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2 August 2017

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Mr Simon Muys
Partner
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101 Collins Street
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Dear Mr Durrant and Mr Muys,

Re: Arbitration Procedure—Public lighting dispute between local councils-Department of Planning and SAPN in 2010–15 period

I refer to my letter of 22 June 2017 setting out the AER's proposed procedure for the determination of the dispute (Access Dispute) between your respective clients, the 61 councils and the Department of Planning, Transport and Infrastructure of South Australia (PLCs), and SA Power Networks (SAPN) concerning access to public lighting services during the 2010 to 2015 regulatory period.

We received submissions commenting on the AER's proposed procedure from the PLCs dated 6 July 2017, and from SAPN dated 6 and 12 July 2017.¹ I am now writing to confirm the procedure set by the AER for the arbitration of the dispute, including the AER's consideration of, and response to, the issues raised by the parties in response to the process described in my letter 22 June 2017 (Initial Process letter).

The timelines for the resolution to the dispute are set out below. The next step is for SAPN to respond to the HoustonKemp report by 30 August 2017 (20 business days from the date of this letter).

¹ We note that SAPN's submission of 12 July 2017 was provided outside the 6 July 2017 deadline set by the AER for comments. The AER accepted that submission given that it did not raise any matters prejudicial to the PLCs, and in fact resolved an issue previously in contention. The parties should be aware that the AER will not automatically accept late submissions in determining this dispute. We may decide not to accept late submissions, or to give them less weight, depending on the circumstances.

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Both parties' submissions largely accepted the proposed approach to the arbitration process set out in the Initial Process letter. The AER will proceed on this basis, as set out in that letter, except where specified otherwise in this letter.

The issues and objections that were raised in submissions by the parties on the proposed process, and the AER's response to them, are set out below.

1 Process following draft determination

Submissions

SAPN submitted that the procedure which follows the draft determination should not be settled until after draft determination is published "depending on the content of any draft determination it may be that further expert input or modelling will be required by the parties to fairly address the issues raised by the AER and therefore further time may be required".

SAPN also requested that the AER should expressly provide a stage for consultation on the process post the draft determination.

AER response

The AER will consider the appropriateness and feasibility of the procedure and timelines throughout the dispute hearing process. It will be better informed of the nature and extent of the dispute when issuing its draft determination and so will be able to set out in that decision the procedure to be followed. In that sense, the present timeframes for post-draft determination submissions by each party are provisional at this stage.

If it appears appropriate to seek the parties' views on suitable next steps following the draft determination, the AER will consult the parties beforehand. However, we will not commit to a further round of consultations on procedure following the draft determination at this stage. We will decide whether that is appropriate at that time.

We also note SAPN's comment that further expert input or modelling will be required by the parties to address the issues raised by the AER in its draft determination. The AER considers the scope of the matters in dispute is clear; it is whether the PLC's proposed resolution of the access dispute is appropriate for the reasons set out in the report of HoustonKemp. The AER's draft determination will set out its views on the submissions and replies that have been provided by the parties on these matters. The draft determination will not raise new matters.

Therefore, the AER considers that SAPN should be in a position to ascertain any requirement for expert evidence or modelling needed to fairly address the issues, and to provide this during its primary submissions, rather than following the AER's draft determination. That said, the AER will of course give due consideration to any relevant matters or issues that may arise.

2 Arbitration under Part 10 of the NEL

Submissions

The PLCs raised the significance of the word "arbitration" and whether the *Commercial Arbitration Act 2011* (SA) applies and if the AER's determination is subject to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act).

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AER response

This is an access dispute under Part 10 of the National Electricity Law (NEL), which will be determined in accordance with that Part. The use of the word "arbitration" by the AER is intended to denote that the AER considers this access dispute must be determined through a binding determination of the AER. It follows usual practice for the use of the word "arbitration" when referring to a binding determination of access disputes concerning services subject to "light handed" or "negotiate/arbitrate" regulation, such as applies to public lighting services in the access dispute.

The use of the word "arbitration" by the AER is not intended to indicate that this dispute is subject to the provisions of the *Commercial Arbitration Act 2011* (SA).

The AER's understanding is that the determination would be a decision to which the Administrative Decisions (Judicial Review) Act applies. However, the AER will not provide advice to the parties on their legal rights regarding the review of its decisions.

3 Reply submissions

Submissions

The PLCs objected to SAPN having an opportunity to reply to the PLCs reply submission. The PLCs described this as a departure from "the ordinary course", and referred to the rights of applicants and respondents.

SAPN submitted that it should continue to have a right of reply.

AER response

The AER confirms that both parties will have a right of reply to the other's first submission. This is an administrative determination of an access dispute, not a judicial hearing in court. The AER is not bound by, and will not be following, court procedures. The AER considers that it is appropriate to allow parties equal opportunities to be heard. We consider there will be no prejudice to the PLCs arising from SAPN having an opportunity to make a reply submission. For clarity, neither party will be permitted to raise new issues in their reply submissions.

4 Oral hearings

Submissions

The PLCs requested that "the dispute hearing be held in public with one public hearing for no more than half a day for oral presentation".

SAPN stated that the question whether an oral hearing is appropriate should be deferred until after the draft determination, while noting that "[a]t this stage, we share the view of the AER that a decision is likely able to be made on the papers." In SAPN's 12 July 2017 submission it stated that it did not object to the PLCs request for an oral hearing, with no more than half a day for submissions.

AER Response

In its Initial Procedure letter, the AER noted its preliminary view that the hearing would most efficiently be conducted on the papers and invited the parties, if they sought an oral hearing, to explain why their case could not be fairly presented in writing.

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While the PLCs requested an oral hearing, it gave no reasons to justify the request.

The AER continues to consider that this access hearing will most efficiently be conducted on the papers, and that there is no reason justifying an oral hearing. The AER confirms there will be no oral hearing and the parties are to present their case by way of written submissions. The AER will, however, consider any further arguments in favour of an oral hearing made in the pre-draft determination submissions. We reiterate that a party seeking an oral hearing should explain why the relevant issue(s) could not be fairly presented in writing.

5 Publicity of Proceedings

Submissions

The PLCs stated they needed to "adhere to the principals of good government and transparency in the expenditure of public monies". On that basis the PLCs requested that the dispute hearing be held in public. The PLCs requested that the AER revoke its order under s 141 of the NEL requiring the parties to maintain privacy. The PLCs requested that instead, the hearing process generally be held in public, with specific orders under s 141 being made by the AER in respect of confidential information.

In SAPN's 12 July 2017, responding to the PLCs submission, SAPN noted that under s 137 of the NEL, dispute hearings must be held in private unless both parties agree. On this basis, in the context of discussing any oral hearing, SAPN requested that these should be in private.

However, SAPN referred to the PLCs proposed s 141 orders and proposed that, instead of making specific confidentiality orders, the AER revoke its existing general s 141 order, and replace it with a general order applying to information in respect of which a non-disclosure claim has been made.

AER Response

SAPN has proposed that the AER make an alternative order under s 141 applying only to information obtained in the proceedings that is subject to a claim for non-disclosure. By implication, therefore, SAPN does not object to the disclosure of information of documents and information produced in the dispute hearing (in particular, submissions, evidence and AER determinations) which is not subject a confidentiality claim. However, SAPN's position is that any oral hearing should be held in private.

Therefore, any non-confidential aspects of written submissions, evidence, AER determinations and other information in the access dispute (not made during any oral hearing) may be disclosed by the PLCs to their respective stakeholders and constituents. (Third parties will not be permitted to make submissions without leave.) The overall result is that the parties consent to written submissions and documents (not provided in any oral hearing or subject to a confidentiality claim) will be public documents.

Therefore, the AER hereby orders under s 141 as follows:

- (a) with effect from 8 August 2017,
- (b) the order made under s 141 on 22 June 2017 regarding privacy of the access dispute is vacated;

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- (c) the parties are ordered to not divulge information obtained by them as a result of, and during the course of, this access dispute arbitration process in respect of which a party has made a claim of confidentiality without the AER's written permission, other than to the AER and the parties, and other persons nominated by the AER;
- (d) the parties may disclose written information obtained by them as a result of, and during the course of, this access dispute arbitration process that is not subject to a confidentiality claim, or with the AER's written permission;
- (e) notwithstanding paragraphs (c) and (d), the parties are ordered to not divulge information obtained by them as a result of, and during the course of, any oral hearing that may occur during the course of this access dispute arbitration process.

6 Independent Experts

Submissions

The PLCs submitted that if the AER decides to refer any matter to an independent expert, "the PLCs request that procedural fairness be accorded in respect of the identity of the expert, its scope and purpose".

AER Response

If the AER determines that it would be assisted by the advice of an independent expert, the identity of the expert and the scope of any referral to are part of the AER's deliberative processes, and are properly within its discretion.

The draft determination would annex any expert report, and the report would include a copy of the expert's instructions, so that the parties will have an opportunity to comment on the expert's views and the scope of work that the AER refers to him/her before the final determination. The parties will be afforded procedural fairness in this way. We will not undertake to seek comment from the parties on the identity of any expert or the scope of its work.

7 Evaluation Review Panel Report

Submissions

SAPN consented to the provision of Books 1, 2 and 3 of the bundle of materials provided to the Evaluation Review Panel, as well as a copy of the Panel's report.

PLC consented to provision of the Evaluation Review Panel report.

AER Response

Having considered the list of materials provided to the Evaluation Review Panel, the AER considers it would only be assisted by the Panel's report at this stage. If upon seeing that, further information and documents are required, the AER will seek these from the parties.

The administrative burden of providing the report seems to be minimal. The AER requires the PLCs to provide a copy of the Panel report to the AER by email on or before 8 August 2017.

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8 Next Steps

The framework for the settlement of the dispute is set out in Table 1, below. As previously stated, we will treat the PLCs' letter of 3 May 2017 and the attached HoustonKemp report as the PLC's submission in chief.

Therefore, the next step is for SAPN is now required to respond to the matters set out in that submission, explaining why the PLCs offer is not an appropriate settlement of this dispute by 30 August 2017. The following steps will be as set out in Table 1.

The scope of the Access Dispute is defined in section 3 of the Initial Process letter.

SAPN's submission of 6 July stated that it "does not object to the AER's approach to defining the matters in dispute". The AER requests that SAPN's initial submission include its position on how the PLCs should be recompensed, in the event that the AER determines that the PLCs have overpaid for public lighting services during 2010–15. This should address the PLCs proposal to determine the NPV of overpayments using the regulatory weighted average cost of capital of 9.76 per cent, and for the compensation to be paid by setting off the NPV of any overpayment against the PLCs' future payments for public lighting services.

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Table 1: Process for arbitration of access dispute

Process step	Detail	Timing
AER: Arbitration initial letter	Sent.	22 June 2017
Parties: Response	Received.	6 July 2017
AER: Response and initiation letter	This letter.	2 August 2017
PLCs	Provide ERP report to AER	8 August 2017
SAPN: Submission in response to the HoustonKemp report	SAPN responds to HoustonKemp Report. (Limit of 60 pages)	30 August 2017
PLCs: Submissions in reply to SAPN's submissions	PLCs to provide any reply submission to SAPN's submission. Reply submissions must not raise new issues. (Limit of 25 pages)	20 September 2017
SAPN: Submissions in response to public lighting customers' reply submissions	SAPN provides any further reply submission to PLC's reply submission. Reply submissions must not raise new issues. (Limit of 25 pages)	12 October 2017
AER: gather further information required for draft determination	AER considers all submissions and determine whether it requires further information to determine the dispute. If necessary, engage and brief independent expert/s. AER issues any information requests deemed necessary. Advise AER's views on parties' comments on process and merits of any requests for oral hearing/meeting.	TBC
AER: draft determination	AER to issue draft determination on access dispute.	TBC
Parties: submissions on draft determination	SAPN and PLCs to provide submission on draft determination.	Within 15 business days of draft determination
AER: final determination	AER issues final determination.	TBC (timeframe likely to be set out in draft determination)

The AER reserves the right to alter the intended procedure described above at any time if it deems that necessary or appropriate.

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Please direct your responses to Craig Madden via craig.madden@aer.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C. Pattas', with a long, sweeping flourish extending to the right.

Chris Pattas
General Manager, Networks

Sent by email on: 02.08.2017