IN THE WESTERN AUSTRALIAN ELECTRICITY REVIEW BOARD

No. 1 to 7 of 2017

BETWEEN:

STEPHEN DAVIDSON

Applicant

and

ECONOMIC REGULATION AUTHORITY

Respondent

DECISION

Made by: DS Ellis (Presiding), J Davis and W Harding
Date of Order: 28 September 2018
Where made: Perth

Having heard the parties and having considered the materials provided by the parties, the Western Australian Electricity Review Board **ORDERS:**

1 Applications ERB 1, 2, 3, 4, 5, 6 and 7 of 2017 be dismissed.

2 The parties provide submissions as to whether the Board may exercise powers under the *Electricity Industry (Arbitrator and Board Funding) Regulations 2009* in respect of Applications ERB 1, 2, 3, 4, 5, 6 and 7 of 2017 and if so, how those powers should be exercised.

3 The submissions be provided in accordance with the following:

(a) the respondent provide its submissions on or before 5 October 2018;

(b) the application provide its submissions on or before 12 October 2018;

(c) the submissions should include submissions with the amount of any costs that might be ordered;

(d) either party may request an oral hearing in relation to the issued identified in Order 2 on or before 16 October 2018 failing which the Board will decide on the papers; and

(e) the parties have permission to apply for further directions in relation to these directions on 48 hours' notice in writing.

4 Pursuant to section 38(3) of Schedule 1 to the *Gas Pipelines Access (Western Australia) Act, 1998*, the time limited for making a decision in respect of these matters be extended up to and including 1 November 2018.

The reasons of the Board are annexed hereto and form part of this decision.

DS Ellis
Presiding Member
Electricity Review Board of Western Australia

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REASONS FOR DECISION

Summary

1 During 2017, Mr Davidson, the applicant, made or purported to make 6 applications, ERB 1 to 6 of 2017 (substantive applications), for review of decisions of the Economic Regulation Authority (ERA).[1]

2 The decisions challenged by applications ERB 1, 2, 4, 5 and 6 of 2017 involve approval by the ERA of changes to Western Power's Technical Rules for network. The decision challenged by Mr Davidson in application ERB 3 of 2017 was a decision under s 6.71 of the *Electricity Networks Access Code 2004* about the inclusion of costs associated with the Collgar Windfarm in Western Power's capital base.

3 The Board considers that it cannot deal with the substantive applications because:

(a) the decisions the subject of the substantive applications (Decisions) do not fall within s 130(2) of the *Electricity Industry Act 2004* (Industry Act); and

[1] Information about the applications and the decisions challenged by Mr Davidson is set out in Table A.

(b) Mr Davidson is not entitled to bring the applications because he is not a person 'adversely affected' by the Decisions within s 130(3) of the Industry Act; and

Each of the substantive applications must be dismissed.

4 In addition, Mr Davidson made, or purported to make an application, ERB 7 of 2017, seeking a 'pre-emptive' order that he not be required to pay the ERA's costs should he ultimately prove not to be successful in the substantive applications, after those matters were heard and determined.

5 Given that the substantive applications were dismissed, there is no occasion for a pre-emptive order. Application 7 of 2017 must be dismissed as well.

6 The parties will have the opportunity to make submissions about what order the Board can and should make under the *Electricity Industry (Arbitrator and Board Funding) Regulations 2009* in respect of the costs of the applications.

Procedural Background

7 The Board is established by s 50 of the *Energy Arbitration and Review Act 1998* (EAR Act). The Board is constituted in relation to particular proceedings by a presiding member chosen by the Attorney General from a panel of legal practitioners established under Division 2 of the EAR Act and by two experts chosen by the presiding member from a panel of experts established under the same Division.

8 On 3 May 2018 the Presiding Member, Mr Ellis, was selected by the Attorney General in respect of each of Mr Davidson's applications. On 10 June 2018, the Presiding Member selected Jennifer Davis and Warren Harding from the panel of experts, thereby constituting the Board in respect of each of the current applications.

9 A hearing was convened on 21 June 2018 (directions hearing) to make procedural directions about the conduct of the applications.

10 The Presiding Member conducted the directions hearing alone because, pursuant to s 57(3) of the EAR Act, questions of law or procedure before the Board are to be determined by the presiding member.

11 At the directions hearing, Mr Davidson represented himself. Ms FB Seaward of the State Solicitor's Office represented the respondent.

12 It was apparent from correspondence attached to application 7 of 2017 that the ERA maintained that the Board did not have jurisdiction to deal with the substantive applications. It was accepted by both parties that it was appropriate for the jurisdictional questions and application 7 of 2017 to be determined before the merits of the substantive applications.

13 A directions was made that:

> The issues of:
>
> (a) the jurisdiction of the Board to consider applications ERB 1 to 6 of 2017 ("Applications") and the Applicant's standing to bring them; and
>
> (b) application 7 of 2017
>
> be considered and determined prior to any consideration of the substantive merits of the Applications.

14 At the request of the respondent, there was a short hearing on 3 September 2018 (preliminary hearing) at which the parties made oral submissions.

15 At the preliminary hearing, the Board was again constituted by the Presiding Member because the matters the preliminary issues fell within s 57(3) of the EAR Act.

16 On 6 September 2018, a direction was made pursuant to s 38(4) of the *Gas Pipelines Access (Western Australia) Act, 1998* extending the time limit for making a decision in respect of the applications to 4 October 2018.

The materials provided to the Board

17 Section 57(2) of the EAR Act provides that the Board is not bound by the rules of evidence and may inform itself as it thinks fit. It must act according to equity, good conscience and the substantial merits of the case and without regard to technicalities and forms. Accordingly, the process of formally tendering documents was not adopted. The Board considered the materials identified below, along with the applications themselves and the oral submissions made by the parties at the preliminary hearing.

18 Prior to the directions hearing, Mr Davidson was requested to provide a copy of the Decisions. Copies were provided to Board and the respondent. Mr Davidson also provided various announcements or notices that Decisions had been made. These announcements or notices did not form part of the actual Decisions.

19 At the hearing on 21 June 2018, directions were made for the parties to provide submissions about the preliminary issues, which they did. The following were provided:

(a) Submissions of the First Respondent on the Preliminary Jurisdictional Questions for Applications 1 – 6 of 2017 (ERA submissions);

(b) Submissions of the Applicant on the Preliminary Jurisdictional Questions for Applications 1 – 6 of 2017 (Mr Davidson's submissions);

(c) Submissions of the the Applicant dated 12 July 2018 as to costs; and

(d) Submissions of the Respondent – Application 7 of 2017 – Costs.

After the preliminary hearing, Mr Davidson made further submissions by email dated 3 September 2018 (September submissions)

20 The ERA also provided a bundle of the following documents:

(a) an unofficial consolidated copy of the *Electricity Networks Access Code 2004* dated 23 December 2016;

(b) a document entitled 'Amended Proposed Revisions to the Access Arrangements for the Western Power Network' dated June 2015 (June Access Arrangements);

(c) a document entitled 'Technical Rules', dated 1 December 2016 and described as 'Revision 3' (2016 Technical Rules); and

(d) extracts from the *Gas Pipelines Access (Western Australia) Act 1998*, most importantly, s 38 of Schedule 1 to that Act.

The *Gas Pipelines Access (Western Australia) Act 1998* has been substantively repealed, although s 38 of the Schedule lives on, in relation to proceedings under the Industry Act, by virtue the reference to it in s 130 of the Industry Act.

21 Mr Davidson disputed the relevance of the June Access Arrangement, contending that there was no Western Power Access Arrangement dated June 2015.

22 On 31 August 2018, the Board provided a copy of the following documents to the parties:

(a) Access Arrangement revisions submission letter;

(b) Proposed revisions to the Access Arrangement (2012 Access Arrangement); and

(c) Further Final Decision on Proposed Revisions to the Access Arrangement for the Western Power Network dated 29 November 2012.

These documents were downloaded from the ERA website. It was accepted by both parties that the document described as Proposed Revisions to the Access Arrangement for the Western Power Network was the most recent version of the Access Arrangement approved by the ERA. It replaced the earlier version of the Access Arrangement. It appears that the 2012 Access Arrangement was subsequently varied by decisions of the ERA on 4 June 2013 and 3 April 2014. The June Access Arrangement was an unofficial reprint, as at June 2015, of the 2012 Access Arrangement, incorporating those amendments.

23 Mr Davidson also objected to the 2016 Technical Rules, on the basis that it incorporated amendments after the date of the decisions challenged by him. Ms Seaward indicated at the preliminary hearing that the 2016 Technical Rules were provided to show the nature of the content of the Technical Rules. The ERA did not rely on the substantive effect of particular terms of the 2016 Technical Rules. I have used the 2016 Technical Rules in this limited way.

The issues

24 Having regard to the preliminary issues and the submissions made by the parties, the questions which arise are:

(a) do the applications fall within s 130(2) of the Industry Act?

(b) is Mr Davidson 'a person adversely affected' by the Decisions, within s 130(3) of the Industry Act?

(c) were the applications invalid or ineffective because they were not made within the time limited for the making of applications by s 38(2) of the *Gas Pipelines Access (Western Australia) Act 1998 Schedule 1*?

(d) what order, if any, should be made on application ERB 7 of 2017?

It is necessary to first discuss the legislative framework in which the Decisions were made.

The Industry Act

25 Under s 50(2A) of the EAR Act, the Board has the powers conferred on it under:

(a) the Industry Act;

(b) the *Gas Services Information Act 2012*; and

(c) any other written law.

26 The *Gas Services Information Act 2012* has no bearing on the applications. Mr Davidson did not rely on that Act. He did not point to any other written law which might confer powers on the Board.

27 The Industry Act is the primary piece of legislation regulating the generation, transmission and sale of electricity in Western Australia, although much detailed regulation is effected by subordinate legislation. Relevant purposes are set out in s 102 of the Industry Act: to provide access to services and to give effect to the relevant principles of the Competition Principles Agreement made on 11 April 1995. The Industry Act gives effect to these purposes by requiring the owners and operators of electricity networks to provide access to potential users of that infrastructure on terms which are subject to review and approval by the ERA. In this case, the infrastructure is Western Power's network for the transmission of electricity. 'Services' is defined in s 102 to mean the conveyance of electricity and other services provided by means of network infrastructure facilities, and services ancillary to such services. This definition does not include the sale of electricity.

28 Section 104(1) of the Industry Act requires the Minister to establish a Code for the purposes of, and in accordance with Part 8 of Division 2 of that Act. The *Electricity*

Networks Access Code 2004 (Code) was established by the then Minister for Energy on 29 November 2004.

29 Subsection (2) sets out the matters about which provision must be made in the Code. There are 13 such matters. Section 104(2)(c) says that provision is to be made in the Code:

> (c) as to the lodgement by the network service provider of an arrangement for network infrastructure facilities covered by the Code setting out —
>
> (i) the policies applying to access to services;
>
> (ii) the basic terms and conditions that will apply to access to services unless an access agreement contains different terms and conditions; and
>
> (iii) any other matters prescribed by the Code;

30 Section 104(2)(d) requires that provision must also be made in the Code:

> as to the production by the network service provider of information to enable persons to understand the derivation of the elements of an arrangement for network infrastructure facilities lodged under paragraph (c), whether or not that arrangement has become an access arrangement;

31 Section 104(2)(l) requires provision in the Code for:

> ... the formulation by a network service provider, and approval by the Authority, of technical codes for the purposes of access to services that are to be complied with by access users and other persons specified in the Code;

32 Section 105 sets out other matters about which the Code may make provision, including the arbitration of disputes between a network service provider and a person who has made a proposal for access to services and, in s 105(1)(d)(ii), the regulation of matters that are necessary or convenient for the purposes of Part 8 of Division 2 of the Industry Act. Section 104(2) does not specifically refer to amendment or revision of arrangements within s 104(2)(c) of the Industry Act.

33 Section 130 of the Industry Act deals with review by the Board of certain categories of decisions by the ERA. It provides:

> (1) In this section —
>
> **Code** means the Code for the time being in force under section 104;

gas pipelines access provisions means the *Gas Pipelines Access (Western Australia) Act 1998* Schedule 1 as in force immediately before the day on which the *National Gas Access (WA) Act 2009* section 51 deleted it.

(2) This section applies to —

(a) a decision of the Authority to refuse to grant or renew a licence;

(b) a decision of the Authority to refuse to approve the transfer of a licence;

(c) a decision of the Authority to refuse to amend a licence under section 21;

(d) a decision of the Authority as to the length of the period for which a licence is granted or renewed;

(e) a decision of the Authority as to any term or condition of a licence;

(f) a decision of the Authority to amend a licence under section 22;

(g) a decision of the Authority to refuse to approve —

(i) a standard form contract under section 51; or

(ii) an amendment to, or replacement for, a standard form contract under section 52;

(h) a direction given by the Authority under section 53;

(i) a decision by the Minister that network infrastructure facilities are to become covered by the Code or are to cease to be covered by the Code;

(j) a decision by the Authority to add to the obligations of a network service provider under the Code in respect of the segregation of the functions and business of providing services from the network service provider's other functions and business, or to waive any of those obligations;

(k) a decision by the Authority to approve or not to approve an arrangement lodged under section 104(2)(c); or

(l) a decision by the Authority to release confidential data given to the Authority for the performance of its functions under Par 8.

(3) A person adversely affected by a decision or direction to which this section applies may apply to the Board for a review of the decision.

(4) Section 38(2) to (5) and (7) to (12) of the gas pipelines access provisions apply to the application and to the review of the decision or direction as if references in them to —

(a) the relevant appeals body were references to the Board;

(b) a decision included references to a direction;

(5) The application operates to stay the decision or direction unless, in the case of a decision under subsection (2)(j), the Board determines otherwise.

(6) In the case of a decision under subsection (2)(k), section 39(2) to (5) of the gas pipelines access provisions also apply to the application and to the review of the decision as if references in them to —

(a) the relevant appeals body were references to the Board;

(b) the relevant regulator were references to the Authority.

(7) In the case of a decision under subsection (2)(l), section 43(2) to (4) of the gas pipelines access provisions also apply to the application and to the review of the decision as if references in them to —

(a) the relevant appeals body were references to the Board;

(b) the relevant regulator were references to the Authority.

(8) When the Energy Arbitration and Review Act 1998 Part 6 Division 2 refers to the functions of, and proceedings before, the Board those functions and proceedings include functions and proceedings under this section.

(9) For proceedings to which subsection (8) extends the provisions described in that subsection, sections 57(1) and 59(4) of those provisions apply only to the extent that it is consistent with the Code for them to apply.

Do the substantive applications fall within s 130(2) of the Industry Act?

34 The first issue which arises is whether the Decisions, or any of them, fell within s 130(2)(k) of the Industry Act? Mr Davidson contended that they did. He did not point to any other provision of s 130 as a foundation for the substantive applications.[2]

35 Details of the Decisions are set out in Table A.

36 Whether any of the applications fall within s 130(2)(k) of the Industry Act is resolved by considering the nature of each Decision.

37 It is convenient to consider the Decisions by reference to the provision relied upon by the ERA in making the Decision.

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[2] Each of the substantive applications refers to and purports to rely on Chapter 10 of the Code. The provisions of Chapter 10 deal with access disputes between an 'applicant' and a 'service provider'. 'Access disputes' is defined in s 1.3 of the Code to mean various types of dispute between an applicant for access to a network and the service provider. Neither of the parties was an applicant for access or a service provider. The person authorised to resolve access disputes disputes is the Gas Arbitrator (now known as the WA Energy Disputes Arbitrator). Chapter 10 does not provide any basis on which the Board could exercise jurisdiction in respect of the Decisions. Mr Davidson did not rely on Chapter 10 of the Code in his submissions or at the preliminary hearing.

Section 12.53

38 Applications 1, 2, 5 and 6 concern decisions under s 12.53 of the Code.[3]

39 Section 12.53 is one of the provisions of the Code regulating how the ERA should deal with proposals to amend the technical rules. Section 12.50 provides that a proposal to amend the technical rules may be made at any time. The ERA may reject a proposal to amend in certain, limited circumstances under s 12.51, or may defer it, if there is a more general review of the technical rules going on.

40 If the proposal is not rejected or deferred, then s 12.53 comes into operation. It says:

> As soon as practicable, the Authority must consider whether any amendments to technical rules proposed under section 12.50 are consistent with this Chapter 12 and the Code objective, having regard, among other things, to section 12.4A to any exemptions granted under sections 12.34 and 12.41, and then either:
>
> (a) approve; or
>
> (b) not approve,
>
> the proposed amendments by publishing a notice of its decision, and if the decision was to approve the proposed amendments, the date on which the amendments commence.

41 If the proposal to amend is a substantial one, the ERA must consult the public in accordance with Appendix 7 of the Code.[4]

Technical Rules

42 Clause 12.6 of the Code says that a covered network must have technical rules.

43 The expression 'technical rules' is defined in s 1.3 of the Code to mean the technical rules in effect for the network under Chapter 12. Section 12.32 requires the technical rules to address the matters listed in Appendix 6 to the Code. Chapter 12 identifies objectives for the technical rules, namely that they are reasonable, do not impose inappropriate barriers to entry, are consistent with good electricity industry practice and are consistent with relevant written laws and statutory instruments. An example, chosen at random, of a technical rule is s 2.9.9 of the 2016 Technical Rules, which provides:

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[3] Application 2 of 2017 concerns two decisions, the first a decision to amend the technical rules under s 12.53 and the second, a decision to exempt Western Power from certain of the technical rules under s 12.40 of the Code.
[4] Section 12.54.

All protection scheme secondary circuits that include a circuit breaker trip coil have trip circuit supervision which must monitor the trip coil when the circuit breaker is in both the open and closed position and alarm for an unhealthy condition.

44 The rest of the 2016 Technical Rules is along the same lines. The technical rules deal with technical matters, not commercial terms between the service provider and the user of the network.

45 The provisions of Chapter 12 address the requirements of s 104(2)(d) of the Act. That paragraph is set out above at paragraph [30] above.

Access arrangements

46 Section 1.3 of the Code defines "access arrangement" to mean an arrangement for access to a covered network that has been approved by the Code.

47 Chapter 4 of the Code is headed 'Access Arrangements: Approval and Review'. Chapter 5 is headed 'Access Arrangements: Content'.

48 Section 5.1 of the Code sets out what an 'access arrangement' must contain. It provides:

> 5.1 An access arrangement must:
>
> (a) specify one or more reference services under section 5.2; and
>
> (b) include a standard access contract under sections 5.3 to 5.5 for each reference service; and
>
> (c) include service standard benchmarks under section 5.6 for each reference service; and
>
> (d) include price control under Chapter 6; and
>
> (e) include pricing methods under Chapter 7; and
>
> (f) include a current price list under Chapter 8 a description of the pricing years for the access arrangement; and
>
> (g) include an applications and queuing policy under sections 5.7 to 5.11; and
>
> (h) include a capital contributions policy under sections 5.12 to 5.17; and
>
> (i) include a transfer and relocation policy under sections 5.18 to 5.24; and
>
> (j) if required under section 5.25, include efficiency and innovation benchmarks under section 5.26; and

(k) include provisions dealing with supplementary matters under sections 5.27 and 5.28; and

(l) include provisions dealing with:

(i) the submission of proposed revisions under sections 5.29 to 5.33; and

(ii) trigger events under sections 5.34 to 5.36.[5]

Chapter 5 does not provide that an access arrangement cannot contain substantive provisions dealing with matters other than those specified in s 5.1.

49 Chapter 4 of the Code deals with the process by which an access arrangement within s 5.1 comes to be in force in relation to a covered network. The process includes the opportunity for members of the public to make submissions about the terms of an access arrangement proposed by the service provider. There are three stages in the process at which the ERA may approve the terms of an access arrangement, depending on many drafts of the proposed access arrangements have been required. These are dealt with at ss 4.17, 4.21 and 4.24 of the Code. Section 4.17 provides:

> 4.17 Subject to section 4.27, the Authority must consider any submissions made under section 4.15 on the draft decision and must make a final decision either:
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> (a) to approve the proposed access arrangement; or
>
> (b) to not approve the proposed access arrangement, in which case the Authority
>
> must in its reasons for the final decision provide details of the amendments required to the proposed access arrangement before the Authority will approve it.

Sections 4.21 and 4.24 are similarly worded.

50 Sections 4.17, 4.21 and 4.24 are found in that part of Chapter 4 of the Code, which deals with the application for the initial access arrangement. However, s 4.52 provides that ss 4.2 to 4.36 apply, with minor changes, to the process by which revisions submitted by a service provider are approved by the Authority. Decision of the ERA in respect of revisions are therefore made, to some extent, under ss 4.17, 4.21 and 4.24 of the Code.

[5] Emphasis in original.

51 It may be inferred that the provisions of Chapters 4 and 5 are an implementation of the requirement at s 104(2)(c) of the EAR Act, requiring that the Code contain provisions relating to the terms and conditions upon which access may be may be obtained to covered infrastructure facilities.

Access information

52 'Access information' is also dealt with in Chapter 4 of the Code. Section 4.1 provides that, when an application is made for approval of a proposed access arrangement, the service provider must also provide 'access arrangement information'. The access arrangement information must enable interested persons to understand how the elements of the proposed access arrangement are derived and form an opinion whether a proposed access arrangement complies with the Code. The access arrangement information must also include information detailing, and supporting the price control mechanism, the pricing methods, the measurement of the components of approved total costs and the service provider's system capacity. These provisions appear to reflect the requirement of the Code set out in s 104(2)(l) of the Industry Act.

Discussion

53 On first impression, decisions about the technical rules are not decisions about the access arrangements. The technical rules and the access arrangements are separate documents, so that decisions about the technical rules are not decisions about the access arrangements. This conclusion reflects the note to s 5.1 of the Code, which states that neither the access arrangement information nor the technical rules form part of the access arrangement. Section 1.6.1 of the July Access Arrangement is to the same effect.[6]

54 Further, as discussed above, the access arrangements, the technical rules and the access information are implementations of different paragraphs of s 104(2) of the Industry Act. The words of s 130(2)(k) are apt to cover implementations of paragraphs of s 104(2)(c). They are not apt to cover implementation of the other paragraphs of 104(2) of the Industry Act. Section 130(2)(k) is not apt to cover implementations of paragraphs 104(2)(d) or s 104(2)(l) of the Industry Act.

[6] Section 1.6.1 in the 2012 Access Arrangement is the same as that clause in the July Access Arrangement.

55 Mr Davidson contended that decisions about the technical rule fall within s 130(2)(k) because the access arrangements, technical rules and access information formed a 'complex integral whole'.[7] All three are required for a network. He said decisions about the technical rules 'significantly impact and determine quality and price of the electrical goods and services.'[8] It may be accepted that a decision imposing significant technical burdens on either a user or the network provider could significantly increase costs for network users. Mr Davidson's argument is also supported, to a limited extent, by the requirement that technical rules must be submitted for approval at the same time that the service provider submits its first access arrangements.[9]

56 However, the fact that the three separate documents operate in tandem does not mean they are the same thing. They have quite different functions. In broad terms, an access arrangement sets out commercial matters associated with the use of a covered network, while the technical rules set out technical aspects of the operation and use of a covered network. The access information explains and justifies the access arrangement. An analogy may be drawn with parts of a car. The engine is different from the wheels and the instruction manual. They must be considered together for many purposes and affect each other in many ways. A defective engine may increase the cost of motoring and mean that there is little point having wheels. However, the wheels, engine and instruction manual they are separate things. If you buy a new engine, you do not get new wheels.

57 The conclusion that decisions about the technical rules under s 12.53 are *not* decisions about access arrangements is supported by the fact that there are provisions in the Code which readily fall within the language of s 130(2)(k) of the Industry Act. These are the decisions involving ss 4.17, 4.21 and 4.24 of the Code, referred to at paragraphs 49 and 50 above.

58 Decisions falling within s 130(2)(k) can now identified. The decision of the ERA on 29 November 2012 to approve the 2012 Access Arrangement was a decision falling within s 130(2)(k). Mr Davidson did not challenge this decision. The ERA took the position in its submissions that decisions of the ERA to revise or amend the 2012 Access

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[7] At [55] of Mr Davidson's submissions.
[8] At [84] of Mr Davidson's submissions.
[9] Sections 12.10 and 12.11.

Arrangement, such as those referred to at paragraph 22 above, were also decisions falling within s 130(2)(k). It is not necessary to finally determine whether that position is correct because Mr Davidson did not seek to challenge those decisions. None of the Decisions were decisions under Ch 4 of the Code.

59 The Board considers that a decision made under s 12.53 of the Code is not a decision within s 130(2)(k) of the Act. It is a decision about the technical rules, rather than a decision 'to approve or not to approve an arrangement lodged under section 104(2)(c)', that is to say, the decisions under s 12.53 are not decisions to approve or not approve an access arrangement within s 130(2)(k) of the Industry Act.

Section 12.41 of the Code

60 Applications 2[10] and 4 of 2017 concerned decisions by the ERA to exempt Western Power from compliance with requirements of the technical rules.

61 The provisions dealing with exemptions from compliance with the technical rules are found at ss 12.40 to 12.49 of the Code. Section 12.40 provides that a service provider may apply to the ERA for an exemption from the requirements of the technical rules. Section 12.41 provides:

> 12.41 The Authority must as soon as practicable determine an application under section 12.40:
>
> (a) as a reasonable and prudent person on reasonable technical and operational grounds; and
>
> (b) having regard to the effect the proposed exemption will, if granted, have on the service providers and users of the network and any interconnected network, and must grant the exemption if the Authority determines that in all the circumstances the disadvantages of requiring the network persons to comply with the requirement are likely to exceed the advantages.

62 A decision made under s 12.41 is not a decision to which s 130(2)(k) of Industry Act applies. It is a decision about the technical rules. For the reasons given above about

[10] Application 2 of 2017 also involved a challenge to a separate decision of the ERA to alter the technical rules. This has been dealt with above.

decisions under s 12.53 of the Code, decisions under s 12.41 of the Code are not decisions relating to an access arrangement falling within s 130(2)(k) of the Industry Act.

Section 6.72 of the Code

63 Application ERB 3 of 2017 involved a decision by the ERA that certain forecast new facilities investments met the requirements of s 6.51A of the Code. The application was made by Western Power under s 6.71 of the Code. The decision was made under s 6.72 of the Code.

64 Section 6.51A of the Code deals with whether new facilities investment may be added to the 'capital base' and sets out certain criteria for determining whether that is to occur.

65 'Capital base' is defined in s 1.3 of the Code to mean 'the value of the network assets that are used to provide covered services on the covered network determined under sections 6.44 to 6.63.' The capital base of the network provider is relevant because, in general terms, the scheme of the Code is to give the network provider the opportunity to earn revenue (target revenue) which meets the costs of providing covered services, including a return on investment. The costs of providing covered services includes capital related costs.[11]

66 New forecast facilities investment may be included in the capital base for the start of subsequent access arrangements if the new facilities investment satisfies the criteria set out in s 6.51.[12] Those criteria incorporate the criteria in s 6.52, which include whether the investment exceeds the amount that would be invested by a service provider efficiently minimising cost.

67 Section 6.71 enables a service provider to obtain an advance ruling about particular forecast new facilities investment prior to submitting a new proposed access arrangement. A determination under s 6.71 is binding on the ERA.[13] The service provider would then be able to include the new facilities investment in the capital base for that new access

[11] Section 6.38.
[12] See ss 6.48, 6.49, 6.50 and 6.52.
[13] Section 6.74.

arrangement and calculate the target revenue under the proposed access arrangement in light of that decision.

68 It follows that a decision of the ERA under s 6.71 might affect the target revenue under the next iteration of the access arrangement, but a decision under s 6.71 does not affect the terms of the access arrangement on foot at the time the application is made.

69 In the September submissions, Mr Davidson referred to the investment adjustment mechanism. Chapter 6 of the Code also contemplates that an access arrangement will have an investment adjustment mechanism. The investment adjustment mechanism is a mechanism for comparing the new facilities investment which occurred during the period of the access arrangement period with the forecast new facilities investment. It creates an 'investment difference' which is taken into account in the next access arrangement. Again, this is not a matter which changes the terms of the access arrangement as it applied at the time of the Decision.

70 The terms of the access arrangement are not altered by a decision under s 6.71.

71 A decision under s 6.71 is not 'a decision by the Authority to approve or not to approve an arrangement lodged under section 104(2)(c)'.

Section 12.53 Revisited

72 The September submissions also sought to challenge the Decisions varying the technical rules on a ground related to Chapter 6 of the Code. It is convenient to deal with that now.

73 Mr Davidson pointed out that the target revenue may be adjusted to take into account changes to the technical rules, in accordance with ss 6.4, and 6.9 to 6.12, so that a change in the technical rules might have an impact on the target revenue.

74 However, an adjustment to the target revenue because of changes to the technical rules does not alter the terms of the access arrangement which is applicable at the time the exemption is granted, even if it alters the target revenue which might be earned by the service provider. This argument does not alter the conclusion that s 130(2)(k) of the Industry Act does not apply to decisions under s 12.53 of the Code.

General submissions

75 Mr Davidson made general submissions to the effect that the interests of the public would best be served by review of the Decisions by the Board. He suggested this this would avoid the possibility of speculators bringing class actions. He noted that s 26 of the *Economic Regulation Authority Act 2003* requires the ERA to promote outcomes which are in the public interest. He argued that the objects of the Industry Act and the Code would be better achieved by allowing review of decisions of the ERA which affected the Regulated Asset Base and hence the target revenue, the costs to users of the covered network and consumers of electricity.

76 The Board proceeds on the basis that Parliament has determined that best interests of the public are best advanced by confining the powers of the Board to review decisions of the ERA to the circumstances and decisions identified in s 130(2) of the Act. The Board is obliged to apply the Act as the Act stands.

77 Mr Davidson also suggested that the ERA should not dispute that the Board had jurisdiction to deal with the applications. However, the parties to these proceedings cannot, by agreement between them, enlarge the scope of the Board's ability to review decisions of the ERA. The scope of review is fixed by the legislation.

Conclusion

78 For the reasons given above, the Board is satisfied that the Decisions do not fall within s 130(2)(k) of the Industry Act and may not be reviewed by it. Each of the substantive applications must be dismissed for that reason.

'Person adversely affected'

79 Section 130(3) provides that a 'person adversely affected' by a decision may apply to the Board. The ERA argued that Mr Davidson was not entitled to bring the applications because he was not a 'person adversely affected' by the decisions. This is the second issue identified at paragraph 24 above.

80 The relationship between Mr Davidson and the Decisions was not the subject of formal evidence before the Board. However, in his submissions, Mr Davidson made various statements dealing with that matter. He said:

> The Applicant, an ordinary Australian, seeks the Board's protection from the harm caused by poor decisions made by those who have power over him and other consumers of electricity – poor decisions by the Economic Review Authority of WA and by Western Power (and by implication, the State Government."[14]

81 It is apparent from these submissions that the commercial or financial impact of the decisions is confined to Mr Davidson's interests as a 'consumer' of electricity. There was no suggestion that Mr Davidson carried on a business which involved the use of substantial amounts of electricity or that his livelihood had been put at risk by reason of increases in electricity prices. However, the Board proceeds on the assumption that Mr Davidson uses electricity and further, that Mr Davidson personally pays for it, which many members of the public who use electricity do not.

82 Mr Davidson also identified a 'non-pecuniary' interest in the Decisions, that of an 'ordinary Australian'. This interest may be described as an interest shared with other members of the public. The Board notes that energy prices are currently a matter of interest and controversy in Australia.

83 Both parties relied on a passage from the judgment of Ellicot J in *Tooheys Ltd v Minister for Business and Consumer Affairs*:[15]

> The words "a person who is aggrieved" should not, in my view, be given a narrow construction. They should not, therefore, be confined to persons who can establish that they have a legal interest at stake in the making of the decision. It is unnecessary and undesirable to discuss the full import of the phrase. I am satisfied from the broad nature of the discretions which are subject to review and from the fact that the procedures are clearly intended in part to be a substitution for the more complex prerogative writ procedures that a narrow meaning was not intended. This does not mean that any member of the public can seek an order of review. I am satisfied, however, that it at least covers a person who can show a grievance which will be suffered as a result of the decision complained of beyond that which he or she has as an ordinary member of the public. In many cases that grievance will be shown because the decision directly affects his or her existing or future legal rights. In some cases, however, the effect may be less direct. It may affect him or her in the conduct of a business or may, as I think is the case here, affect his or her rights against third parties.

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[14] The ERA relied on this passage in their submissions on jurisdiction. Mr Davidson suggested that this had the consequence that they conceded that the Board had jurisdiction to deal with the substantive matters. This is not correct.

[15] (1981) 54 FLR 421 at 437 – 438.

84 This case concerned the meaning of the expression 'person aggrieved' in s 5 of the *Administrative Decisions (Judicial Review) Act 1975* (ADJR Act), rather than the expression 'person adversely affected' which appears in s 130(2) of the Industry Act. However, the definition of 'person aggrieved' by a decision in s 3(4) of the ADJR Act includes a 'person whose interests are adversely affected by the decision'. This expression is functionally equivalent to 'person adversely affected'. Also, decisions under the ADJR Act may provide guidance in deciding whether persons may pursue remedies in other statutory contexts.

85 *Tooheys v Minister* is authority for the proposition that a person whose interest in a decision is shared with or common to members of the public generally is not, by reason of that interest, a 'person aggrieved' within s 5 of the ADJR Act.[16] The same conclusion applies to s 130(2) of the Industry Act - such a person is not a 'person adversely affected'. The Board notes that s 130(3) refers to a person 'adversely affected', which suggests objectively adverse effects upon the putative party, rather than using the expression 'person aggrieved', which might connote a feeling of subjective wrong, in the absence of any statutory extension of its scope. Mr Davidson's concern, as an ordinary Australian, about the Decisions does not mean that he was 'adversely affected' by them.

86 The other aspect of the Decisions is their effect on Mr Davidson as a purchaser of electricity. It might be said that decisions have or might have an impact on electricity prices, so that he is adversely affected by the decisions and has a sufficient interest in having them reviewed.

87 The question of the economic effect of decisions was considered by the High Court in *Argos v Corbell*.[17] In that case, the Court accepted that the economic effects of a decision might be enough to make a person an 'aggrieved person' within the scope of the equivalent in the ACT of s 5 of the ADJR Act, even though the person was not a party to the decision being challenged and did not have any legal rights or interests that were the subject . Chief Justice French and Keane J accepted that 'a practical effect upon a person's business could entitle a person to commence proceedings under the ACT ADJR

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[16] See also *Right to Life Association (NSW) Inc v Secretary of, Department of Human Services* (1995) 56 FCR 50 at 65

[17] (2014) 254 CLR 394.

Act. Section 130(2) is not limited to persons who are in business. The economic interests of persons who do not carry on business are as worthy of protection as the economic interests of business people.

88 However, in the present case, the Board is not satisfied that the Decisions have a 'practical effect' on his economic interests. The decisions the subject of applications 1, 2, 4, 5, and 6 of 2017 were changes to the technical rules. The Decisions appear to be part of an ongoing process of modification and adaptation of the technical rules. It is not clear that any one of these Decisions would have a discernable practical impact on Mr Davidson. Mr Davidson did not identify the cost impacts of the changes to the Technical Rules, or even that the changes to the Technical Rules increased rather than decreased the costs of the system. It is not inconceivable that Western Power would make applications for changes to the Technical Rules which reduced its costs burden. [18] Mr Davidson's economic interests would not be adversely affected by a change to the Technical Rules which had this effect.

89 There is slightly more information about the economic effect of the decision the subject of ERB 4 of 2017. That Decision concerned the inclusion of an investment of about $14 million in the capital base for the next access arrangement. Recovery of that investment would be borne by all users of the network over several years. The capital base of the Western Power network as a whole might well be orders of magnitude more than that sum. If so, the addition of $14 million to the capital base might not have a significant effect on the capital base as a whole. Further, Mr Davidson has not entered into an access agreement with Western Power. He is a purchaser of electricity, rather than a user of the network in the sense of a person who pays Western Power to transmit electricity over the network. Mr Davidson is just one of many purchasers of electricity transmitted over Western Power's network. It has not been shown that this Decision had a practical, or even a discernable, impact on Mr Davidson.

90 For these reasons, the Board is satisfied that Mr Davidson is not a person 'adversely affected' by the Decisions. He could not bring proceedings in the Board seeking review

[18] At page 6 of the decision of the ERA of November 2016, 'Western Power's Proposed Amendments to the Technical Rules Submitted March 2016' advanced this contention.

of the Decisions even if, which is not the case, the Decisions were decisions falling within s 130(2)(k) of the EAR Act.

Were the substantive applications made out of time?

91 The respondent also argued that the substantive applications should be dismissed on the ground that the applications were made out of time.

92 Section 130(4) of the Industry Act applies s 38(2) of Schedule 1 of the *Gas Pipelines Access (Western Australia) Act 1998* to the application and review of decisions under s 130 of the Industry Act. Section 38(2) imposes a 14-day time limit for making applications. Each of the substantive applications was made more than 14 days after the date of which the Decision to which it relates.

93 The Board does not propose to dismiss the substantive applications because of non-compliance with s 38(2) of Schedule 1. The Board considers that it is better to treat any failure to comply with s 38(2) as a matter of defence, which could be agitated if there were applications on foot which were otherwise within the jurisdiction of the Board and were brought by a person able to do so within s 130(3) of the Industry Act. For the reasons given above, we do not consider that the Board has before it applications which satisfy those two conditions.

Conclusion in relation to the substantive applications

94 The Board finds that:

(a) the substantive applications do not seek to challenge decisions falling within s 130(2)(k) of the Industry Act or any of the other paragraphs of that subsection; and

(b) Mr Davidson is not a 'person adversely affected' by the decisions.

In the circumstances, it is appropriate that each of the substantive applications be dismissed.

Application 7 of 2017

95 Application 7 of 2017 sought a 'pre-emptive' determination that an order for costs should not be made against Mr Davidson under the *Electricity Industry (Arbitrator and Board*

Funding) Regulations 2009 (Funding Regulations), whatever the outcome of the substantive proceedings. Mr Davidson argued that he should not be put at risk because he was pursuing proceedings that were in the public interest.

96 Application 7 of 2017 proceeded on the assumption that the substantive applications would proceed to a hearing. That assumption has not turned out to be correct. In the circumstances, the appropriate course is to permit the parties to make submissions to the Board about whether the Board can exercise powers under the Funding Regulations, and if it can, how any powers should be exercised.

Date: 28 September 2018

DS Ellis
Presiding Member
Electricity Review Board of Western Australia

TABLE A

Application Number	Subject Matter	Date decision placed on the public register	Provision of Code	Date of application by Mr Davidson
1 of 2017	Amendment to Technical Rules – revised definition of Credible Contingency Event.	9 November 2016	12.53	12 May 2017
2 of 2017	(a) Amendment to Technical Rules – revised wording of the Normal Cyclic Rating (**NCR**) criterion. (b) Amendment to Technical Rules – approved exemption from compliance with Technical Rules cl.2.5.4(b) NCR by Western Power	(a) 9 November 2016 (b) 20 July 2015	(a)12.53 (b) 12.41	19 May 2017
3 of 2017	Approval of the reviewed New Facilities Investment Test for transmission works to connect Collgar Windfarm under section 6.71(b) of the Code.	13 May 2011	6.72	9 June 2017

Application Number	Subject Matter	Date decision placed on the public register	Provision of Code	Date of application by Mr Davidson
4 of 2017	Amendment to Technical Rules – approved exemption from compliance with Technical Rules cl.2.9.4 Maximum Total Fault Clearance Times by Western Power.	15 July 2015	12.41	30 June 2017
5 of 2017	Amendment to Technical Rules – revised wording of cl.2.9.4 and defined new term Weak Infeed Fault conditions.	9 November 2016	12.53	30 June 2017
6 of 2017	Amendment to Technical Rules – proposed deletion of DC Injection Clause 3.2.1(c)(3) and insertion of new clause 3.2.1(g)(2).	19 July 2016	12.53	30 June 2017