AUSTRALIAN COMPETITION TRIBUNAL

In the matter of Energex Limited [2010] ACompT 3

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| Citation: | In the matter of Energex Limited [2010] ACompT 3 |
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| Review from: | Australian Energy Regulator |
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| Parties: | **Energex Limited (ACN 078 849 055)****Ergon Energy Corporation Limited (ACN 078 646 062)****ETSA Utilities (ABN 13 332 330 749))** |
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| File number(s): | 3 of 20104 of 2010 |
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| Members: |  **(DEPUTY PRESIDENT),****MR R DAVEY AND MR R SHOGREN** |
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| Date of Decision: | 24 August 2010 |
|  |  |
| Place: | Melbourne |
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| Category: | No Catchwords |
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| Solicitor for Australian Energy Regulator: | Corrs Chambers Westgarth |
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| Solicitor for Energex Limited: | Allens Arthur Robinson |
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| Solicitor for Ergon Energy Corporation Limited: | Minter Ellison Lawyers |
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| Solicitor for ETSA Utilities: | Gilbert and Tobin |
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| Solicitor for EnergyAustralia: | Gilbert and Tobin |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | File No 2 of 2010 |

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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 ENERGEX LIMITED PURSUANT TO CLAUSE 6.11.1 OF THE NATIONAL ELECTRITICY RULES |
| BY: | ENERGEX LIMITED (ACN 078 849 055)Applicant |

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| MEMBERS: | MIDDLETON J |
| DATE OF DECISION: | 24 AUGUST 2010 |
| WHERE MADE: | MELBOURNE |

THE TRIBUNAL DECIDES THAT:

1. The application by EnergyAustralia pursuant to section 71K of the National Electricity Law to intervene in the above proceedings be refused.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | File No 3 of 2010 |

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| RE: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY (QUEENSLAND) LAW FOR A REVIEW OF A DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ERGON ENERGY CORPORATION LIMITED PURSUANT TO CLAUSE 6.11.1 OF THE NATIONAL ELECTRICITY RULES |
| BY: | ERGON ENERGY CORPORATION LIMITED(ACN 078 646 062)Applicant |

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| MEMBERS: | MIDDLETON J (DEPUTY PRESIDENT),MR R DAVEY AND MR R SHOGREN |
| DATE OF DECISION: | 24 AUGUST 2010 |
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|  | File No 4 of 2010 |

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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 ETSA UTILITIES PURSUANT TO CLAUSE 6.11.1 OF THE NATIONAL ELECTRITICY RULES |
| BY: | ETSA UTILITIES (ABN 13 332 330 749)Applicant |

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| MEMBERS: | MIDDLETON J (DEPUTY PRESIDENT),MR R DAVEY AND MR R SHOGREN |
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| BY: | ETSA UTILITIES (ABN 13 332 330 749)Applicant |

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| MEMBERS: | MIDDLETON J (DEPUTY PRESIDENT),MR R DAVEY AND MR R SHOGREN |
| DATE OF PUBLICATION OF REASONS FOR DECISION: | 1 SEPTEMBER 2010 |
| WHERE MADE: | MELBOURNE |

**REASONS FOR DECISION**

# INTRODUCTION

1. On 24 August 2010, in each of the above proceedings the Australian Competition Tribunal (‘the Tribunal) decided to refuse applications made pursuant to s 71K of the National Electricity Law (‘NEL’) by EnergyAustralia seeking leave to intervene. The Tribunal now gives its reason for these decisions.
2. The Tribunal does not delay in setting out the background to these proceedings or EnergyAustralia’s application, as all the parties and EnergyAustralia are well familiar with this background. However, the Tribunal makes the following preliminary observations which give rise to EnergyAustralia’s concerns and its applications to intervene.
3. The current EnergyAustralia distribution determination published by the Australian Energy Regulator (‘AER’) on 30 April 2009 expires on 30 June 2014. EnergyAustralia will be required to submit a regulatory proposal to the AER for the next regulatory period of 1 July 2014 to 30 June 2019, by no later than 31 May 2013.
4. EnergyAustralia’s current distribution determination (for the period 1 July 2009 to 30 June 2014) included an amount for corporate income tax based on a gamma value of 0.5.
5. In submitting its regulatory proposal for the next period of 1 July 2014 to 30 June 2019, EnergyAustralia will be required to provide a building block proposal and this proposal must include an allowance for the *estimated cost of corporate income tax*. In turn, the *estimated cost of corporate income tax* must be calculated in accordance with a formula which requires the input of a value for gamma (γ).
6. In May 2009, the AER published a Statement of Regulatory Intent (‘SoRI’) which revised the previous value of gamma in the National Electricity Rules (‘the Rules’) from 0.50 to 0.65.
7. A distribution determination to which a SoRI is applicable must be consistent with the SoRI unless there is persuasive evidence justifying a departure, in the particular case, from a value set in the SoRI.
8. A review of the SoRI is not required until 31 March 2014. As such, the SoRI published in May 2009 (setting gamma at 0.65) will likely apply in respect of EnergyAustralia’s 2014-2019 regulatory proposal.
9. The only basis on which a gamma value different to the SoRI gamma value of 0.65 will be applied to EnergyAustralia’s regulatory proposal is if it can establish that there is persuasive evidence justifying a departure.
10. The SoRI published in May 2009 setting gamma at 0.65 applied to the regulatory proposals submitted by the Applicants in these proceedings.
11. In each of the review processes of the regulatory proposals submitted by the Applicants, evidence was submitted as to the value of gamma and submissions were made to the effect that the AER should depart from the SoRI gamma value of 0.65.
12. In these proceedings, the Applicants seek merits review of the AER’s decision refusing to depart from the value of gamma of 0.65 in the SoRI. The Applicants will be seeking to persuade this Tribunal that the material before the AER justified a departure from the value of gamma of 0.65 in the SoRI.
13. When EnergyAustralia submits its regulatory proposal to the AER on or before 31 May 2013 it, likewise, will be likely to be seeking to persuade the AER that the material before it justifies a departure from the value of gamma of 0.65 in the SoRI. Based on EnergyAustralia’s revenue requirements for the 2009-2014 regulatory period, an increase in the value of the gamma parameter from 0.5 to 0.65 would have had a $136 million impact on EnergyAustralia’s revenues. Such an increase would probably have a similar impact on EnergyAustralia’s 2014-2019 revenue.
14. These proceedings will consider the evidence relied upon by the AER in setting the gamma parameter under the current SoRI. It will also consider the evidence submitted by the Applicants and considered by the AER as part of the regulatory review process in relation to the gamma parameter.
15. EnergyAustralia sought leave to intervene on the grounds that it was a reviewable regulatory decision process participant as:
16. it had a sufficient interest in the decision being reviewed; and
17. it made a submission in relation to the making of that decision within the time required under the Rules following an invitation by the AER to do so.
18. EnergyAustralia made a submission on 16 February 2010 in relation to the AER’s draft decisions in satisfaction of s 71K(2)(b) of the NEL.
19. The issue for the Tribunal to determine was whether EnergyAustralia had a ‘sufficient interest’ for the purposes of s 71K(2)(a) of the NEL.

# SUBMISSIONS

1. EnergyAustralia submitted it had a sufficient interest for the purposes of s 71K(2)(a). In relation to the gamma issues EnergyAustralia submitted that:
2. the particular nature of the gamma issue before the Tribunal – the gamma value being a market-wide general parameter which is not specific to any particular business (or specific to the primary applicants in these proceedings);
3. the determination by the Tribunal in these proceedings whether the AER should have departed from the gamma value of 0.65 in the SoRI will in all likelihood determine whether the AER should depart from the gamma value of 0.65 in the SoRI in relation to the future EnergyAustralia’s regulatory proposal; and
4. the large impact of the gamma value on EnergyAustralia’s revenues,

give EnergyAustralia a ‘sufficient interest’ in the decisions being reviewed by the Tribunal.

1. In relation to public lighting, EnergyAustralia submitted that for practical purposes the AER Ergon distribution determination and the Tribunal’s review of that determination will determine whether EnergyAustralia is required to submit a regulatory proposal for the 2014 to 2019 regulatory control period encompassing public lighting services and the extent to which the AER will regulate the revenues to be derived from those services under Ch 6 of the Rules.
2. The AER opposed EnergyAustralia’s applications. In summary, the AER’s opposition was based on the following matters:
3. No aspect of any of the distribution determinations under review in these proceedings applied to EnergyAustralia.
4. EnergyAustralia’s interest in the determinations under review was not ‘a sufficient interest’ within s 71K(2) of the NEL, properly construed in the context of the merits review regime for which the NEL provides, because:
	1. EnergyAustralia has not identified any interest in the distribution determinations under review in these proceedings over and above the interest it has by reason of being a member of the class of distribution network services providers (‘DNSPs’);
	2. EnergyAustralia’s interest in the distribution determinations under review is no more than an interest in attempting to secure determinations on review by the Tribunal which EnergyAustralia considers will be of advantageous precedential value when EnergyAustralia’s next regulatory proposal, for the 2014-2019 regulatory control period, falls to be considered by the AER, which is likely to occur from about June 2013; and
	3. the particular issues on which EnergyAustralia seeks an advantageous precedent are gamma (the assumed utilisation of input tax credits associated with franked dividends) and the classification of services in connection with the provision of public lighting, which are both issues that are common to many, if not all, distribution determinations.
5. Further, EnergyAustralia did not make submissions to the AER on gamma or public lighting during the AER’s consideration of the regulatory proposals of Energex, Ergon and ETSA Utilities, which reinforces the conclusion that EnergyAustralia’s asserted interests are not ‘a sufficient interest’ in the distribution determinations.
6. Therefore, EnergyAustralia was not a ‘reviewable regulatory decision process participant’ within the meaning of s 71K of the NEL.

# SUFFICIENT INTEREST

1. A few introductory comments may be made as to the concept of ‘sufficient interest’.
2. The legislature intended that a network service provider (‘NSP’) may have a ‘sufficient interest’ under s 71K in circumstances where the decision does not apply to it.
3. Secondly, the Tribunal accepts the submission of EnergyAustralia that in determining the breadth of the phrase ‘sufficient interest’ in s 71K, the Tribunal ought to read s 71K as concomitant to, and to be read consistently with, the other provisions in Div 3A dealing with standing. It is clear from the scheme of Div 3A that the ‘sufficient interest’ under s 71K is a different and lower threshold than being either a regulated NSP to whom the decision applies, or a NSP whose commercial interests are materially affected by the decision (see s 71A definition).
4. Further, s 71K creates a mandatory intervention regime, as the Tribunal “*must*” grant leave to intervene if the criteria in s 71K(2) are met. For instance, leave could not be declined because to grant leave might allow multiple entities to intervene.
5. On the basis that it may need to identify an interest over and above the interest it has by reason of being a member of the class of DNSPs, EnergyAustralia asserts that it is one of only four of the 13 other DNSPs that will be required to submit a regulatory proposal to the AER prior to it issuing a new SoRI with a new gamma value.
6. Therefore, in considering this matter, the Tribunal accepts EnergyAustralia’s submissions that a proposed intervener under s 71K does not have to demonstrate that:
7. the decision applies to it;
8. its commercial interests are materially affected by the decision; or
9. its interests are adversely affected by the decision.

# CONSIDERATION

1. The distribution determinations do not apply to EnergyAustralia. However, this does not necessarily preclude intervention.
2. However, there must be more than just an interest in the decision. The qualifying word ‘sufficient’ indicates that there will be interests that are not sufficient. There must be an interest other than by reason of just being a NSP or DNSP. Questions of fact and degree arise in determining whether there is sufficient interest, and the interest established must not be too remote.
3. The Tribunal first addresses the alleged ‘sufficient interest’ in the context of the gamma issues.
4. In the circumstances of these proceedings, an interest claimed in the precedential effect of the way in which the Tribunal will conduct the review, or of the criteria by which that review will be conducted, is not a sufficient interest to support intervention in the review.
5. The best EnergyAustralia can do is point to the fact that it will be soon placed in a position, unlike some others, to put forward a regulatory proposal which may be influenced by the Tribunal’s determination.
6. The Tribunal does not accept that the decision in these proceedings will necessarily be probative in relation to EnergyAustralia’s regulatory review process which does not take place until 2013.
7. However, even if the Tribunal’s decision is going to be probative, the fact is that in making a decision in relation to EnergyAustralia, the AER will need to reach conclusions that are specific to the particular facts before it.
8. The Tribunal does not accept that the decisions already made by the AER (or the Tribunal’s decisions) will directly bear on the interests of EnergyAustralia. The Tribunal also does not accept that the evidence and material to be placed before it and that was before the AER will be the same by the time EnergyAustralia submits its next regulatory proposal.
9. The Tribunal now addresses the public lighting issue. EnergyAustralia also asserted that it had a sufficient interest in the Ergon matter, (proceeding no 3 of 2010), by reason of its interest in the classification of services and activities in connection with the provision of public lighting because:
	1. Energy Australia is a significant provider of public lighting services in New South Wales;
	2. under the terms of the transitional rules in Ch 11 of the Rules which applied to EnergyAustralia’s present distribution determination, public lighting is classified as a direct control service and, within that category, as an alternative control service, but the classification of public lighting for EnergyAustralia’s future distribution determination in respect of the regulatory control period 2014-2019 will not be bound by the transitional rules; and
	3. the manner in which the AER classifies public lighting services in that future distribution determination will be affected by the way in which public lighting services and activities have been classified by the AER in the distribution determinations and/or the way in which the Tribunal reviews that classification.
10. As with the gamma issue, the precedent value to EnergyAustralia does not establish a ‘sufficient interest’ for the purposes of s 71K of the NEL. The comments made in relation to the gamma issue referred to in paragraphs 31 to 34 above equally apply in relation to the issue of public lighting.

# CONCLUSION

1. In the circumstances, as a factual matter EnergyAustralia has not established that it has a ‘sufficient interest’ in the decisions being reviewed, within the meaning of s 71K(2). EnergyAustralia is thus not a reviewable regulatory decision process participant for the purposes of s 71K.

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| I certify that the preceding thirty-seven (37) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton (Deputy President), Mr R Davey and Mr R Shogren. |

Associate:

Dated: 1 September 2010