AUSTRALIAN COMPETITION TRIBUNAL

WA Gas Networks Pty Ltd (No 2) [2011] ACompT 15

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| Citation: | WA Gas Networks Pty Ltd (No 2) [2011] ACompT 15 |
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| Parties: | **WA GAS NETWORKS PTY LTD (ACN 089 531 975)** |
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| File number: |  |
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| Tribunal: | **JUSTICE MANSFIELD (President)**  **PROFESSOR D ROUND**  **MR R DAVEY** |
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| Date of decision: | 28 October 2011 |
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| Date of hearing: | Heard on the papers |
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| Date of last submissions: | 12 August 2011 |
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| Place: | Adelaide |
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| Category: | No catchwords |
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| Solicitor for WA Gas Networks Pty Ltd: | Jackson McDonald |
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| Solicitor for Economic Regulation Authority: | Talbot Olivier |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 1 of 2011 |

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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 ECONOMIC REGULATION AUTHORITY OF WESTERN AUSTRALIA IN RELATION TO WA GAS NETWORKS PTY LTD PURSUANT TO RULE 62 OF THE NATIONAL GAS RULES  WA GAS NETWORKS PTY LTD (ACN 089 531 975)  Applicant |

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| TRIBUNAL: | JUSTICE MANSFIELD (PRESIDENT)  PROFESSOR D ROUND  MR R DAVEY |
| DATE OF ORDER: | 28 OCTOBER 2011 |
| WHERE MADE: | ADELAIDE |

THE TRIBUNAL ORDERS THAT:

1. The application is refused.
2. The applicant pay to Economic Regulation Authority of Western Australia its costs of the application.

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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 ECONOMIC REGULATION AUTHORITY OF WESTERN AUSTRALIA IN RELATION TO WA GAS NETWORKS PTY LTD PURSUANT TO RULE 62 OF THE NATIONAL GAS RULES  WA GAS NETWORKS PTY LTD (ACN 089 531 975)  Applicant |

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| tribunal: | justice MANSFIELD (president)  PROFESSOR D ROUND  MR R DAVEY |
| DATE: |  |
| PLACE: |  |

**REASONS FOR DECISION**

# THE ISSUE

1. The Applicant has applied for leave pursuant to s 245(1) of the National Gas Law (NGL) to apply to the Tribunal for a review of the decision of the Economic Regulation Authority of Western Australia (ERA) published on 28 February 2011 pursuant to Rule 62 of the National Gas Rules (NGR) (the Final Decision) in respect of the access arrangement for the Mid-West and South-West Gas Distribution Systems (GDS) of the Applicant.
2. The Applicant owns and operates the GDS. It comprises various connected and non-interconnected sub-networks covering the Perth metropolitan area and country centres from Geraldton in the north to Busselton in the south. It excludes the Kalgoorlie and Albany networks.
3. The ERA disputes that the Tribunal can give leave to apply to review the Final Decision under s 245 because it is not a “reviewable regulatory decision”.

# BACKGROUND

1. It is desirable to set out the processes leading to the Final Decision, and the subsequent processes, which led to the Reviewable Decision of 28 April 2011, which is the subject of the leave to review application in ACT 3 of 2011. The ERA by the Reviewable Decision imposed its own terms and revisions on the then existing access arrangements. The Applicant has separately applied under s 245 for leave for review of the Reviewable Decision. That leave has been given by decision given on the same date as this decision: *WA Gas Networks Pty Ltd (No 1)* [2011] ACompT 14.
2. The predecessor of the ERA on 18 July 2000 approved an access arrangement in respect of the GDS in accordance with the *Gas Pipelines Access (Western Australia) Act* 1998 (WA Act). That arrangement was revised with the approval of the ERA given on 10 August 2005 to apply from 25 August 2005. By extensions of time given by the ERA, the Applicant was given ultimately to 31 January 2010 to lodge proposed revisions to that arrangement.
3. On 29 January 2010, the Applicant submitted proposed revisions to that arrangement in accordance with Rule 52 of the NGR. A draft decision on that application was published by the ERA on 17 August 2010 pursuant to Rule 59. Then, the Applicant submitted its Proposed Access Arrangement Revisions pursuant to Rule 60 of the NGR on 8 October 2010 (Applicant’s Proposed Revised Access Arrangement). One issue which attracted particular discussion was the appropriate means for measuring Debt Risk Premium. In addition to submissions from the Applicant, submissions were received from other interested entities.
4. On 28 February 2011, pursuant to Rule 62 of the NGR, the ERA published the Final Decision on the applicant’s Proposed Revised Access Arrangement for the GDS. The Final Decision refused to approve revisions to access arrangement in the terms of the Applicant’s Proposed Revised Access Arrangement. Finally, after further submissions, the ERA on 28 April 2011 published the Reviewable Decision under Rule 64 of the NGR.
5. The proposed grounds of review in this application and the application of ACT 3 of 2011 are substantially the same. Subject to the question of whether the Final Decision is a reviewable regulatory decision, for the reasons given in relation to the Reviewable Decision, the Tribunal would give leave to review the Final Decision as there is no other significant point of differentiation between the two applications.

# CONSIDERATION

1. The NGL is a schedule to the *National Gas (SA) Act 2008*, as modified by the Schedule to the *National Gas (WA) Act 2009* (WA). It applies to this application.
2. Section 245 of the NGL entitles “an affected or interested person or body”, with the leave of the Tribunal to apply to the Tribunal for a review of a reviewable regulatory decision. This application satisfies the formal requirements in s 245(2). It is also made within the time imposed by s 247 of the NGL.
3. Section 244 of the NGL relevantly defines a “reviewable regulatory decision” as:

… an applicable access arrangement decision (other than a full access arrangement decision that does not approve a full access arrangement);

1. The term “full access arrangement decision” is defined in s 2 of the NGL as follows:

***Full access arrangement decision***means a decision of the ERA under the Rules that –

(a) approves or does not approve a full access arrangement or revisions to an applicable access arrangement submitted to the ERA under section 132 or the Rules; or

1. makes a full access arrangement –

(i) in place of a full access arrangement the ERA does not approve in that decision; or

* 1. because a service provider does not submit a full access arrangement in accordance with section 132 or the Rules;

1. makes revisions to an access arrangement –

(i) in place of revisions submitted to the ERA under section 132 that the ERA does not approve in that decision; or

* 1. because a service provider does not submit revisions to the ERA under section 132;

1. It is clear that the Final Decision does not fall within (b) or (c) of that definition. It did not make a full access arrangement in place of that proposed by the Applicant; that was done by the Reviewable Decision. Nor did it make revisions to the full access arrangement proposed by the Applicant; that also was done by the Reviewable Decision.
2. It is clear enough that the Final Decision was an applicable access arrangement decision, as defined in 2 of the NGL as it was a full access arrangement decision that did not approve a full access arrangement. It is accepted by the ERA that the Applicant’s Revised Proposed Access Arrangement, in their context, proposed a full access arrangement.
3. It follows, in the Tribunal’s view, that the Final Decision was a full access arrangement decision within (a) of the definition.
4. The ERA contends simply that the Final Decision is not a reviewable regulatory decision because, even though it was an applicable access arrangement decision, and a full access arrangement decision, within those definitions, it was a full access arrangement decision not to approve a full access arrangement. That is, the parenthesised exclusion in the definition of “reviewable regulatory decision” applies.
5. The Tribunal agrees with that contention. As set out above, s 244 excludes from the definition of a “reviewable regulatory decision” any decision that is a “full access arrangement decision that does not approve “full access arrangement”. Applying the definitions set out above, the Final Decision, as informed by Rule 62(2) was a full access arrangement decision that did not approve the full access arrangements proposed by the Applicant by its Proposed Revised Access Arrangement. Accordingly, the Final decision is within the exclusion in the definition in s 244 and is not a “reviewable regulatory decision”. That conclusion is also consistent with the structure and operation of the NGL and the NGR. If the ERA does not approve a full access arrangement, it is obliged under Rule 64 of the NGR to propose an access arrangement itself and to make a decision giving effect to its proposed access arrangement. The decision to not approve a full access arrangement is a preliminary step to the decision to give effect to the ERA’s proposed access arrangement by the Reviewable Decision. It would be undesirable and unnecessary to allow review of the preliminary step reflected in the Final Decision.
6. The Tribunal observes that the access arrangement approved in the Reviewable Decision was formulated subsequent to, and in the light of, the ERA’s reasons contained in Final Decision. The leave granted to review the Reviewable Decision will, to the extent it is appropriate, enable the Applicant to refer to the reasons of the ERA in the Final Decision.
7. The application under s 245(1) for leave to apply for review of the Final Decision is refused.
8. The Applicant should pay to the ERA its costs of the application.

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| I certify that the preceding twenty (20) 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: 28 October 2011