

AUSTRALIAN COMPETITION TRIBUNAL

Application by Multinet Gas (DB No 1) Pty Ltd (No 2) [2013] ACompT 6

Citation: Application by Multinet Gas (DB No.1) Pty Ltd (No 2)
[2013] ACompT 6

Review from: Australian Energy Regulator

Parties: **MULTINET GAS (DB NO.1) PTY LTD AND
MULTINET GAS (DB NO.2) PTY LTD, TRADING AS
MULTINET GAS DISTRIBUTION PARTNERSHIP**

File number: ACT 3 of 2013

Tribunal: **MANSFIELD J, PRESIDENT
PROFESSOR DK ROUND, MEMBER
MR GF LATTA, MEMBER**

Date of decision: 31 July 2013

Date of hearing: Heard on the papers

Date of last submissions: 29 July 2013

Place: Adelaide

Category: No catchwords

Number of paragraphs: 10

Solicitor for the Applicant: Johnson Winter Slattery

Solicitor for the Respondent: Australian Government Solicitor

IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 3 of 2013

RE: APPLICATION UNDER SECTION 245 OF THE NATIONAL GAS LAW FOR REVIEW OF AN ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO MULTINET LTD PURSUANT TO RULE 64 OF PART 8 OF THE NATIONAL GAS RULES

**BY: MULTINET GAS (DB NO.1) PTY LTD AND MULTINET GAS (DB NO.2) PTY LTD, TRADING AS MULTINET GAS DISTRIBUTION PARTNERSHIP
Applicant**

**TRIBUNAL: MANSFIELD J, PRESIDENT
PROFESSOR DK ROUND, MEMBER
MR GF LATTA, MEMBER**

DATE OF ORDER: 31 JULY 2013

WHERE MADE: ADELAIDE

THE TRIBUNAL DETERMINES AND ORDERS THAT:

1. The matter be remitted to the Australian Energy Regulator to re-make the decision under Rule 64(4) of the *National Gas Rules* giving effect to its proposed revisions to the access arrangement of the Applicant (Multinet) for the 2013-2017 period by the Access Arrangement Decision Multinet Gas (DB No.1) Pty Ltd and Multinet Gas (DB No.2) Pty Ltd 2013-2017 dated April 2013 and published on 29 April 2013 in accordance with the following directions:
 - (a) the opening capital base for the 2013-2017 access arrangement period be determined by reference to conforming capital expenditure made by Multinet in 2012 and not by reference to the forecast of 2012 capital expenditure made by the Essential Services Commission of Victoria in relation to the preceding access arrangement period;
 - (b) in assessing the conforming capital expenditure made by Multinet in 2012, the AER shall have regard to the most accurate information available regarding Multinet's actual capital expenditure including Multinet's audited statutory and regulatory accounts submitted to the AER;

- (c) despite Rule 64(3) of the *National Gas Rules*, the AER shall consult Multinet and take into account any written submissions made by Multinet.

IN THE AUSTRALIAN COMPETITION TRIBUNAL

ACT 3 of 2013

RE: APPLICATION UNDER SECTION 245 OF THE NATIONAL GAS LAW FOR REVIEW OF AN ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO MULTINET LTD PURSUANT TO RULE 64 OF PART 8 OF THE NATIONAL GAS RULES

**BY: MULTINET GAS (DB NO.1) PTY LTD AND MULTINET GAS (DB NO.2) PTY LTD, TRADING AS MULTINET GAS DISTRIBUTION PARTNERSHIP
Respondent**

**TRIBUNAL: MANSFIELD J, PRESIDENT
PROFESSOR DK ROUND, MEMBER
MR GF LATTA, MEMBER**

DATE: 31 JULY 2013

PLACE: ADELAIDE

REASONS FOR DECISION

1 On 5 July 2013, the Tribunal granted leave to the Applicant (Multinet) to apply for review of a decision of the Australian Energy Regulator (AER) published on 29 April 2013 giving effect to its proposed revisions to the access arrangement for Multinet's Victorian gas distribution network) for the period from 1 January 2013 to 31 December 2013 (the Access Arrangement Decision): *Application by Multinet Gas (DB No 1) Pty Ltd* [2013] ACompT 5 (the Leave Decision).

2 Directions were duly given for the hearing, and the application listed for hearing commencing on 27 August 2013.

3 Multinet and the AER have informed the Tribunal that they consent to the making of a determination pursuant to s 259(2)(b) of the *National Gas (Victoria) Law* (NGL) in this proceeding which will deal with the application. They have provided a memorandum in support of the consent determination sought.

4 As the Tribunal is obliged by s 259(1) of the NGL to make a determination in respect of the application, having granted leave in accordance with s 245, it is appropriate for such a joint submission, so that the Tribunal may properly fulfil its statutory function. In that regard there is some, but not complete, correspondence with the Federal Court dealing by consent with an application by way of appeal from a decision of the Administrative Appeals Tribunal under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth): see eg *Irwin v Military Rehabilitation & Compensation Commission* (2009) 107 ALD 253; [2009] FCAFC 33. The correspondence is not complete, because the legislative provisions are not identical, and because the Tribunal, unlike the Court, is not exercising the judicial power of the Commonwealth.

5 Nevertheless, the Tribunal is being asked to make a determination under s 259(2)(a) and (b) which will have the effect of submitting the matter to the AER for a limited purpose with directions from the Tribunal as to how the AER should determine the opening capital base of Multinet, and it may make such a determination only if it is satisfied that a ground of review under s 246 exists. Moreover, the Tribunal in making a determination must bear in mind the national gas objective and the revenue and pricing principles in ss 23 and 24 of the NGL. As is clear, the role of the AER and on review of the Tribunal is to give effect to that objective and those principles as their respective decisions concern the long term interests of consumers of natural gas.

6 Where the Tribunal is asked to make a determination by consent, including the consent of the AER, it will not generally require a full hearing. The AER will have had the benefit of considering the application and the material the applicant relies upon. It has regard to the same concern for the relevant public – the long term interests of consumers of natural gas – as the Tribunal. It will have accepted that the ground or grounds of review may have merit. In review of its decisions, it commonly presents to the Tribunal material and submissions in support of the decision which is under review: see eg *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 at [36]-[37]. In circumstances such as the present, therefore, the Tribunal may be satisfied that it should make the proposed determination where the AER itself supports it. The Tribunal has nevertheless considered the application itself, the grounds of review as expressed on the application, including to the extent necessary the material they refer to, and the joint submission.

7

The grounds of review contained in Multinet's application relate to the AER's determination of the opening capital base for the 2013-17 access arrangement period. Multinet's revised access arrangement proposal calculated the opening capital base in accordance with rule 77(2) of the *National Gas Rules* (NGR) and, for such purposes, estimated its conforming capex in 2012 as \$76.3 million (2012 dollars). In its Final Decision of March 2013 under Rule 62 of the NGR, the AER did not accept Multinet's estimate of 2012 capex. Instead, the AER applied an efficiency incentive and carry over mechanism contained in clause 6.4(b)(2) of Multinet's 2008-12 access arrangement so as to include in the opening capital base the benchmark 2012 capex forecast by the Essential Services Commission (ESC) adjusted for actual growth (an amount of \$47.6 million). Following the publication of the Final Decision, Multinet wrote to the AER providing information from its audited statutory and regulatory accounts showing its actual capital expenditure in 2012 was \$78.1 million. See generally the Leave Decision at [27]-[28] and the grounds of review also summarised there at [30]-[33].

8

The AER has reconsidered its decision to apply clause 6.4(b)(2) of Multinet's 2008-12 access arrangement so as to include the ESC forecast 2012 capex in the opening capital base. For the following reasons, the AER has reached the view that it made an error of fact in its finding on Multinet's 2012 capex that was material to the making of the Access Arrangement Decision within the meaning of s 246(1)(a) and (b) of the NGL.

- (1) The determination of the opening capital base is governed by rule 77(2) of the NGR, subject to any applicable transitional provisions in Schedule 1 of the NGR.
- (2) The transitional provision in clause 5(1) of Schedule 1 of the NGR provides that the AER must take into account the operation of an incentive mechanism in a transitional access arrangement and ensure that revenue calculations made for the next access arrangement period properly reflect increments or decrements resulting from the operation of the incentive mechanism.
- (3) Multinet's 2008-12 access arrangement is a transitional access arrangement for the purposes of the NGR. Clause 6.4(b)(2) of Multinet's 2008-12 access arrangement specified a mechanism by which Multinet would be able to retain, into the next regulatory period, an efficiency reward based upon underspending capex in 2012 in comparison to a stipulated forecast of the Essential Services Commission (ESC). The mechanism required the AER to assume that the capex of Multinet in 2012 was equal

to the ESC forecast. If Multinet's actual capex in 2012 was a lower figure, the mechanism would result in Multinet receiving a return (the efficiency reward) on the difference between the forecast and actual capex in 2012. The AER accepts that clause 6.4(b)(2) does not permit a negative carry-over of a decrement or financial penalty.

- (4) If Multinet's conforming capex in 2012 was higher than the ESC forecast, the inclusion of the ESC forecast in the opening capital base at the commencement of the 2013-17 access arrangement period would result in a decrement or financial penalty to Multinet and clause 6.4(b) would be inapplicable.
- (5) There was evidence before the AER that Multinet's conforming capex in 2012 would be higher than the ESC forecast.
- (6) There was no evidence before the AER that Multinet's conforming capex in 2012 would be lower than the ESC forecast.
- (7) In such circumstances, clause 6.4(b) of Multinet's 2008-12 access arrangement was not applicable, and the AER was required to determine the opening capital base in accordance with rule 77(2)(b) by ascertaining the conforming capital expenditure made, or to be made, by Multinet during the 2008-12 access arrangement period.

9 The Tribunal is satisfied, on the basis of that material, that the grounds of review in respect of which leave to apply for review was given and on which it is accepted that they are made out, provide a proper basis for the proposed determination. It commends the AER for the acknowledgment of the matters referred to above, which obviate the need for a further hearing of the application. It would be repetitious and prolix to do other than to refer to the material in the preceding paragraph to support its determination.

10 For the reasons given, pursuant to s 259(2)(b) of the NGA, the Tribunal orders that:

1. The matter be remitted to the AER to re-make the decision under Rule 64(4) of the NGR giving effect to its proposed revisions to Multinet's access arrangement for the 2013-2017 period in accordance with the following directions:
 - (a) the opening capital base for the 2013-2017 access arrangement period be determined by reference to conforming capital expenditure made by Multinet in 2012 and not by reference to the forecast of 2012 capital expenditure made by

the Essential Services Commission of Victoria in relation to the preceding access arrangement period;

- (b) in assessing the conforming capital expenditure made by Multinet in 2012, the AER shall have regard to the most accurate information available regarding Multinet's actual capital expenditure including Multinet's audited statutory and regulatory accounts submitted to the AER;
- (c) despite Rule 64(3) of the *National Gas Rules*, the AER shall consult Multinet and take into account any written submissions made by Multinet.

I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield, Professor DK Round and Mr GF Latta.

Associate:



Dated: 31 July 2013