AUSTRALIAN COMPETITION TRIBUNAL

Application by ATCO Gas Australia Pty Ltd [2015] ACompT 7

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| Citation: | Application by ATCO Gas Australia Pty Ltd [2015] ACompT 7 |
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| Review from: | Economic Regulation Authority |
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| Parties: | **ATCO GAS AUSTRALIA PTY LTD**  **(ABN 90 089 531 975)** |
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| File number: | ACT 10 of 2015 |
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| Tribunal: | **MIDDLETON J (DEPUTY PRESIDENT)**  **MR R STEINWALL (MEMBER)**  **PROFESSOR KT DAVIS (MEMBER)** |
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| Date of direction: | 1 December 2015 |
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| Catchwords: | **CONSUMER LAW** – application for leave to review decision of Economic Regulation Authority – consideration of criteria for leave in s 248 of the *National Gas Law* – consideration of whether serious issue to be heard and determined – consideration of whether asserted grounds of review, if made out, would, or would be likely to, result in a materially preferable NGO (National Gas Objective) decision |
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| Legislation: | *National Gas Access (WA) Act 2009* (WA)  *National Gas Access (Western Australia) Law*  *National Gas (South Australia) Act 2008* (SA)  *National Gas Rules* |
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| Cases cited: | *Application by ActewAGL Distribution* [2015] ACompT 3  *Re Application by ElectraNet Pty Ltd* [2008] ACompT 1  *Application by Energex Ltd (No 4)* [2011] ACompT 4  *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2 |
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| Date of hearing: | Heard on the papers |
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| Place: | Melbourne |
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| Category: | Catchwords |
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| Number of paragraphs: | 32 |
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| Solicitor for ATCO Gas Australia Pty Ltd: | Johnson Winter & Slattery |
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| Solicitor for the Economic Regulation Authority: | Holman Fenwick Willan |

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| AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 10 of 2015 |

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| RE: | APPLICATION UNDER SECTION 245 OF THE NATIONAL GAS LAW FOR A REVIEW OF A FULL ACCESS ARRANGEMENT DECISION MADE BY THE ECONOMIC REGULATION AUTHORITY IN RELATION TO ATCO GAS AUSTRALIA PTY LTD PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
| BY: | ATCO GAS AUSTRALIA PTY LTD (ABN 90 089 531 975)  Applicant |

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| TRIBUNAL: | MIDDLETON J (DEPUTY PRESIDENT)  MR R STEINWALL (MEMBER)  PROFESSOR KT DAVIS (MEMBER) |
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| DATE OF DIRECTION: | 1 DECEMBER 2015 |
| WHERE MADE: | PERTH |

THE TRIBUNAL GIVES LEAVE TO:

1. ATCO Gas Australia Pty Ltd to apply for a merits review of the Access Arrangement Decision by the Economic Regulation Authority published on 10 September 2015 in respect of the matters identified in its application and on the grounds it has specified in its application.

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| TRIBUNAL: | MIDDLETON J (DEPUTY PRESIDENT)  MR R STEINWALL (MEMBER)  PROFESSOR KT DAVIS (MEMBER) |
|  |  |
| DATE: | 1 december 2015 |
| PLACE: | melbourne |

**REASONS FOR DECISION**

# INTRODUCTION

1. This is an application by ATCO Gas Australia Pty Ltd (‘**ATCO**’), pursuant to s 245 of the *National Gas Access (Western Australia) Law* (‘**NGL**’), for leave to apply for review of a decision made by the Economic Regulation Authority (Western Australia) (‘**ERA**’).
2. Section 7 of the *National Gas Access (WA) Act 2009* (WA) (the ‘**Act**’) applies the NGL, set out in the Schedule to the *National Gas (South Australia) Act 2008* (SA) as modified by Sch 1 to the Act, as a law of Western Australia. Section 26 of the NGL gives the *National Gas Rules* (‘**NGR**’) the force of law in Western Australia.

## Background

1. On 17 March 2014, ATCO submitted an access arrangement revision proposal for the access arrangement period from 1 July 2014 to 31 December 2019 (‘**AA Revision Proposal**’) for consideration by the ERA. On 14 October 2014, the ERA published a draft decision on ATCO’s AA Revision Proposal, indicating that the ERA would publish its own revised access arrangement and access arrangement information.
2. ATCO then submitted additions and amendments to its AA Revision Proposal and a revised access arrangement proposal to the ERA (‘**Amended AA Revision Proposal**’), in response the draft decision published by the ERA.
3. On 1 July 2015, the ERA published its access arrangement final decision entitled *Final Decision on Proposed Revisions to the Access Arrangement for the Mid-West and South-West Gas Distribution System* (‘**Final Decision’**). In its Final Decision, the ERA refused to approve ATCO’s Amended AA Revision Proposal and indicated that it would publish its own revised access arrangement and access arrangement information.
4. Following, and in response to the ERA’s publication of its Final Decision, ATCO made further submissions and provided further information to the ERA.
5. On 10 September 2015, the ERA published:
6. an amended Final Decision entitled *Final Decision on Proposed Revisions to the Access Arrangement Decision for the Mid-West and South-West Gas Distribution System* (‘**Amended Final Decision**’), in which the ERA again refused to approve the Amended AA Revision Proposal submitted by ATCO; and
7. a further decision entitled *Economic Regulation Authority’s Revised Access Arrangement Decision for the Mid-West and South-West Gas Distribution System* for the ATCO distribution network (‘**Access Arrangement Decision**’), in which the ERA decided to approve the access arrangement drafted by the ERA (‘**ERA Access Arrangement**’).

The decision that is the subject of this current application for review under s 245 is the Access Arrangement Decision.

1. On 29 September 2015, the ERA published minor corrections to the ERA Access Arrangement.

## Application for Leave and Review

1. On 1 October 2015, ATCO filed its application for leave and application for review by the Australian Competition Tribunal (the ‘**Tribunal**’) of the Access Arrangement Decision, pursuant to s 245 of the NGL. ATCO also filed the affidavit of Simon Harvey Byrne, sworn 1 October 2015 (‘**Byrne Affidavit**’), and the supplementary affidavit of Simon Harvey Byrne, sworn 5 November 2015, in support of its application for leave (‘**Leave Application**’), and application for review (‘**Review Application**’), should leave be granted.
2. The Tribunal accepts that, for the purposes of s 245(1) of the NGL:

(a) ATCO is an ‘affected or interested person or body’; and

(b) the Access Arrangement Decision that is the subject of this Review Application is a designated reviewable regulatory decision, and therefore a ‘reviewable regulatory decision’.

1. In addition, it is accepted that there is no issue that ATCO’s application for review was made within the 15 business day time limit prescribed by s 247 of the NGL.
2. This Leave Application is unopposed by the ERA.

# REQUIREMENTS FOR THE LEAVE APPLICATION

1. Section 246 of the NGL stipulates the following two relevant requirements for applications made under s 245 of the NGL:

***246 – Grounds for review***

*(1) An application under section 245(1) may be made only on 1 or more of the following grounds:*

*(a) the original decision maker made an error of fact in the decision maker’s findings of facts, and that error was material to the making of the decision;*

*(b) the original decision maker made more than 1 error of fact in the decision maker’s findings of fact, and those errors of fact, in combination, were material to the making of the decision;*

*(c) the exercise of the original decision maker’s discretion was incorrect, having regard to all the circumstances;*

*(d) the original decision maker’s decision was unreasonable, having regard to all the circumstances.*

*(1a) An application under section 245(1) that relates to a designated reviewable regulatory decision must also specify the manner in which a determination made by the Tribunal varying the designated reviewable regulatory decision, or setting aside the designated reviewable regulatory decision and a fresh decision being made by the* [ERA] *following remission of the matter to the* [ERA] *by the Tribunal, on the basis of 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable designated* [National Gas Objective] *decision.*

1. Section 23 of the NGL relevantly provides:

***23 - National Gas Objective***

*The objective of this Law is to promote efficient investment in, and efficient operation and use of natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.*

1. The Tribunal accepts that ATCO’s Review Application has been made only on the grounds of review specified in s 246(1). In reaching that conclusion, the Tribunal has had regard to the observations made in recent Tribunal decisions in the NSW electricity proceedings, in which provisions equivalent to s 246 of the NGL apply. In particular, the Tribunal accepts that:

*(a) the line between the several available grounds for review is not necessarily always clear cut;*

*(b) there is no clear line between factual error, opinion, and discretionary judgment; one may feed into the other;*

*(c) any such error or errors - if accepted by the Tribunal - may be a combination of error or errors of fact, wrongful exercise of discretion, and/or the outcome of an unreasonable decision;*

*(d) because the characterisation of error or errors, if made out, will more clearly emerge in the course of considering the review related material and the submissions dealing with it, it is not appropriate or necessary to embark upon a careful textual analysis and criticism (if any) of an application to describe the combination or permutation of alternative expressions of reviewable error in the relevant application.*

See Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy [2015] ACompT 2; Application by ActewAGL Distribution [2015] ACompT 3.

1. Further, the Tribunal has had regard to the matters outlined in ATCO’s submissions on the Leave Application (‘**ATCO’s Leave Submissions**’) and paragraphs [207] – [212] of ATCO’s Review Application. In considering these arguments, the Tribunal accepts that ATCO has sufficiently addressed the manner in which a determination by the Tribunal in accordance with s 246(1a) of the NGL may result in a materially preferable designated National Gas Objective (‘**NGO**’) decision.

# CRITERIA FOR THE GRANTING OF LEAVE

1. As set out in ATCO’s Leave Submissions, the NGL requires that the following criteria be satisfied before leave can be granted:

(a) The Tribunal must not grant leave to apply under s 245(1) unless it appears to the Tribunal that there is a serious issue to be heard and determined as to whether a ground for review set out in s 246(1) exists (s 248(a) of the NGL);

(b) The Tribunal must not grant leave unless it appears that the applicant has established a *prima facie* case that a determination made by the Tribunal varying the designated reviewable regulatory decision, or setting aside the designated reviewable regulatory decision and a fresh decision being made by the ERA following remission of the matter to the ERA by the Tribunal, on the basis or 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable designated NGO decision (s 248(b) of the NGL);

(c) Even where it is demonstrated that there is a serious issue to be heard and determined under s 248(a), the Tribunal must not grant leave unless the amount in question specified in or derived from a decision exceeds the lesser of $5 million or 2% of the average annual regulated revenue of ATCO (s 249(2) of the NGL).

1. ATCO’s Leave Submissions also identified the criteria for leave under ss 250 and 251 of the NGL. The Tribunal accepts ATCO’s submissions on these criteria in that s 250 does not apply to this present application, and there has been no evidence of any of the conduct described in s 251.
2. Each of the relevant criteria above are considered below.

## Financial threshold (s 249(2))

1. The Byrne Affidavit states that 2% of ATCO’s average annual total revenue is $3.09 million. This is lower than the $5 million threshold under s 249. As such, the amount specified in or derived from the decision must exceed $3.09 million.
2. As noted in ATCO’s Leave Submissions, and held by the Tribunal in *Application by Energex Ltd (No 4)* [2011] ACompT 4 at [52], when determining whether the financial threshold in s 249(2) is satisfied, all of the errors are to be taken into account; the threshold does not need to be satisfied for each ground.
3. The financial threshold of $3.09 million is amply satisfied, having regard to the amounts specified in the Byrne Affidavit, and as summarised in the table at paragraph 43 of ATCO’s Leave Submissions.

## Serious issue to be heard and determined (s 248(a))

1. ATCO adopted the submissions of Ausgrid, Endeavour Energy and Essential Energy in *Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy* [2015] ACompT 2, in relation to the legal principles relevant to the meaning of ‘serious issue to be heard and determined’. The Tribunal accepts the submissions adopted by ATCO, and notes the following legal principles as particularly relevant:

(a) The phrase ‘serious issue to be heard and determined’ has been correlated with the phrase ‘serious question to be tried’ in the context of the grant of interlocutory injunctions: *Re Application by ElectraNet Pty Limited* [2008] ACompT 1 at [39] –[42].

(b) The relevant question is indeed whether an applicant has established that there is a serious issue to be heard and determined given the nature of the rights asserted by the applicant and ‘the practical consequences likely to flow’ from the grant of leave. In particular, the Tribunal has previously expressed the view that the threshold merely requires the applicant to ‘*show that there is a sufficient prospect of success to justify in the circumstances it being given the opportunity*’ to have the decision reviewed: *Application by Envestra Ltd* [2011] ACompT 12 at [21].

1. As such, the Tribunal accepts ATCO’s submission that

*at the leave stage, the Tribunal is not required to determine if it is satisfied that the issues, or some of them, raised in the* [Review] *Application are correct and if so whether the potential orders the Tribunal might make as a result would lead to a materially preferable NGO decision. Its function is to decide whether it appears that the criteria in s 248(a) and (b) for leave to apply for review have been met.*

1. The particular matters which ATCO contends gives rise to a serious issue to be heard and determined are:

(a) the allowed rate of return in respect of the return on equity;

(b) the cost of corporate income tax estimated and the decision on the value of imputation credits;

(c) the forecast operating expenditure allowance;

(d) the forecast capital expenditure allowance;

(e) the amount of depreciation and approach to its calculation; and

(f) the applicable reference tariff mechanism.

1. ATCO alleges that the ERA made errors, not only of fact, but in its exercise of discretion and in the reasonableness of the decision reached, in respect of each of these matters above. Given this, each of these matters gives rise to many contested issue between the ERA and ATCO. The Tribunal treats this as a significant consideration that weighs in favour of granting leave.
2. Another key submission of ATCO accepted by the Tribunal is that the grant of leave does not affect the rights of any other person or entity, including the ERA. Rather, granting leave to ATCO to make its Review Application merely allows ATCO the opportunity to argue that:

(a) any or all of the identified grounds for review are established; and

(b) a determination to vary or set aside and remit the Amended Final Decision will result in a materially preferable decision in making a contribution to the achievement of the NGO.

1. In light of this and the number of issues in dispute between the parties, the Tribunal is satisfied that there appears to be a serious issue to be heard and determined.

## *Prima facie* case (s 248(b))

1. The Tribunal has had regard to the principles relevant to considering whether a *prima facie* case under s 248(b) has been established. Similarly to the approach adopted in respect of s 248(a), at the leave stage, it is sufficient for the Tribunal to be satisfied that it ‘appears’ that there is a *prima facie* case of the kind provided for in s 249(b). As ATCO submits, ‘*the test does not require the same degree of “satisfaction” as that specified in the NGL when it comes time for the Tribunal to make a determination after the review has taken place*.’
2. In summary, ATCO submits that should it be found that the alleged errors identified in its application need to be corrected, the Access Arrangement Decision will better adhere to the relevant provisions of the NGR and the NGL, thereby contributing to the NGO, as ‘*those provisions are made of that purpose*’. For example, ATCO submits that correcting the alleged errors:

(a) ‘*will prevent adverse impacts on the quality, safety, security and reliability of gas supply to consumers over the long term*’;

(b) ‘*would promote the efficient investment in the ATCO gas distribution system, which would be more conducive to its efficient operation and use’*; and

(c) will ‘*provide ATCO with a reasonable opportunity to recover at least its efficient costs of providing reference services and complying with its regulatory obligations and requirements as contemplated by s 24(2) (being one of the Revenue and Pricing Principles) of the NGL.*’

1. On the basis of these considerations, and on the matters set out more fully in ATCO’s Review Application, the Tribunal considers that a *prima facie* case pursuant to s 249(b) of the NGL has been established by ATCO.

# CONCLUSION

1. As the three relevant criteria for the granting of leave have been satisfied, the Tribunal grants leave to ATCO to apply for a merits review of the Access Arrangement Decision under s 245 of the NGL.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton, Mr R Steinwall and Professor KT Davis. |

Associate:

Dated: 1 December 2015