

**THE COMPETITION TRIBUNAL**

**IN THE MATTER OF** the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

**IN THE MATTER OF** an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

**AND IN THE MATTER OF** certain policies and procedures of Reliance Comfort Limited Partnership.

**BETWEEN:**

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
August 21, 2013	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 41

**THE COMMISSIONER OF COMPETITION**

Applicant

- AND -

**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

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**AFFIDAVIT OF GORD POTTER**  
**(Sworn August 20, 2013)**

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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 Reliance Comfort Limited Partnership ("Reliance") filed on August 12, 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 Reliance's dominant position. However, to the best of my knowledge and belief, National is Reliance's largest and only meaningful competitor 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 Reliance.

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, Union Gas transferred its portfolio of water heater rentals to Union Energy Inc., which was subsequently acquired by 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. This territory corresponds to the Relevant Market as defined in the Commissioner's Application.

15. Also 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 monopoly position in the supply of water heater rental services in the territory formerly served by Enbridge.

16. In 2008, National began to supply water heater rental services to consumers located in the principal operating territory of Direct Energy. At the time, National did not attempt to enter into the Relevant Market where Reliance operated.

17. When National entered into the principal operating region of Direct Energy in 2008, 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.

18. The Consent Order facilitated entry and expansion by National into the principal operating territory of Direct Energy by preventing Direct Energy from engaging in anti-competitive conduct that would impede or constrain National's ability to compete in those local regions.

19. In 2010, two years after starting operations in Ontario, National began supplying water heater rental services to residential customers located in the principal operating region of the Respondent, Reliance, generally consisting of southwestern Ontario, northern Ontario and eastern Ontario (defined as the "Relevant Market" in the Commissioner's Application).

20. When National entered into the Relevant Market in 2010, Reliance – unlike Direct Energy – was not operating under a Consent Order from the Competition Tribunal or similar remedy that prohibited Reliance from engaging in anti-competitive conduct. As a consequence, National's expansion in the Relevant Market has been more difficult than its earlier entry into the principal operating territory of Direct Energy which, at that time, was subject to a Consent Order.

21. Since commencing operations in the Relevant Market in 2010, National has secured approximately 69,100 customers or approximately 6% of the approximately 1.2

million available water heater rental customers located in the Relevant Market. Reliance 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, Reliance remains the dominant supplier of water heater rentals in the Relevant Market, with more than 1,100,000 water heater rental customers or approximately 92% of all available water heater rental customers.

22. Although National holds a relatively small share in the Relevant Market, National is the largest competitor to Reliance for the supply of water heater rental services in the Relevant Market. Significantly, to the best of my knowledge and belief, National is the only competitor to Reliance for water heater rentals with operations in several regions throughout Ontario and Quebec. This provides National with a unique and distinct perspective that cannot be offered by any of Reliance's other competitors.

23. 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 Reliance.

**B. Test for Intervention**

24. 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.

25. 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 Reliance's conduct, including the water heater return policies and other procedures implemented by Reliance;
- (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**

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

27. 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 Reliance's anti-competitive conduct, National will continue to be constrained from effectively competing and expanding in the Relevant Market.

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

29. 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.

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

31. Historically, Reliance's competitors and customers routinely disconnected and returned old Reliance rental water heater tanks to Reliance without any form of pre-authorization.

32. However, when National entered into the Relevant Market in 2010, Reliance changed its historical practice regarding the process for returning water heater tanks. Specifically, in May 2010, Reliance implemented a policy that prohibits customers or competitors from returning water heater tanks without first obtaining a form of authorization from Reliance called a "Removal Reference Number" or "RRN".

33. Reliance has used, and continues to use, the RRN policy to attempt to prevent customers from switching to National or other competitors. For example, Reliance requires customers to contact Reliance by telephone to obtain the RRN, Reliance often keeps customers that are seeking an RRN on hold for an excessive period of time, and Reliance threatens to apply additional charges to customers who elect to continue with their request to terminate the rental agreement with Reliance.

34. National has attempted to assist its customers in navigating through Reliance's RRN process by attempting to obtain an RRN on behalf of the customer or by participating with the customer on the telephone call with Reliance. Reliance has refused to permit National to obtain an RRN on behalf of its customers or even to permit National to join in on calls to Reliance by customers attempting to obtain an RRN, notwithstanding that such customers have requested that National participate in these calls.

35. Reliance also began to impose limitations on the process for returning tanks to Reliance's return depots. 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 National may return tanks, including refusing to accept tanks at locations where Reliance previously accepted tanks from National; and (iv) imposing other restrictions that frustrate National's efforts to return Reliance water heater tanks in an efficient manner.

36. Reliance also charges excessive "damages fees" for scratches and dents to tanks that are returned with ordinary wear and tear, as well as for tanks that are clearly outside of their useful life and will simply be disposed of by Reliance.

37. Further, Reliance is constantly changing the policies applicable to its return depots without providing any advance notice. In addition, Reliance applies different policies at different return depots, making it very difficult for National to determine whether Reliance will accept a tank at a particular depot. For example, at Reliance's Cambridge depot, National is only permitted to return 15 tanks per day on any given Monday or Friday, but must arrive before 12:00 pm on those days and make an appointment at least one day in advance. At Reliance's Windsor depot, National is generally only permitted to return Reliance's tanks on a Thursday.

38. As a result of Reliance's restrictions on the return of water heater tanks, National is currently storing more than 2,100 tanks that it has not been able to return to Reliance. National has been required to expand its warehouse facilities to store water heater tanks that Reliance will not accept on a timely basis.

39. In circumstances where National has not been able to return Reliance's tank to one of Reliance's depots, Reliance will continue to bill the homeowner, even after Reliance 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 Reliance to profit from customers that have switched to National by continuing to charge customers who have not been able to return their old Reliance tanks.

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

41. As a result of Reliance's anti-competitive conduct, National's ability to effectively compete and expand in the Relevant Market is impeded or constrained. Reliance'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 Reliance.

42. As a competitor to Reliance 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.

43. In the absence of an appropriate remedy with respect to Reliance'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**

44. 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:

45. The matters that affect National relate to:

- (a) The impact or likely impact of Reliance's exclusionary 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 Reliance'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 Reliance'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 Reliance'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.

46. 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**

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

48. 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 Reliance's anti-competitive acts as they relate to National, including the impact of Reliance's exclusionary 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 Reliance's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers;
- (d) National's interactions with Reliance with respect to the matters at issue in the proceeding, including dealings with Reliance regarding 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 Reliance'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 Reliance'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 Reliance concerning National in the Response of Reliance filed in this proceeding; and
- (j) the impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.

49. 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. 29 to 32 of Commissioner's Application];
- (b) Whether Reliance is the dominant supplier of water heater rental services in the Relevant Market [paras. 14, 35 and 36 of Commissioner's Application];
- (c) The history and development of Ontario's rental water heater industry [paras. 7 to 14 of Commissioner's Application];
- (d) Whether Reliance'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, 42 and 43 of Commissioner's Application];

- (e) Whether Reliance's conduct has had and is having the effect of preventing and lessening competition substantially in the Relevant Market [paras. 3 and 48 to 51 of Commissioner's Application];
- (f) Whether in the absence of Reliance's water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market [paras. 3, 42 and 43 of Commissioner's Application];
- (g) Whether Reliance's water heater return policies and other conduct creates significant barriers to entry [paras. 17 and 18 of Commissioner's Application]; and
- (h) The nature of the remedies required to address Reliance's conduct and specifically, whether the relief sought by the Commissioner should be granted [para. 55 of Commissioner's Application].

**F. National's Unique or Distinct Perspective**

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

51. To the best of my knowledge and belief, National is Reliance's largest competitor for the supply of natural gas and electric water heater rentals and related services in the Relevant Market. National is also the only competitor to Reliance for water heater rental services with operations in several regions throughout Ontario and Quebec.



52. As noted above, National commenced supplying water heater rental services in the principal operating region of Direct Energy in 2008. At that time, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that subsequently expired on April 30, 2012. National is therefore uniquely positioned to provide a perspective on the conditions of entry and expansion both in the presence of, and in the absence of, the Consent Order.

53. Although National has supplied water heater rental services in Ontario since 2008, National is a relatively recent entrant into the Relevant Market having commenced operations in that region in 2010. National is therefore well-positioned to provide a unique perspective on the barriers to entry and other conditions of entry into the Relevant Market.

54. In addition, 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 industry developments over the longer term.

55. The anti-competitive conduct of Reliance was implemented primarily or entirely as a result of National's entry into the Relevant Market. As stated above, Reliance changed its historical practice regarding the process for returning water heater tanks and began engaging in other forms of anti-competitive conduct shortly after National entered into the Relevant Market in 2010.

56. While National began offering water heater rental services in certain regions of the Relevant Market prior to the implementation of the anti-competitive conduct of Reliance, National has also attempted to enter and expand into other local regions

within the Relevant Market following the anti-competitive conduct of Reliance. National is therefore positioned to provide the Tribunal with a unique perspective on the impact of Reliance's anti-competitive conduct on barriers to entry and the costs associated with customer switching, as well as the conditions of competition generally in these regions.

57. Although National has a substantially smaller presence in the Relevant Market than Reliance, to the best of my knowledge and belief there is no other competitor to Reliance that provides water heater rental services in the Relevant Market with the same scope and scale as National.

58. Unlike smaller competitors to Reliance, 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.

59. National also has a perspective that is unique or distinct from that of the Commissioner of Competition. As an experienced participant in the industry, as the target of Reliance's anti-competitive conduct and as a firm that is attempting to expand in the Relevant Market, National will bring a perspective to the issues and evidence that is distinct from the Commissioner's perspective.

60. Although the pleadings have not closed and the matter is at a preliminary stage, based upon the allegations made in the Commissioner's Application, some examples of where the perspective of National and the Commissioner appear to be different include 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 Reliance. In addition to the anti-competitive conduct alleged in the Commissioner's Application, I note the following: (i) Reliance 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; and (ii) Reliance has refused to permit National to act as an agent for customers with respect to the process for obtaining the RRN required by Reliance for the return of a tank.
- (b) **Relief Sought:** I also do not believe that the relief sought by the Commissioner is sufficient to address the anti-competitive conduct of Reliance. For example, with respect to the tank return process, the relief sought should include (at least) the following elements: (i) Reliance 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 Reliance; (ii) Reliance should be prohibited from preventing a customer of Reliance from electing to have a tank disconnected and removed by any licenced service provider (including National) or to remove their own tank; (iii) Reliance 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)

Reliance should be required to identify a sufficient number of Return Locations to adequately serve customers throughout their respective service areas; (v) Reliance 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) Reliance should be prohibited from continuing to bill customers following the point of time at which Reliance is advised that the customer has switched to an alternate supplier.

61. As recognition of National's role in the Relevant Market, National is the subject of a number of specific allegations in the Response of Reliance filed on August 12, 2013, including paragraphs 14, 48, 55 and 73 of Reliance's Response.

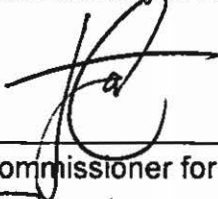
62. National's unique position as a firm attempting to expand in the Relevant Market and to enter into certain local regions within the Relevant Market, as a target of Reliance's anti-competitive conduct, and as the most significant competitor to Reliance for the supply of water heater rental services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

63. 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**

64. 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 20th day of August, 2013



Commissioner for taking Affidavits, etc.

Jana Loganathan  
LSUC# 583480

  
GORD POTTER

**THE COMPETITION TRIBUNAL**

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**AFFIDAVIT OF GORD POTTER**  
**(Sworn August 20, 2013)**

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