AUSTRALIAN COMPETITION TRIBUNAL

Application by Jemena Gas Networks (NSW) Ltd [2010] ACompT 8

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| Citation: | | Application by Jemena Gas Networks (NSW) Ltd [2010] ACompT 8 |
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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 Determination: | | 13 October 2010 |
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| Date of hearing: | 13 October 2010 | |
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| Place: |  | |
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| Category: | No Catchwords | |
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| Number of paragraphs: | 16 | |
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| Counsel for the Applicant: | C A Moore  M Darke | |
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| Solicitor for the Applicant: | Gilbert + Tobin | |
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| Counsel for the Australian Energy Regulator: | C Scerri QC  P Wallis  V Priskich | |
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| Solicitor for the Australian Energy Regulator: | Australian Government Solicitor | |
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| Counsel for Intervening Applicant - AGL Energy: | M H O’Bryan | |
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| Solicitor for Intervening Applicant - AGL Energy: | Minter Ellison | |
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| Counsel for Intervening Applicant – TRUenergy: | R Peters | |
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| Solicitor for Intervening Applicant – TRUenergy: | Mallesons Stephen Jaques | |
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| Intervening Applicant (in person): | M Kingston | |

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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  Applicant |
| BY: | JEMENA GAS NETWORKS (NSW) LTD (ABN 87 003 004 322) |

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| TRIBUNAL: | JUSTICE FINKELSTEIN (PRESIDENT)  PROFESSOR D ROUND  MR R STEINWALL |
| DATE OF DIRECTION: | 18 OCTOBER 2010 |
| 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 grounds specified in its Application for Review dated 20 July 2010 (**JGN grounds for review**), except for the capital expenditure – mine subsidence ground of review.
2. The Tribunal reserves its decision regarding leave in respect of JGN’s capital expenditure – mine subsidence ground of review.
3. Leave be granted to AGL Energy Limited, AGL Retail Energy Limited and AGL Energy Sales and Marketing Limited, and TRUenergy Pty Ltd, (together, **Interveners**)under s 254 of the National Gas Law to intervene in the review, including to make submissions, in relation to the following matters raised in connection with the JGN Reference Services Agreement (**RSA**):
   1. the liability and indemnity ground for review as raised by the Applicant in its Application for Review (**JGN RSA ground for review**);
   2. the minimum billing period intervals in clause 22.1; and
   3. the security for payment in clause 30 and the definition of “Security”.

In this order, matters (b) and (c) are collectively referred to as the **Intervener RSA grounds for review**.

1. The application by Madeleine Kingston pursuant to ss 254 and 255 of the National Gas Law to intervene in the review be refused.
2. The AER serve on the Applicant and the Interveners a draft index of all review-related matter (**Draft Review Related Matter Index**), as defined under s 261(7)(c), (d), (e), (f), (g) and (h) of the National Gas Law (**Review Related Matter Index**), pertaining to the JGN grounds for review and the Intervener RSA grounds for review within three business days of leave to apply for review being granted.
3. The Applicant and Interveners request copies of any document in the Draft Review Related Matter Index within two business days of the Review Related Matter Index being served on the Applicant and the Interveners.
4. The AER provide copies of any document in the Draft Review Related Matter Index requested by the Applicant and the Interveners within three business days of such a request being made.
5. The Applicant prepare and provide to the AER a statement of material facts in relation to the JGN grounds of review other than the JGN RSA ground of review (material facts being those that the Applicant will contend are relevant to the determination of the review), including footnotes that record the source of the facts in the review related matter, by 4:00pm on 27 October 2010 (**Main Statement of Facts**).
6. The Applicant provide to the AER and the Interveners the statement of material facts in relation to the JGN RSA ground for review, including footnotes that record the source of the facts in the review related matter, by 4:00pm on 27 October 2010 (**RSA Statement of Facts**).
7. The Interveners prepare and provide to the Applicant and the AER a version of the RSA Statement of Facts indicating in a different text colour to that used by the Applicant material facts in relation to the Intervener RSA grounds for review (material facts being those that the Interveners will contend are relevant to the determination of the review), including footnotes that record the source of the facts in the review related matter, by 4:00pm on 29 October 2010.
8. The Applicant and Interveners identify any documents they consider should be added to or removed from the Draft Review Related Matter Index and the Applicant and the Interveners provide the AER with a revised consolidated Draft Review Related Matter Index by 4:00pm on 29 October 2010.
9. The AER provide to the Applicant its version of the Main Statement of Facts indicating in a different text colour to that used by the Applicant any relevant additions or non-agreed facts, by 4:00pm on 5 November 2010. The AER may add to, but may not delete text from, the Main Statement of Facts.
10. The AER provide to the Applicant and Interveners its version of the RSA Statement of Facts indicating in a different text colour to that used by the Applicant and the Interveners any relevant additions or non-agreed facts, by 4:00pm on 5 November 2010. The AER may add to, but may not delete text from, the RSA Statement of Facts. In relation to the JGN RSA ground for review, the AER will prepare any relevant additions or non-agreed facts in conjunction with the Interveners. In relation to the Intervener RSA grounds for review, the AER will prepare any relevant additions or non-agreed facts in conjunction with the Applicant.
11. The Applicant file and serve on the AER a written outline of submissions in relation to the JGN grounds for review other than the JGN RSA ground for review by 4:00pm on 17 November 2010.
12. The Applicant file and serve on the AER and Interveners a written outline of submissions in relation to the JGN RSA ground for review by 4:00pm on 17 November 2010.
13. The Interveners file and serve on the Applicant and the AER a written outline of submissions in relation to the JGN RSA ground for review and the Intervener RSA grounds for review by 4:00pm on 22 November 2010.
14. The AER file and serve on the Applicant a written outline of submissions in relation to the JGN grounds for review other than the JGN RSA ground for review by 4:00pm on 29 November 2010.
15. The AER file and serve on the Applicant and Interveners a written outline of submissions in relation to the JGN RSA ground for review and the Intervener RSA grounds for review by 4:00 pm on 29 November 2010.
16. The Applicant file and serve on the AER and Interveners a written outline of submissions in relation to the Intervener RSA grounds for review by 4:00 pm on 29 November 2010.
17. The Applicant, in consultation with the AER and Interveners, prepare a review book index to include:
    1. the application for review;
    2. the Main Statement of Facts;
    3. the RSA Statement of Facts;
    4. all submissions on the JGN grounds for review other than the JGN RSA ground for review;
    5. all submissions on the JGN and Intervener RSA grounds for review;
    6. a copy of all documents to be relied on by the parties

by 4:00pm on 30 November 2010.

1. The Applicant file and serve the review book by 4:00pm on 1 December 2010.
2. The proceedings be listed for hearing for four days on 6, 7, 8 and 10 December 2010.

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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  Applicant |
| BY: | JEMENA GAS NETWORKS (NSW) LTD (ABN 87 003 004 322) |

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| tribunal: | JUSTICE FINKELSTEIN (PRESIDENT)  PROFESSOR D ROUND  MR R STEINWALL |
| DATE: |  |
| PLACE: |  |

**REASONS FOR DETERMINATION**

## Application for leave to review

1. Jemena Gas Networks (NSW) Ltd (JGN) applies for leave to review a full access arrangement decision made by the Australian Energy Regulator (AER) on 29 June 2010. The application is brought under s 245 of the National Gas Law, which provides that the Tribunal may grant that leave. If leave is granted AGL Energy Limited, AGL Retail Energy Limited, AGL Energy Sales and Marketing Limited (the AGL companies), TRUenergy Pty Ltd (TRUenergy) and Ms Kingston seek leave to intervene.
2. Section 246 of the Law 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.
3. Section 248 of the Law 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 exists.
4. Section 249 applies 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. JGN has set out in its application the several grounds upon which it relies to have the AER’s decision set aside. The grounds relate to a number of matters dealt with in the decision. In summary the matters are:
6. the debt risk premium calculated by the AER;
7. the value of gamma calculated by the AER;
8. the manner in which expenditure with respect to mine subsidence was classified and dealt with in calculating the opening capital base and forecast capital expenditure;
9. the manner in which an amount was deducted from the opening capital base representing a return on the difference between estimated and actual capital expenditure; and
10. the treatment of several provisions in the Reference Service Agreement relating to liability and indemnity clauses.
11. The Tribunal is satisfied, for the reasons set out in JGN’s written submissions, that leave should be granted in respect of the matters mentioned in paragraphs (a), (b), (d) and (e). In respect of each of those matters the Tribunal accepts that a serious issue is raised and that, at least in the case of the matters in paragraphs (a), (b) and (d), the revenue threshold is satisfied, however that threshold is to be determined. As regards the matter in sub-paragraph (e) the Tribunal is satisfied that the revenue threshold is not brought into play because the relevant provisions about which complaint is made do not directly bear on the revenue that JGN will earn.
12. There is, however, a difficulty with the application of the revenue threshold to the matter specified in paragraph (c). JGN contends that the revenue threshold that is relevant is that derived from the decision as a whole and not the revenue which might flow from each particular issue the subject of a complaint. In other words, according to JGN, the issue is whether or not the revenue threshold is satisfied having regard to the aggregated value of the revenue derived from all the issues or matters under challenge. The other view is that the threshold must be satisfied in the case of each and every aspect of the decision that is challenged.
13. The Tribunal has decided that at this point it will not resolve this construction question. It is preferable for the Tribunal to reserve its decision on the matter, which is of some complexity, so as to be able to give it better consideration. Accordingly, the Tribunal will not grant leave to review the AER’s decision insofar as it dealt with the matters mentioned in paragraph (c). The Tribunal will hand down its decision on this aspect in the future.

## Applications for leave to intervene

1. The Law confers on several parties the right to intervene and on other parties the right to apply to the Tribunal for leave to intervene. The relevant provisions are ss 253-255 of the Law, together with the associated definitions in s 244.
2. Each of TRUenergy and the AGL companies have applied for leave to intervene under s 254. By that section a person who is a “reviewable regulatory decision process participant” is entitled to intervene. Generally speaking a person satisfies that description if they have a “sufficient interest” in the decision being reviewed and they made a submission or comment in relation to the making of the decision following an invitation to do so: s 154(2). The evidence tendered by TRUenergy and the AGL companies shows that they satisfy the relevant criteria and therefore may intervene as of right.
3. Ms Kingston also applies under s 254. She concedes that she does not meet the requirements of s 253 (a service provider to whom the decision applies or a relevant Minister) or s 255 (a user or consumer intervener). Ms Kingston does meet one of the requirements of s 254(2), namely that she made a submission to the AER in relation to the AER’s decision. The question at issue is whether she satisfies the other criterion, which is whether she has a “sufficient interest” in the decision being reviewed.
4. The Tribunal is in no doubt that Ms Kingston is, in an intellectual sense, interested in the AER’s decision, as she is in many other decisions made by the AER. Not only does she have an intellectual interest in those decisions, she seems to know a good deal about the relevant industry.
5. That, however, is not enough to establish that she has a “sufficient interest” for purposes of intervention. More must be shown. While it may be accepted that a “sufficient interest” is not a concept that involves technical niceties of the kind encountered in the old standing rules for judicial review, more than merely being a citizen must be established. Here it is not necessary to consider precisely what must be shown. Whatever that might be, Ms Kingston has not shown enough. She lives in Victoria. She consumes gas in Victoria from an organisation (or organisations) that supplies (or supply) gas in Victoria. The AER’s decision is not a decision that affects Victorian consumers of gas. It does not affect them because it does not regulate the price that Victorian consumers are required to pay for their gas.
6. We do not mean to suggest one way or the other that a mere consumer whose price for gas is affected by an impugned decision is or is not a person with a “sufficient interest” to intervene in a proceeding that brings up the validity of that decision. But, plainly, a person who is not directly affected in the way we have just discussed falls outside the standing threshold.
7. For this reason we cannot accede to Ms Kingston’s request. Perhaps Ms Kingston has useful information which she could put to the Tribunal. But, she does not have a sufficient interest that would enable her to put forward that material.
8. The parties are to formulate appropriate orders for the future progress of the application.

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| I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice Finkelstein (President), Professor D Round and Mr R Steinwall. |

Associate:

Dated: 27 October 2010