FINAL

National Electricity Law (Schedule to the National Electricity (South Australia) Act 1996) and the National Electricity Rules applied as the law of Queensland by the Electricity - National Scheme (Queensland) Act 1997

BETWEEN

Millmerran Energy Trader Pty Ltd (ACN 084 923 973)

Applicant

AND

National Electricity Market Management Company Limited (ACN 072 010 327)

Respondent

AND

Registered Participants listed in Annexure A of the Direction of the DRP of 6 December 2006

Joined Parties

DATE:

SUBJECT:

Final Determination With Reasons

On 21 December 2006 I published an Interim Determination in which I made the following Directions:

"The DRP makes the following directions:

1. NEMMCO is required to withdraw the intra-regional loss factors for the 2006/7 financial year previously published by it.

2. NEMMCO is required within 14 business days after the date of this determination to:

   (a) Publish in the place of the previously published intra-regional loss factors the intra-regional loss factors for the 2006/7 financial year published as the "List of Boundaries and Marginal Loss Factors for the 2006/7 Financial year (version 3) dated 24 November 2006."

   (b) Apply the intra-regional loss factors published in accordance with paragraph (1) of this determination for the 2006/7 financial with effect from 1 July 2006.

3. NEMMCO is required to issue routine revised statements or special revised statements (as the case may be) in accordance with clause 3.15.19 of the Rules for Millmerran and the joined parties incorporating any adjustments arising from any difference between the intra-regional loss factors referred to in para 1 of this determination and the intra-regional loss factors published in accordance with para 2(a) of this Determination."

In that Determination I also explained that I had described it as Interim only in the sense that I had not included my reasons for concluding that NEMMCO had power to publish amended intra-regional loss factors. In this Final Determination I set out those reasons.

The fundamental position taken by NEMMCO was that, once it had calculated and published intra-regional loss factors for a financial year in accordance with Clauses 3.6.2(f) and 3.6.2 (f1) of the National Electricity Rules, it was *functus officio*.

The opposing viewpoint is that, as a matter of construction of the Rules, NEMMCO was not disentitled from publishing recalculated loss figures in circumstances where it became apparent that the published figures were infected with error.

The difference in the two approaches is well illustrated by reference to the judgement of Gummow J in Minister for *Immigration v Kurtovic* 92 ALR 93 at 112 –

> "There was "an inconvenient common law doctrine of somewhat uncertain extent to the effect that a power conferred by statute was exhausted by its first exercise": *Halsbury's Laws of England*, 1st ed, vol 27, p 131. However, s 33(1) of the *Acts Interpretation Act 1901* (Cth) (which was modelled upon s 32(1) of the *Interpretation Act 1889* (UK)) provides that where an Act confers a power or imposes a duty, then unless the contrary intention appears, the power may be exercised and the duty shall be performed "from time to time as occasion requires". But in any given case, a discretionary power reposed by statute in the decision-maker may, upon a proper construction, be of such a character that it is not exercisable from time to time and it will be spent by the taking of the steps or the making of the statements or representation in question, treating them as a substantive exercise of the power. The result is that when the decision-maker attempts to resile from his earlier position, he is prevented from doing so not from any doctrine of estoppel, but because his power to do so is spent and the proposed second decision would be *ultra vires.* The matter is one of interpretation of the statute conferring the particular power in issue."

It will be noticed that the ultimate sentence expresses the approach which must be taken when a tribunal is confronted with a claim that a particular statutory power may be exercise once only so that an attempted later exercise of the power is *ultra vires.*

It is accordingly necessary to focus on the Rules in order to decide whether, as a matter of the intention of the Rule Maker, there is to be discerned a legislative intention that NEMMCO's power to publish intra-regional loss factors may be exercised once and thereafter NEMMCO's power is relevantly spent.

The starting point for the consideration of the problem is to be found in Rules 3.6.2(f) and 3.6.2(f1) which read:

3.6.2 Intra-regional losses

(f) NEMMCO must calculate *intra-regional loss factors* for each *transmission network connection point* for each *financial year* in accordance with the methodology prepared and published by *NEMMCO* under clause 3.6.2(d).

(f1) By 1 April in each year, *NEMMCO* must *publish* the *intra-regional loss factors* revised under clause 3.6.2(f) and to apply for the next *financial year.*

It should be observed, at the outset, that the Rules do not invest NEMMCO with a discretionary power. Rather, there is imposed on NEMMCO a duty to publish the loss factors, and to do so by a particular date to apply for the next financial year. This, to my mind, distinguishes this case from the cases, of which *Kurtovic* is a good example, where the administrative decision may be quasi judicial in nature. Suffice for me to say, in this respect, that this is not one of those cases where there is a general rule against the changing or revocation of an administrative decision (see *Firearm Distributors Pty Ltd v Carson* (2001) 2QD.R.26 especially at 29, 31 and 32).

NEMMCO contends that, having published the intra-regional loss factors for the 2006/7 financial year on 31st March 2006 it has no power now to publish recalculated intra-regional loss factors for that financial year.

This is so, it argues because of the fundamental importance of the loss factors and the imperative language of the Rules to which I have just referred. An appreciation of the argument requires some explanation of intra-regional loss factors and the reason why they are of fundamental importance.

An explanation is conveniently set out in the joint submission of NEMMCO and Millmerran in the paragraphs which I set out hereunder:

"Intra-regional loss factors

1.3 Energy is lost as electricity is transported from where it is produced to where it is consumed through both electrical resistance and heat produced during transportation.

1.4 This means the quantity of electricity generated must always be greater than the quantity of demand by end-users. In addition to this, the proportion of power generated that is lost depends on the location of generator and *load* connection points.

1.5 As the NEM is a wholesale exchange for the trade of electricity, these losses need to be accounted for in the course of the trade of electricity.

1.6 *Spot prices* at the *regional reference node* in each *region* provide the basis upon which trade in the NEM is conducted.

1.7 *Loss factors* are a mathematical representation of these losses that are taken into account in the calculation of *spot prices.*

1.8 *Intra-regional loss factors* notionally describe the *marginal electrical energy losses* for electricity transmitted between a *regional reference node* and a *transmission network connection point* in the same *region* for a defined time period and associated set of operating conditions (see clause 3.6.2(b) of the *Rules).*

1.9 *Loss factors* are fundamental to the NEM for reasons including the following:

(a) they provide for the *dispatch* of generation that is as economically efficient as possible.
(b) they provide appropriate signals for network investment decisions; and
(c) they enable new entrants into the market to connect their *loads* or generators to the *transmission network* at locations which are efficient having regard to *network losses.*"

These propositions, including the proposition that loss factors are fundamental to the NEM, are, I emphasise, common ground between the parties. Further, the obligatory nature of the duty imposed on NEMMCO is clear from the use of the word 'must'.

However to discern the legislative intention it is necessary to go beyond the two Rules I have quoted and to refer to two clauses of the National Electricity Law. They are: -

CL19(1) of Schedule 2:
"If (the National Electricity Rules) confers a function or power on a person or body, the function may be performed, or the power may be exercised from time to time as occasion requires."

CL20(a) of Schedule 2 provides that:
"Where the Rules require the making of an instrument, decision, or determination, the power includes power to amend or repeal the instrument, decision or determination."

In the submissions it is said that statutory provisions such as these have been interpreted in some cases as constituting a contrary intention sufficient to displace the operation of *functus officio.* NEMMCO, however, disagrees with that proposition. It points to clause 1(2) of Schedule 2 which essentially provides that the application of the Schedule to the Rules may be displaced, wholly or partly, by a contrary intention appearing in the National Electricity Rules. It then contends that clause 3.6.2 of the Rules manifests an intention to displace the operation of clauses 19 and 20 of Schedule 2 and it points to a number of aspects of clause 3.6.2. In particular it argues that under paragraph (f1), the intra-regional loss factors must be published by 1 April each year and are to apply for the next financial year. This, it contends, suggests they cannot be published twice. Such a conclusion is consistent with a number of other paragraphs that specify that the intra-regional loss factors apply for the full financial year, including paragraphs (b)(2), (e), (1) and (f). In addition paragraph (i) provides for a regime to determine or recalculate intra-regional loss factors during the final year for new or modified connection points. When this occurs, the intra-regional loss factors for all other transmission connection points for that financial year, determined in accordance with clauses 3.6.2 (a) to (g), must remain unchanged (paragraph (n)).

In summary the structure of clauses 3.6.2 (a) to (g) is that NEMMCO must calculate and publish the intra-regional loss factors for a financial year and it is submitted that this is inconsistent with an ability for NEMMCO to publish recalculated intra-regional loss factors. In response to a suggestion that it would be absurd to impose incorrect loss factors for a full financial year on the members of the market it refers to clause 8.2 of the Rules establishing a dispute resolution scheme allowing for a review of decisions made under the Rules as well as judicial review under Section 70 of the *National Electricity Law.* In short there is, it argues, provision under the Law and the Rules for the correction of the loss factors published on or before 1 April for the following financial year.

The opposing submissions by Millmerran focuses essentially on clauses 19(1) and 20(a) of the National Electricity Law and the absurdity of treating as obligatory the requirement in sub-clause (f1) that the loss factors must be published by 1 April of each year. In essence, the critical point is whether the imperative nature of the language in clauses 3.6.2 (f) and (f1) coupled with the fundamental importance to the

market of loss factors provide a contrary intention displacing the operation of clauses (19) and (20(a)) of Schedule 2.

While one can readily accept that clause 3.6.2(f) imposes an obligation on NEMMCO which must be carried out, it is not clear to me that the direction that the publication take place by 1 April in each year is also an obligation which must be carried out in order to ensure that the publication is valid. It would, it seems to me, only be so if it created an obligatory pre-condition to the exercise of the power to publish intra-regional loss factors. Assistance in the consideration of this problem is to be found in the judgement of the majority of the High Court in *Project Blue Sky v ABA* 194 CLR 355. The relevant parts read:

> "91 An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition.
>
> …….
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> 92 Traditionally the Courts have distinguished between acts done in breach of an essential preliminary to the exercise of a statutory power and authority and acts done in breach of a procedural condition for the exercise of a statutory power or authority. Cases falling within the first category are regarded as going to the jurisdiction of the person or body exercising the power or authority. Compliance with the condition is regarded as mandatory, and failure to comply with the condition will result in the invalidity of an act done in breach of the condition. Cases falling within the second category are traditionally classified as directory rather than mandatory.
>
> ……
>
> As a result, if the statutory condition is regarded as directory, an act done in breach of it does not result in invalidity."

The judgement then goes on to criticise the 'elusive distinction between directory and mandatory requirements' and concludes: "A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ……..

In determining the question of purpose, regard must be had to: "the language of the relevant provision and the scope of the object of the whole statute.""

Two further passages from the judgement should be noted. The first is the statement that: "The fact that s 160 regulates the exercise of functions already conferred on the ABA rather than imposes essential preliminaries to the exercise of its function strongly indicates that it was not a purpose of the act that a breach of s 160 was intended to invalidate any act done in breach of that section."

And the second, at paragraph 97: "Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act."

In the present case it is clear to me that clause 3.6.2(f1) regulates the exercise of the power under clause 3.6.2(f) and is not an essential preliminary to the exercise of that power. This, as *Blue Sky* establishes, strongly indicates that it was not a purpose of the Act and Rules that publication in breach of clause 3.6.2(f1) was intended to invalidate the calculation and publication of the loss factors to the market. Further the extreme inconvenience to the Electricity Market created by, for instance, a conclusion that a publication of the intra-regional loss factors on 4 April in the relevant year rendered the publication wholly invalid is powerful support for the proposition that although the publication was in breach of clause 3.6.2(f1) it was not thereby invalid. As Millmerran submitted the contrary conclusion would lead to windfall gains to some entities and burdens unfairly imposed on others in substantive disregard of the market design principles.

My conclusion, therefore, is that clause 3.6.2(f1) is not an essential precondition to the compliance by NEMMCO with its obligation to calculate and publish intra-regional loss factors such that any publication of those factors later than 1 April of the relevant year would not thereby render the published factors invalid. That is not to gainsay the importance of complying with clause 3.6.2(f1) as there are many reasons of importance why NEMMCO should comply with the direction thereby contained. It is

simply a conclusion that a failure to comply with a direction in that clause does not render the publication invalid.

The essential importance of that conclusion is that it acts as a counter to the argument that clause 3.6.2 of the Rules manifests an intention to displace the operations of clause 19(1) and 20(a) of Schedule 2. If, for whatever reason, NEMMCO is not able to complete its calculation and publish the loss factors by 1 April, its exercise of that function after that date would not, as I have sought to explain, invalidate the publication. This fact is wholly inconsistent with the idea there is to be found in clause 3.6.2 a contrary intention to the application of clauses 19(1) and 20(a) of Schedule 2 to that clause.

In this case the precise question is whether NEMMCO has power, after 1 April in the relevant year, to recalculate the intra-regional loss factors and publish them. It would have an apparent power to do so in the light of clauses 19(1) and 20(a) of Schedule 2 unless a legislative intention can be discerned from clause 3.6.2 that the importance of the loss factors to the market are such that strict compliance with the two clauses 3.6.2(f) and (f1) are obligatory to the valid publication of loss factors. For reasons that I given I am unable to conclude that clause 3.6.2 taken as a whole, and clauses 3.6.2(f) and (f1) taken together provide that contrary intention. It follows, in my view, that NEMMCO had power to correct its errors and to publish amended calculations notwithstanding that that publication took place after 1 April. Indeed a contrary view appears to be quite inconsistent with the purpose underlying the requirement that there be calculated and published intra-regional loss factors for, inter alia, the proper operation of the electricity market. For these reasons I reach the conclusions and gave the Directions contained in the Interim Determination.

Millmerran has made an application for costs pursuant to clause 8.2.8 of the Rules. Sub-clause (a) of that clause provides that the costs of the dispute resolution processes…. are to be borne equally by the parties to the dispute unless: (i) clause 8.2.8(b) applies…… Subclause (b) empowers the DRP to allocate the costs for payment by one or more parties as part of any determinations and then proceeds "subject to clause 8.2.8(c) (which is not presently relevant), in deciding to allocate costs against one or more parties to a dispute the DRP may have regard to any

relevant matters, including (but not limited to) whether the conduct of that party or those parties unreasonably prolonged or escalated the dispute or otherwise increased the costs of the DRP proceedings".

In short the prima facie rule is that the costs are to be borne equally by the parties to the dispute, but the DRP has an essentially unfettered discretion to order costs against one or other of the parties. Although the specification of matters to which the DRP may have regard are not expressed as exclusive matters they do indicate a general legislative intention that the prima facie rule should apply unless there is something in the conduct in one of the parties which should lead the DRP to award costs against it. Perhaps a more appropriate way to put the proposition is that, while the DRP's discretion is not fettered, the prima facie rule should apply unless there is something particular in the conduct of a party which could be considered properly to lead to costs being awarded against it. Whether or not that view is correct it seems to me that, in this case, there are no reasons to displace the prima facie rule in sub-clause (a) that the costs are to be borne equally by the parties to the dispute. In reaching that conclusion I am strongly influenced by paragraph 2.14 of the joint written submissions which reads: "2.14 NEMMCO and Millmerran are of the view that there is, at least, sufficient doubt about whether NEMMCO can publish and give effect to the recalculated intra-regional loss factors at this time to warrant the parties having the dispute formally resolved by a DRP's binding determination. This is particularly the case where the re-calculated intra-regional loss factors will give rise to a new set of winners and losers, potentially leading to a multiplicity of disputes on essentially the same issue."

For the reasons above stated I have given the Directions set out in the Interim Determination and earlier in this Final Determination.

DATED:

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M.J. Clarke QC

Dispute Resolution Panel.