AUSTRALIAN COMPETITION TRIBUNAL

Application by APT Allgas Energy Pty Ltd [2011] ACompT 11

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| Citation: | | Application by APT Allgas Energy Pty Ltd [2011] ACompT 11 |
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| Review from: | | Australian Energy Regulator |
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| Parties: | | **APT ALLGAS ENERGY PTY LTD (ABN 52 009 656 446)** |
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| File number: | |  |
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| Tribunal: | | **MANSFIELD J (PRESIDENT)**  **PROFESSOR D ROUND**  **MR R DAVEY** |
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| Date of decision: | | 12 October 2011 |
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| Date of hearing: | Heard on the papers | |
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| Place: |  | |
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| Solicitor for APT Allgas Energy Pty Ltd: | Gilbert + Tobin | |
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| Solicitor for Australian Energy Regulator: | Corrs Chambers Wesgarth | |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 5 of 2011 |

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| RE: | APPLICATION UNDER S 245 OF THE NATIONAL GAS LAW FOR A REVIEW OF An ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO APT ALLGAS ENERGY PTY LIMITED PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
| BY: | APT ALLGAS ENERGY PTY LTD  (ABN 52 009 656 446)  Applicant |

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| TRIBUNAL: | MANSFIELD J (PRESIDENT)  PROFESSOR D ROUND  MR R DAVEY |
| DATE OF order: | 12 OCTOBER 2011 |
| WHERE MADE: | ADELAIDE |

THE TRIBUNAL ORDERS THAT:

1. Leave be granted to APT Allgas Energy Pty Limited (the Applicant) pursuant to s 245(1) of the National Gas Law as set out in the Schedule to the *National Gas (South Australia) Act 2008* (SA) and as applied as a law of Queensland pursuant to s 7 of the *National Gas (Queensland) Act 2008* (Qld) to apply to the Australian Competition Tribunal for review of the applicable access arrangement decision of the Australian Energy Regulator (AER) entitled *Decision: Access Arrangement APT Allgas Queensland Gas Distribution Network 1 July 2011 – 30 June 2016* published on 30 June 2011 (read together with the reasons for that applicable access arrangement decision, contained in *Final Decision:* *APT Allgas Access Arrangement proposal for the Qld Gas Network 1 July 2011 – 30 June 2016* published on June 2011).

THE TRIBUNAL DIRECTS THAT:

1. The AER file and serve on the Applicant a draft index of all review related matter (Draft Review Related Matter Index) as defined under s 261 of the National Gas Law identifying any matter subject to a claim or claims of confidentiality and the identity of the claimant(s) by 4:00 pm on 13 October 2011.
2. The Applicant request copies from the AER of any documents from the Draft Review Related Matter Index by 4:00 pm on 17 October 2011.
3. The AER provide to the Applicant an electronic copy of any document from the Draft Review Related Matter Index requested pursuant to Order by 4:00 pm on 18 October 2011.
4. The Applicant identify any document it considers should be added to or removed from the Draft Review Related Matter Index and provide the AER with a revised consolidated Draft Review Related Matter Index by 4:00 pm on 20 October 2011.
5. The AER file and serve on the Applicant a revised Review Related Matter Index (Final Review Related Matter Index) identifying any matter subject to a claim or claims of confidentiality and the identity of the claimant(s) by 4:00 pm on 25 October 2011.
6. The Applicant file and serve on the AER a written outline of submissions in relation to the grounds for review specified in the Applicant’s applications by 4:00 pm on 26 October 2011.
7. The Applicant provide to the AER a draft index of the documents the Applicant proposes to include in the review book for each ground for review by 4:00 pm on 2 November 2011.
8. The AER file and serve on the Applicant a written outline of submissions in reply to the Applicant’s written outline of submissions filed pursuant to Order by 4:00 pm on 11 November 2011.
9. By 4:00 pm on 11 November 2011, the AER:
   * 1. provide to the Applicant a list of documents to be included in the review book for each ground for review;
     2. provide to the Applicant an electronic copy of the documents requested for inclusion in review books pursuant to Order 10(a); and
     3. request any copies of review books.
10. The Applicant file and (subject to payment of reasonable printing, copying and collating costs) serve on the AER review books requested pursuant to Order 10(c) in hard copy by 4:00 pm on 16 November 2011.
11. The proceedings be listed for hearing at 10:15 am commencing on 21 November 2011.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 5 of 2011 |

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| RE: | APPLICATION UNDER SECTION 245 OF THE NATIONAL GAS LAW FOR A REVIEW OF An ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO APT ALLGAS ENERGY PTY LIMITED PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
| BY: | APT ALLGAS ENERGY PTY LTD  (ABN 52 009 656 446)  Applicant |

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| TRIBUNAL: | MANSFIELD J (PRESIDENT)  PROFESSOR D ROUND  MR R DAVEY |
| DATE: |  |
| PLACE: |  |

**REASONS FOR DECISION**

# Applicant for leave to review

1. By application dated 8 July 2011, APT Allgas Energy Pty Limited (the Applicant) seeks leave to apply under s 245 of the National Gas Law (NGL) for a review by the Tribunal of an access arrangement decision made by the Australian Energy Regulator (AER) in respect of the Applicant’s gas distribution network in Queensland. The NGL is set out in the Schedule to the *National Gas (South Australia) Act 2008* (SA) and by s 7 of the *National Gas (Queensland) Act 2008* (Qld) the NGL applies in Queensland as the relevant law. Section 26 of the NGL gives the National Gas Rules (NGR) the force of law in Queensland.
2. The Applicant is wholly owned by APT Pipelines Limited, part of the publicly listed APA Group. The APA Group owns and operates a number of gas transmission pipelines and gas distribution networks in Australia and in particular to this application in Queensland.
3. The Applicant is a “service provider” within the meaning of s 8 of the NGL as it owns, controls or operates a scheme pipeline. The NGL defines a “scheme pipeline” to include a “covered pipeline”. The Applicants’ gas distribution network is a “covered pipeline” within the meaning of the NGL, pursuant to Item 7 of Schedule 3 of the NGL.
4. The AER is responsible for the economic regulation of pipeline services provided by service providers by means of or in connection with a scheme pipeline. In particular, under Part 9 of the NGR, the AER is responsible for determining the total revenue for service providers for each regulatory year of an access arrangement period.
5. Section 132 of the NGL provides that a covered pipeline service provider must submit to the AER for its approval under the NGR a full access arrangement or revisions to an applicable access arrangement that is a full access arrangement, in respect of the pipeline services that the service provider provides or intends to provide.
6. Under Rule 52 of the NGR, the Applicant was required to submit, and did submit, access arrangement revision proposals for the relevant access arrangement period to the AER for consideration. The Applicant’s proposal was submitted on 30 September 2010 for the period 1 July 2011 to 30 June 2016 (the Applicant’s Access Arrangement Proposal).
7. Under Rule 59 of the NGR, the AER was required to make, and did make, an access arrangement draft decision with respect to the Applicant’s Access Arrangement Proposal published on 17 February 2011 (Draft Decision).Rule 60 of the NGR entitled the Applicant to submit additions or other amendments to the Applicant’s Access Arrangement Proposal to address the matters raised in the Draft Decision. The amendments which the Applicant was permitted to make were limited to those amendments necessary to address matters raised by the AER in the Draft Decision, unless the AER approved further amendments.
8. On 23 March 2011, the Applicant submitted revised access arrangement proposals to the AER (the Applicant’s Revised Access Arrangement Proposal).
9. Pursuant to Rule 62 of the NGR, the AER was required to make an access arrangement final decision in relation to the Applicant’s Revised Access Arrangement Proposal. Rule 62 of the NGR provides that an access arrangement final decision is a decision to approve, or refuse to approve an access arrangement proposal. Pursuant to Rule 64(1) of the NGR, if in an access arrangement final decision the AER refuses to approve an access arrangement proposal, the AER must itself propose revisions to the access arrangement for the relevant pipeline.
10. On 17 June 2011, the AER published a final decision with respect to the Applicant’s Revised Access Arrangement Proposal, entitled *Final Decision: APT Allgas Access Arrangement proposal for the Qld Gas Network 1 July 2011 – 30 June 2016* (Final Decision).
11. Pursuant to Rule 64(4) the AER on 30 June 2011 published its decision with respect to the Applicant giving effect to its own proposed revisions with respect to the access arrangements, entitled *Decision: Access Arrangement APT Allgas Queensland Gas Distribution Network 1 July 2011 – 30 June 2016* (the Access Arrangement Decision).
12. The applicants seek review of the Access Arrangement Decision (Reviewable Decision) as read together with the reasons for the Final Decision.
13. The proposed application for review relates to that part of the Reviewable Decision as concerns the rate of return in which the AER, in calculating the debt risk premium (DRP), relied upon a 50:50 weighting of the Bloomberg BBB fair value curve and the Australian Pipeline Trust (APT) bond. There are four grounds for review specified in the application.
14. The AER has indicated that it does not oppose the granting of leave to apply for review in relation to the grounds advanced by the Applicant.
15. Section 245 (1) of the NGL provides:

An affected or interested person or body, with the leave of the Tribunal, may apply to the Tribunal for a review of a reviewable regulatory decision.

1. The Applicant is clearly a service provider and is therefore an “affected or interested person or body” within the meaning of s 245.
2. The NGL provides that a “reviewable regulatory decision” includes an “applicable access arrangement decision (other than a full access arrangement decision that does not approve a full access arrangement): s 244 of the NGL. A “full access arrangement” means an access arrangement that provides for price or revenue regulation as required by the NGR and deals with all other matters for which the NGR require provision to be made for in an access arrangement: s 2 of the NGL. The Reviewable Decision has that character.
3. That is because an “applicable access arrangement decision” is defined in s 2 of the NGL to include a decision of the AER under the NGR that “makes a full access arrangement…in place of a full access arrangement [proposed by the Applicant] the AER does not approve in that decision” or “makes revisions to an access arrangement in place of revisions submitted to the AER under s 132 that the AER does not approve in that decision.”
4. Consequently, the Reviewable Decision is a “reviewable regulatory decision”. It was a decision to “make a full access arrangement” in place of a full access arrangement the AER did not approve. Further, the Reviewable Decision as formulated with regard to the AER’s reasons contained in the Final Decision resulted in “revisions to an access arrangement…in place of revisions submitted to the AER…that the AER does not approve”.
5. Section 246 of the NGL specifies the grounds upon which a decision of the AER may be reviewed. In brief, the grounds are that the AER has made a material error of fact, incorrectly exercised its discretion and/or that its decision was unreasonable.
6. There are two relevant limitations on the Tribunal’s discretion to grant leave to appeal from a decision of the AER.
7. *First,* s 248 of the NGL specifies that the Tribunal must not grant leave to review the AER’s decision “unless there is a serious issue to be heard and determined as to whether a ground for review set out in s 246(1) exists”.
8. In its written submission, the Applicant made reference to the Tribunal’s reasoning in *Application by ElectraNet Pty Ltd* [2008] ACompT 1(*ElectraNet*) when considering the equivalent provision in the National Electricity Law. In that case, the Tribunal held at [39] that the question of whether “there is a serious issue to be heard and determined” should be resolved by reference to the principles applicable to the grant of interlocutory injunctions.
9. In *ElectraNet,* the Tribunal referred to the High Court decision in *Australian Broadcasting Corporation v O’Neill* (2006) 227 CLR 57 (O’Neill), in which Gummow and Hayne JJ held that a relevant consideration in relation to the grant of interlocutory injunctions is (at 82):

whether the plaintiff has made a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action, the plaintiff will be held entitled to relief.

1. Gummow and Hayne JJ stated that the reference to a “prima facie case” requires the plaintiff to show a sufficient likelihood of success to justify in the circumstances the grant of an interlocutory injunction to preserve the status quo pending a hearing. It does not require the plaintiff to show that it is more probable than not that at trial the plaintiff would succeed. The likelihood of ultimate success which is required depends on the nature of the rights which the plaintiff asserts and the practical consequences which are likely to flow from the interlocutory order sought by the plaintiff.
2. The Applicant submitted that the Tribunal should not follow *ElectraNet,* but rather that it should adopt an ordinary and grammatical meaning of “serious issue to be heard and determined” in the context of the NGL. It contended that that expression in the NGL is materially different from a requirement of a prima facie case referred to in *O’Neill*. It said that the merits review regime of the Tribunal is intended to provide the opportunity for an applicant to put a case to the Tribunal, and so to provide further confidence in the outcomes produced by the regulatory regime, which outcomes can have significant consequences for the parties affected. In light of those considerations, the applicant submitted that the onus of satisfying the threshold of a “serious issue to be heard and determined” is not high. The AER contended that the exposition of the Tribunal in *ElectraNet* is correct, and that it does no violence to the ordinary meaning of the words in s 248.
3. The Tribunal does not consider it necessary in the circumstances to address whether it should depart from the principles enunciated *ElectraNet*, or indeed whether the principles enunciated in *ElectraNet* impose a burden different from the ordinary meaning of the words in s 248. That is because, however the test is applied, it is satisfied in this matter. Where the correctness of the approach of the Tribunal as expressed in a previous decision is raised, it would be wise to adhere to the approach previously adopted at least until the matter had been fully argued. It may, however, be fairly said that where there is a statutory formulation of a threshold test such as that in s 248, there is often little benefit in any paraphrase of the wording of the actual expression used. The Tribunal does not, in any event, read the Tribunal’s observations in *ElectraNet* as requiring that an applicant for leave to review a decision show that there is a sufficient likelihood of success to justify, in the circumstances, the Applicant being given the opportunity to present its case to the Tribunal in relation to the issues raised in the application for leave and the proposed application for review.
4. *Second,* s 249 applies (as here) if the leave that is sought under s 245 is about an error in a full access arrangement decision and the ground for review relates to the amount of revenue that may be earned by the service provider. In that event the Tribunal cannot grant leave to review the AER’s decision even if there is a serious issue to be determined unless “the amount that is specified in or derived from the decision exceeds the lesser of $5 million or 2% of the average annual regulated revenue of the … service provider”.
5. Whether the financial threshold in s 249 is satisfied with respect to an application is determined by reference to the cumulative effect of all the errors alleged with respect to that application: *Application by Energex Limited (No 4)* [2011] ACompT4 (*Energex*)at [52]. The reasoning in *Energex* was adopted in *Jemena Gas Networks (NSW) Ltd (No 2)* [2011] ACompT 5, where the Tribunal found that the aggregate value of Jemena Gas Networks’ grounds of review that met the serious issue threshold exceeded the financial threshold test.
6. In the view of the Tribunal, the Applicant’s application concerning the issue of the DRP raises only grounds encompassed within s 246(1) of the NGL. It has been made within the time permitted by s 247(1), namely within 15 business days of the publication of the Reviewable Decision. The submission of the AER accepts that the “serious issue” threshold has been satisfied. That appears to be an appropriate acknowledgment. The Applicant had submitted to the AER that the Bloomberg BBB fair value curve was appropriate to measure the corporate bond rate for the purposes of calculating the DRP, but adapted to extend from 7 years to 10 years. The Bloomberg BBB fair value curve has been used for that purpose in the past, either in conjunction with the fair value curve provided by CBA Spectrum (*Application by ActewAGL Distribution* [2010] ACompT 4 at [78] and [80]) or alone (*Application by Jemena Gas Networks (NSW) Ltd (No 5)* [2011] ACompT 10 at [86]). The Applicant’s case was that the appropriate DRP was therefore 4.37%. The AER decision allowed the DRP at 3.64%, by averaging that derived from the Bloomberg BBB fair value curve and that derived from the APT bond yield. In doing so, it appears to have regarded the Applicant’s approach as producing an excessive outcome in the prevailing market conditions, and to have regarded the APT bond rate as relevant or significant due to its close matching to the corporate bond rate adopted by the AER in other matters. There is sufficient foundation in the detailed submissions of the Applicant, in particular at [7.5] to [7.13] to be satisfied that there is a serious issue to be heard and determined as to whether the grounds of review as specified, falling within s 246(1), exist.
7. The AER also accepts that, on the calculations by the Applicant in [8.1] of its submissions, the financial threshold specified by s 249 is met. The Tribunal has considered those submissions. There is little point in repeating them. In its view, that financial threshold is satisfied.
8. There is no suggestion that the matters referred to in ss 250 and 251 should lead to the application for leave to review the Reviewable Decision should be refused.
9. Accordingly, the Tribunal grants leave to the Applicant pursuant to s 245(1) of the NGL to apply to the Tribunal to review the Reviewable Decision.
10. The parties have formulated appropriate orders for the future progress of the applications and the Tribunal adopts those orders.

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| I certify that the preceding thirty-four (34) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield (President), Professor D Round and Mr R Davey. |

Associate:

Dated: 12 October 2011