AUSTRALIAN COMPETITION TRIBUNAL

Application by Jemena Gas Networks (NSW) Ltd (No 2) [2011] ACompT 5

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| Citation: | | Application by Jemena Gas Networks (NSW) Ltd (No 2) [2011] ACompT 5 |
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| Review from: | | Australian Energy Regulator |
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| Parties: | | **JEMENA GAS NETWORKS (NSW) LTD**  **(ABN 87 003 004 322)** |
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| File number: | |  |
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| Tribunal: | | **JUSTICE FINKELSTEIN (PRESIDENT)**  **PROFESSOR D ROUND**  **MR R STEINWALL** |
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| Date of Decision: | | 11 February 2011 |
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| Legislation: | | National Gas Law, s 249(2) |
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| Cases cited: | | *Application by Energex Ltd* [2011] AComp T 4  *Application by Jemena Gas Networks (NSW) Ltd* [2010] ACompT 8 |
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| Date of hearing: | | 13 October 2010 |
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| Date of last submissions: | Applicant: 29 October 2010 and 24 November 2010  Respondent: 18 November 2010 | |
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| Place: |  | |
|  |  | |
| Category: | No Catchwords | |
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| Number of paragraphs: | 6 | |
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| Counsel for the Applicant: | Mr J C Sheahan SC, Mr C A Moore, Mr M J Darke | |
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| Solicitor for the Applicant: | Gilbert + Tobin | |
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| Counsel for the Australian Energy Regulator: | Mr C Scerri QC, Mr P Wallis, Dr V Priskich | |
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| Solicitor for the Australian Energy Regulator: | Australian Government Solicitor | |

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 5 of 2010 |

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| RE: | APPLICATION UNDER S 245 OF THE NATIONAL GAS LAW FOR A REVIEW OF A FULL ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR (AER), IN RELATION TO JEMENA GAS NETWORKS (NSW) LTD PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
| BY: | JEMENA GAS NETWORKS (NSW) LTD (ABN 87 003 004 322)  Applicant |

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| MEMBERS: | JUSTICE FINKELSTEIN (PRESIDENT)  PROFESSOR D ROUND  MR R STEINWALL |
| DATE OF DIRECTION: | 11 FEBRUARY 2011 |
| WHERE MADE: | MELBOURNE |

THE TRIBUNAL DIRECTS THAT:

1. Leave be granted to the Applicant, Jemena Gas Networks (NSW) Ltd (**JGN**) (the **Applicant**), pursuant to s 245(1) of the National Gas Law, to apply to the Australian Competition Tribunal (**Tribunal**) for a review of the applicable full access arrangement decision made by the Australian Energy Regulator (**AER**) entitled *JGN’s NSW Gas Distribution Networks: Decision – Access Arrangement*, published on 29 June 2010 (read with the reasons for that decision which are contained, in part, in the AER’s access arrangement final decision entitled *Jemena Gas Networks Access Arrangement Proposal for the NSW Gas Networks 1 July 2010 – 30 June 2015: Final Decision* published on 11 June 2010) in respect of the “capital expenditure – mine subsidence ground of review”.

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| IN THE australian competition tribunal |  |
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| RE: | APPLICATION UNDER S 245 OF THE NATIONAL GAS LAW FOR A REVIEW OF A FULL ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR (AER), IN RELATION TO JEMENA GAS NETWORKS (NSW) LTD PURSUANT TO RULE 64 OF THE NATIONAL GAS RULES |
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| MEMBERS: | JUSTICE FINKELSTEIN (PRESIDENT)  PROFESSOR D ROUND  MR R STEINWALL |
| DATE: | 11 FEBRUARY 2011 |
| PLACE: |  |

**REASONS FOR DECISION**

1. On 13 October 2010 the Tribunal granted Jemena Gas Networks (NSW) Ltd (JGN) leave to apply for a review of the full access arrangement decision made by the Australian Energy Regulator (AER) on 29 June 2010 in respect of several grounds of review which JGN had raised in its application: *Application by Jemena Gas Networks (NSW) Ltd* [2010] ACompT 8. The Tribunal reserved its decision, however, on whether to grant leave in respect of the so-called “capital expenditure – mine subsidence” ground. The issue to be resolved is whether that ground must satisfy the financial threshold in s 249(2) of the National Gas Law (NGL) or whether it is sufficient that, in the aggregate, all grounds of review which raise a serious question meet the threshold.
2. Section 249(2) provides:

Despite section 248, the Tribunal must not grant leave to apply under s 245(1) even if there is a serious issue to be heard and determined as to whether a ground for review set out in section 246(1) exists unless the amount that is specified in or derived from the decision exceeds the lesser of $5 000 000 or 2% of the average annual regulated revenue of the covered pipeline service provider.

1. Contemporaneously with the publication of these reasons the Tribunal published its decision in *Application by Energex Ltd* [2011] AComp T 4. That decision considered the same issue in the context of the National Electricity Law (NEL). The Tribunal concluded that the financial threshold must be satisfied by the aggregate value of the grounds of review which meet the serious issue threshold. In reaching that conclusion the Tribunal considered material extrinsic to both the NEL and NGL, there being much in common between the two.
2. The Tribunal here proposes simply to adopt what was said about the financial threshold in *Energex*. As it is not in dispute that the aggregate value of JGN’s grounds of review that meet the serious issue threshold exceeds $5,000,000, JGN will be granted leave to apply for a review of the AER’s decision in respect of the mine subsidence ground.
3. In light of this decision, it is not necessary to consider whether, when calculating the value of the revenue attributable to a ground of review, it is permissible to include revenue which would be earned after the end of the regulatory period in question. The Tribunal will nevertheless express its tentative view on that issue.
4. The Tribunal is currently of the opinion that only revenue which will be earned in the revenue period to which the determination relates can be included when deciding whether the financial threshold has been met. If that were not the case then, due to the long life of many assets used in electricity and gas networks, almost any ground of review would satisfy the financial threshold if all possible (or likely) regulatory periods are taken into account. Further, the same time period should be applied to the words “specified in” and “derived from” in s 249(2). As the AER’s determination only concerns calculations for one regulatory period, any amount “specified in” the determination can only concern that regulatory period. Accordingly revenue “derived from” that determination should be confined to revenue which will be earned in that regulatory period.

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| I certify that the preceding six (6) numbered paragraphs are a true copy of the Reasons for Determination herein of the Tribunal. |

Associate:

Dated: 11 February 2011