

**NATIONAL ELECTRICITY CODE**

**PARTICIPANTS FEE DISPUTE**

**SUMMARY OF SECOND GROUP'S DECISION**

**OF 6 DECEMBER 2002**

1. The Decision relates to a Fee Determination made by NEMMCO to recover in Participant fees the budgeted revenue requirements of itself and NECA, to apply for three years from 1 July 2000. A dispute was commenced by a dispute notice served on NEMMCO on 5 April 2001 by the NGF on behalf of 16 Market Generators. The notice was served under cl 8.2.4(a) of the National Electricity Code and claimed that the Determination did not comply with the principles laid down in the Code. In this notice and its subsequent reference and amended reference notice, the NGF named as parties to the dispute the 16 Market Generators and NEMMCO.
2. On 14 August 2001 NEMMCO by notice under cl 2.8.5 of the Code referred a dispute to the Adviser, being the dispute expressed in the NGF amended reference notice, joining as parties to the dispute all Code Participants so that they will be bound by a decision arising out of the dispute resolution arising under Ch. 8 of the Code.
3. The First Group considered the various issues arising from the submissions of the interested parties. It concluded, inter alia, that the Second Group has jurisdiction to resolve the dispute initiated by the NGF, but that it has no power to make a re-determination of the Participant fee structure as sought in the NGF notice.
4. The First Group concluded that the central function of the Second Group was "to decide whether NEMMCO misinterpreted, misapplied or failed to apply relevant Code provisions within cl 8.2.1(a)(1). In undertaking this function, the Second Group is bound to identify any misapplication or failure to apply relevant Code provisions by NEMMCO so as to enable NEMMCO to make a redetermination which complies with the Code."
5. In the event that the Second Group "decides that NEMMCO misinterpreted, misapplied or failed to apply a Code provision", it will be for it to determine whether it should remit the matter to NEMMCO.
6. The NGF in its disputation of NEMMCO's Determination argued that NEMMCO made essentially five errors, in:
  - a. Applying cl 2.11.1 b(3) of the Code to a class or category of Code Participants, instead of to Code Participants individually;
  - b. Putting all Market Scheduled Generators into one Class;

- c. Exempting new entrant Generators from the Generator Fixed Fee;
  - d. Unreasonably and arbitrarily discriminating against a category or categories of Code Participants in its various fee apportionment decisions; and
  - e. Failing to structure Participant fees to recover the budgeted revenue requirements of both NEMMCO and NECA
7. During the hearing Error 5 was expressly abandoned.
8. The Second Group concludes that it should not intervene unless there has been legal error by way of misinterpretation of the Code or a material misapplication or failure to apply the Code, in the sense that in applying the judgment and discretion permitted to it by the Code NEMMCO's economic opinions and overall conclusions were arbitrary, illogical or unsustainable on the available materials before it. The Second Group considers that any factual error made by NEMMCO would have to be one of a truly fundamental nature before it could rise to the level of a material misapplication or failure to apply the Code.
9. The Second Group believes that its function is not to pursue a judicial review, as the powers of a dispute resolution panel are not to be equated with those of a reviewing court.
10. The Second Group does not believe that its role is to determine whether the Second Fee Determination produced a better outcome than did the First Fee Determination.
11. **Error No. 1.** The Second Group finds that Error No. 1 has not been established. The Code requires that "the structure of participant fees should be simple", and provides a qualifier in cl 2.11.1(b) that the structure of fees should follow the listed principles "to the extent practicable". The principles of the Code are far from being clear-cut, but are abstractions as to which legal, economic and business minds may reasonably differ.
12. A multitude of possible fee structures was available to NEMMCO. There is plainly no one right answer or first best solution when a fee structure is promulgated.
13. The Second Group finds that the Code provides ample indication that a distinction may be made between Generators as a class of Participant and other Code Participants, and in turn that the further sub-division of generators into four sub-categories may well be an appropriate grouping by which to apply the principle in cl 2.11.1(b)(3).
14. The Second Group rejects the contention by the NGF that the phrase "reflective of the extent of involvement" must involve a precise degree of correspondence. If that were so the principle would be deprived of any operational utility because of the practical difficulty of precise

attribution of fixed and common costs. It was entirely appropriate for NEMMCO to conclude that in the case of fixed and common costs multiple Code Participants were involved with it in relevantly similar ways, as their presence in the NEM leads to the consumption of scarce resources by NEMMCO.

15. **Error No. 2.** This is put as an alternative to Error No. 1 and asserts that NEMMCO misapplied the Code by grouping all Generators together. However the Second Group concludes that once it is accepted that on a true construction Code principle (3) allows NEMMCO to group Participants who have the same or similar implications for NEMMCO's costs, the evidence strongly supports the view that the Generators meet this criterion. The heterogeneity of Generators, both in physical characteristics and operational factors, has no implications for the costs incurred by NEMMCO, and they still require the same NEMMCO services regardless of these differing characteristics.
16. **Error No. 3.** The NGF claims that NEMMCO has departed from cl 1.3 (b) (4) of the Code by determining that new Generator entrants to the Market are not subject to a Generator General Fixed Fee, thereby treating these new entrants more favourably than Generators already participating in the Market. The Second Group concludes that the intention of this clause is to treat all new capacity the same with respect to fee exemption, whether it arises from new entrants or from expansion by incumbent Generators. NEMMCO's decision creates no cost asymmetry or inequality of opportunity. In prospect, new entrants are not treated more favourably than an incumbent that chooses to expand its capacity.
17. **Error No. 4.** The NGF asserts that NEMMCO's decision to apportion its fixed and common fees to various classes of fixed and variable cost to various classes of Code Participants were arbitrary and contrary to available material. The Second Group concludes that in terms of achieving economically efficient outcomes in the NEM, NEMMCO's adoption of a fixed fee structure for the recovery of part of its fixed and common costs is understandable and as a matter of economics defensible.
18. The Second Group finds that the decision by NEMMCO to charge its fixed and common fees only to Generators and Market Customers does not constitute unreasonable discrimination against a category or categories of Code Participants. In particular, the exclusion of the TNSPs from liability to pay is understandable, given that they do not in any significant or certain operational or conceptual sense contribute to the fixed and common costs incurred by NEMMCO and NECA. Rather, the TNSPs themselves provide NEMMCO with information and other inputs necessary for NEMMCO to perform its Code functions. They do not trade in the NEM and in that sense do not use or are not a direct beneficiary of NEMMCO's services.

19. **COSTS** – The NGF's should pay the costs of the other parties (other than legal costs of the other parties) including the costs of the adviser.

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