



Neutral citation [2008] CAT 30

IN THE COMPETITION
APPEAL TRIBUNAL

Case Number: 1099/1/2/08

Victoria House
Bloomsbury Place
London WC1A 2EB

17 October 2008

Before:

VIVIEN ROSE
(Chairman)

Sitting as a Tribunal in England and Wales

BETWEEN:

NATIONAL GRID PLC

Appellant

- v -

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

supported by

SIEMENS PLC
CAPITAL METERS LIMITED
METER FIT (NORTH WEST) LIMITED
METER FIT (NORTH EAST) LIMITED

Interveners

SUPPLEMENTARY RULING ON ADMISSIBILITY OF
INTERVENERS' MATERIAL

APPEARANCES

Mr Jon Turner QC and Mr Josh Holmes (instructed by Pinsent Masons LLP) appeared for the Appellant.

Mr Brian Kennelly (instructed by Ofgem) appeared for the Respondent.

Mr Fergus Randolph (instructed by United Utilities Group plc) appeared on behalf of Meter Fit.

Miss Kassie Smith (instructed by Reed Smith LLP) appeared on behalf of Siemens plc.

Mr Ben Rayment (instructed by Slaughter and May) appeared on behalf of Capital Meters Limited.

1. At a case management conference on 8 October 2008 I handed down a ruling on admissibility of evidence and disclosure in this appeal. That ruling ([2008] CAT 26) (“the earlier Ruling”) was circulated in draft to the parties in advance of the hearing. I concluded in that Ruling that the inclusion or exclusion of certain passages in the Interveners’ pleadings and evidence depended on whether National Grid was prepared to withdraw passages in its Notice of Appeal because those passages appeared to raise issues which were not raised in the Decision under appeal. National Grid has agreed to withdraw some but not all of the paragraphs of the Notice of Appeal referred to. National Grid, Siemens and CML made written and oral submissions as to how the withdrawal of those passages should affect the question of the admissibility of the parts of the Interveners’ material which National Grid had challenged and which were left unresolved in the earlier Ruling.
2. The order issued today therefore incorporates both my decisions set out in the earlier Ruling and my subsequent decisions on the paragraphs which were left unresolved in that Ruling and on which submissions were made at the hearing on 8 October. It also settles the timetable for the remaining steps in the appeal leading up to the hearing which is fixed to start on 15 January 2009.

Bundling of maintenance

3. In the earlier Ruling (paragraphs [9] to [14]) I considered National Grid’s challenge to paragraph 20 of Siemens’ Statement of Intervention and paragraph 37 of Mr Lee’s witness statement. I indicated that Siemens’ material appeared to be a legitimate response to paragraphs 287 to 298 of the Notice of Appeal. In their written submissions, National Grid withdrew paragraphs 289, 293 and 297 of the Notice of Appeal but said that they would not withdraw the other paragraphs referred to in the earlier Ruling, namely paragraphs 287, 288, 290, 291, 292 and 294 to 296. They argued that these remaining paragraphs did not justify the inclusion of the disputed Siemens’ passages.
4. In my introductory remarks on 8 October I indicated that I agreed with National Grid’s analysis save as regards paragraph 287 of the Notice of Appeal as to which I invited further submissions. That paragraph appears to challenge the Decision for failing to

analyse the degree to which new entrants bidding for gas supply metering requirements can achieve economies of scale and points to the market entry of UMS as evidence of this. At the hearing on 8 October, Mr Turner on behalf of National Grid stated that paragraph 287 was not intended to be read as raising any point about the effect of maintenance work on CMOs' economies of scale and density but was intended only to respond to paragraphs 3.66 to 3.74 of the Decision where the Authority set out its case on barriers to entry and expansion. The paragraph was therefore intended to be read as limited to making points about scale and density in meter replacement work but not as raising any issue as to maintenance work.

5. At the hearing Siemens, with the support of CML, argued that paragraphs 287 and 292 of the Notice of Appeal should support the introduction of an examination of the effect of National Grid's bundling of maintenance work on their economies of scale and density.
6. My conclusion on this point is that National Grid are clearly on notice that their case must not stray beyond considering meter replacement work in this regard. On the basis that paragraph 287 is to be read as limited to meter replacement work, I will exclude the second sentence of paragraph 20 of Siemens' Statement of Intervention which starts "From Siemens' point of view..." and paragraph 37 of Mr Lee's witness statement.
7. On this point also I record that since paragraph 289 of the Notice of Appeal is now withdrawn, paragraphs 48 to 51 of Mr Lee's witness statement are also excluded.

Policy meter replacements

8. In paragraph [20] of the earlier Ruling I upheld National Grid's objections to some passages in the Interveners' material on this ground, namely paragraphs 32 and 33 of Mr Williams' witness statement, paragraph 21 of Siemens' Statement of Intervention other than the first sentence and paragraph 42 of Siemens' Statement of Intervention.
9. I left the admissibility of certain other passages unresolved pending National Grid's consideration of the passages of the Notice of Appeal listed in paragraphs [17] to [19] of the earlier Ruling. This was because those passages appeared to me to be putting

forward a positive case that National Grid's policy meter replacement work was beneficial to CMOs in providing work which enables them to operate efficiently.

10. In its written submissions, National Grid withdrew paragraph 428 and asserted further that none of the other paragraphs referred to in the earlier Ruling should be read as making such a positive case. At the hearing on 8 October, in the light of submissions made by Siemens, again supported by CML, National Grid also withdrew the opening words of paragraph 429 which read "This flexibility has recently increased even further as" (see Transcript, 8 October 2008, p 20 line 15).
11. I accept Mr Turner's assurance on behalf of National Grid that they are not mounting a positive case on the effect of policy replacements on the CMOs' business. Having prevented the Interveners from countering any such case I will ensure during the conduct of this appeal that National Grid do not attempt to take us down that path. In the light of that, as I said at the 8 October hearing, paragraphs 53 to 64 of Mr Lee's witness statement are excluded as are the following passages in the witness statement of Mr King: (a) paragraph 51 in so far as it responds to paragraph 428 of the Notice of Appeal (now withdrawn); (b) the last sentence of the sub-paragraph of paragraph 51 which responds to paragraph 459 where Mr King says of National Grid's policy exchange requirements that "By their very nature, they impose a constraint on the freedom of CMOs to plan and schedule their meter exchanges around CRE commitments"; and (c) at paragraph 52, the last three sentences of Mr King's comments at the end of his witness statement on Exhibit NA1 to Mr Avery's witness statement (on behalf of National Grid) from the words "Again, these are now having an impact..." to the end of that sub-paragraph.

Linear Nature of the glide path

12. In the earlier Ruling (paragraphs [21] to [25]) I indicated that National Grid's challenge to the passages in Siemens' Statement of Intervention and Mr Lee's witness statement concerning the linear nature of the glide path depended on how paragraph 440 of the Notice of Appeal should be interpreted. That paragraph asserted that there was nothing to suggest that the rate of replacement of meters under the glide path was different from what would be expected under normal competitive conditions and that there is no reason to suppose that the glide path artificially limits the rates of meter replacement.

13. In its written submissions National Grid stated that it was not part of its case that the rate of meter replacement under the glide path was the same as would occur if there had been no contractual constraint on replacement. They agreed to delete the heading above paragraph 440 which reads “The replacement rate as envisaged under the glide path is normal” and the first sentence of paragraph 440 which reads: “Finally there is nothing to suggest that the rate of replacement meters under the glide path differs from what would be expected under normal competitive conditions”.
14. As I indicated in my introductory remarks on 8 October, I therefore exclude paragraph 43 of Siemens’ Statement of Intervention and paragraphs 69 to 72 of Mr Lee’s witness statement.

Danger to the continued presence of the CMOs

15. National Grid objected to assertions by CML and Siemens that the alleged abusive conduct might result in their exit from the market. This was not an allegation which the Authority had made in the Decision. Siemens and CML agreed that some of the passages complained of went beyond what was permissible, that is paragraphs 23 to 26 of Mr Hoskin’s witness statement, paragraph 78 of Mr Lee’s witness statement and the last two sentences of paragraph 46 of Siemens’ Statement of Intervention.
16. In the earlier Ruling I excluded certain additional passages on this ground, namely paragraph 39 of CML’s Statement of Intervention and the last sentence of paragraph 21 of Siemens’ Statement of Intervention (although that sentence had already been excluded on other grounds: see paragraph [8], above).

Price comparisons

17. In the earlier Ruling I upheld National Grid’s challenge in so far as it extended the price comparison exercise to pre-payment meters as well as domestic credit meters. I concluded therefore that the comparisons of pre-payment meter prices in paragraph 13 of Mr Hoskin’s witness statement and in his exhibit TPH1 should be excluded.

“Payment completion” as a feature of normal competition

18. There are no exclusions merited on this ground. At the hearing on 8 October I heard submissions concerning how much information about CML’s contracts needed to be disclosed to National Grid in order for the Tribunal to be able properly to consider the issues of objective justification raised in the Decision. In its letter to the Tribunal of 8 October, CML set out certain information about those contracts which it said it would incorporate into a supplementary witness statement. National Grid indicated that that information would then suffice.
19. I therefore grant CML permission to file and serve that supplementary witness statement.

Miscellaneous other matters

20. It is not necessary for the parties to refile the revised pleadings and evidence in the light of the earlier Ruling and this Ruling but revised versions must be included in the trial bundles. The exception to this is tab 2 of the exhibit to Mr Hoskin’s witness statement TPH1. This needs to be revised both to take account of the exclusion of (i) the information purporting to show how much gas suppliers could have saved if National Grid had unbundled meter maintenance (see paragraph [8(b)] of the earlier Ruling referring to paragraph 17 of Mr Hoskin’s witness statement) and (ii) the price comparison for pre-payment meters. CML have said that they will re-serve tab 2 of TPH 1 as soon as possible having removed the inadmissible data.
21. National Grid accepted at the hearing that the consequence of the exclusion of the passages which I have ruled inadmissible is that some of its own evidence, in particular in the witness statement of Mr Mark Way dated 28 Junly 2008, also becomes irrelevant. The parties agreed at the hearing on 8 October to identify for the Tribunal what passages are affected and the Tribunal will make any order which is necessary to deal with those paragraphs in due course.
22. At the hearing on 8 October Siemens asked for permission to file and serve a short additional witness statement from Mr Duncan Southgate correcting something in his earlier statement (see Transcript, 8 October 2008, p. 22). I grant permission for them to

do so. That witness statement has now been filed at the Tribunal although some clarification is being sought by National Grid.

23. I also grant permission to National Grid to file further short written submissions and further evidence (if so advised) on two matters: the first relates to price comparisons between National Grid's and CMOs' domestic credit meters and the second to the reasonableness of assumed achievable volumes of meter replacement (referred to in paragraph 4.73 of the Decision). I do not consider that any further submissions or evidence are warranted by those passages of the Interveners' material which National Grid contested but which have not been excluded.

Timetable

24. A timetable for the further steps in this appeal was set by the Tribunal's order made on 23 May 2008. This needs to be revised because of the time taken to resolve the challenges to the Interveners' material. At the hearing on 8 October I heard submissions on timetabling. Having regard to what the parties have told me and to the need to ensure that the Tribunal has enough time to prepare for the January hearing I will make an order for the following timetable:

- (a) Agreed chronology of events to be served by National Grid by 5 pm on 24th October 2008;
- (b) A schedule of issues agreed so far as possible between the parties to be served by National Grid by 5 pm on 24th October 2008;
- (c) Additional submissions referred to in paragraph [23] above to be served by National Grid by 5 pm on 24th October 2008;
- (d) Any response by the Authority or the Interveners to the additional submissions served by National Grid to be filed and served by 5 pm on 31st October 2008;
- (e) Bundles to be lodged by 5 pm on 3rd November 2008;

- (f) National Grid to file its skeleton by 10 am on 10th November 2008;
- (g) the Authority to file its skeleton by 5 pm on 1st December 2008;
- (h) the Interveners' to file their skeletons by 12 noon on 12th December 2008.

Vivien Rose

Charles Dhanowa
Registrar

Date: 17 October 2008