

148. Thirdly, the primary judge found, and it was not disputed, that for SoundShield the *appropriate* receive gain setting for a 100mV input signal was HIGH: see [159] of the primary judge’s reasons for judgment. Consequently, although the facts indicated that the appellant’s test set up using the MID level receive gain setting with a 100mV input signal did not have any adverse affect on the SoundShield results, the *admitted* representation was that it was the “appropriate setting” that was critical. Testing at 100mV input signal with a MID level receive gain setting was not the appropriate setting. The appropriate receive gain setting for a 100mV input signal was HIGH.

149. In light of the those three findings (incomplete knowledge, conducting a test which was not a properly designed and conducted scientific test and, finally, that the SoundShield device was not appropriately set up for test conditions), I do not consider that the appellant has demonstrated that the primary judge’s conclusion that the first, third and fourth test set up representations were misleading and deceptive was erroneous.

150. I agree that the appeal should be dismissed.

[¶42-333] APPLICATION BY ENERGEX LIMITED (DISTRIBUTION RATIO (GAMMA)) (NO 3)

(2010) ATPR ¶42-333

Court citation: [2010] ACompT 9

Australian Competition Tribunal

24 December 2010

Competition law — Energy regulation — Distribution determinations — Calculation of corporate tax inputs — “Gamma value” — Review of gamma value used — Applicants had to submit regulatory proposal governing their distribution of electricity — Regulatory proposal was to be determined by Australian Energy Regulator — AER determined to use a “gamma” value for corporate tax input calculation that applicants disagreed with — Applicants sought review in Tribunal — Whether gamma value determined by AER was empirically supported — National Electricity Law, s 71K.

Energex Limited, Ergon Energy Corporation Limited and ETSA Utilities (the applicants) sought review before the Australian Competition Tribunal of a decision of the Australian Energy Regulator (the AER) pertaining to regulatory proposals that they had submitted. More particularly, the applicants sought merits review of the AER decisions pertaining to a “gamma value” to be used in the context of distribution determinations. That gamma value represented an element of a formula used to calculate a corporate tax estimate in relevant submitted regulatory proposals.

All parties made submissions to the tribunal with respect to the distribution ratio to be used in the calculation of gamma. In its submissions, the AER accepted that, on the material presently before the tribunal, there was no empirical data that was capable of supporting an estimated distribution ratio higher than 0.7. For that reason, the AER accepted that it was open to the tribunal to adopt a substitute distribution ratio of 0.7 in place of its determined ratio. The applicant nevertheless sought that the tribunal substitute a different ratio for the purposes of calculating the gamma value.

Held: application allowed in part.

1. While each applicant challenged the AER’s prognosis of what the ratio for the calculation of gamma might have been in the future, its prospective determination was an issue for another day. In light of those submissions and the material before the tribunal, it

was appropriate to conclude that the distribution ratio was 0.7 for the purposes of calculating gamma.

[Headnote by the CCH TRADE PRACTICES EDITORS]

S Doyle SC with P O'Shea SC and A Pomerence for Energex (instructed by Allens Arthur Robison).

T Bradley for Ergon Energy (instructed by Minter Ellison Lawyers).

CA Moore and M Borsky for ETSA Utilities (instructed by Gilbert + Tobin).

P Hanks QC with Gray, R Ellyard, T Clarke and L Merrick for the Australian Energy Regulator (instructed by Corrs Chambers Westgarth).

Before: Middleton J (Deputy President), R Davey and R Shogren.

Middleton J, Mr R Davey and Mr R Shogren: The Tribunal has received submissions as to the distribution ratio to be used in the calculation of gamma.

2. The AER accepts that on the material presently before the Tribunal, there is no empirical data that is capable of supporting an estimated distribution ratio higher than 0.7. The AER therefore accepts that it is open to the Tribunal to adopt a substitute distribution ratio of 0.7.

3. While each applicant agrees with the submissions of the AER in respect of the

distribution ratio to be adopted by the Tribunal in this review, they challenge the AER's prognosis of what the ratio may be in the future. That is an issue for another day.

4. In light of these submissions and the material before the Tribunal, the Tribunal concludes that the distribution ratio is 0.7 for the calculation of gamma.

5. The Tribunal directs that the parties confer and provide minutes of the appropriate determination to be made in light of the above reasons no later than 4:00pm on Monday 31 January 2011.

[¶42-334] **APPLICATION BY ERGON ENERGY CORPORATION LIMITED (CUSTOMER SERVICE COSTS) (NO 2)**
(2010) ATPR ¶42-334
Court citation: [2010] ACompT 10
Australian Competition Tribunal
24 December 2010

Competition law — Energy regulation — Distribution determinations — Costings — Customer service costs — Applicant was a distributor of electricity — Distribution determination governing applicant's operations was due to expire — Applicant had to submit new regulatory proposal to Australian Energy Regulator — Proposal had to include projections relating to customer service costs — Applicant's initial projected customer service costs were rejected by AER on basis that they may have amounted to double-counting — Amended proposal submitted by applicant — Applicant again rejected applicant's proposed costs with respect to customer service costs — Whether AER misinterpreted material provided to it by Ergon Energy — Whether AER made errors of fact in reaching its conclusions — National Electricity Law, s 71C.

As part of its plan to supply electricity as a Distribution Network Service Provider (DNSP) under the National Electricity Rules (the Rules) for the period 2010 to 2015, Ergon Energy Corporation Limited (Ergon) was required to submit a regulatory proposal (the proposal) to the Australian Energy Regulator (the AER). Part of that proposal had to include total forecast operational expenditures (opex) for the relevant period. Clause 6.5.6(b) of the Rules required that a DNSP's forecast for operating expenditure be for expenditure that was properly allocated to standard control services in accordance with the principles and policies set out in the Cost Allocation Method for the DNSP.