its water heater rental services within the Relevant Market, including through print advertisements and direct marketing with new and existing homeowners.

29. As noted above, the vast majority of homeowners in the Relevant Market are existing customers of Direct Energy. When an existing customer of Direct Energy decides to switch to National, the Direct Energy water heater tank located in the customer's home will be disconnected by National and replaced with a new water heater tank. The old Direct Energy water heater tank is returned to one of Direct Energy's depots by National.

30. During the term of the Consent Order, National was able to employ a simple process for returning Direct Energy tanks on behalf of new customers that did not require any form of pre-authorization from Direct Energy. Specifically, National employed the following process: (i) the customer agreed to purchase water heater rental services from National; (ii) National and the customer agreed on a date for the installation of a new National water heater tank; (iii) the new National water heater tank was installed at the home of the customer and the old Direct Energy tank was removed;

and, (vi) the old Direct Energy tank was returned to a Direct Energy depot during normal business hours.

31. The water heater tank process required under the Consent Order allowed National to return tanks to Direct Energy efficiently with little or no impact on the homeowner.

32. During the course of the Consent Order, Direct Energy attempted to implement certain changes to its water heater tank return process. For example, in 2010, Direct Energy amended its tank return process to require customers that wished to return a Direct Energy water heater tank to complete a Rental Removal Order Form and obtain a Rental Authorization Number ("RAN") from Direct Energy. However, following an investigation of this conduct by the Competition Bureau, Direct Energy suspended the proposed policies prior to implementation.

33. Direct Energy also amended the terms of its water heater rental agreements effective as of September 16, 2010. Under the revised terms, customers that wish to terminate their water heater rental agreement prior to the end of the term of the agreement are required to purchase their water heater from Direct Energy at a significant cost. This requirement constrains or impedes the ability of customers to switch to competing suppliers of water heater rental services, such as National.

34. When the Consent Order expired on February 21, 2012, Direct Energy reintroduced the changes to its tank return policies and also attempted to change the terms of its water heater rental agreements with existing customers. These changes included the following:

- (a) Direct Energy imposed significant restrictions on its return depot locations making it difficult and costly for National and other competitors to return old Direct Energy tanks. Such restrictions included restricting the hours of operation of return depot locations, the locations at which competitors may return tanks and the number of tanks that competitors could return to those locations.
- (b) Customers that wished to return a Direct Energy water heater tank were now required to complete a Rental Removal Order Form and obtain a RAN from Direct Energy.
- (c) Direct Energy used the RAN policy to deter or impede customers from switching to National or other competitors. For example, Direct Energy requires former customers to contact Direct Energy by telephone to obtain a RAN and uses this process to dissuade customers from switching to National or other competitors.
- (d) Effective as of the date of the expiry of the Consent Order, Direct Energy refused to recognize the validity of letters appointing National to act as an agent for former Direct Energy customers with respect to the process for returning water heater tanks. National has attempted to assist its customers through the RAN process by obtaining a RAN on behalf of the customer or by participating with the customer on calls with Direct Energy. Following the expiry of the Consent Order, Direct Energy refused to recognize National's appointment as the agent of the customer and

refused to permit National to join in on calls by customers attempting to obtain a RAN, even though such customers requested that National participate in these calls.

- (e) Direct Energy amended the terms of its water heater rental agreements to provide that existing customers who wished to terminate their agreement with Direct Energy would be required to purchase the water heater tank at a significant cost, unless such customers opted-out of the amended terms by notifying Direct Energy prior to a specified deadline.

35. National attempted on several occasions to negotiate with Direct Energy to establish a procedure that would permit National to return water heater tanks to Direct Energy with minimal impact upon the homeowner and in particular, a process that would allow National to obtain RANs on behalf of customers. In this regard, please see the letters dated February 17 and 28, 2012 from National to Direct Energy and the response of Direct Energy dated February 29, 2012 attached as Exhibit "A" to this Affidavit.

36. Following a review of Direct Energy's conduct by the Ontario Ministry of Consumer Affairs, Direct Energy agreed to suspend its proposal to amend the terms of water heater rental agreements for existing customers. However, customers of Direct Energy that entered into a rental agreement after September 16, 2010 and who wish to terminate their water heater rental agreement prior to the end of the term must still purchase their water heater from Direct Energy at a significant cost.

37. Further, on March 24, 2012, Direct Energy agreed to permit National to return water heater tanks and to obtain RANs on behalf of National's customers. However, this

arrangement was explicitly stated by Direct Energy to be on an interim basis only and with a full reservation of Direct Energy's rights to insist on strict compliance with the RAN and other policies of Direct Energy. A copy of an email from Jason Frost of Direct Energy to Saj Khan of National dated March 24, 2012 describing the interim arrangement is attached as Exhibit "B" to this Affidavit.

38. I believe 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.

39. In any event, despite the interim arrangement, Direct Energy has consistently delayed in providing National with RANs required under Direct Energy's process. In some cases, Direct Energy has failed to provide the RAN for 30 days or more.

40. In addition, even where National is able to obtain a RAN, Direct Energy has imposed arbitrary limits on the process for returning tanks at its depots that prevent National from returning old Direct Energy water heaters on behalf of customers in a timely and efficient manner. These restrictions include: (i) limiting the number of water heater tanks that National can return at any given time; (ii) restricting the return of tanks to only certain days or hours within a day; (iii) restricting the locations at which competitors may return tanks, including refusing to accept tanks at locations where Direct Energy previously accepted tanks; and (iv) imposing other restrictions that frustrate National's efforts to return Direct Energy water heater tanks in an efficient manner.

41. As a result of Direct Energy's restrictions on the return of water heater tanks, National is currently storing more than 550 tanks that it has not been able to return to Direct Energy. National has been required to expand its warehouse facilities to store water heater tanks that Direct Energy will not accept on a timely basis.

42. In circumstances where National has not been able to return Direct Energy's tank to one of Direct Energy's depots, Direct Energy will continue to bill the homeowner, even after Direct Energy has been informed of the homeowner's decision to switch to National. In some cases, this can result in several months of double-billing to customers. This enables Direct Energy to profit from customers that have switched to National by continuing to charge customers who have not been able to return their old Direct Energy tanks.

43. National often has to incur the cost of these additional rental charges to homeowners. In addition, National has to bear other costs arising from Direct Energy's water heater tank return policies, such as the cost of storing water heater tanks that Direct Energy refuses to accept in a timely manner.

44. As a result of Direct Energy's anti-competitive conduct, National's ability to effectively compete and expand in the Relevant Market is impeded or constrained. Direct Energy's water heater return policies and other conduct described above impose significant costs on National and prevent customers from switching to National, making it more difficult for National to effectively compete against Direct Energy.

45. As a competitor to Direct Energy and as a firm attempting to compete and expand in the Relevant Market, National has a direct and significant interest in the outcome of this proceeding and the competitiveness of this industry.

46. In the absence of an appropriate remedy with respect to Direct Energy's anti-competitive conduct, National will continue to be constrained from effectively competing and expanding in the Relevant Market.

D. Matters Alleged to Affect National are Within the Scope of the Tribunal's Consideration

47. The matters that affect National are within the scope of the Tribunal's consideration and are relevant to the Tribunal's mandate to hear and determine the issues raised by the Commissioner's Application.

48. The matters that affect National relate to:

- (a) The impact or likely impact of Direct Energy's water heater return policies and procedures and other anti-competitive conduct on the ability of competitors to effectively compete and expand in the Relevant Market;
- (b) The impact of Direct Energy's anti-competitive acts on customers or potential customers of competitors, including the impact of this conduct on the ability of competitors, such as National, to effectively induce customers to switch suppliers;
- (c) The impact or likely impact of Direct Energy's conduct upon competition in the Relevant Market generally and National, in particular;

- (d) Barriers to entry and ease of entry into the Relevant Market, including the impact of Direct Energy's conduct in creating artificial barriers to entry and expansion for rivals, such as National, and raising rival's costs; and
- (e) The impact of the Commissioner's proposed remedies on competitors, such as National, and on competition in the Relevant Market.

49. I believe that these matters are within the scope of the Tribunal's consideration of this matter and are relevant to the Tribunal's mandate to hear and determine the issues.

E. National's Proposed Topics are Relevant to the Issues Raised by the Proceeding

50. National's proposed topics are relevant to the issues raised by the Commissioner's Application.

51. National's proposed topics (the "National Proposed Topics") address the matters that affect National in this proceeding and include:

- (a) the development of the Ontario rental water heater industry as it relates to National;
- (b) the issue of Direct Energy's anti-competitive acts as they relate to National, including the impact of Direct Energy's water heater return policies and procedures and other anti-competitive conduct on the ability of National to effectively compete and expand in the Relevant Market;

- (c) the impact of Direct Energy's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers;
- (d) National's interactions with Direct Energy with respect to the matters at issue in the proceeding, including dealings with Direct Energy regarding the Return Authorization Number and other aspects of the water heater removal and return process;
- (e) National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets;
- (f) the issue of Direct Energy's dominant position as it affects National and competition in the Relevant Market generally;
- (g) the issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally;
- (h) barriers to entry and ease of entry into the Relevant Market, including the impact of Direct Energy's conduct in creating artificial barriers to entry and expansion for National and raising National's costs;
- (i) the statements made and conclusions drawn by Direct Energy concerning National in the Response of Direct Energy filed in this proceeding; and
- (j) the impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.

52. I believe that the National Proposed Topics are relevant to the issues raised by the Commissioner's Application, including, but not limited to, the following issues raised in the Commissioner's Application:

- (a) The definition of the relevant market for the supply of water heater rental services in Ontario [paras. 30 to 33 of Commissioner's Application];
- (b) Whether Direct Energy is the dominant supplier of water heater rental services in the Relevant Market [paras. 14, 34 and 35 of Commissioner's Application];
- (c) The history and development of Ontario's rental water heater industry [paras. 12 to 17 of Commissioner's Application];
- (d) Whether Direct Energy's water heater return policies and procedures have the effect of imposing significant costs on competitors and preventing customers from switching to those competitors, thereby excluding competitors in the Relevant Market [paras. 2 and 39 to 41 of Commissioner's Application];
- (e) Whether Direct Energy's conduct has had and is having the effect of preventing and lessening competition substantially in the Relevant Market [paras. 4 and 44 to 47 of Commissioner's Application];
- (f) Whether in the absence of Direct Energy's water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market [paras. 4 and 44 to 47 of Commissioner's Application];

- (g) Whether Direct Energy's water heater return policies and other conduct create significant barriers to entry [paras. 35 and 46 of Commissioner's Application]; and
- (h) The nature of the remedies required to address Direct Energy's conduct and specifically, whether the relief sought by the Commissioner should be granted [para. 51 of Commissioner's Application].

F. National's Unique or Distinct Perspective

53. For the reasons set out below, I believe that National will bring a unique or distinct perspective to the proceeding:

- (a) National is one of Direct Energy's largest competitors for the supply of natural gas and electric water heater rentals and related services in the Relevant Market. To best of my knowledge and belief, apart from Reliance, National is the only competitor to Direct Energy for water heater rental services with operations in several regions throughout Ontario and Quebec;
- (b) As noted above, National commenced supplying water heater rental services in the Relevant Market in 2008 and is therefore uniquely positioned to provide a perspective on barriers to entry and other conditions of entry into the Relevant Market;
- (c) National began offering water heater rental services prior to the expiry of the Consent Order, but has also attempted to expand into other local

regions within the Relevant Market following the expiry of the Consent Order. National is therefore positioned to provide the Tribunal with a unique perspective on the impact of the Consent Order on barriers to entry and the costs associated with customer switching, as well as the conditions of competition generally in these regions;

- (d) Although National has a substantially smaller presence in the Relevant Market than Direct Energy, to the best of my knowledge and belief, there is no other competitor to Direct Energy for water heater rental services apart from Reliance that operates in the Relevant Market with the same scope and scale as National;
- (e) Unlike smaller competitors to Direct Energy, National also supplies water heater rental services in several parts of Ontario and Quebec. National is therefore positioned to provide the Tribunal with a broader perspective on the supply of water heater rental services in areas both within and outside of the Relevant Market;
- (f) National has been supplying water heater rental services in Ontario since 2008 and is therefore able to provide the Tribunal with a valuable perspective on the conduct of the participants and the industry generally over the longer term; and
- (g) As recognition of National's role in the Relevant Market, National is the subject of a number of specific allegations in the Response of Direct Energy dated August 26, 2013, including paragraphs 6, 18 and 28.

54. In addition, although National intends to support the position of the Commissioner generally, based on the allegations in the Commissioner's Application, there are topics on which the position of the Commissioner and National appears to differ. For example, the following:

- (a) **Anti-Competitive Conduct:** I do not believe that the Commissioner's Application addresses the full scope of the anti-competitive conduct of Direct Energy. In addition to the anti-competitive conduct alleged in the Commissioner's Application, I note that Direct Energy has engaged in price discrimination or similar forms of discriminatory promotional programs that target only those customers that are the subject of National's marketing efforts or who have recently elected to switch to National.

- (b) **Relief Sought:** I also do not believe that the relief sought by the Commissioner is sufficient to address the anti-competitive conduct of Direct Energy. For example, with respect to the tank return process, the relief sought should include (at least) the following elements: (i) Direct Energy should be prohibited from implementing any restrictions or limitations that would prevent National or any other licenced third party from disconnecting and returning a used water heater tank on behalf of a customer to Direct Energy; (ii) Direct Energy should be prohibited from preventing a customer of Direct Energy from electing to have a tank disconnected and removed by any licenced service provider (including National) or to remove their own tank; (iii) Direct Energy should be

required to designate specific “Return Locations” where a customer or a licenced third party (including National) is entitled to return disconnected water heaters between normal business hours; (iv) Direct Energy should be required to identify a sufficient number of Return Locations to adequately serve customers throughout their respective service areas; (v) Direct Energy should be prohibited from implementing any capacity restrictions or other restraints on the number of water heaters that can be returned to any of the Return Locations in a given period of time; and (vi) Direct Energy should be prohibited from continuing to bill customers following the point of time at which Direct Energy is advised that the customer has switched to an alternate supplier.

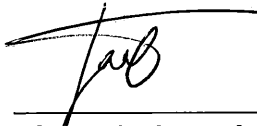
55. National's unique position as a firm attempting to expand in the Relevant Market and to enter into certain local regions within the Relevant Market, as a target of Direct Energy's anti-competitive conduct, and as the most significant competitor to Direct Energy for the supply of water heater rental services places National in a unique position to assist the Tribunal in its consideration of the relevant issues.

56. By providing evidence and making submissions relating to the National Proposed Topics, I believe that National's participation in the manner requested will assist the Tribunal in deciding the issues before it in this proceeding.

G. Conclusion

57. For the reasons outlined above, I believe that National meets the test for leave to intervene in this proceeding.

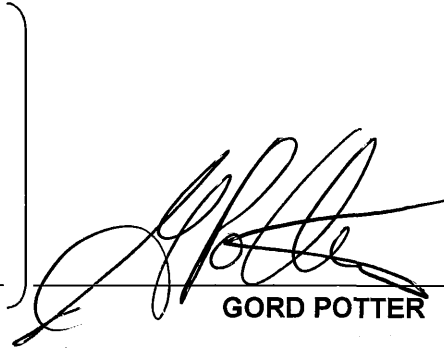
SWORN BEFORE ME at the City of
Toronto, in the Province of Ontario,
this 4th day of September, 2013



Commissioner for taking Affidavits, etc.

LSUC 583 480

Jana Loganathan



GORD POTTER



February 17, 2012

Mr. Len Diplock
VP & GM, Water Heater & Rental Services
Direct Energy
80 Allstate Parkway,
Markham ON,
L3R 6H3

Dear Sirs:

Re: Direct Energy's Tank Return Policy

I am writing to you in connection with your company's new tank return policy which you wish to put in place Tuesday, February 21, 2012. We anticipate that a high volume of customers will switch their water heater from Direct Energy to National Home Services and with that in mind, we would like to work with you to develop a return policy that manages the process in a reasonable and cost efficient manner for all concerned and ensures that you have adequate time to reconcile accounts. We will be obtaining written authorization forms from all of our new customers which specifically authorize us to obtain tank removal reference numbers from you and to deal with all other matters relating to the return of their tanks on their behalf. A template of this authorization is enclosed for your reference and we trust you will find it satisfactory for your purposes. It would be helpful if you could designate one or more individuals at Direct with whom we may deal with on an ongoing basis to ensure that tanks are returned in an orderly manner.

Starting next week we will provide you with a list of customers who have decided to switch providers together with written notices of termination of their rental arrangements with Direct Energy (including our appointment as the customer's agent to deal with you on their behalf), and expect that you will respect their wishes. We intend to continue to return tanks to your depots in the ordinary course and will not be responsible for any loss or damage to those tanks should you refuse to accept them.

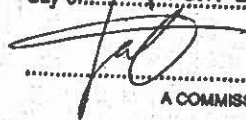
Should you wish to discuss the new process with us please feel free to contact us.

Yours truly,

National Home Services

Per: 
Saj Khan, VP Operations

This is Exhibit... "A"referred to in the
affidavit of... Gord Potter
sworn before me, this... 4th
day of... September 2013.



A COMMISSIONER FOR TAKING AFFIDAVITS

LSUL 583480



February 28, 2012

Direct Energy
80 Allstate Parkway
Markham, ON
L3R 6B3

Dear Sirs:

Re: New Direct Energy Tank Return Process

For the record, I have not received a response to my letter to you of February 17, 2012 in connection with the above-noted matter. In view of your refusal to respond and based on advice received yesterday from one of your customer service representatives, it is evident that you will not permit your customers to nominate National Home Services to obtain tank return authorization numbers on their behalf notwithstanding that we have been properly authorized by them to do so. For your information, our authority to act on behalf of customers was confirmed by the Supreme Court of Ontario in a similar dispute with Reliance Home Comfort Limited Partnership and a copy of that decision is attached to this email.

In view of your refusal to provide your reasonable co-operation to facilitate the tank return process, we will be submitting a daily file of those customers who require return authorization numbers. If we do not receive a satisfactory response from you within five business days of each submission, we will dispose of the tanks in question without further notice to you and will then initiate the billing dispute process for each affected customer under the Open Billing Agreement pursuant to the authorizations given to us by these customers.

If you wish to reconsider your position, I would be pleased to hear from you. If I do not hear from you by the close of business tomorrow, I will assume that you do not intend to change your return policy.

Yours very truly,

Sajid Khan



Direct Energy.

February 29th, 2012

Mr. Sajid Khan
VP Operations
National Home Services
25 Sheppard Avenue West, Suite 1700
Toronto, Ontario
M2 N 6S6

Re: Direct Energy's Tank Return Policy

Dear Mr. Khan:

I am writing to you in response to the letters you sent via email to Mr. Len Diplock on February 17th and 28th 2012 with respect to Direct Energy Marketing Limited's ("Direct Energy") new water heater return policy (the "Return Policy"). We agree that Direct Energy and National Home Services ("National") should work together to facilitate a valid request by a customer to return his/her water heater in a reasonable and cost efficient manner. We feel the Return Policy must protect our customers' interests and represent their true intentions.

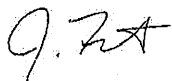
Therefore, with the customer in mind, we will recognize a valid customer appointment of National as her agent in regard to obtaining the return authorization number and all other matters relating to the return of the Direct Energy rental water heater under the following conditions:

- 1) We will only accept the appointment of National as the customer's agent where permitted under the terms of the customer's water heater rental contract. For greater certainty, if the water heater rental contract specifically prohibits customers from appointing an agent to act on their behalf with respect to their account, the customer will not be able to appoint National as his agent.
- 2) A water heater rental customer must specifically contact Direct Energy to accept the appointment of National as her agent. The customer must call us directly at 1-877-334-1843 and inform us of their intentions to have National represent them as their agent for all matters relating to the return of their water heater and reconciling of their rental water heater account. This is necessary in order to verify the identity of our customer. Furthermore, given the numerous complaints that we have received from our customers of being misled by door to door representatives, we must ensure that our customers are fully informed when making the decision to appoint an agent and return their water heater. Once we receive such confirmation from the customer, the account will be "flagged" in our system and we will only take future direction from National and/or the customer.
- 3) National will obtain written customer consent to act as agent for a Direct Energy water heater rental customer via your proposed Customer Authorization Form. A copy of the signed Form will be provided to Direct Energy with the return of each tank.
- 4) After the customer has called Direct Energy and verified the appointment of National as his agent, if return of the water heater is permitted under the customer contract, Direct Energy will provide National with a return authorization number on behalf of the customer and National will then return the tank in a timely manner to one of Direct Energy's designated water heater drop-off locations together with the Customer Authorization Form signed by the customer.
- 5) All water heaters must be returned in "good" condition (normal wear and tear excepted) without damage and must include all manufactured supplied parts (i.e. ventor motors, gas valves, T&P valves, relief tubes, etc).

Direct Energy will not accept the return of any tanks from National except in accordance with this process. Direct Energy will hold National fully responsible for any losses Direct Energy incurs as a result of any unauthorized removal or tampering with Direct Energy water heaters by National.

Should you wish to discuss these terms or review Direct Energy's Return Policy further, please contact me directly at 905-943-6872.

Yours Truly,

A handwritten signature in black ink, appearing to read "J. Frost".

Jason Frost
Director, Rental Sales & Marketing

This is Exhibit "B" referred to in the affidavit of Gord Potter

sworn before me, this 4th day of September 2013



A COMMISSIONER FOR TAKING AFFIDAVITS

LSUC 583480

Jason Frost, Jason [mailto:Jason.Frost@directenergy.com]
Sent: Saturday, March 24, 2012 11:36 AM
To: Saj Khan
Subject: RE: Direct Energy's Refusal to Accept Return of Tanks

Saj,

The water heaters which have been removed by National from the homes of Direct Energy customers are and remain the property of Direct Energy. There is value in these tanks and National has absolutely no right to destroy them.

As indicated in the letter from Direct Energy to you on February 29, 2012, Direct Energy will recognize a valid customer appointment of National as her agent in regard to obtaining a return authorization number and all other matters relating to the return of the Direct Energy rental water heater under stipulated conditions. We are and have been willing to work together with you to facilitate a valid request by a customer to return his water heater in a reasonable and cost efficient manner. We have not received a response to this letter. Due to your blatant disregard of Direct Energy's new water heater return policy and your unwillingness to work with Direct Energy to negotiate a resolution, we fear that our customers are going to be somehow inconvenienced. Therefore, notwithstanding that National does not have the proper authority to return the removed water heaters and is in complete contravention of Direct Energy's water heater return policy, Direct Energy is willing at this time to provide National with return authorization numbers and accept the return of the applicable tanks. We are doing this to protect our customers' interests and we reserve our rights to insist upon full compliance with Direct Energy's water heater return policy in the future. Furthermore, we reserve our rights to take legal action against National for the improper return of Direct Energy water heaters.

I will provide you with RA numbers for the attached list of rental water heaters customers by end of business day Wednesday, March 28th, 2012. It is our expectation that all tanks will be returned in good condition to one of our appointed drop off locations.

Note that if all of the water heaters which have been removed from customers' homes to date are not returned, Direct Energy will immediately seek reimbursement of its losses.

We hope that on a going forward basis, National will demonstrate a willingness to work cooperatively with Direct Energy to ensure that the needs of both companies are met and more importantly, that the customer's interests are protected.

Regards,

Jason

Jason Frost
Director, Rental Sales & Marketing
Direct Energy Home Services
Phone: 905-943-6872 Cell: 1-416-688-0445
Fax: 705-730-7042
Certified Sales Professional with Distinction
Jason.Frost@directenergy.com

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

AFFIDAVIT OF GORD POTTER
(Sworn September 4, 2013)

Davies Ward Phillips & Vineberg LLP

155 Wellington Street West
Toronto, Ontario M5V 3J7

Adam Fanaki (LSUC #38208L)

Tel: 416.863.0900

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Counsel to National Energy Corporation