

National Electricity Law (Schedule to the National Electricity (South Australia) Act 1996 and the National Electricity rules applied as a law of New South Wales by the National Electricity (New South Wales) Act 1997

IN THE DISPUTE RESOLUTION PANEL AT SYDNEY

Between

Macquarie Generation

Applicant

and

National Electricity Market Management Company Limited ACN 072 010 327

Respondent

DECISION OF THE DISPUTE RESOLUTION PANEL

(Mr M. J. Clarke QC & Mr G. H. Thorpe)

1. In a Market Event Report, dated 28 December 2007, on the events of 22 October 2007 NEMMCO declared that "it failed to follow the central dispatch process and, hence, a scheduling error occurred on 22 October 2007 for the dispatch intervals ending 9:20 through to 10am, noting that it took some time after 10:00am for the dispatch of Hunter Valley generation to return to optimal steady state levels".
2. Subsequently Macquarie Generation (MacGen) initiated a claim that it suffered loss of \$4,544,638.00 as a consequence of the scheduling error. In accordance with Rule 3.16.2 this claim was referred to the present

Dispute Resolution Panel (DRP) seeking a determination that an amount of compensation should be paid to it.

3. In a joint submission NEMMCO and MacGen noted that compensation in the above amount was sought and that NEMMCO did not oppose the claim.
4. In the circumstances of the scheduling error on 22 October 2007 the Panel accepts the calculation of loss in MacGen's submission.
5. The joint submission contained the following final paragraph:

"K *Issues for Dispute Resolution Panel*

91. *The matters to be determined by the Dispute Resolution Panel (DRP) are:*

a. *the amount of compensation to be paid to Macquarie Generation for its loss (under Clause 3.16.2(d) of the Rules);*

and

b. *the manner and timing of that payment (under Clause 3.16.2(i) of the Rules).*

92. *In making its determination, the DRP must use the spot prices which were determined by the central dispatch process pursuant to Clause 3.9 of the Rules;¹*

93. *The DRP needs to also take into account the matters referred to in Clauses 3.16.2(4) and (5) of the Rules."*

¹ Rule 3.16.2(h)(3)

6. On 20 March 2008 a hearing was convened at which oral submissions were received and the hearing terminated with the parties agreeing to lodge further written submissions, which have since been received.
7. The claim is for payment of compensation by the Participant Compensation Fund (the Fund) constituted pursuant to Rule 3.16.1, the rules providing that when a claim is made on the Fund, the claim must be referred to a DRP to determine whether compensation is payable, and the amount of that compensation.
8. The funding requirement for the Fund for each financial year is the lesser of \$1,000,000 and \$5,000,000 minus the amount which NEMMCO reasonably estimates will be the balance of the Fund at the end of the relevant financial year (Rule 3.16.1(c)).
9. At the present time the Fund has a balance of \$5,964,786.00. If the compensation was paid in full the balance would be reduced to \$1,420,148.
10. The Rules relevantly require the DRP to take into account the current balance of the fund and the potential for further liabilities to arise during the year (Rule 3.16.2(h)4) and to recognise that the aggregate liability in any year in respect of scheduling errors cannot exceed the balance of the Fund (Rule 3.16.2(h)5).
11. In addition Rule 3.16.2(c) provides that the manner and timing of payments from the Fund are to be determined by the DRP.

12. Hence the DRP is invested with a wide discretion, which is limited only as stated above and in respect of which no other guidance is to be found in the Rules.
13. Because the DRP is required to take account of the potential for further liabilities to arise during the year, questions arose at the hearing as to the meaning of the words "year, potential and liabilities".
14. MacGen submitted that "year" should be understood in the relevant rules as "the financial year", as the phrase is defined in the Glossary (ie. 30 June in each year) primarily for the reason that it is a financial year to which reference is made in Rule 3.16.1(c) which requires NEMMCO to estimate the amount of the Fund at the end of the financial year. In that context it is said that the reference in Rule 3.16.2(h)5 to the balance in the Fund at the end of the year can only sensibly be understood as referring to the financial year.
15. NEMMCO agreed with this submission and the DRP accepts that it is correct. This is primarily because it would be incongruous in the context to adopt the alternative; i.e. calendar year.
16. That this is so becomes clear when regard is had to other provisions regarding the Fund. In the first place the funding requirements specifically refer to the lesser of \$1,000,000.00 and \$5,000,000.00 minus the amount at the end of the financial year (Rule 3.16.1(c)).
17. Secondly Rule 3.16.2(h)5 directs attention to the balance of the Fund that would have been available at the end of that year. Having regard to the

fact that the Fund is to be replenished on the basis of the financial year this reference can only sensibly be understood in the same sense ie. financial year.

18. Finally, the text of both Rules 3.16..2(h) 4 and 5 clearly refer to the same year – in sub rule 4 the expression is “during the year” and in sub rule 5 the words are “during that year”.
19. The more difficult question relates to the approach which should be taken to the exercise in taking account of “the potential for further liabilities to arise during that year”.
20. The purpose underlying this rule is quite clear. That is, the avoidance of a situation where the Fund is almost exhausted by payment of a liability at the expense of a further claim for compensation. Hence the DRP must take account of the potential for a further liability, or further liabilities to arise during the year.
21. The question which then arises is whether the liabilities of which the DRP must take account include potential or contingent liabilities or whether it is only actual liabilities with which the rule is concerned.
22. There is an argument for the wider meaning based on practicality. As an actual liability only arises when a DRP has accepted a claim for compensation and quantified the amount, it may be thought unduly restrictive to limit the claims which potentially should be taken into account to actual claims. That is because the process takes time and the actual

liability may not arise until the following year and need not be taken into account under the rule.

23. Nonetheless, in directing attention at the potential for a liability to arise the rule appears to be focussing on the possibility that an actual liability will arise rather than a contingent or potential liability. After all it makes no sense to speak of the potential for a potential liability to arise. Furthermore, the administration of the Fund needs to have a specific figure in the Fund at the beginning of a financial year in order to carry out the exercise under Rule 3.16.1(c).
24. On balance, while there are strong arguments in according the work "liabilities" a wider meaning, we are of the view that the rule is speaking of actual liabilities which at the end of the year will have created a clear balance in the Fund.
25. In the light of these considerations the proper conclusion is that the rule is concerned with actual liabilities. It follows that the panel making a determination is required to take account of the possibilities of further actual liabilities during the financial year. It should be emphasised that the direction requires consideration only of the potential for liabilities to arise during that year, rather than those which might occur in the following year. This may be thought a weakness in the scheme because a large payment from the Fund in one year could conceivably have a dramatic impact on claims made the following year, having regard to the funding scheme in Rule 3.16(c).

26. The factual inquiry thus focuses on circumstance which might throw light on liabilities likely to arise before 30 June 2008.
27. The facts upon which this question is to be resolved appear in the following paragraphs of the joint submission:

"85. Since the commencement of the market there has only been one payment made from the fund. This was an amount of \$438,892 to Snowy Hydro Limited as compensation for a scheduling error that occurred on 31 October 2005.

86. There have been no other formal claims for compensation for scheduling errors in recent years. Since the incident on 22 October 2007, NEMMCO has not declared any further scheduling errors. However, NEMMCO has been advised by another Market Participant that it is seeking legal advice to establish whether a problem it has been raising constitutes a scheduling error. The participant has made an unsubstantiated comment to NEMMCO that it has been disadvantaged by more than \$7 million. NEMMCO is not aware of the legal reasoning on which it is being asserted that scheduling error arose. No further indication has been received from the participant since 7 February 2008.

87. If the compensation was paid from the full amount of Macquarie Generation's loss, the balance of the fund would be \$1,420,148."


28. It should be recognised at the outset that the discretion afforded to the Dispute Resolution Panel by the Rules is very wide and apart from the constraints in Rules 3.16.2(h)3, 4 and 5 there is no guidance as to the manner of its exercise.
29. Further, there is no instruction as to the correct approach which should be taken when there are two or more competing claims which may, or may not, become liabilities in any given financial year beyond the requirement that the Panel take into account the potential for further liabilities to arise during the year.
30. The difficulties that may be encountered in the making of an award become readily understandable by assuming that a provable claim sufficient to exhaust the Fund becomes the subject of a determination early in a financial year. The difficulty is exacerbated when there then exist no circumstances likely to give rise to a liability.
31. Some of these difficulties were recognised by MacGen's lawyers who advanced a resolution based on payment on the last settlement day of the year on a pro rata basis.
32. In response NEMMCO, while recognising that the pro rata approach should not readily be dismissed, contends that where there are no competing claims, and here there are, in essence, none, the Panel should refrain from what are, in effect, no more than obiter dicta.
33. In our view it is the latter approach that should be adopted where there are no competing claims. In saying this we are conscious of the difficulties

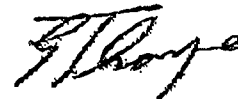
which could arise in a case where there is a definite liability and also a strong potential for other liabilities to arise during the year. The solution to that dilemma will need to be based on the actual facts under consideration.

34. That is not, however, this case. The evidence is that there was one scheduling error during the year which has produced just the one claim. True it is that recently a possible claim has surfaced but so little is known about it that the potential for that claim, if it is indeed made, to proceed through the various procedures this financial year is almost negligible.
35. In these circumstances there is no sound reason to deny MacGen the full amount of its claim.
36. Accordingly the Panel determines that compensation in the amount of \$4,544,638.00 is payable to MacGen in respect of the scheduling error. As there is no reason to delay the payment, this should be made within thirty (30) days of this decision.

DATED *24* APRIL 2008

SIGNED:


M. J. Clarke


G. H. Thorpe