AUSTRALIAN COMPETITION TRIBUNAL

Application by South Australian Council of Social Service Incorporated [2016] ACompT8

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| Review from: | Australian Energy Regulator |
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| File number: | ACT 12 of 2015 |
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| Tribunal: | **MIDDLETON J (DEPUTY PRESIDENT)****PROFESSOR K DAVIS (MEMBER)****MR R STEINWALL (MEMBER)** |
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| Date of Determination: | 2 May 2016 |
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| Catchwords: | **CONSUMER LAW** – application for leave to review decision of Australian Energy Regulator – application for leave to amend application for review – consideration of serious issue to be heard – consideration of s 71O(2)(c) of the *National Electricity Law* – whether applicant raised matter in a submission to the AER before reviewable regulatory decision made. |
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| Legislation: | *National Electricity (South Australia) Act 1996* (SA)*National Electricity Law**National Electricity Rules* |
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| Cases cited: | *Application by EnergyAustralia and Others* [2009] ACompT 8*Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)* [2010] ACompT 14*Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1*Application by United Energy Distribution Pty Limited (No 2)* [2012] ACompT 1 |
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| Counsel for South Australian Council of Social Service Incorporated: | Mr R Dick SC with Dr V Priskich |
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| Solicitor for South Australian Council of Social Service Incorporated: | Public Interest Advocacy Centre |
| Counsel for Australian Energy Regulator: | Mr M O’Bryan QC with Mr T Clarke |
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| Solicitor for Australian Energy Regulator: | Australian Government Solicitor |
|  |  |
| Council for South Australia Power Network: | Miss R C A Higgins |
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| Solicitor for South Australia Power Network: | Gilbert + Tobin |

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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|  | ACT 12 of 2015 |
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| RE: | **APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF A DISTRIBUTION DETERMINATION BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO SA POWER NETWORKS PURSUANT TO CLAUSE 6.11.1 OF CHAPTER 6 OF THE NATIONAL ELECTRICITY RULES** |
| BY: | SOUTH AUSTRALIAN COUNCIL OF SOCIAL SERVICE INCORPORATED (ABN 93 197 662 296)Applicant |

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| TRIBUNAL: | MIDDLETON J, (DEPUTY PRESIDENT)PROFESSOR K DAVIS (MEMBER)MR R STEINWALL (MEMBER) |
| DATE OF DETERMINATION: | 2 May 2016 |
| where made: | Melbourne |

THE TRIBUNAL DETERMINES THAT:

1. The application for leave to review the distribution determination of the Australian Energy Regulator in relation to SA Power Networks by South Australian Council of Social Service Incorporated be dismissed.

REASONS FOR DETERMINATION

# INTRODUCTION

1 On 29 October 2015, the Australian Energy Regulator (**AER**) made a distribution determination regarding SA Power Networks (‘**SAPN**’) for the regulatory control period 1 July 2015 to 30 June 2020 (‘**Final Decision**’).

2 On 19 November 2015, South Australian Council of Social Service Incorporated (‘**SACOSS**’) filed an application for review of the Final Decision pursuant to s 71B of the *National Electricity Law* (being the Schedule to the *National Electricity (South Australia) Act 1996* (SA)) (‘**SACOSS’s** **Application**’). SACOSS contended that, in respect of the AER’s determination on operating expenditure (‘**opex**’) in the Final Decision, the AER erred by failing to properly assess whether SAPN’s 'corporate and other operating costs' (being a component of base opex) were efficient costs. SACOSS’s Application also included an application for leave to intervene on various grounds in the application for review of the Final Decision also filed by SAPN on 19 November 2015 (‘**SAPN’s Review Application**).

3 Pursuant to the directions of the Tribunal on 10 March 2016, SACOSS filed an application for leave and a proposed amended application for review on 17 March 2016 (‘**Proposed Amended Application**’). SACOSS proposed an additional ground in respect of opex (as a new paragraph 49(a)), which asserted that the AER had erred by placing too much weight on benchmarking analysis when assessing whether SAPN’s base year opex was efficient. SACOSS’s Proposed Amended Application also included an amended application for leave to intervene in SAPN’s Review Application.

# BACKGROUND

4 On or about 30 October 2014, SAPN submitted a regulatory proposal to the AER for the regulatory control period 1 July 2015 to 31 June 2020.

5 In November 2014, the AER invited submissions on SAPN’s regulatory proposal. On 30 January 2015, SACOSS made a written submission to the AER on the regulatory proposal titled ‘SACOSS Submission to Australian Energy Regulator on SA Power Networks’ 2015-2020 Regulatory Proposal’ (‘**January Submission**’).

6 On 30 April 2015, the AER made a preliminary decision on SAPN’s regulatory proposal, under cl 6.10.3 of the *National Electricity Rules* (‘**NER**’).

7 The AER then invited submissions on the preliminary decision. On 2 July 2015, SACOSS made a written submission to the AER on the preliminary decision titled ‘SACOSS Submission to the Australian Energy Regulator on SA Power Networks’ 2015-2020 AER Preliminary Decision’ (‘**2 July Submission**’).

8 On 3 July 2015, SAPN submitted a revised regulatory proposal to the AER.

9 The AER invited submissions on the revised regulatory proposal. On 24 July 2015, SACOSS made a written submission to the AER on the revised regulatory proposal titled ‘Submission to the Australian Energy Regulator on SA Power Networks’ Revised Regulatory Proposal 2015-20’ (‘**24 July Submission**’).

10 On 29 October 2015, the AER made the Final Decision under cl 6.11.1 of the NER.

11 On 19 November 2015, SAPN’s Review Application was filed. On 2 May 2016, the Tribunal granted leave to SAPN to apply for review.

# LEGISLATIVE FRAMEWORK

12 Section 71B of the *National Electricity Law* (‘**NEL**’) provides that an affected or interested person or body may, with the leave of the Tribunal, apply to the Tribunal for a review of a reviewable regulatory decision. An application for review must specify the grounds of review upon which the application is made: s 71B(2)(b) of the NEL.

13 It is not disputed that, as a ‘reviewable regulatory decision process participant’ within the meaning of s 71A of the NEL, SACOSS is an ‘affected or interested person or body’, nor that SACOSS has standing to seek leave to apply for review of the Final Decision. In addition, it is accepted that the Final Decision is a ‘reviewable regulatory decision’ for the purposes of s 71B(1) of the NEL, as it is a network revenue or pricing determination that sets a regulatory period.

14 Pursuant to s 71E of the NEL, the Tribunal must not grant leave to apply for review unless it appears to the Tribunal that:

(a) there is a serious issue to be heard and determined as to whether each ground for review exists; and

(b) the applicant has established a *prima facie* case that a determination made by the Tribunal varying the reviewable regulatory decision, or the setting aside and remittal and consequent fresh AER decision, on the basis of one or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable National Electricity Objective (‘**NEO**’) decision.

15 Pursuant to s 7 of the NEL, the NEO is

*to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to –*

*(a) price, quality, safety, reliability and security of supply of electricity; and*

*(b) the reliability, safety and security of the national electricity system.*

16 Most relevant to SACOSS’s Application and Proposed Amended Application and the question of whether it should be granted leave to apply for review is s 71O(2)(c) of the NEL which provides:

*[i]n a review under this Subdivision, the following provisions apply in relation to a person or body, other than the AER (and so apply at all stages of the proceedings before the Tribunal):*

*…*

*(c) an affected or interested person or body (other than a provider under paragraph (a) or (b)) may not raise in relation to the issue of whether a ground for review exists or has been made out any matter that was not raised by the person or body in a submission to the AER before the reviewable regulatory decision was made…*

# SACOSS’S APPLICATION FOR LEAVE AND APPLICATION TO AMEND

## SACOSS’s paragraph 49 grounds (as originally formulated)

17 By paragraph 31(a) of SACOSS’s Application, SACOSS applied for review of the base year opex component of the AER’s Final Decision. Paragraph 31(a) provides that SACOSS applies for a review in respect of:

Operating expenditure (base year opex): *the decision in calculating the forecast of the total of SA Power Networks’ required operating expenditure pursuant to clause 6.5.6 of the NER, to use a base opex amount of $237.9 million ($2014-15)…*

18 The asserted errors, as identified in paragraph 49 of SACOSS’s Application (‘**original paragraph 49**’), are that the AER:

*a. did not have proper regard to, or alternatively gave insufficient weight to the fact that SA Power Networks’ costs category of “Corporate and other operating costs” had significantly increased from the previous regulatory control period.*

*b. did not have proper regard to whether SA Power Networks’ corporate overhead expenditures for the base year were efficient operating expenditures.*

*c. was inconsistent in its treatment of different cost categories in that the AER considered whether SA Power Networks’ cost category of ‘vegetation management’ were efficient costs but had no or insufficient regard to whether SA Power Networks’ cost category of “Corporate and other operating costs” were efficient costs.*

*d. unreasonably relied upon SA Power Networks’ relative efficiency by reference to other service providers without sufficient consideration to whether SA Power Networks’ cost category of “Corporate and other operating costs” is an efficient component of base year costs.*

19 As such, SACOSS broadly contended that the AER erred in failing to scrutinise the ‘corporate and other operating costs’ component of SAPN’s base year opex.

20 By its notice dated 30 March 2016, the AER gave notice that it opposed leave to review being granted to SACOSS with respect to the errors asserted in the original paragraph 49. The AER opposed leave being given on the basis that, pursuant to s 71O(2)(c) of the NEL, SACOSS had not fairly raised the matters in the original paragraph 49 in a submission to the AER before the Final Decision was made. The AER contended that SACOSS was therefore prevented from raising those matters at any stage of the proceedings before the Tribunal. If found to be the case:

(a) SACOSS would not be permitted to apply for leave to review in respect of those matters; or

(b) as a consequence of the operation of s 71O(2)(c), there would be no serious issue to be heard and determined as to whether a ground of review exists under s 71C of the NEL in respect of SACOSS’s Application.

21 SACOSS contended that the matter it sought to raise on review is a matter ‘*broadly arising*’ from the submissions it made to the AER during the regulatory review.

## SACOSS’s Proposed Amended Application

22 SACOSS also applied to amend its application for review to raise an additional matter for review by the Tribunal. The additional ground of review, contained in proposed paragraph 49(a) is as follows:

*49. The exercise of the AER’s discretion in making the Base Year Opex Decision was incorrect, further or alternatively the Base Year Opex Decision was unreasonable, having regard to all the circumstances because the AER:*

*a. placed too much weight on benchmarking analysis in assessing whether SAPN’s base year opex reasonably reflected efficient costs.*

23 The AER contended that, for substantially the same reasons as stated earlier in relation to s 71O(2)(c), SACOSS ought not be permitted to raise as a matter for review the error alleged in proposed paragraph 49(a). The AER contended that the matter was not only not raised in SACOSS’s submissions to the AER, but SACOSS had in fact argued that the AER should have done precisely the opposite to what it sought to raise in proposed paragraph 49(a).

24 Accordingly, the AER submitted that SACOSS should not be permitted to amend its application. In the alternative, it should be refused leave to review in respect of its proposed paragraph 49(a).

25 On 4 April 2016, SAPN also gave notice that it opposed SACOSS’s Proposed Amended Application on the basis that the new matter raised in proposed paragraph 49(a) was not raised within the 15 business days allowed by s 71D of the NEL. Further, the matters raised by SACOSS both in relation to original paragraph 49 and proposed amended paragraph 49(a), were not raised in a submission by SACOSS to the AER before the Final Decision was made. As such, SAPN contended that SACOSS was prevented from raising the matter before the Tribunal by reason of s 71O(2)(c) of the NEL.

# CONSIDERATION

26 The central question for consideration is whether SACOSS has satisfied the criteria in s 71O(2)(c) of the NEL in respect of the grounds of review in relation to opex, both in respect of SACOSS’s Application and Proposed Amended Application (‘**opex grounds**’).

27 A party may be permitted to raise an argument before the Tribunal if it can be identified as broadly arising out of a matter fairly raised by that party before the final determination was made: *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 at [698] (‘***PIAC and Ausgrid****’)*; *Application by EnergyAustralia and Others* [2009] ACompT 8 at [312(f)].

28 There are two key policy considerations relevant to s 71O(2)(c) of NEL:

(a) *first,* to ensure efficiency in the process of regulatory determinations, by limiting the matters which can properly be the subject of merits review: *Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)* [2010] ACompT 14 at [42]; and

(b) *second,* to ensure fairness in the decision making process, by allowing the regulated network service provider, the AER and interested parties to make submissions on matters raised during the decision making process.

29 Relevant to the first policy consideration outlined above, the Tribunal held in *Application by United Energy Distribution Pty Limited* [2012] ACompT 1 at [104]:

*There are good reasons why the Tribunal is not permitted to deal with matters (including submissions and arguments) not raised in submissions before the AER. The AER is the regulator. The Tribunal is the reviewing authority, not the regulator. A review by the Tribunal is limited to the grounds specified in s 71C. It is not a full-blown reconsideration of the AER’s decision equivalent to a hearing* de novo*. The legislature intended to ensure, as far as possible, that the regulation of the industry did not become mired in endless decisions and reconsiderations.*

30 In relation to the second policy consideration outlined above, in *Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)* [2010] ACompT 14 at [31], the Tribunal held:

*Had Ergon Energy’s Regulatory Proposal not accepted the AER’s classification of services, interested parties may well have made submissions to the AER on the issue. Also, had Ergon Energy been successful in persuading the AER to decide that street lighting is not a distribution service, those interested parties who made such a submission could challenge the decision before the Tribunal. If, however, the issue were to be allowed to be pursued in the manner now proposed by Ergon Energy, those interested parties would be denied an opportunity to be heard unless the Tribunal put a procedure in place to allow such interested parties to come before it. This would involve delay and expense.*

31 Therefore, where leave to review is sought by an interested person, it is both costly and unfair to the AER and to the regulated network service provider to allow the interested person to raise, as an alleged error, a matter that was not fairly raised in submissions to the AER during its decision making process. The object of the prescriptive decision making process under the NEL is to enable contentious issues to be identified and resolved. A review before the Tribunal is confined to such matters; it is not a forum for raising new contentions that could have been raised before the AER but were not.

## Objections to original paragraph 49 in SACOSS’s Application

32 SACOSS submitted that the grounds of review at original paragraph 49 raise matters that can be identified as broadly arising from the submissions made by SACOSS to the AER.

33 SACOSS raised the following with regard to base year opex in its submissions to the AER prior to the Final Decision:

(a) the opex levels allowed for in the preliminary decision of 30 April 2015, regarding SAPN’s original regulatory proposal submitted to the AER on 31 October 2014 were higher than those in the 2005-10 regulatory period, and SACOSS called on the AER to review its opex findings and determine the material causes for the increases in the 2005-10 regulatory period; and

(b) its concern that the AER’s approach of using a recent base year rather than examining a long term average of opex was distortionary, encouraged a ‘status quo’ approach to spending, and undermined the supposed incentive properties of the regulatory regime.

34 Despite this, the AER contended that SACOSS’s submission on opex can in fact be summarised as follows:

(a) SACOSS’s January Submission did not expressly address opex, let alone the corporate and other operating costs component.

(b) SACOSS’s 2 July Submission urged the AER to determine the cause of the increase in SAPN’s opex in the previous regulatory period, but did not make any submission concerning the corporate and other operating costs component or otherwise contend that the AER’s preliminary decision was in error in that respect.

(c) SACOSS’s 24 July Submission expressed concerns with respect to the AER’s approach of using a recent base year for assessing the opex forecast, made reference to analysis prepared by Bev Hughson, a member of the Consumer Challenge Panel dated 13 May 2015, and highlighted the rapid rise in opex. The analysis by Ms Hughson restated the increase in opex over the prior regulatory period.

(d) As such, none of SACOSS’s submission to the AER mentioned ‘corporate and other operating costs’ at all.

35 The Tribunal accepts the AER’s submissions in this regard. Further, the Tribunal considers that SACOSS’s concern regarding the use of a recent base year was an issue regarding the AER’s general approach to assessing base opex. SACOSS did not call for an assessment of SAPN’s specific base opex or any of its components, such as ‘corporate and other operating costs’.

36 SACOSS raised only the very broad issue of an overall increase in base opex from the 2005- 10 regulatory control period and asked the AER to consider the reasons for the increase. As SAPN submitted, a broad submission of this nature does not satisfy the requirements of s 71O(2)(c) of the NEL. The submissions do not descend into the level of specificity and detail required by that provision, and as such, cannot be properly characterised as ‘a matter…raised by the person or body in a submission to the AER before the reviewable regulatory decision was made’: s 71O(2)(c) of the NEL.

## Proposed Paragraph 49(a)

### Section 71O(2)(c)

37 SACOSS, in its 24 July Submissions, acknowledged the results of the AER’s benchmarking but nonetheless directed the AER’s attention to the trend in actual costs over recent regulatory control periods. This can be seen in the following extract of SACOSS’s 24 July Submission upon which it predominantly relied to demonstrate that the matters were fairly raised during the regulatory process:

***Revised opex proposal***

*Table 3 shows SA Power Networks’ revised opex claims in the Revised Regulatory Proposal.*

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|  | **Opex** | **Step Changes** | **Output growth** | **Real price growth** |
| **Regulatory Proposal** | 1524.1 | 216.8 | 46.7 | 61.4 |
| **AER Preliminary Decision** | 1225.8 | 4.1 | 20.5 | 5.9 |
| **Revised Regulatory Proposal** | 1421.9 | 140 | 36.4 | 50.2 |
| **Difference** | 196.1 | 135.9 | 15.9 | 44.3 |

*Table 3: Opex reinstatements sought by SA Power Networks (June 2015, $ million)*

*The opex reinstatements are in two main areas: (i) step changes and (ii) rate of change factors. The rate of change reinstatements have been broken down in Table 3 into output growth and real price growth reinstatements.*

***General view on opex reinstatements***

*While SACOSS acknowledges that SA Power Networks is more efficient than some other distributors in the electricity industry, it agrees with the view of the Consumer Challenge Panel that the opex allowance should be set closer to the efficient benchmark. Bruce Mountain estimated that SA Power Networks was 16 per cent below the efficient frontier for opex. Compared to SA Power Networks’ average opex over 2006 to 2013, and adjusting for growth in the network, SA Power Networks should be spending around $168 million per year in opex. This is around $73 million below the average $241 million in opex allowed in the AER Preliminary Decision.*

*SACOSS is concerned that the AER’s approach of using a recent base year rather than examining a longer term average of opex is distortionary, encourages a ‘status quo’ approach to spending, and undermines the supposed incentive properties of the regulatory regime. Bev Hughson notes that SA Power Networks has tended to spend close to the opex allowance each year, which suggests to SACOSS that the AER’s approach may be encouraging a culture of spending to the allowance rather than seeking efficiencies. In this regard, using a recent single year as a base year is particularly distortionary for SA Power Networks (and other electricity distributors) because SA Power Networks’ opex allowances have been rising rapidly over the past two RCPs and are at or close to an historical peak. There is little reason to believe that recent opex spending is more reflective of underlying costs than longer term opex trends. There have been few major changes in the immediate past to explain the rise, and in particular the scale of the rise.*

38 By raising concerns about the scale of actual opex increases despite the benchmarking results, SACOSS submitted that it had made the argument in its submission that the AER was placing too much emphasis on the results of its benchmarking. For instance, SACOSS submitted that the first sentence of the extract of the 24 July Submission above was ‘plainly a reference to benchmarking.’ Accordingly, SACOSS submitted that the review ground at proposed paragraph 49(a) arose from the submissions made by SACOSS to the AER.

39 However, the 24 July Submission obliquely refers to the benchmarking issue. Such a reference is not sufficient and the topic should have been more specifically raised before the AER as a matter that the AER had to consider.

40 Further, as contended by the AER, the observations of SACOSS in the 24 July Submission are not in fact a challenge to the benchmarking methodology as articulated in proposed paragraph 49(a). The ground that is sought to be agitated by proposed paragraph 49(a) is not what is contended in SACOSS’s 24 July Submission.

41 SACOSS acknowledged that its proposed new ground of review had been identified and put forward only after its consideration of the Tribunal’s decision in *PIAC and Ausgrid.* However, SACOSS submitted that the terms of the Tribunal’s observations could not have been reasonably anticipated prior to delivery of the decision. Such circumstances do not relieve SACOSS from the requirements of s 71O(2)(c) of the NEL. Moreover, the notion of benchmarking as a substantial issue in these cases had been manifest for many months before the Tribunal in the *PIAC and Ausgrid* proceedings, a fact about which SACOSS was aware. SACOSS had ample opportunity to raise this as an issue in this matter.

### Other matters

42 Having determined that the grounds of review raised in original paragraph 49 and proposed amended paragraph 49(a) do not satisfy s 71O(2)(c), the Tribunal does not need to address the other issues raised by the parties.

# CONCLUSION

43 As a consequence of the operation of s 71O(2)(c) of the NEL, there is no serious issue to be heard and determined as to whether a ground of review exists under s 71C of the NEL in respect of SACOSS’s Application and Proposed Amended Application. Therefore, the Tribunal does not grant leave to SACOSS to apply for a review of the Final Decision. As a consequence, and as a result of SAPN deciding not to press certain grounds of review upon which SACOSS sought to intervene, SACOSS’s application for leave to intervene in SAPN’s Review Application also falls away.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice Middleton, Professor K Davis and Mr R Steinwall. |

Associate:

Dated: 15 June 2016