IN THE WESTERN AUSTRALIAN GAS REVIEW BOARD

No. 1 of 2008

BETWEEN: **INDEPENDENT MARKET OPERATOR**

Applicant

and

ALINTA SALES PTY LTD

Respondent

FINAL ORDERS OF THE BOARD

Members: Mr A.G.Castledine (Presiding Member) and Messrs G. Mathieson and J. Collins (Expert Members)

Date: 12 March 2010

Where made: Perth

The Board orders and determines:

1. In breach of clause 7.9.1(b) of the *Wholesale Electricity Market Rules* ('Rules'), on 8 August 2008, the Respondent failed to confirm with System Management the expected time of synchronisation in respect of its Wagerup facility five minutes before it synchronised to the network at 16:00 WST.

2. In breach of clause 7.9.1(b) of the Rules, on 8 September 2008, the Respondent failed to confirm with System Management the expected time of synchronisation in respect of its Wagerup facility five minutes before it synchronised to the network at 11:22 WST.

3. In respect of the breach referred to in paragraph 1, the Respondent must pay to the Applicant a penalty of $12,000.

4. In respect of the breach referred to in paragraph 2, the Respondent must pay to the Applicant a penalty of $24,000.

5. The Respondent is to pay the Applicant's costs of the Application to be agreed or assessed by the Board.

Presiding Member

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BETWEEN: **INDEPENDENT MARKET OPERATOR**

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ALINTA SALES PTY LTD

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REASONS FOR DECISION

Introduction

1. By application dated 29 October 2008, the Applicant ('IMO') seeks orders that the Respondent pay a penalty in the amount of:

   (a) $20,000 in respect of a breach of clause 7.9.1(b) of the *Wholesale Electricity Market Rules* ('Rules') on 8 August 2008; and

   (b) $30,000 in respect of a breach of the same provision on 8 September 2008.

2. At the time the breaches took place, Rule 7.9.1 provided as follows.

   '7.9.1 Subject to clause 7.9.2, if a Market Participant intends to synchronise a Scheduled Generator, then it must confirm with System Management the expected time of synchronisation

   (a) at least one hour before the expected time of synchronisation; and

   (b) must update this advice five minutes before synchronising.'

3. The application is made pursuant to sub-regulation 32(1) of the *Electricity Industry (Wholesale Electricity Market) Regulations 2004* ('Regulations') which provides that where the IMO considers that a participant has contravened a provision of the Rules, it may apply to the Board for one or more orders under regulation 33.

4. Under sub-regulation 33(1), the Board may make various orders in respect of a contravention of the Rules including an order that the participant pay to the IMO a civil penalty of an amount that does not exceed the maximum civil penalty amount prescribed for the contravention in the Table to Schedule 1. In the case of clause 7.9.1, the maximum civil penalty is $30,000 for a first contravention and $60,000 for subsequent contraventions.

5. From the outset, the Respondent admitted that the breaches alleged by the IMO in the application had occurred, namely:

   (a) on 8 August 2008, the Respondent failed to confirm with System Management the expected time of synchronisation in respect of its Wagerup facility five minutes before it synchronised to the network at 16:00 WST; and

   (b) on 8 September 2008, the Respondent failed to confirm with System Management the expected time of synchronisation in respect of its Wagerup facility five minutes before it synchronised to the network at 11:22 WST.

   Accordingly, the function of the Board is to determine what orders should appropriately be made under sub-regulation 33(1).

6. A hearing took place before the Board on 11 August 2009, following which the Board reserved its decision in the matter. Subsequent to the hearing, further evidence was filed on behalf of the Respondent in the form of an affidavit of Troy Edwin McKelvie sworn on 23 October 2009. That evidence is the subject of confidentiality orders made by consent for the purpose of protecting confidential contractual information.

7. Since reserving its decision, the Western Australian Gas Review Board has been abolished and replaced by the Western Australian Electricity Review Board. This change

reflects the amendments made to the *Gas Pipelines Access (Western Australia) Act 1998* (now entitled the *Energy Arbitration and Review Act 1998*) which included the removal from the Board's jurisdiction of gas access related matters.

Orders open to the Board and relevant considerations

8. Under sub-regulation 33(1), the Board may make one or more of the following orders –

   (a) if the provision is a civil penalty provision — an order that the participant pay to the IMO a civil penalty of an amount that does not exceed the maximum civil penalty amount prescribed for the contravention in the Table to Schedule 1;

   (b) an order that the participant cease, within a specified period, the act or omission constituting the contravention;

   (c) an order that the participant take such action, or adopt such practice, as the Board requires for remedying the contravention or preventing a recurrence of the contravention;

   (d) an order that the participant implement a specified program for compliance with the market rules;

   (e) if the participant is a registered participant — an order suspending the participant's registration for a specified period or suspending any other specified right of the participant under the market rules for a specified period;

   (f) if the participant is a registered participant — an order that the participant's generating system or transmission or distribution system, or other facilities or loads, be disconnected;

   (g) if the participant is a registered participant — an order that the participant's registration be cancelled.

   The IMO is only seeking orders of the kind referred to in paragraph (a).

9. Under sub-regulation 33(4), before making an order, the Board must have regard to all relevant matters, including –

   (a) the nature and extent of the contravention;

   (b) the nature and extent of any loss or damage suffered as a result of the contravention;

   (c) the circumstances in which the contravention took place;

(d) whether the participant has previously been found by the Board in proceedings under the Act to have engaged in any similar conduct; and

(e) the consequences of making the order.

10. The parties were invited by the Board to lodge evidence and submissions dealing with each of these relevant matters.

The evidence

11. The parties filed a statement of agreed facts which included the following in relation to the breach of 8 August 2008.

- At approximately 4.00 pm, the Wagerup Powerhouse Facility ('Facility') synchronised to the South West Interconnected System ('SWIS').
- As a result of the synchronisation of the Facility, the generation output for the Facility increased at a rate of 8MW per minute. By 4.15 pm, as a result of the synchronisation of the Facility, the frequency of the SWIS had increased to 50.097 Hz.
- System Management is required to maintain the SWIS at a frequency of 50 Hz. If the frequency of the SWIS increases to 50.2 Hz, the safety and security of the SWIS may be compromised.
- Immediately following the Facility's synchronisation to the SWIS, in order to maintain system security, System Management issued a Dispatch Instruction to the Facility's operator directing that the Facility not exceed a generation output of 114 MW.
- At approximately 4.22 pm, in order to reduce the frequency of the SWIS caused by the synchronisation of the Facility, System Management requested that NewGen Power Kwinana Pty Ltd (NewGen) reduce the generation output for its Kwinana power station registered facility by 50 MW within 5 minutes, from approximately 320 MW to 270 MW and remain at the level for 30 minutes. The NewGen facility was in the process of commissioning at the time of this request, that is, it was synchronised to the SWIS and generating power, but was not available for normal dispatch under the Rules.
- At approximately 4.30 pm, NewGen reduced its generation output by 50 MW.
- At approximately 4.31 pm, in order to reduce the frequency of the SWIS to a safe level, System Management instructed Verve Energy Kwinana 4 to reduce its ramp rate to the minimum rate possible without risk to safety and security of the machinery.
- At approximately 4.34 pm, in order to reduce the frequency of the SWIS to a safe level, System Management instructed Verve Energy Collie to reduce its generation output to 280 MW.
- At approximately 4.50 pm, System Management issued a Dispatch Instruction to the Facility's operator directing that the Facility return to its resource plan for that trading day.

- Contrary to clause 7.9.1(b) of the Rules, the Respondent did not provide System Management with any prior confirmation that it intended to synchronise the Facility to the SWIS five minutes before synchronising.

12. In respect of the breach which took place on 8 September 2008, the following facts were agreed.

- On 8 September 2008 the Facility was synchronised to the SWIS in accordance with its resource plan for that trading day.
- At approximately 11.07 am, without prior notice to System Management, the Facility de-synchronised to the SWIS.
- At approximately 11.08 am, the Facility's operator telephoned System Management and undertook to rectify the problem as soon as possible.
- At approximately 11.07 am, as a result of the Facility's disconnection to the SWIS and in order to maintain system security, System Management instructed Verve Energy Kemerton 12 to synchronise to the SWIS. Following several failed attempts, Verve Energy Kemerton 12 synchronised at 11.15 pm and began ramping up.
- At approximately 11.22 am, as a result of the Facility's disconnection to the SWIS and in order to maintain system security, System Management:
  (a) manually caused Verve Energy Pinjar 2 to synchronise and ramp up to 14 MW; and
  (b) manually caused Verve Energy Pinjar 4 to synchronise and ramp up to 14 MW.
- At approximately 11.22 am, the Respondent's Facility resynchronised to the SWIS.
- The Respondent did not provide System Management with confirmation 5 minutes prior to re-synchronisation as required under clause 7.9.1(b) of the Rules.
- As a result of the Facility's re-synchronisation referred to above, the frequency of the SWIS increased to 50.063 Hz at 11.23 am.
- At approximately 11.22 am System Management became concerned about excess generation and instructed Verve Energy Kemerton 12 to stop ramping and to maintain a generation output of 100 MW.
- In order to reduce the frequency of the SWIS caused by the Facility's re-synchronisation:
  (a) at approximately 11.25 am, System Management instructed Verve Energy Kemerton to ramp down to 70 MW from 100 MW;
  (b) at approximately 11.27 am, System Management manually caused:
    (i) Verve Energy Pinjar 10 to ramp down to 64 MW from 110 MW;
    (i) Verve Energy Pinjar 11 to ramp down to 80 MW from 120 MW; and
  (c) at approximately 11.48 am, System Management manually caused Verve Energy Pinjar 11 to de-synchronise from the SWIS.

13. The IMO called evidence from Mr Neil Hay, Manager of Market Operations for the IMO. Mr Hay gave evidence that in circumstances where a Participant deviates from its resource plan (either above or below) otherwise than in accordance with a dispatch instruction, it must pay either a Downwards Deviation Administered Price ('DDAP') for the amount of energy it failed to produce, or an Upwards Deviation Administered Price

('UDAP') for the additional amount of energy produced. Where Verve Energy is required to produce additional energy, it is paid the Marginal Cost Administered Price ('MCAP') for the amount produced.

14. Mr Hay's evidence indicated that in relation to the breach on 8 August 2008, the Respondent paid sums of $11,374.73 and $11,419.07. In relation to the breach of 8 September 2008, the Respondent paid DDAP amounts of $14,981.51 and $1940.22, and Verve Energy was paid MCAP amounts of $11,524.24 and $1492.53.

15. Mr Hay also gave evidence of prior relevant conduct by the Respondent on 1 November 2007 and 24 January 2008.

16. Correspondence attached to Mr Hay's affidavit indicated that on 1 November 2007, the Facility synchronised to the network without prior notice being provided to System Management of the expected time of synchronisation in breach of clause 7.9.1. This resulted in the IMO issuing a formal warning to the Respondent.

17. By letter dated 15 November 2007, the Respondent informed the IMO that this breach occurred due to the operator being 'of the belief that System Management had been informed and not objected to synchronisation...' The letter goes on to explain that the Respondent was changing its procedures to ensure that 'the person responsible for synchronising the facility is the same as the person responsible for communicating with System Management's operators', and that it is hoped that this change will 'minimise the risk of a repeat of the event.'

18. The second prior breach occurred on 24 January 2008 when the Facility again synchronised to the network without the Respondent first providing confirmation to System Management as required by Rule 7.9.1(b). By an email dated 29 January 2008, the Respondent informed the IMO that the requirement for operators to 'communicate with System Management prior to synchronising/ de-synchronising at all times, even when a resource plan is in place, was in this case overlooked due to human error/ lack of experience with the new market rules by the operators on site'. The email also asserted that 'on this occasion the impact on the system would have been minimal as the units literally were turned off as soon as they started exporting power (in accordance with the resource plan)'. Finally, it was proposed that '(I)n view of the fact of this incidence and previous ones, we have undertaken to organise a course for all our operators at both Pinjarra and Wagerup to get up to speed with some of the essential terms and "market language" used when communicating with System Management'.

19. The IMO also called evidence from Mr Glen Michael Vardy, a Senior Systems Operations Controller for System Management. Mr Vardy's affidavit sworn on 8 July 2009 attaches a copy of a transcript of telephone conversations he had with the Wagerup Facility operator (described only – and somewhat confusingly - as 'Glen') on 8 September 2008.

20. The transcript indicates that after the Facility had de-synchronised at around 11.07 am, the operator informed Mr Vardy that he would 'rectify the problem as soon as possible'. In his affidavit, Mr Vardy states that he did not regard this comment as 'notification of

Wagerup's intention to synchronise to the system in accordance with the Wholesale Market Rules notification requirements'.

21. At this point, Mr Vardy, not expecting the Wagerup Facility to be able to re-synchonise for approximately 30 minutes (in accordance with Standing Data for the Facility lodged by the Respondent with the IMO), took action to 'ramp up' the system (via Verve Energy plant) in order to maintain system security. However the Wagerup Facility re-synchronised at about 11.22 am.

22. The transcript indicates that at 11.24 am, the operator of the Facility contacted Mr Vardy and stated: 'Just letting you know I am back on the grid'. Mr Vardy responded with the words: 'Yeah, you started the other one did you? Wish you would have let me know, because I started a s*** load of Verve plant'. Later in the transcript, the operator is recorded as stating: 'I thought we were in the boat where I had to rectify the problem and get the other machine on ASAP', to which Mr Vardy responds: 'Ah, no, well that's, you know, I usually, we sort that out you know that's why I started the other Verve plants, but never mind, that's ah, you'll remember for next time'.

23. The Respondent adduced evidence from Mr Troy Edwin McKelvie, in-house Legal Counsel. In Mr McKelvie's affidavit sworn on 9 June 2009, evidence is given that while the Respondent is the Market Participant of the facilities at Wagerup and Pinjarra, the day-to-day manager of those facilities is Alcoa World Alumina Australia ('Alcoa').

24. In a subsequent affidavit sworn by Mr McKelvie on 23 October 2009, evidence is given that this day to day management occurs pursuant to an Operating and Maintenance Agreement dated 8 September 2006 between Alinta Cogeneration (Wagerup) Pty Ltd ('ACGW') and Operator World Alumina Australia ('Operator'). In paragraph 6 of his affidavit, Mr McKelvie expresses his belief that this contract 'provides a sufficient legal basis to ensure that the Operator complies with [the Respondent's] directions regarding compliance with the Wholesale Electricity Market Rules'.

25. Certain extracts from the operating agreement are attached to Mr McKelvie's second affidavit. These include clause 5.6 under which the 'Operator covenants with ACGW to comply with the obligations of ACGW and Alinta Sales under each of the Connection Agreement and the Access Law in relation to the operation and maintenance of the Generating Facility under this Agreement, and comply with directions from the SWIS Operator, System Management and the IMO…' Although this does not expressly include compliance with the Rules, sub-clause (g) goes on to oblige the Operator to 'provide the SWIS Operator, System Management, Director of Energy Safety, the IMO or any other Governmental Agency with any information validly requested of ACGW or Alinta Sales under the Network Access Agreement, the Access Law, the WEM Rules, Relevant Consents or relevant Laws, and notified by ACGW to Operator, concerning the operation or maintenance of the Generating Facility.'

26. The Respondent also lodged two affidavits sworn by Mr William Peter Truscott, the Manager of Energy Market Operation for the Respondent.

27. In his affidavit sworn 26 June 2009, Mr Truscott confirms that although Alinta is the Market Participant for the Wagerup facility, the day to day management and operation of

the facility is handled by Alcoa. Part of Mr Truscott's role is to liaise with Alcoa in relation to the operation of the facility and compliance with the Rules.

28. Mr Truscott gave evidence that in April 2008 (following the incidents referred to in paragraphs 15 to 19 of these Reasons) he met with Alcoa's facility operators to 'discuss the need for Alcoa, and the Facility Operators, to ensure that Alcoa complied with the WEM Rules'.

29. In relation to the incident on 8 August 2008, Mr Truscott gave evidence that the Varanus Island gas pipeline explosion on 3 June 2008 caused a significant gas shortage which resulted in the Facility being required to operate on diesel fuel to produce electricity at a far greater quantity than was normally the case. He stated that 'the Facility Operators were operating the Facility more frequently, and in a mode that had not previously been used, and with which they were therefore less familiar.'

30. In this context, Mr Truscott expressed the view that 'the failure to notify System Management 5 minutes prior to synchronisation was an isolated incident which was an oversight of the Facility Operator on the day operating under the above unusual conditions'.

31. Mr Truscott also gave evidence of certain action taken by Alinta and Alcoa since the breach on 8 August 2008 which included:

    - Informing Alcoa, and in particular the Facility operators, of the importance of informing System Management before synchronisation;
    - Amending the procedure document to reflect this requirement;
    - Placing a sign at the gas turbine at the Facility reminding the operators of this requirement.

32. In relation to the incident on 8 September 2008, Mr Truscott gave evidence that on this date, 'the second generating unit (Unit 2) tripped from service at 11.07am due to a static excitation fault leading to a control logic unit trip'. Part of the Facility operator's response to this emergency was to contact System Management 'to inform them of the trip and to discuss restoring as soon as possible the Unit back to the level of operation stated in the Resource Plan' (see reference to the transcript in paragraph 20 of these Reasons).

33. Mr Truscott attempted to give evidence of how the Facility operator interpreted System Management's instructions (in Mr Truscott's words, that the operator 'was authorised to return the Facility to its Resource Plan target on an urgent basis and without further notifying the System Manager'). This evidence is hearsay, and the Board attributes little weight to it having regard to the fact that a transcript of the relevant discussion has been produced (and the Respondent does not dispute the accuracy of the transcript).

34. In his second affidavit sworn 7 August 2009, Mr Truscott again attempts to give evidence as to the state of mind and intentions of the facility operator during the discussion with System Management. Again, the Board does not attribute significant weight to this material in the absence of direct evidence from the operator himself. In this affidavit, Mr Truscott also states his understanding that Senior Management of Alcoa were in the

process of planning a training package for Facility operators which would include 'the important rules and processes for operation of the Facility in the current market'. Mr McKelvie's second affidavit also made reference to training provided by himself and Mr Truscott to operator staff on 2 September 2009.

35. Having regard to the evidence, the Board's consideration of the matters set out in sub-regulation 33(4) is set out below.

Nature and Extent of Contravention

36. A breach of clause 7.9.1(b) has the potential to adversely affect the safety and security of the SWIS, particularly where the frequency increases to 50.2Hz. In relation to the first incident, the frequency increased to 50.097Hz on synchronisation. In relation to the second incident, on de-synchronisation, the frequency decreased to approximately 49.6Hz, and on re-synchronisation the frequency increased from about 50Hz to 50.063Hz.

37. The Respondent submitted that in the case of both breaches, there is no evidence that the SWIS was actually placed at risk. The IMO did not argue otherwise, but referred to the potential for safety and security to be compromised had System Management not implemented the measures which it took. The Board agrees that System Management was called upon to act decisively in these cases, especially having regard to the fact that the normal frequency operating range for the SWIS is 50 Hz plus or minus 0.2Hz.

38. The Respondent also argued that a mitigating circumstance in the first case was that the planned time for synchronisation was in accordance with the Respondent's resource plans as lodged in advance with System Management. While this does not absolve the Respondent from its notification obligations, the Board accepts that this situation is less severe than where a synchronisation occurs in a manner inconsistent with the approved resource plan.

39. In the Board's view, while the contraventions should not in any way be trivialised, it may be concluded that the extent of each breach was not severe in the circumstances.

Nature and Extent of any Loss or Damage Suffered

40. The Respondent paid $22,793.80 as a dispatch instruction payment as a result of the first contravention and also paid $16,921.73 to the IMO as a result of the second contravention.

41. The IMO submitted that the dispatch instruction payment made by the Respondent relates to its deviation from its resource plan not its failure to notify System Management of synchronisation under clause 7.9.1(b). Similarly, it was submitted that the second payment was a DDAP payment relating to under-generation caused by the Respondent's de-synchronisation.

42. For the reasons submitted by the IMO, the Board accepts that the payments made by the Respondent as referred to in paragraph 40 are not relevant to sub-regulation 33(4)(b).

43. There is no clear evidence before the Board that any other party suffered quantifiable loss and damage as a result of either incident. In Mr Vardy's affidavit a statement was made that it 'costs Verve in the order of $10,000 in start up costs every time it is required to start up its plant.' However no further evidence was given to show that such costs were incurred in this case or, if they were incurred, whether they had been recouped through any other process.

Circumstances in which the Contravention took place

44. The Respondent submitted that 'in large part, the [first] incident occurred as a result of the stress and pressure caused by an extraordinary situation, namely the Facility having to operate in a stressed state due to the Varanus Island gas pipeline explosion.' This incident was also partly relied on to explain the circumstances of the second incident.

45. The Respondent also argued that in relation to the second incident, the Facility Operator believed that the communication to System Management was sufficient to comply with the Rules.

46. Other than to state that the modus operandi for the Facility at the time was different from that to which the Facility Operators had previously been accustomed, the evidence given on behalf of the Respondent did not fully explain why stresses associated with the Varanus Island incident affected the ability of the operators to comply with this Rule. The Board accepts that the Facility would have been under some additional stress at this time, however it should not have been beyond the capacity of competent operators to continue to comply with this Rule under these circumstances.

47. Having reviewed the transcript of the discussion between the Facility Operator and System Management concerning the second incident, the Board does not accept that the Respondent's interpretation of those communications is reasonable. The fact that the Operator informed Mr Vardy that he would 'rectify the problem as soon as possible' cannot reasonably be regarded as notification of intended re-synchronisation for the purposes of the Rules. The Board considers that Mr Vardy acted appropriately in taking action to 'ramp up' the system in order to maintain system security – action which he clearly would not have taken had he been properly notified. It is apparent that the sudden unannounced re-synchronisation of the Wagerup Facility caused some difficulties for System Management having then to reverse these actions.

48. The transcript also indicates that there is room for improvement in the communication approach taken by System Management. In response to the Facility Operator's comment (concerning the second incident) that he would '...would rectify the problem as soon as possible...', Mr Vardy responded: 'Okay, all right, thanks mate cheers'. The Board considers that a more professional approach would have been for System Management to reiterate the safety and security risks associated with the situation, and remind the Operator of the importance of giving notice prior to re-synchronisation occurring. Such an approach would presumably have prevented the breach from occurring.

49. Those shortcomings do not, however, provide any excuse for the Respondent's non-compliance with the Rule. In this regard, the Board notes that one of the Respondent's prior breaches (on 1 November 2007) involved a similar mistaken belief on the part of the Operator that 'System Management had been informed and not objected to synchronisation...' It appears that this breach did not result in any, or any effective, changes in procedures being implemented to ensure that the same contravention did not recur. Against that background, it is difficult to accept that the Respondent had any reasonable justification for adopting a similar view of the circumstances of this incident.

50. The Board accepts that the contraventions in this case were not the result of wilful or reckless conduct on the part of the Facility Operators, but rather were the result of insufficient emphasis having been placed by the Respondent and the Facility Operators on the need to comply strictly with this Rule. There is no evidence that the Respondent took any substantive action to ensure proper procedures were put in place to improve compliance following the two earlier warnings for breaches of the same Rule. This appears to have lead to a casual attitude being adopted in relation to the requirement for notification of synchronisation.

Previous Findings by the Board

51. Prior to the hearing of the application, the Board had not made any previous findings or orders against the Respondent in relation to any similar conduct. However, since the hearing, the Board has made orders in matter no. 3 of 2008 concerning a breach of clause 7.10.1 of the Rules. That matter was heard shortly after the hearing in this matter, and the Board ordered that the Respondent pay a penalty of $17,500.

52. The breach in matter no. 3 of 2008 concerned the Respondent exceeding its scheduled energy output for Unit 1 at its Pinjarra facility in three consecutive trading intervals on 16 September 2008.

53. It may be debateable as to whether or not this breach constitutes 'similar conduct' to the breaches in question in this matter. Furthermore, this conduct did not occur 'previously' to the two breaches of clause 7.9. The Board therefore considers that the findings and orders made in matter no. 3 of 2008 have little relevance to the findings and orders to be made in this matter.

Consequences of Making the Order

54. The IMO submitted that 'in light of the history of prior breaches, the financial impact and potential serious impact on system security' a penalty is necessary to encourage the Respondent to establish better compliance processes and procedures and to deter the Respondent and others from similar breaches of the Rules in the future.

55. The Respondent submitted that the Rule in question has since been removed by amendments introduced on 1 February 2009 in recognition of 'the onerous burden that clause 7.9.1(b) presents for both Market Participants and System Management'. It was also submitted that this conduct would not breach the current Rules.

56. In the Board's view, although the five minute notification requirement is no longer in place in the Rules, there remains a requirement to notify System Management at least one hour prior to the expected time of synchronisation (and to update that advice immediately if the expected time changes). As such, the Board considers that the conduct complained of in this matter would still constitute a contravention of the Rules in their current form, and a penalty imposed by the Board would therefore have a relevant deterrent effect in relation to other Market Participants.

57. Furthermore, the prior history of breaches and failed undertakings by the Respondent to improve its compliance processes with respect to this provision indicates a need for a penalty sufficient to provide a specific deterrent against further similar offences by the Respondent in the future.

Other Relevant Matters

58. As discussed above, the Respondent had been the subject of prior warnings by the IMO of breaches of clause 7.9.1. These prior warnings prompted the Respondent to undertake to change its procedures and organise training for operators to ensure that such breaches are not repeated. Despite those undertakings, two further breaches occurred within 12 months of the prior breaches.

59. The Board also expressed concern that while the Respondent was the registered Market Participant with obligations under the Rules, the day to day operator of the relevant Facilities is Alcoa. While Market Participants are free to outsource the management of the operational functions in this way, it is clear that problems can occur when there is insufficient control of the operating entity allowed under the relevant contractual documentation.

60. The extracts of the operating agreement provided to the Board do not satisfy the Board that the Respondent is in a position to ensure that the Rules are complied with in the operation of the relevant facilities. Although Alcoa has made certain covenants in favour of the Respondent, these relate to complying with directions or requests for information made by System Management rather than a more general undertaking to comply with the Respondent's obligations under the Rules (so far as they are relevant).

61. The Board was informed by Counsel for the Respondent that negotiations were on foot with Alcoa in relation to the terms of the operating agreement, however no further evidence of any amendments to those terms has been provided. In the absence of tighter contractual controls in the operating agreement, the Board remains concerned that there is the potential for further breaches of the Rules to occur in the future, despite the Respondent's best intentions.

62. Nevertheless, the Board accepts that the Respondent has now taken steps to ensure that further contraventions of this kind do not occur. This includes the provision of additional training by Mr Truscott and Mr McKelvie to Facility personnel in relation to their obligations under the Rules. It is not clear whether or not such training is proposed to be conducted on an on-going basis. The Board would expect that this training should be carried out regularly in the future, and that it should be mandatory for all Facility operational staff to attend such training at least once per year in order to ensure that a culture of compliance is promoted. Beyond improved training processes, the Board

would also expect that the Respondent will ensure that processes are established for risk management and improved accountability in cases where procedures are not followed by operational staff.

63. Finally, the Board wishes to acknowledge that the Respondent admitted both contraventions at an early stage in the proceedings, and has generally co-operated in the prosecution of the application.

Conclusion

64. In conclusion, the Board has found that:

(a) while the nature of the contraventions is potentially serious, in this case the extent of the breaches was not severe;

(b) there is no clear evidence that any other parties suffered loss or damage as a result of the contraventions;

(c) the actions of the Respondent in relation to the contraventions were not wilful or reckless, but appear to reflect an unduly casual approach to compliance with notification requirements which resulted in four breaches of the same Rule in a period of less than 12 months;

(d) the Respondent has not previously been found by the Board in proceedings under the Act to have engaged in similar conduct;

(e) having regard to prior warnings provided by the IMO to the Respondent for breaches of the same provision, together with a lack of responsiveness to those warnings in the form of substantive actions to improve the prospects of future compliance, there is a need for a penalty of a sufficient amount to be imposed in order to deter the Respondent (and others) from similar contraventions in the future;

(f) while the Board is concerned at the lack of clear control mechanisms in the operating agreement between the Respondent and Alcoa to ensure strict compliance with the Rules, the Respondent has taken some steps to provide additional training to Alcoa operators in relation to the requirements under the Rules; such training is a good first, but not on its own sufficient, step towards establishing effective risk management procedures and a culture of compliance in the future.

65. The maximum penalty is $30,000 for the first incident and $60,000 for the second incident. The IMO seeks penalties of $20,000 and $30,000 respectively. The Respondent has submitted that penalties in the order of $7,500 and $10,000 respectively would be more appropriate.

66. Having regard to all relevant matters, the Board considers that:

(a) a penalty in the amount of $12,000.00 should be paid in relation to the first incident; and

(b) a penalty in the amount of $24,000.00 should be paid in relation to the second incident.

67. In addition, the Board orders the Respondent to pay the IMO's costs of the proceedings, to be agreed or assessed by the Board.

Date: 12 March 2010

Expert Member

Expert Member

Presiding Member