CT-2012-002

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:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

RELIANCE COMFORT LIMITED PARTNERSHIP

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, Reliance Comfort Limited Partnership ("Reliance"), respectively, on September 4, 2013 (together, the "Responses").

2. Reliance consents to leave to intervene being granted to National and the Commissioner does not oppose the granting of leave to intervene to National. The sole remaining issue between the parties is the terms upon which National should be granted leave to intervene.

3. As is evident from the Responses, the parties recognize that National meets the test for leave to intervene and in particular, that National is directly affected by this proceeding and brings a unique and distinct perspective that will assist the Tribunal in determining the issues raised by the Commissioner's Application.

4. However, while Reliance accepts that National should be granted leave to intervene, Reliance seeks through its Response to impose significant and unwarranted 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.

B. Scope of Intervention

5. National seeks leave to intervene with respect to nine topics that are directly relevant to the issues raised by the Commissioner's Application (the "Proposed Topics"). The Proposed Topics are listed in subparagraphs 27(a) to (j) of National's Request for Leave to Intervene.

6. The Affidavit of Gord Potter and National's Request for Leave to Intervene set out in detail how National will provide a unique and distinct perspective from that of the parties on each of these topics that will assist the Tribunal in determining the matters at issue in this proceeding.

7. As set out more fully below, the Commissioner has no objection to four of the nine Proposed Topics. The Commissioner has suggested modifications to the other five Proposed Topics. Reliance objects to two of the Proposed Topics, suggests modifications to six of the Proposed Topics and has no objection to one

of the Proposed Topics. The position of the parties with respect to each of the Proposed Topics and National's response are set out below.

(a) the development of the Ontario rental water heater industry as it relates to National;

8. The Commissioner does not oppose this Proposed Topic in any way.

9. Reliance opposes National's request for leave to intervene on this Proposed Topic on the basis that National cannot offer a unique perspective as "the Commissioner was already active in the Ontario rental water heater industry when National began operations in 2008".

10. While it is unclear what Reliance means when it states that "the Commissioner was already active" in the industry, the Commissioner – unlike National – is clearly not, and never has been, a participant in the industry. There can be no serious debate that the Commissioner does not have National's first-hand, direct knowledge of how the industry developed or of how those developments impacted on National.

11. The Tribunal has frequently recognized that unlike participants in a given industry, the Commissioner obtains information about the market second-hand from third parties and, as such, does not have direct knowledge of the industry. McKeown J. emphasized this very point in *Canada (Competition Act, Director of Investigation and Research) v Washington*, stating as follows:

> "Unlike the Director, who generally starts from the position of knowing nothing about the industry and must obtain all her information from third parties, the respondents are participants in this industry themselves. They already have considerable knowledge about its operations and the players and potential players".
>
> *Canada (Competition Act, Director of Investigation and Research) v Washington*, [1996] CCTD No 24 at para 9; National's Brief of Authorities ("National's Authorities"), Tab 7

12. As a participant in the Ontario rental water heater industry since 2008, National has considerable knowledge about the industry's operations and the players in the industry. Neither the Commissioner, nor Reliance suggest otherwise in their Responses.

13. Further, because this Proposed Topic is limited to the issue of the development of the Ontario rental water heater industry *as it relates to National*, National is uniquely positioned to provide the Tribunal with a distinct perspective on this Proposed Topic.

14. By opposing National's request to intervene on this Proposed Topic, Reliance seeks to substantially impair National's ability to meaningfully address the other Proposed Topics. The other Proposed Topics concern current issues in the Ontario rental water heater industry. National cannot meaningfully address the current issues in the industry without first explaining its perspective on the background and history of the industry, including the events leading up to National's entry in 2008 and the conditions of competition that existed at that time.

15. For these reasons, National submits that the development of the Ontario rental water heater industry as it relates to National should remain within the scope of National's intervention.

(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;

16. The Commissioner does not oppose this Proposed Topic in any way.

17. Reliance also does not oppose this Proposed Topic. However, Reliance submits that the reference in this Proposed Topic to its other anti-competitive acts "lacks

specificity". On this alleged basis, Reliance seeks to limit this Proposed Topic to "Reliance's water heater return policies and procedures".

18. Contrary to Reliance's assertions, this Proposed Topic does not require further specificity and should not be restricted or narrowed as proposed by Reliance. National should be permitted to address the full range of Reliance's anti-competitive conduct as it impacts upon National.

19. Alternatively, to the extent that the Tribunal determines that this Proposed Topic requires further specificity (which National denies), the scope of the anti-competitive conduct that National may address should at a minimum include all of the anti-competitive acts specifically alleged in the Commissioner's Application. This includes, in addition to Reliance's exclusionary water heater return policies and procedures, Reliance's conduct in imposing exclusionary exit fees and charges on former customers, such as damage fees, account closure fees and double-billing of such customers.

Commissioner's Notice of Application at paras 15 and 22-27

20. Rather than attempting to list each of the anti-competitive acts of Reliance, to the extent any modification to this Proposed Topic is required, the appropriate modification would simply be to substitute the phrase "other anti-competitive conduct as alleged in the Commissioner's Application" for the words "other anti-competitive conduct".

(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;

21. The Commissioner does not oppose this Proposed Topic in any way.

22. Reliance opposes this Proposed Topic on the basis that: (i) the impact of Reliance's anti-competitive conduct on the ability of National to induce customers to switch suppliers is subsumed within the broader Proposed Topic described in

subparagraph (b) above; and (ii) with respect to the impact of Reliance's anti-competitive acts on customers or potential customers, Reliance argues that National is "not a proper spokesperson for consumers".

23. With respect to the first objection, to the extent that the Tribunal agrees with Reliance, National will consent to a modification of this Proposed Topic by removing the reference to Reliance's anti-competitive conduct on the ability of National to effectively induce customers to switch suppliers on the basis that National can address this conduct under the Proposed Topic listed in subparagraph (b) above.

24. With respect to the impact of Reliance's conduct on customers or potential customers, contrary to Reliance's assertion, National does not intend to speak for or on behalf of consumers. Rather, National has first-hand and direct knowledge of how Reliance's anti-competitive conduct impacts customers or potential customers of National, including how the conduct increases the costs to such customers of switching to National.

25. The authorities are clear that where helpful to the Tribunal, an intervenor should be permitted to provide its knowledge with respect to effects of anti-competitive conduct on customers. For example, in *Canada (Commissioner of Competition) v Air Canada (2011)*, WestJet was recently granted leave to intervene in respect of the following topic:

> "The significant adverse effects <u>on Canadian consumers</u> if WestJet is unable to provide effective, viable air passenger services in competition with Air Canada, United and Continental" [emphasis added]
>
> *Canada (Commissioner of Competition) v Air Canada*, [2011] CCTD No 21 at para 5(h) [*Air Canada (2011)*]; National's Authorities, Tab 6

26. Consistent with the intervention in *Air Canada*, *supra*, the Tribunal will benefit from National's perspective and direct knowledge regarding the impact of Reliance's anti-competitive conduct on customers or potential customers.

27. For these reasons, National's submits that the impact of Reliance's anti-competitive acts on customers or potential customers of National should remain within the scope of National's intervention.

(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;

28. Neither the Commissioner, nor Reliance oppose this Proposed Topic in any way.

(e) National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets;

29. Reliance objects to this Proposed Topic on the basis that National has not stated a different position from that of the Commissioner regarding the appropriate definition of the relevant market. Reliance argues in paragraph 42 of its Response that "having regard to the additional delay and costs to the proceeding caused by the proposed intervenor, leave to intervene should be refused where the proposed intervenor's position would be repetitive, or does not differ from that of the Commissioner".

30. Reliance's objection is without merit and is based on a test for the appropriate scope of interventions before the Tribunal that is overly restrictive and unsupported by the relevant authorities. Specifically, Reliance confuses a unique and distinct perspective (which is a requirement for an intervention) with the adoption of a different legal position (which is <u>not</u> a requirement for an intervention).

31. 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 p. 57 [*D & B Companies*]; National's Authorities, Tab 8

32. None of the cases cited by Reliance in its Response support the proposition put forward by Reliance that intervenors must have a different legal position from the parties. For example, in *Commissioner of Competition v Visa Canada Corp.*, the Tribunal determined that as an issuer of credit cards, TD Bank had a different perspective than the credit card networks. There was no suggestion that TD Bank's legal position was different from that of either Visa or MasterCard.

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

33. Similarly, in *Air Canada*, *supra*, the Tribunal granted leave to intervene to WestJet in its capacity as a competitor or potential competitor of Air Canada on a number of the routes that were the subject of the arrangement at issue in that case. There was no suggestion that WestJet would adopt a different legal position from the Commissioner, but only that as a participant in the industry and as a competitor to Air Canada, WestJet had a unique perspective on the matters at issue in that proceeding.

> *Air Canada (2011)*, *supra*; National's Authorities, Tab 6

34. Indeed, limiting the scope of interventions to only those issues where the legal position of the intervenors is different 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.

35. As the cases referenced above make clear, although National is not required to present a different legal position from the parties to this proceeding, it is worth noting that National has, in fact, identified several topics on which the position of the Commissioner and National appears to differ at this early stage of the proceeding. As outlined in paragraph 31 of National's Request for Leave to Intervene and paragraph 60 of the Affidavit of Gord Potter, these topics include the adequacy of the remedies sought by the Commissioner and the scope of the anti-competitive conduct of Reliance.

36. The relevant issue is whether National's perspective as a participant in the industry regarding the appropriate definition of the relevant market is distinct from that of the Commissioner and useful to the Tribunal.

37. In this regard, it is evident that as a participant in the industry, National has knowledge that is directly relevant to the topic of the appropriate definition of the relevant product and geographic markets, including: whether from National's perspective, purchasing a water heater is a sufficiently close substitute to constrain the price for water heater rental services; the range of products and suppliers that National considers when determining prices for water heater rental services; and, the geographic regions that can be competitively served by a water heater rental service provider.

38. Contrary to the allegations in paragraphs 43 and 44 of Reliance's Response, the Tribunal's decision in *Washington v Canada (Competition Act, Director of Investigation and Research)* is of no assistance to Reliance. The intervenor in that case proposed to undertake an investigation into the effect on competition of a new entrant entering into the market and to submit such evidence before the Tribunal. The Tribunal declined to grant leave on the basis that the intervenor did not have knowledge of the matter at issue.

> *Washington v Canada (Competition Act, Director of Investigation and Research)*, [1998] CCTD No 4 at paras 18-19 [*Washington (1998)*]; National's Authorities, Tab 11

39. The facts of *Washington* bear no resemblance to the facts of this case. Unlike the proposed intervenor in that case, National is not seeking to conduct any investigation into the issue of the relevant market. Rather, National intends to provide a unique and useful perspective on this issue based on its first-hand knowledge as an industry participant.

40. Reliance also omits a critically important part of the quote from the *Washington* case that appears at paragraph 43 of its Response. The omitted portion of the quote clearly makes the distinction between an intervenor that is seeking leave to adduce evidence gathered through an investigation (which is not permissible) and evidence that an intervenor can supply based on its own knowledge of the matters at issue (which is permissible). The omitted portion of the relevant quote is underlined below:

> "The difficulty with Smit's position is that it is essentially asking the Tribunal for leave to replicate the investigation into this matter which has already been undertaken by the Director. The mere fact of the Director's consent to a proposed variation does not in itself create an evidentiary void which must be filled by an intervenor. It is the Director's responsibility as a representative of the public interest to investigate the proposed variation and to determine whether or not it should be opposed. The Director has used the authority given to him under the Act to investigate the impact of Tiger Tugz's entry and he has concluded that the variation will not compromise the level of competition in the relevant market. <u>This should not be taken as an indication that the Tribunal will accept without question the Director's conclusions. That is far from the case. If a potential intervenor were to come forward and satisfy the Tribunal that it had some unique knowledge of the matters at issue which would provide the Tribunal with a perspective different than the Director's, the Tribunal would be most interested. However, in this case Smit has not satisfied the Tribunal that it has any unique perspective nor any facts of assistance on the question of the impact of Tiger Tugz's entry in Burrard Inlet. There is no basis to allow the intervention on this point".</u> [emphasis added]
>
> *Washington (1998)*, *supra*, at para 19; National's Authorities, Tab 11

41. The Tribunal further held:

> … However, it is not sufficient for an applicant for leave to intervene to merely come before the Tribunal indicating that it believes that there are certain areas in relation to which it expects to be able to make representations and that it expects that through an investigation it will uncover the facts which will support those representations. At the very least a proposed intervenor has to satisfy the Tribunal that it is in a unique position to make those representations and that it has some facts to present without conducting a fishing expedition. Smit has not done so.
>
> *Washington (1998)*, *supra*, at para 20; National's Authorities, Tab 11

42. Reliance also objects to this Proposed Topic on the ground that permitting National to intervene with respect to the appropriate definition of the relevant market will result in "delay and costs", presumably from the repetition of evidence on this topic in the proceeding.

43. This additional ground for objecting is also without merit. 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 on 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.

44. Further, even if allowing an intervention on the topic of the relevant market may add some time or complexity to the proceeding (which it will not in this case), this is not a legitimate or recognized basis for denying an intervenor the right to effectively participate in respect of issues where it can provide a unique perspective that will be useful to the Tribunal.

45. 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)". [emphasis added, italics in original]
>
> *American Airlines, Inc. v Canada (Competition Tribunal)* (1989) 54 DLR (4th) 741 at 749; National's Authorities, Tab 1

46. Reliance's submission regarding any potential delay is particularly inapposite given that Reliance has already delayed this proceeding by over six months through a series of meritless appeals and stay applications arising from an unsuccessful pleadings motion.

47. The Commissioner does not oppose National's intervention on this Proposed Topic but submits that it should be redrafted as "National's perspective as a participant in the industry on the product and geographic markets".

48. National submits that to the extent that this modification is intended to prevent National from addressing the appropriate definition of the relevant market, it should be rejected as overly restrictive. As outlined above, the Tribunal will be required to determine the appropriate relevant market to be applied in considering Reliance's anti-competitive conduct. As a participant in the industry and as a party that is directly affected by this proceeding, National has a useful and distinct perspective to offer on this issue.

49. For these reasons, National submits that the topic of the appropriate definition of the relevant market should remain within the scope of National's intervention.

(f) the issue of Reliance's dominant position as it affects National and competition in the Relevant Market generally;

50. Reliance submits that this Proposed Topic should be revised and limited to the following: "The issue of whether Reliance has a dominant position in the Relevant Market". According to paragraphs 45 and 46 of Reliance's Response, the reason for this proposed revision is that the issue of "whether or how Reliance's position affects National" is subsumed within the Proposed Topic listed in subparagraph (b) above. In the event that the Tribunal agrees that the impact of Reliance's dominant position on National is subsumed within the Proposed Topic listed in subparagraph (b) above, National will consent to a modification of this portion of the Proposed Topic.

51. In addition, both Reliance and the Commissioner submit that this Proposed Topic should be modified by removing the reference to how Reliance's dominant position affects competition in the relevant market generally. There is no basis for this modification.

52. As a participant in the industry, a target of Reliance's anti-competitive conduct and as a firm attempting to expand in the relevant market, National has a unique perspective with respect to how Reliance's conduct affects the Relevant Market generally.

53. The Tribunal has recognized in prior cases that an intervenor should be permitted to address the impact of the conduct at issue, not just in respect of the intervenor, but in respect of the industry as a whole. For example, in the recent *Visa* case, Simpson J. permitted TD Bank to address the impact of the proposed remedy on the payments system generally, and did not limit TD Bank to addressing the impact on the bank alone:

> "The impact of the Proposed Order on the payments system is relevant. The Association has not listed this as a topic and it appears that Visa and MasterCard will focus on the impact of the order on their credit card networks. Accordingly, an intervention on this topic [by TD Bank] will assist the Tribunal". [emphasis added]
>
> *Visa*, *supra*, at p. 11; National's Authorities, Tab 10

54. Similarly, in *Air Canada, supra*, Simpson J. permitted WestJet to intervene not only in respect of how the anti-competitive conduct at issue impacted on WestJet, but also on the question of how the conduct at issue impacted on the airline industry generally. WestJet was granted leave to intervene on the following topic:

> "The relationship between the Structural Barriers and the Contractual Barriers and how these impact competition in the airline industry generally and WestJet in particular" [emphasis added]
>
> *Air Canada (2011)*, *supra*, at para 5(c); National's Authorities, Tab 6

55. In light of these cases, and given that National has a unique and useful perspective on the issue of Reliance's dominant position as it affects competition in the Relevant Market generally, National respectfully requests that the Tribunal reject the modifications proposed by the parties to this Proposed Topic.

(g) the issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally;

56. Both Reliance and the Commissioner seek a modification to this Proposed Topic restricting National to addressing only the substantial lessening or prevention of competition as it relates to National, and not "competition in the Relevant Market generally". For the reasons set out in paragraphs 51 to 55, above, National disagrees with this proposed modification and respectfully requests that the Tribunal reject the modification proposed by the parties.

(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;

57. The Commissioner does not oppose this Proposed Topic in any way.

58. Reliance also does not oppose National's intervention in respect of this Proposed Topic, provided that "it relates only to National's own direct experience" and "is phrased in neutral language". Reliance proposes to restate the Proposed Topic as follows: "barriers to entry and ease of entry into the Relevant market, based on National's experience in entering and expanding in the Relevant Market".

59. National submits that Reliance's proposed modification should not be accepted on the basis that it omits any reference to the impact of Reliance's conduct in creating or enhancing barriers to entry and raising National's cost, issues that are directly relevant in this proceeding and in respect of which National can provide a useful perspective.

60. To the extent that the Proposed Topic is required to be stated in "neutral" language, National proposes the following revised wording: "Barriers to entry and ease of entry into the Relevant Market, based on National's experience, including whether Reliance's conduct creates artificial barriers to entry and expansion for National or raises National's costs".

(i) the statements made and conclusions drawn by Reliance concerning National in the Response of Reliance filed in this proceeding; and

61. Reliance does not object to this Proposed Topic in any way.

62. The Commissioner seeks a modification to this Proposed Topic to limit it to the "statements made and conclusions drawn by Reliance concerning the conduct of National in the Response of Reliance filed in this proceeding". [emphasis added]

63. National submits that the Commissioner's proposed modification is unnecessarily restrictive. The references to National in the Reliance Response are not limited to the "conduct" of National. For example, the Reliance Response discusses National's relationship to Just Energy (para. 14), National as one of several options for homeowners (para. 15) and National's ability to grow through securitization (para. 37(c)).

64. National respectfully requests that the Tribunal decline to make the Commissioner's proposed modification to this Proposed Topic.

(j) the impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.

65. Both Reliance and the Commissioner seek a modification to this Proposed Topic to limit National to addressing only the impact of the Commissioner's proposed remedies on National, but not on "competition in the Relevant Market". For the reasons discussed in paragraphs 51 to 55, above, National disagrees with this proposed modification and respectfully requests that the Tribunal decline to make such modification.

C. Scope of Participation

66. The Commissioner requests modifications to two of National's proposed terms of participation. Reliance requests modifications to three of National's proposed terms of participation. Each of these requests is discussed below.

(b) To produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene.

67. Reliance proposes a modification to this term of participation to require National to produce "all correspondence between National and the Commissioner". There is no merit to this request for several reasons, including that:

(i) the proposed modification is inconsistent with the established terms of participation in prior proceedings;

(ii) the modification requested by Reliance would impose on National an unprecedented obligation to produce documents that goes well beyond the obligation to produce documents imposed on the parties themselves, including an obligation to produce documents regardless of their relevance and regardless of whether they are subject to valid claims of privilege; and

(iii) the request to impose an obligation to produce specific categories of documents is, at best, premature.

68. In recent interventions, the Tribunal has required that intervenors provide an affidavit of documents listing documents that are relevant to the topics for which leave to intervene has been granted. For example:

> "To prepare an affidavit of documents dealing with the WestJet Topics (the "WestJet Documents"). The WestJet Documents are to be produced to the parties".
>
> *Air Canada (2011)*, *supra*, at para 6; National's Authorities, Tab 6

> "The intervenors are to produce documents relevant to the topics of their respective interventions and deliver affidavits of documents on or before August 15, 2011".
>
> *Visa*, *supra*, at para 53; National's Authorities, Tab 10

> "In its role as intervenor, CREA is to: Prepare an affidavit of documents listing documents relevant to its Topics" and, "Produce those documents to the extent that they are not privileged".
>
> *The Commissioner of Competition v Toronto Real Estate Board*, [2011] CCTD No 22 at para 41 [*TREB*]; National's Authorities, Tab 5

69. Beyond the general requirement that an intervenor produce documents relevant to the scope of its intervention, in no instance has the Tribunal attempted to predetermine the types of documents that an intervenor is obligated to produce as a condition of participation in the proceeding.

70. Acceding to Reliance's requests would obligate National to produce any correspondence with the Commissioner, even where such correspondence is not relevant to the topics on which National has been granted leave to intervene or where such correspondence is subject to a valid claim of privilege.

71. In this regard, it is notable that the Tribunal has repeatedly and consistently recognized a public interest privilege in respect of communications between the Commissioner and parties that have supplied information to the Commissioner, including maintaining confidentiality over communications between the Commissioner and such parties.

> *Canada (Director of Investigation and Research, Competition Act) v Southam Inc.*, [1991] CCTD No 16 at p. 19; National's Authorities, Tab 12
>
> *Canada (Director of Investigation and Research, Competition Act) v NutraSweet Co.*, [1989] CCTD No 54 at paras 13-16; National's Authorities, Tab 13
>
> *Canada (Commissioner of Competition) v United Grain Growers Ltd.*, [2002] CCTD No 31 at paras 29-34 [*UGG*]; National's Authorities, Tab 14

72. The Tribunal has also held that the public interest privilege attaching to communications with the Commissioner is a "recognized class privilege" that

does not require a case-by-case justification. As Lemieux J. held in *Canada (Commissioner of Competition) v United Grain Growers Ltd*.:

> "In my view, counsel for the Commissioner expresses the correct view on the issue – the existence of a recognized class privilege generally attaching to the Bureau's investigation conducted under the Act for the purpose of enforcing that statute obviates the necessity of establishing at the discovery stage in each proceeding before the Tribunal on a case-by-case basis the existence of this privilege".
>
> *UGG*, *supra*, at paras 38-39; National's Authorities, Tab 14
>
> *Canada (Director of Investigation and Research, Competition Act) v D & B Companies of Canada Ltd.*, [1994] FCJ No 1643 at paras 3-5 (FCA); National's Authorities, Tab 15

73. Requiring National to produce documents, even if irrelevant and privileged, goes well beyond even the parties' own obligations with respect to the production of documents. It is perplexing, to say the least, how Reliance can seek to hold an intervenor to a higher standard than either the Respondent or the Commissioner with respect to documentary discovery.

74. In any event, the issue of whether any correspondence between National and the Commissioner is relevant or subject to a valid claim of privilege is not an issue that is appropriately determined in the context of a request for leave to intervene.

75. In the event that National is granted leave to intervene, it has agreed to produce an affidavit of documents listing those documents that are relevant to the topics for which National has been granted leave to intervene. Any issues with respect to the sufficiency of National's affidavit of documents are appropriately addressed by the Tribunal in the context of a motion arising from the documentary productions.

(e) To file expert evidence within the scope of its intervention in accordance with the procedure set out in the Competition Tribunal Rules;

76. The Commissioner proposes to modify the language of this right of participation as follows: “to file expert evidence relating to the topics for which National has been granted leave to intervene within the procedures set out in the *Competition Tribunal Rules*”. National does not oppose this modification.

(f) To attend and make representations at any pre-hearing motions, case conferences or scheduling conferences

77. Reliance proposes a modification to confine National’s right of attendance to only those pre-hearing conferences “where National’s interests are in issue”.

78. The proposed modification is completely unworkable and seeks to prevent National from meaningfully participating as an intervenor in the proceeding. Neither National, nor any of the parties is prescient. None of them is capable of predicting with complete accuracy what issues may arise at a given pre-hearing conference or on a given motion. National must be permitted to attend pre-hearing conferences and motions to determine whether its interests are in issue. If National's interests are in issue, it should be given a fair opportunity to make appropriate representations to the Tribunal.

79. Further, National’s participation in any pre-hearing conference or motion will remain subject to the Tribunal’s general oversight and supervision of its own process.

(g) To make written and oral argument, including submissions on any proposed remedy.

80. Both the Commissioner and Reliance have requested modifications to this proposed right of participation. The Commissioner proposes the following modification: “to make <u>non-repetitive</u> written and oral argument <u>relating to the</u>

topics for which National has been granted leave to intervene, including submissions on the proposed remedy". [emphasis added]

81. Reliance proposes the following modification: "To make written and oral argument, on topics for which National is granted leave to intervene, including submissions on any proposed remedy".

82. National will consent to a modification to limit the scope of written and oral argument to the "topics for which National has been granted leave to intervene".

83. The Commissioner's proposed modification to limit National to only "non-repetitive" written and oral arguments, raises certain practical issues. To avoid duplication, National must be given a sufficient opportunity to review any written arguments of the parties prior to serving its own written arguments. For example, to avoid duplication, National should be permitted to serve its Closing Argument only after the parties have served their Closing Arguments. Assuming that this procedure is acceptable, National will consent to the modification requested by the Commissioner.

D. Previous Litigation Between National and Reliance

84. A significant portion of Reliance's 205 page Response is dedicated to tracing the history of prior and ongoing litigation between Reliance and National.

85. Contrary to the unfounded assertions of Reliance, there is no basis whatsoever for accusing National of being a vexatious litigant. Indeed, even the carefully chosen excerpts relied upon by Reliance demonstrate that a number of the supposedly "ill-fated" or "meritless" proceedings referenced in the Reliance Response resulted in relief being granted for National (either through contested proceedings or on consent) or that these proceedings were actually commenced by Reliance, and not National.

86. For example, in *MacGregor v Reliance Comfort Limited Partnership*, National was successful in obtaining a judgment that permitted former customers of

Reliance to appoint National as an agent in dealing with the tank return process. As Echlin J. stated:

> ”Having determined that these provisions are valid, I turn next to whether MacGregor is at liberty to appoint an agent to fulfil his contractual obligations. I find that he is. While Reliance may not be desirous of dealing with National as agent, I can find no reason at law why it should be entitled to require its customers to seek approval of the appointment of an agent, in the absence of a specific contractual provision to that effect. It was open to Reliance to provide for this in its contract. It did not do so. My understanding of basic agency law (vis Boustead & Reynolds On Agency (2006), London, Sweet v. Maxwell at Article 6 pp. 44ff and Halisbury On Agency, Vol. 1(2) at pp. 6-10) is that a person may act by way of agency in nearly every instance except when prohibited by statute or where a personal services contract is involved. Mr. Bresner was unable to point me to any authority to the contrary”. [emphasis added]
>
> *MacGregor v Reliance Comfort Limited Partnership*, 2010 ONSC 6925 at para 10; National’s Authorities, Tab 16

87. In any event, the prior litigation between National and Reliance is not relevant to this Motion for Leave to Intervene. In this regard, Reliance's attempt to rely on the decisions of the Tribunal in *TREB*, *supra* and *Canada (Commissioner of Competition v The Canadian Real Estate Association* is wholly misplaced. In both of these cases, the previous litigation history was considered only in respect of the narrow issue of whether individuals that were parties to that litigation should be called to testify as a witness in the proceeding:

> “There is a further caveat. Because of the lengthy litigation history and the current lawsuits between RS's senior executives and TREB in which damages totalling more than half a billion dollars are claimed, counsel for RS undertook not to call Lawrence Dale as a witness on the RS Topics. In my view, testimony from Fraser Beach should also be excluded and I have decided that he is also prohibited from testifying on the RS Topics”.
>
> *TREB*, *supra*, at para 53; National’s Authorities, Tab 5

88. The same issue does not arise in the present case as there is no individual from National that is a party to any ongoing litigation between the parties and no suggestion that anyone from National would be an inappropriate witness in this proceeding. The litigation history recounted by Reliance is simply not relevant to the issues to be determined by the Tribunal on this motion.

E. Summary regarding the Scope of National's Intervention and Participation

89. In summary, National is agreeable to modify Proposed Topics (b), (c), (f) and (h) as follows:

(b) To the extent that the Tribunal determines that Proposed Topic (b) requires further specificity, National submits that it should be modified to read: "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 as alleged in the Commissioner's Application, on the ability of National to effectively compete and expand in the Relevant Market".

(c) To the extent that the Tribunal determines that "the impact of Reliance's anti-competitive conduct on the ability of National to induce customers to switch suppliers" is subsumed within Proposed Topic (b), National agrees to modify this Proposed Topic to read: "the impact of Reliance's anti-competitive acts on customers or proposed customers of National".

(f) To the extent that the Tribunal determines that "the impact of Reliance's dominant position on National" is subsumed within Proposed Topic (b), National agrees to the modification of this Proposed Topic to read: "the issue of Reliance's dominant position as it affects competition in the Relevant Market generally".

(h) To the extent that the Tribunal concludes that Proposed Topic (h) must be restated in neutral language, National agrees to the modification of this Proposed Topic to read: "barriers to entry and ease of entry into the

Relevant Market, based on National's experience, including whether Reliance's conduct creates artificial barriers to entry and expansion for National or raises National's costs".

90. National is also agreeable to the modification of terms (e) and (g) of its participation in this proceeding as follows:

(e) As requested by the Commissioner, National consents to the modification of this term of participation to read: "to file expert evidence relating to the topics for which National has been granted leave to intervene within the procedures set out in the *Competition Tribunal Rules*".

(g) To the extent that the Tribunal permits National to review any written arguments of the parties prior to serving its own written arguments, National consents to the modification of this term of participation to read: "to make non-repetitive written and oral argument relating to the topics for which National has been granted leave to intervene, including submissions on any proposed remedy".

F. Hearing Request

91. As Reliance and the Commissioner have objected to certain terms of National's proposed intervention, National respectfully requests an oral hearing.

DATED at Toronto, Ontario, this 11th day of September, 2013.

Adam Fanaki

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CT-2012-002

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 Reliance Comfort Limited Partnership.

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BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and –

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

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

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