

GIC RULINGS PANEL

BREACH	2009-127 2009-140
BETWEEN	Jade Software Corporation (NZ) Limited Registry Operator Reporting Entity
AND	The Auckland Gas Company Limited (Participants in breach)
AND	Genesis Power Limited (Party to some of the breaches)
AND	E-Gas Limited (Party to some of the breaches)
AND	E-Gas 2000 Limited (Party to some of the breaches)
Hearing:	23 February 2010
Appearances:	J Kean – Investigator T Stevens for Auckland Gas Company Limited J Eves for Gas Industry Company Limited
Before the Rulings Panel:	The Honourable Sir John Hansen KNZM
Decision:	28 May 2010

[1] Genesis Power Limited filed written submissions but did not appear in support of those submissions.

[2] At the commencement of the hearing I was advised that E-Gas Limited and E-Gas 2000 Limited had reached some form of agreement with Auckland Gas Limited and did not intend taking part in the hearing. This was somewhat unfortunate given it was their allegations of breach that led to the investigation and ultimately the hearing. The parties involved did not advise the Rulings Panel as to the terms of any agreement reached.

[3] After I had completed a draft ruling, it became apparent to me that my decision did not accord with industry practice. As a consequence, I requested further submissions from the parties in the following terms:

The Rulings Panel has reached a preliminary view that regulation 69.1.3 of the Gas (Switching Arrangements) Rules 2008 is the only provision that empowers the filing of a GNW. In other words, the only opportunity a participant has to file a GNW is within the first two business days of the GNT. The preliminary view is that there is no further opportunity to file a GNW at any later stage of the process, even if a GAN has been filed within two business days of the GNT. The reason for this preliminary view is that the panel cannot see any other provision in the Rules empowering the filing of GNW. Regulation 75.1 seems to deal with, and circumscribes the circumstances justifying the filing of such a notice, but it does not appear to provide a power to file a GNW. Regulation 75.2 then sets out the parties that may initiate a switching withdrawal. However, in the preliminary view of the Rulings Panel, regulation 75.2.2 and 75.3 appear, on the face of it, to be totally contradictory of regulation 69.1.3.

[4] I have now received further submissions from the parties. Auckland Gas concurs in my interpretation, but accepts it does not accord with industry practice. They submitted that I should maintain my preliminary view, but allow a temporary exemption for all retailers from the affect of the Panel's decision pursuant to rule 90, subject to appropriate conditions, to enable established practices to continue while the Rules review takes place.

[5] However, the investigator and other parties that submitted took a different view. They relied on rule 75.3, which notes that the switching withdrawal must be initiated by giving a gas switching withdrawal notice which may be issued in the period between:

- i) the date that the gas switching notice is sent to the registry by the new retailer; and,
- ii) the date that a new gas switching notice is received by the same retailer, who is now the responsible retailer for that ICP.

They point out that that period is clearly inconsistent with the timeframes contained in rule 69, and therefore the drafters of the Rules must have envisaged a right to file a later GNW.

[6] The submissions received, rather than clarifying the situation, simply highlight the infelicitous nature of the drafting, which is as contradictory as I have seen in many years of being faced with statutory interpretation.

[7] I turn now to the reasons that led to my initial conclusion.

[8] The breaches arise from a series of connected events relating to a single customer in Auckland [REDACTED] that had been an AGC customer from 3 April 2008 to 22 September 2009.

[9] Initially Auckland Gas admitted breaches to the investigator, but has resiled from that position and now argues that no breaches occurred. The alleged breaches bring into sharp focus the relationship between rule 69 which deals with the response to a gas switching notice and rules 75-78 dealing with the withdrawal of a switch notice. In those circumstances, it is appropriate to consider the Rules before turning to the specific breaches alleged here. In the course of the hearing there was considerable discussion as to the Rules as drafted and the effect of them. (NB: by way of exemption granted by Gas Industry Company Limited, the two days in rule 78.1 was extended to five days).

[10] Counsel appearing, and Genesis in their written submissions, has made extensive submissions regarding these Rules and their interplay. I have considered these submissions in depth, but do not consider it necessary to set them out in full.

[11] The investigator stressed what she said was the fundamental underlying principle in the Rules. She said the fundamental requirement was the 23-day period contained in rule 69.2. She submitted that was the cornerstone of the gas switching arrangements. She also

submitted that the Rules did not provide for the responsible retailer to file multiple gas switching withdrawal notices. She further submitted that the failure of the new retailer to comply with the provisions of rule 78 did not remove the obligation on the responsible retailer to comply with the need to switch within 23 business days. This is, of course, subject to the very open time frame in rule 75.

[12] However, Mr Stevens took a different approach. He submitted the 23 business day rule, while important to the switching arrangements, was not an absolute as the investigator appeared to be submitting. Effectively his submission was that if a gas switching withdrawal notice was appropriately filed and the new retailer failed to comply with its obligations under rule 78.1, the gas switching withdrawal notice stood and superseded the provisions of rule 69.

[13] If a responsible retailer receives a gas switching notice it is confronted with an urgent situation. It has two business days to exercise one of the three options set out in rule 69.1. It can file a gas acceptance notice stating it intends the switch to take place on an expected switch date; or a gas transfer notice that includes the necessary information required to complete the switch; or a gas switching withdrawal notice that states the responsible retailer believes that the gas switching notice should be withdrawn.

[14] In my preliminary view, once the responsible retailer has elected to exercise one of those options it is not in a position to have a change of heart and purport to exercise another option. I see nothing in the rule 69 that would permit such a change of heart. The requirement in rule 69.2 to give a gas transfer notice to the registry within 23 business days is only triggered where the responsible retailer files a gas acceptance notice. The rule does not say that it is triggered even in the event of the responsible retailer filing a gas switching withdrawal notice. Indeed, rule 69.3 provides an exception to the requirement for the responsible retailer to give a gas transfer notice within two business days of the switch date. The exception being where a gas switching withdrawal request has been given.

[15] My preliminary view is the effect of this is that if a responsible retailer exercised the options under rules 69.1.1 and 69.1.2, it must comply with 69.2 and 69.3. It cannot then change its mind, even at the request of a customer, and then file a gas switching withdrawal notice. If the client did change its mind, the course then open would be to complete the

switch and for the retailer to initiate its own gas switching notice. I accept in practical terms such a situation is far from satisfactory.

[16] On its face, rule 75 does not empower the filing of a gas switching withdrawal notice. That power seems to exist only in 69.1.3. Rather, rule 75 sets out the circumstances in which a gas switching withdrawal notice may be initiated by either the responsible retailer or the new retailer. If such a notice is given, rules 76-78 come into play.

[17] In the circumstances, it is appropriate I comment on rule 78. It requires the new retailer to file a gas switching withdrawal response notice within two days. The terms of the rule are absolute. The balance then sets out what such withdrawal response notice must contain and the consequences of the new retailer either accepting or rejecting the gas switching notice.

[18] Rule 78.5 makes it clear that if the gas switching withdrawal notice is rejected by the new retailer, the responsible retailer must comply with rule 69 (i.e. complete the switch within 23 business days) and may not issue another gas switching withdrawal notice for the same gas switching notice. In my view this makes it plain that in the event of rejection by the new retailer, the switch must be completed. The rule also makes it plain that the responsible retailer may not file another, or multiple, switching withdrawal notices for the same gas switching notice.

[19] However, in my view 78.1 also makes it plain that the new retailer has only two business days to either accept the gas switching withdrawal notice or reject it. The rules are silent as to the effect of a failure to comply with this rule. In itself, of course, it is a breach. But in my view, even in the absence of direct words, if the new retailer does not comply there is no obligation on the responsible retailer to complete the switch pursuant to rule 69. What this means is the last effective document in the switching arrangement is the gas switching withdrawal notice. Its effect is to reinstate the responsible retailer as “the retailer”. Given that such a notice can only be initiated by a consumer exercising a contractual or statutory right, the responsible retailer should only file a gas switching withdrawal notice where it has clear written instructions from its customer that it has the customer’s authority to do so. That is the more common occurrence that will eventuate in the course of switching. If in fact it is the exercise of a statutory right, which one envisages would be comparatively rare, again it is for the customer to exercise the right and the responsible retailer should receive written

authority referring specifically to the statutory right relied on. This is simply good business practice.

[20] In my view if it was the intention of the drafters of the rules that a switch was to occur regardless of the filing of a gas switching withdrawal notice, and regardless of the failure of the new retailer to comply with rule 78.1, such an intention would need to be stated in quite specific language.

[21] However, in considering the rules I do not consider that was the intention of the regulator. If it was, some unfortunate and illogical occurrences could take place. It would mean, notwithstanding the clearest directions of a customer to withdraw the switch that the switch would have to be completed and the whole process re-started to accord with the customer's wishes. In my view this runs counter to the consumer orientation of the rules. It also runs counter to the consumer's interest. This is brought into a starker highlight where the new retailer takes no steps to comply with rule 78.1. I have already noted that that would create a breach of its own. But to require a switch in the absence of the new retailer acting under rule 78.1 is in my view illogical and inefficient. For example, if the new retailer accepted the customer's wishes but simply could not be bothered with complying with rule 78.1, again a switch would have to be initiated and the whole gas switching arrangements initiated again. Effectively, such an interpretation of the rules would reward a recalcitrant new retailer in circumstances where the customer's wishes were clear and the new retailer simply did not bother to respond. This is contrary to both protecting consumer interests and the efficient management of the switching process. It would simply create unnecessary switches.

[22] Looking at these rules overall, if a responsible retailer could file multiple gas switching withdrawal notices and if the new retailer can ignore the timelines in rule 78, "switching ping pong" is the inevitable result.

[23] This then leaves the effect of rule 75.3. The period set out in that clause is clearly a much wider timeframe than that contained in rule 69. Furthermore, it clearly cuts across the mandatory language contained in rule 69. It essentially means the mandatory terminology of the two-day period in rule 69, provided the provisions of rule 75.1 can be met, are almost irrelevant. It also means that there is virtually an open-ended period in which a gas switching

withdrawal notice may be initiated. Indeed, it is apparent it could occur many years later. I am told that this is a matter that does not concern Gas Industry Company Limited. That worries me. The concern I have is that in its present form rule 75.3 cuts across clear mandatory language in rule 69. It is also unpalatable and unhelpful to all parties, including consumers, to have an open-ended period such as rule 75.3 envisages. However, I must concede that rule 75.3 makes it plain that the Rules as a whole envisage the filing of a gas switching withdrawal notice well outside the mandatory timeframe included in rule 69. It certainly does not extend to multiple gas switching notices being filed and switching ping pong occurring. But it must envisage a gas switching withdrawal notice is available in the circumstances set out in rule 75.1 even if the compulsory right under 69.1 or 69.2 has already responsibly been undertaken by the relevant retailer. This, as I understand it, also accords with industry practice.

[24] Accordingly, I accept that the effect of the Rules, especially 75.3, is to envisage a later gas switching withdrawal notice being filed, which then brings into play the later Rules.

[25] I accept it is a torturous process to reach this stage, and I urge those responsible for the Rules to urgently address the problems created by such infelicitous drafting. Any steps taken to solve this problem should specifically empower the filing of a gas switching withdrawal notice, which at the moment only occurs in rule 69. In my view, and, it is very much a matter for those responsible for the Rules, the open-ended period presently found in rule 75.3 should be practically and sensibly circumscribed. Indeed, in saying that, it is very hard to ascertain the real intention and purpose of the rules relating to gas switching withdrawal notices, from the words of the Rules. But I am satisfied that the wider period provided for in 75.3 shows that that the filing of a gas switching withdrawal notice is not as circumscribed as rule 69 currently provides for.

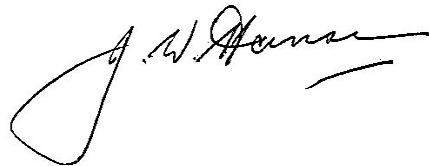
[26] In the context of the breaches alleged in this case, I am very conscious that the difficulties occurred because of a very obvious breakdown of communication within the business of the customer. Contrary messages were sent by various officers of the customer company, all of whom, on the face of it, could be expected to be in a position to contract for the supply of gas. (This highlights the need for clear and comprehensive written instructions from the customer). For those reasons, even if all of the breaches had been proved, I would have been minded to deal with them very leniently. However, what a case like this does

highlight is the need for both the responsible retailer and the new retailer to ensure they are dealing with the right officer of a customer who is empowered to make such decisions and to bind the customer in the contractual sense.

[27] In this case it must be noted that the investigator was hampered by the failure of Auckland Gas to fully supply all necessary information to her. I say no more than that I would expect full information to always be made available at the earliest possible time to the investigator.

[28] This means that by filing multiple gas switching withdrawal notices, there has been a breach by Auckland Gas, although they could file one such notice outside the timeframe in rule 69. However, in view of the unfortunate state of the Rules, I do not consider it appropriate to impose any penalty for such breaches.

[29] If the parties wish to file memoranda as to costs, they are to be filed within 15 working days of the handing down of this ruling.

A handwritten signature in black ink, appearing to read 'J. W. Hansen', written in a cursive style. The signature is positioned above a solid horizontal line.

The Honourable Sir John Hansen KNZM

Rulings Panel