AUSTRALIAN COMPETITION TRIBUNAL

Application by Multinet Gas (DB No 1) Pty Ltd [2013] ACompT 5

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| Citation: | Application by Multinet Gas (DB No 1) Pty Ltd [2013] ACompT 5 |
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| Review from: | Australian Energy Regulator |
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| Parties: | **MULTINET GAS (DB NO 1) PTY LTD AND MULTINET GAS (DB NO 2) PTY LTD, TRADING AS MULTINET GAS DISTRIBUTION PARTNERSHIP** |
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| File number: |  |
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| Tribunal: | **MANSFIELD J, PRESIDENT**  **MR GF LATTA, MEMBER**  **PROFESSOR D ROUND, MEMBER** |
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| Date of decision: | 5 July 2013 |
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| Date of hearing: | Heard on the papers |
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| Place: | Adelaide |
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| Category: | No catchwords |
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| Solicitor for the Applicants: | Johnson Winter & Slattery |
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| Solicitors for the Australian Energy Regulator: | Australian Government Solicitor |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 3 of 2013 |

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| RE: | APPLICATION UNDER SECTION 245 OF THE NATIONAL GAS LAW FOR A REVIEW OF AN ACCESS ARRANGEMENT DECISION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO MULTINET LTD PURSUANT TO RULE 64 OF PART 8 OF THE NATIONAL GAS RULES |
| BY: | MULTINET GAS (DB NO 1) PTY LTD AND MULTINET GAS (DB NO 2) PTY LTD, TRADING AS MULTINET GAS DISTRIBUTION PARTNERSHIP  Applicant |

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| JUDGES: | MANSFIELD J, PRESIDENT  MR GF LATTA, MEMBER  PROFESSOR D ROUND, MEMBER |
| DATE OF ORDER: | 5 JULY 2013 |
| WHERE MADE: | ADELAIDE |

THE TRIBUNAL ORDERS THAT:

1. Leave is granted to the Applicant to apply to the Tribunal for review of a reviewable regulatory decision of the Australian Energy Regulator published on 29 April 2013 on the grounds of review specified in its application dated 20 May 2013.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
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| : | MANSFIELDJ, PRESIDENT  MR GF LATTA, MEMBER  PROFESSOR D ROUND, MEMBER |
| DATE: |  |
| PLACE: |  |

**REASONS FOR DECISION**

# INTRODUCTION

1. Pursuant to s 245(1) of the National Gas (Victoria) Law (NGL), the Applicant hereby:
2. seeks the leave of the Tribunal to apply to the Tribunal for a review of a reviewable regulatory decision published by the Australian Energy Regulator (AER) on 29 April 2013; and
3. subject to leave being given by the Tribunal, applies for review of that reviewable regulatory decision on the grounds set out in s 246 of the NGL.
4. Pursuant to s 247 of the NGL, the application for leave to the Tribunal must be made within 15 business days of the reviewable regulatory decision. The application has been made within that period.
5. The application must specify the grounds for review being relied on. The available grounds for review are only those specified in s 246(1) of the NGL. The application specifies the grounds for review, with particulars, in terms which on their face fall squarely within s 246(1). The specified errors involve alleged errors of fact which are said to be material to the making of the decision, so as to enliven s 246(1)(a) and (b), and incorrect exercises of discretion so as to enliven s 246(1)(c), and unreasonableness so as to enliven s 246(1)(d).
6. The Tribunal must also be satisfied that there is a serious issue to be heard and determined as to whether the grounds of review specified exist: s 248. It must also refuse leave to apply about a reviewable error if a ground of review relates to the amount of revenue that may be earned by the provider is a consequence of the decision; and the financial threshold is not met: s 249.
7. Sections 250 and 251 also prescribe circumstances in which leave to apply for review should be refused. They are not enlivened in the present circumstances.

# BACKGROUND

1. Multinet Gas (DB No.1) Pty Ltd and Multinet Gas (DB No.2) Pty Ltd, trading as Multinet Gas Distribution Partnership (Multinet) own approximately 9,815 kilometres of natural gas distribution networks, serving more than 665,000 customers throughout the south and east areas of metropolitan Melbourne, Yarra Ranges and South Gippsland Towns (Multinet Victorian gas distribution network).
2. Multinet was subject to an access arrangement for the period 1 January 2008 to 31 December 2012 that had been approved by the Essential Services Commission (ESC) under the National Third Party Access Code for Natural Gas Pipeline Systems and the Gas Pipelines Access (Victoria) Law in force under s 7 of the *Gas Pipelines Access (Victoria) Act 1998* (Vic) (2008-2012 Access Arrangement).
3. The *Gas Pipelines Access (Victoria) Act 1998* (Vic) was repealed on 1 July 2008.
4. With effect from its commencement on 1 July 2008, s 7 of the *National Gas (Victoria) Act 2008* (Vic) (Act) applies the National Gas Law, set out in the Schedule to the National Gas (South Australia) Act 2008 (SA), as a law of Victoria.
5. The NGL applies subject to transitional provisions in Part 5 of *National Gas (Victoria) Act 2008* (Vic).
6. Section 26 of the NGL gives the National Gas Rules (Rules) the force of law in Victoria.
7. Multinet is a service provider within the meaning of s 8 of the NGL, in that it owns controls or operates a scheme pipeline. The NGL defines scheme pipelines to include covered pipelines. Multinet’s Victorian gas distribution network is deemed by s 7 of Sch 3 to the NGL to be a covered pipeline as, for the purposes of that Schedule, that network is an old scheme covered pipeline that is a distribution pipeline. Multinet provides pipeline services by means of its Multinet Victorian gas distribution network.
8. The NGL and Rules regulate the tariffs that Multinet is permitted to charge from the provision of pipeline services by making provision for applicable access arrangements which amongst other things provide for tariffs for reference services.
9. The AER is responsible for the economic regulation of pipeline services provided by service providers, including Multinet, by means or in connection with a scheme pipeline.
10. Under s 25(a) of the *National Gas (Victoria) Act 2008* (Vic), the 2008-2012 Access Arrangement was deemed to be an AER approved full access arrangement.
11. Pursuant to s 132 of the NGL and Rule 52, on 30 March 2012 Multinet submitted its Access Arrangement Proposal to the AER.
12. After following the procedures prescribed under the NGL and the Rules, on 29 April 2013 the AER published its decision to give effect to the access arrangement it proposed for Multinet’s Victorian gas distribution network. That decision is set out in the decision entitled Access Arrangement Decision Multinet Gas (DB No.1) Pty Ltd and Multinet Gas (DB No.2) Pty Ltd 2013-2017 dated April 2013 (Access Arrangement Decision).
13. The access arrangement given effect by the AER is as follows:
14. Access Arrangement Multinet Gas (DB No.1) Pty Ltd and Multinet Gas (DB No.2) Pty Ltd Trading as Multinet Gas Distribution Partnership for the Distribution System (“Multinet”) Part A – Principal Arrangements, dated April 2013;
15. Access Arrangement Multinet Gas (DB No.1) Pty Ltd and Multinet Gas (DB No.2) Pty Ltd Trading as Multinet Gas Distribution Partnership for the Distribution System (“Multinet”) Part B – Reference Tariff and Reference Tariff Policy, dated April 2013;
16. Access Arrangement Multinet Gas (DB No.1) Pty Ltd and Multinet Gas (DB No.2) Pty Ltd Trading as Multinet Gas Distribution Partnership for the Distribution System (“Multinet”) Part C – Terms and Conditions, dated April 2013; and
17. Access Arrangement Information-Multinet Gas (DB No 1) and Multinet Gas (DB No 2) Gas Distribution Network-1 January 2013 – 31 December 2017-April 2013

(together, the AER Access Arrangement). The Access Arrangement Decision is a reviewable regulatory decision.

# LEAVE TO APPLY FOR REVIEW

1. Multinet seeks leave to apply for review in respect of the AER’s treatment of its 2012 capex in determining its opening capital base, in particular so that its opening capital base for 1 January 2013 should include “conforming capital expenditure for 2012 of $75.688 million (net). The affidavit of Rohan Madders, solicitor, of 20 May 2013 shows that the capital expenditure in 2012 is about $30 million, and that if the opening capital base is increased by that amount the nominal revenue during the period covered by the Access Arrangement Decision would be about $45 million and real revenue by about $42 million.
2. Clearly, the financial threshold prescribed in s 249 is satisfied.
3. It remains to consider whether, in respect of that topic, there is a serious issue to be heard and determined.
4. By directions given on 24 May 2013, the AER was given the opportunity to indicate whether it opposed leave to review being given to Multinet, and then to make submissions on that question. The AER has not opposed such leave, so it is appropriate to consider the issue of leave on the papers.
5. The tariffs applicable under the Access Arrangement Decision are related to total revenue for each regulatory year. In turn, total revenue requires the calculation of a return on the projected capital base for each year and depreciation on the projected capital base for the year: Rule 76 of the Rules.
6. The starting point is the opening capital base that in turn depends on the opening capital base at the commencement of the 2008-2013 Access Arrangement period and conforming capital expenditure during that period: Rule 77(2). Rules 69 and 79 address conforming capital expenditure.
7. In Multinet’s Access Arrangement Proposal, Multinet included a forecast of capex in 2012 of $99 million (2012 dollars) and supporting material. After the AER Draft Decision of 24 September 2012, Multinet revised its forecast capex in 2012 to $76.3 million.
8. In its Final Decision of 15 March 2013, the AER did not approve Multinet’s revised proposal for determining the opening capital base and adopted a “benchmark” forecast for 2012 capex of $47.6 million gross conforming capex ($45.6 million net of customer contributions), again based on the ESC capex benchmark.
9. Following the publication of the Final Decision, by letters dated 15 March 2013 and 3 April 2013, Multinet provided to the AER its statutory accounts for 2012 (initially in draft and then in signed, audited form), which show that its actual conforming capex in 2012 was $78.1 million, and by the letter dated 3 April 2013, Multinet provided the AER with an extract from its audited regulatory accounts for calendar year 2012 showing that its actual conforming capex in 2012 was $78.1 million.
10. By letters dated 22 March 2013 and 9 April 2013, the AER indicated that it would not take into account the information furnished by Multinet in its letters of 15 March 2013 and 3 April 2013.
11. In its Access Arrangement Decision, the AER adhered to its Final Decision. It stated:

For the purpose of the capital base roll forward, the AER has adopted the ESC's benchmark capex for 2012, adjusted for actual growth… This is consistent with the ESC's capex incentive scheme. (Access Arrangement Information, page 10).

1. In relation to that topic, the specified grounds of review are quite extensive.
2. In relation to the errors of fact asserted, Multinet has pointed to material upon which the AER could have adopted the conforming capex in 2012 for which it contended, rather than a benchmark adopted by the ESC. That material included detailed forecasts supported by expert evidence provided by Multinet, including IT upgrades and their costs, and details of its actual capital expenditure in 2012 and its statutory accounts (although there is much room for debate about whether such detail should have been considered by the AER). It also includes material to challenge the reasonableness or reliability of the forecast or estimate adopted by the AER, and of the ESC capex benchmark, having regard to material available to the AER. It also includes material to challenge the AER’s view that it could not determine whether the adoption of the ESC capex benchmark would be inconsistent with the operation of the incentive mechanism in the 2008-2013 Access Arrangement, and whether the AER’s view that its approach was consistent with that incentive scheme is correct.
3. In relation to the asserted incorrect exercises of discretion and asserted unreasonableness, Multinet has set out briefly its reasons why it says, and the material it relies upon for saying, that the AER’s assessment of the estimate of the conforming capital expenditure in 2012 could not properly have been made.
4. These reasons concern the appropriateness of the AER using a benchmark capex generated in 2008 (if it did) in the light of the material available to it, the application of the incentive mechanism to hold or support holding the conforming capital expenditure in 2012 to the figure adopted by the AER, the way in which the AER addressed Rules 40(2), 74(2), 77(2)(b) and 79, and the decision of the AER not to have regard to material provided to it by Multinet after the Final Decision.
5. The Tribunal, of course, at present has no formed view about the correctness or otherwise of any of the matters raised by Multinet. However, without reciting in more detail the contentions of Multinet or the material relied upon to support those contentions, it does appear to the Tribunal from that material that a serious issue exists to be heard and determined about each of the grounds of review relied upon by Multinet.
6. In view of the above, leave is granted to Multinet to apply for review of the AER Access Arrangement Decision, confined to the matters raised in the application.
7. Directions have already been given, provisionally upon the grant of leave, for the further preparation and hearing of the application. Unless either Multinet, the AER or any third party wishing to intervene seeks further directions or to vary those directions, the application will now be heard on 27 August 2013.

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| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield (President), Mr GF Latta and Professor D Round, Members. |

Associate:

Dated: 5 July 2013