AUSTRALIAN COMPETITION TRIBUNAL

Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6) [2010] ACompT 14

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| Review from: | | Australian Energy Regulator |
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| Parties: | | **ERGON ENERGY CORPORATION LIMITED**  **(ACN 087 646 062)** |
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| Members: | | **(DEPUTY PRESIDENT),**  **MR R DAVEY AND MR R SHOGREN** |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | FILE NO |

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| RE: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF A DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ERGON ENERGY CORPORATION LIMITED PURSUANT TO RULE 6.11.1 OF THE NATIONAL ELECTRICITY RULES |
| BY: | ERGON ENERGY CORPORATION LIMITED  (ACN 087 646 062) |

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| MEMBERS: | MIDDLETON J (DEPUTY PRESIDENT),  MR R DAVEY AND MR R SHOGREN |
| DATE: | 24 DECEMBER 2010 |
| PLACE: |  |

**REASONS FOR DECISION: STREET LIGHTING SERVICES**

1. These reasons deal with street lighting services. The expressions employed in these reasons are the same employed in earlier decisions the subject of the current review.
2. On 22 November 2010, the Tribunal decided that due to the operation of s 71O(2) of the NEL Ergon Energy was precluded from raising a challenge to the AER’s decision to classify street lighting services as alternative control services (‘ACS’). Ergon Energy was, therefore, precluded from raising the claim set out in paragraph 13 of its Application for Review. The Tribunal now provides reasons for this decision.
3. By paragraph 13 of its Application, Ergon Energy claimed that the decision of AER “… to classify street lighting as an alternative control service…” gives rise to grounds of review on each of the bases set out in s 71C(1)(a) – (d) of the NEL.
4. One of the constituent decisions the AER had to make as part of its distribution determination was a decision on the classification of services to be provided by Ergon Energy during the regulatory control period as standard control services (‘SCS’) or ACS – see cl 6.12.1(1) of the Rules.
5. Among the services Ergon Energy provides are services in relation to street lighting, ie, the illumination of public roads and carriageways by electrically powered light fittings.
6. In the final determination made by the AER in May 2010, the AER decided to classify street lighting services provided by Ergon Energy as ACS.
7. Ergon Energy argues that the AER’s finding that it could subject street lighting services to its economic regulation under the Rules was in error because street lighting is not a distribution service.
8. The principal question which would have fallen for determination was whether the relevant street lighting services provided by Ergon Energy are provided “by means of, or in connection with a distribution system”, on the proper construction of that expression as used in the NEL and the Rules.
9. However, the AER raised two preliminary issues. First, whether s 71O(2) of the NEL precludes Ergon Energy from raising the claim made in paragraph 13 of its Application; and secondly, if s 71O(2) of the NEL does not have that effect, whether s 71P(3) of the NEL, read with clause 6.12.3(b) of the Rules, means that the Tribunal has no power to depart from the classification of Ergon Energy’s street lighting services proposed in the AER’s *Final framework and approach paper: Classification of services and control mechanism*, August 2008 (‘Final FAP’).
10. The Tribunal does not propose to deal with the second point raised by the AER, having wholly accepted the AER’s preliminary argument that s 71O(2) of the NEL precludes Ergon Energy from raising the claim made in paragraph 13 of its Application.
11. It is necessary to set out the chronology of events leading up to the constituent classification decision. In March 2008, Ergon Energy submitted a classification of services and control mechanisms proposal to the AER (‘Ergon Energy Classification Proposal’). In the Ergon Energy Classification Proposal, Ergon Energy contended that street lighting services relating to construction and maintenance of street lighting assets fell outside the definition of distribution services in Chapter 10 of the Rules, and should not be classified as such by the AER. Ergon Energy proposed that street lighting services should not be classified by the AER as a distribution service regulated under a revenue cap and instead should be treated as unregulated activities. Ergon Energy briefly summarised its submission as follows:

*…DNSPs* [distribution network service providers] *are not obliged to provide street lighting – instead, it is an obligation on the party responsible for the carriageway (usually Local Authorities or Queensland Department of Main Roads). There is already a market operating for the provision, operation and maintenance of street lighting by parties other than the DNSPs. Furthermore, Local Authorities and Queensland Department of Main Roads have for many years had the capability to choose alternative providers for street lighting.*

1. In the Ergon Energy Classification Proposal, Ergon Energy stated that it could undertake the provision of street lighting services on request and on a competitive basis; and that it would enter into arrangements with other providers under a co-ordination agreement to perform street lighting activities (including construction, maintenance and lamp changes) if other providers needed to work on Ergon Energy’s assets or within the safety approach zones.
2. In July 2008, the AER published a draft framework and approach paper (‘Draft FAP’), setting out its proposed position relating to the classification of distribution services and the form of control to apply to distribution services that was to apply to Ergon Energy for the 2010-15 regulatory period. In the Draft FAP, the AER characterised the present issue as whether the provision, construction and maintenance of street lighting “clearly falls outside the definition of a distribution service”. The AER acknowledged that, from a technical perspective, street lighting services relating to the provision, construction and maintenance of street lighting could be considered closer to the definition of a customer rather than a distribution service.
3. In the Draft FAP, the AER referred to the transitional provisions for NSW/ACT distribution businesses contained in the Rules, Ch 11, and observed that those provisions prescribed street lighting services as a direct control service, and further classified them as ACS. The AER also noted that:

*… the transitional provisions do not make a separation of street lighting services into the carriage of electricity or services relating to provision, construction and maintenance of street lighting.*

1. The AER concluded that, given the policy intent demonstrated in the NSW/ACT transitional rules, the provision of street lighting was intended to be a distribution service. The AER stated that the Rules’ presumption of consistency with current classification requires the AER to continue with the same regulatory approach unless otherwise clearly more appropriate.
2. In the Draft FAP, the AER's proposed position with respect to the classification of street lighting was to classify street lighting services relating to the provision, construction and maintenance of street lighting assets as ACS.
3. In July 2008 Ergon Energy submitted a response to the Draft FAP (Ergon Energy FAP Response). In the Ergon Energy FAP Response, Ergon Energy stated that it did not agree with the AER's proposal to classify the provision, operation and maintenance of street lighting as ACS and maintained its position that street lighting services should be classified as unregulated services. Ergon Energy submitted that street lighting services fell outside the definition of distribution services in Ch 10 of the Rules.
4. In the Final FAP, the AER affirmed its proposed position that the provision, construction and maintenance of street lighting assets is a distribution service and that an ‘ACS’ classification would be applied. The AER considered it was reasonable to take the NSW/ACT transitional rules as a demonstration of policy intent, because most of the consequential changes resulting from classifying street lighting as a non-distribution service would require a policy response from the relevant authorities and a transitional plan to be developed.
5. On 6 May 2010, the AER issued its Determination which applied the following classification of services to Ergon Energy’s street lighting services:

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| AER Service Group | AER Classification | Activities included in service group | Ergon Energy Service |
| Street lighting services | Alternative control services | Provision, construction and maintenance of street lighting | Street lighting – Provision and Operating and Maintenance |

1. Ergon Energy contends that the error of fact in deciding to classify street lighting services as ACS was material to the making of the Final Determination, that the error involved an incorrect exercise of AER’s discretion and that the decision was unreasonable.
2. From the time that the AER published the Final FAP, Ergon Energy did not contest the classification of street lighting services proposed in the Final FAP. It did not suggest any change to the classification of street lighting in its Regulatory Proposal or its Revised Regulatory Proposal, and no submission to the AER suggested such a change.
3. As foreshadowed above in par [4], when the AER came to make the distribution determination on 6 May 2010, one of the constituent decisions that the AER was required to make was a decision on the classification of the services to be provided by Ergon Energy during the regulatory control period.
4. Pursuant to cl 6.12.3(b) of the Rules, the AER was obliged to make that constituent decision in conformity with the Final FAP unless the AER considered that, in the light of Ergon Energy’s Regulatory Proposal and the submissions received, there were good reasons for departing from the classification proposed in the Final FAP.
5. Because Ergon Energy did not dispute the classification in its Regulatory Proposal or its Revised Regulatory Proposal and no submissions were made disputing the classification, the AER now submits that it was required to adopt the classification proposed in the Final FAP when it made the relevant constituent decision on classification.
6. Not only did Ergon Energy not dispute the classification in its Regulatory Proposal or Revised Regulatory Proposal, the classification was positively accepted by Ergon Energy. Ergon Energy’s Regulatory Proposal included the following statement:

*Ergon Energy accepts the AER’s likely classification of Ergon Energy’s services for the next regulatory control period as outlined in the AER’s FAP released 27 August 2008.*

1. The AER observed Ergon Energy’s acceptance of the ACS classification for its street lighting services in the Draft Determination. The Draft Determination stated:

*Ergon Energy submitted that it accepted the AER’s FAP classification of services.*

1. Ergon Energy’s Revised Regulatory Proposal, a document submitted in response to the Draft Determination, further accepted the AER’s classification. In that document Ergon Energy stated:

*In response to the AER’s Draft Determination Ergon Energy… accepts the AER’s classification of services…*

1. As a result of all this, the Final Determination classified street lighting services as ACS, and noted that:

*No submissions were received on this issue.*

1. Ergon Energy now seeks to review this classification.
2. Given the above sequence of events, which were not disputed by Ergon Energy, in response the AER relies on s 71O(2) of the NEL, which states:

*(2) A party (other than the AER) to a review under this Subdivision may not raise any matter that was not raised in submissions to the AER before the reviewable regulatory decision was made.*

1. It is only on the operation of this one provision and the meaning of the word “submissions” in s 71O(2) of the NEL that the parties are in dispute. Ergon Energy have accepted the factual chronology set out above. Whilst there is no doubt that the issue of classification was raised during the process of developing the Final FAP, the issue was dropped by Ergon Energy, and has not been aired in any way until its Application was filed with this Tribunal. Had Ergon Energy’s Regulatory Proposal not accepted the AER’s classification of services, interested parties may well have made submissions to the AER on the issue. Also, had Ergon Energy been successful in persuading the AER to decide that street lighting is not a distribution service, those interested parties who made such a submission could challenge the decision before the Tribunal. If, however, the issue were to be allowed to be pursued in the manner now proposed by Ergon Energy, those interested parties would be denied an opportunity to be heard unless the Tribunal put a procedure in place to allow such interested parties to come before it. This would involve delay and expense.
2. The AER contends that the reference in s 71O(2) of the NEL to “submissions to the AER before the reviewable regulatory decision was made” should be read, not as a mere chronological reference, but as a reference to submissions made in the course of the iterative process that leads to the reviewable regulatory decision: the regulatory proposal, the draft distribution determination, the making of submissions and the revised regulatory proposal.
3. Whilst there is no authority directly on point, the AER sought to rely on *Application by EnergyAustralia and Others* [2009] ACompT 8 at [316(f)], where the Tribunal said:

*Looking at the purpose and scope of s 71O(2) and s 71R(1) and (6) of the NEL, the matters to which the Tribunal can have recourse include the subject matters raised, the issues raised and the materials relied upon in support of the position or proposal put forward by the Applicants’ to the AER prior to the final determinations, as being relevant to those determinations. It is only if a matter, whether by way of argument or evidentiary material, cannot be identified as broadly arising out of a matter fairly raised before the determinations under review were made, that it will not be permitted to be raised in the review ...*

1. One of the decisions referred to by the Tribunal in that case was *Re Epic Energy South Australia Pty Ltd* [2002] ACompT 2 (Epic), at [24]. *Epic* was governed by s 39 of the *Gas Pipelines Access (South Australia) Law* (the GPAL) which was reproduced in the decision at [9].
2. Section 39(2)(b) of the GPAL expressly precluded the raising, in an application for review of a decision of the relevant Regulator under s 39(1) of the GPAL, of:

*… any matter that was not raised in submissions to the relevant Regulator before the decision was made.*

1. Section 39(5) of the GPAL precluded the relevant appeals body from considering any matter other than:

*(a) the application under subsection (1) and submissions in support of it (other than any matter not raised in submissions before the decision was made) and any written submissions made to the relevant Regulator before the decision was made ...*

1. The Tribunal in *Epic* considered the meaning to be accorded to “submissions” as that expression appeared in s 39(2)(b) and s 39(5)(a) of the GPAL in a passage at [2002] ACompT 2 [21]-[26]. *Epic* did not involve agitation of an issue that had at one stage been the subject of submissions but had ceased to be so at the time of the relevant decision, rather, it involved an attempt to adduce material on an issue that had never been raised at any time before the decision was made. Nevertheless, it was contended by the AER that the following passage, at [24]-[25], provided support for reading such provisions as requiring a connection with submissions that were agitated with reference to the decision under review:

*The meaning of “submissions” in s 39(2)(b) and s 39(5)(a) takes its colour from the prohibition on recourse to “any matter” that was not raised in the submissions to the relevant Regulator before the decision was made. Section 39(2)(b) limits the matters to which recourse may be had to those that may be identified in the submissions which, in fact, were made prior to decision. The matters include the subject matters raised, the issues raised and the materials relied upon in support of the position or proposal put forward in the submission as being relevant to the decision to be made. Thus, if any matter, whether by way of argument or evidentiary material, cannot be identified as broadly arising out of a matter fairly raised in the submissions to the relevant Regulator before the decision under review was made, it will not be permitted to be raised in the review. This is not to say that a reformulation of an argument or contention previously put to the relevant Regulator on material which was before it before the decision was made would be excluded.*

*The use of the term “submissions” in s 39(5) including s 39(5)(a) has the same meaning. The word “submissions” does not include or permit recourse to matters, including evidentiary material, which were neither before the relevant Regulator nor relied upon by the applicant for review in support of any contention advanced by it to the relevant Regulator as relevant to the decision to be made. In any event, the submissions of the applicant for review in support of an application under s 39(1) are to demonstrate a ground for review in terms of s 39(2)(a). That ground is to be demonstrated by reference to matters raised in submissions to the relevant Regulator and consideration of the limited category of matters specified in s 39(5). The subject matter of the submissions in support of the application for review, are the matters which were in existence at the time the decision under review was made.*

1. Further, the AER argued that its interpretation of s 71O(2) of the NEL accorded with a purposive construction of the section which encouraged efficient outcomes of the kind referred to in s 7 of the NEL by creating an incentive for service providers to place their “cards on the table” during the iterative process leading to the making of the relevant reviewable regulatory decision.
2. It was the AER’s contention that the development of the Final FAP (in consultation with the DNSPs and other stakeholders) precedes the iterative process leading to the making of the Final Determination. The AER contended that it was clear from cl 6.8.1(h) and cl 6.12.3(b) of the Rules that if a DNSP wishes to contest the classification proposed in the Final FAP, the DNSP must raise that contest in its Regulatory Proposal (including the Revised Regulatory Proposal) or in submissions made in the course of the process that follows publication of the Final FAP and culminates in the reviewable regulatory decision.
3. In response to the AER’s contentions, Ergon Energy argued that the use of the word “submissions” in s 71O(2) of the NEL referred to any submissions made chronologically prior to the reviewable regulatory decision. This could include submissions made in relation to issues raised during the FAP process.
4. The Tribunal accepts the arguments of the AER referred to in pars [32] to [38] and the first sentence of par [39] and rejects the contention of Ergon Energy.
5. One should not just focus on the term “submissions” in isolation from the general prohibition dealing with raising any matter before the Tribunal not raised in submissions before the AER. This is a similar restriction to that placed on the Tribunal under s 71R of the NEL in confining review related matter. The object of both s 71O(2) and s 71R is to limit the extent of merits review under Pt 6, Div 3A of the NEL. The reference to “submissions” in s 71R(6)(d) should be interpreted as being confined to the submissions made leading up to and relevant to the reviewable regulatory decision itself, so as to fulfil the purpose of limited merits review. Section 71O(2) of the NEL should similarly be interpreted, it being in substantially similar terms in making reference to “submissions to the AER before the reviewable regulatory decision”.
6. Section 71O(2) does not contemplate a matter being permitted to be raised where such matter was raised in a different context (in the course of the development of the Final FAP) years before and then, once the Final FAP is published, not raised in any submissions with the AER whilst the AER undertakes the process of making the reviewable regulatory decision. If one focuses on the prohibition of raising a new matter before the Tribunal not raised before the AER in considering its decision under review, then the reference to “submissions” will readily be seen as “submissions” made during the process leading to that decision. The purposive approach to interpretation leads to the conclusion that the reference to “submissions” is to submissions made only in the course of the iterative process leading to and relevant to the making of the reviewable regulatory decision. The reasoning referred to in *Epic* provides support for this approach in the context of the NEL.
7. In the course of submissions, both parties relied upon the Rules and references in the Rules to the expression “submissions” and to the sequence of events contemplated by the Rules. Delegated legislation made under an Act of Parliament should generally not be taken into account for the purposes of interpreting that Act. There are exceptions to this general rule where, for instance, there are regulations which, together with the principal legislation, form part of a legislative scheme. However, in *Brayson Motors* *Pty Ltd (in liq) v FCT* (1985) 156 CLR 651, Mason J observed *arguendo* at p 652:

*one looks at regulations, not to construe an overall scheme or to throw light on ambiguity in a statutory provision, but to ascertain what the scheme is.*

1. Undoubtedly, the NEL and the Rules, which are given the force of law under s 9 of the NEL, establish and regulate the national electricity market including the national electricity system. The NEL and the Rules do, together, constitute a legislative scheme as contemplated by the reference of Mason J in the *Brayson Motors* case. This does not mean, however, that the Rules can be used in order to determine the intention of Parliament when considering the operation of s 71O(2).
2. However, the Tribunal makes this observation. To give s 71O(2) the operation advanced by Ergon Energy would be quite contrary to the purpose of the legislative scheme in devising the sequence of draft framework and approach paper, submissions from DNSPs and interested parties, final framework and approach paper, regulatory proposal, submissions from interested parties, draft determination, revised regulatory proposal/submissions from interested parties, and final determination leading to the limited merits review allowed by Pt 6, Div 3A of the NEL.
3. The Tribunal directs that the parties confer and provide minutes of the appropriate determination to be made in light of the above reasons no later than 4:00pm on Monday 31 January 2011.

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| I certify that the preceding forty-seven (47) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Middleton (Deputy President), RC Davey and RF Shogren. |

Associate:

Dated: 23 December 2010