Note from Gas Industry Co – information which could lead to identification of the consumer has been removed from this public version of the decision.

IN THE MATTER	of the Gas Act 1992 and the Gas (Switching Arrangements) Rules 2008
BETWEEN	Gas Industry Company Limited *Reporting Entity*
AND	E-Gas Limited *Participant allegedly in breach*
AND	Advanced Metering Services Limited *Participant allegedly in breach*
AND	The Auckland Gas Company Limited *Participant allegedly in breach*

Appearances:	J Kean – Investigator T Meo for Gas Industry Company B Ross for E-Gas Limited B Scott for Advanced Metering Services Limited J Palmer – In-house counsel for The Auckland Gas Company Limited
Before the Rulings Panel:	The Honourable Sir John Hansen KNZM
Hearing:	22 September 2009
Decision:	10 November 2009.

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[1] Under the new regulatory regime applicable to the gas retail industry, the market administrator is to refer to the investigator any breaches of the regulations considered to be material. The investigator is then charged to carry out an investigation and attempt to mediate an agreement between the parties in relation to them. All such agreements need to be approved by the Rulings Panel. If settlement is not concluded the matter is referred to the Rulings Panel for determination.

[2] In this case the investigator considered a number of breaches had occurred, but managed to settle one breach, 2009/24. The breaches we are concerned with in this hearing are:

Breach Notice	
2009/21	alleging a breach by E-Gas Limited
2009/22	alleging breaches by Advanced Metering Services Limited
2009/23	alleging breaches by Auckland Gas Company Limited

[3] The various breach notices are attached to this decision as appendices 2, 3 and 4.

[4] To complete the procedural information on Ms Kean's application, I formally dismissed the alleged breach of rule 58.1 in 2009/22 against Advanced Metering Services and alleged breaches of rules 58.1 and 61.1 against Auckland Gas in 2009/23.

[5] It is alleged that E-Gas breached rule 34.1 in that it failed to act reasonably in relation to its dealings with Auckland Gas (AGS) and Advanced Metering Services (AMS) in relation to the switch of a consumer and the installation of a GMS at an installation control point (ICP). An allegation of a breach of the same regulation is contained in the breach notice of AMS. Against AGS there is an allegation of breach of rule 72.2 relating to the switch date; and rule 34.1 mirroring the alleged breaches against AMS and E-Gas.

Background facts

[6] There was no real dispute with the facts set out in the investigator's report. There was an issue around affidavits and email correspondence between the parties which led to affidavits, with one deponent being unavailable for cross-examination. In any event, I consider I have power under regulation 45 of the Gas Governance (Compliance) Regulations 2008 to consider the emails, even in the absence of someone who can formally identify and produce them.

[7] Given there is little dispute with the factual summary contained in the investigator's report for the purposes of this hearing, I set it out.

Summary of facts

14. On or about 27 May 2008, Akld Gas became the supplier of gas to a company that owns and operates a restaurant of the same name on in Auckland. The restaurant can seat 300 people. It caters for the lunch trade and the dinner trade, and is also available for hire for functions and banquets.

15. Akld Gas entered into a written contract for supply with (signed for the company by its then manager, . The contract has key terms (such as commencement date, term, pricing) on the front page, and then sets out Akld Gas's standard terms and conditions for commercial consumers. The contract specified a 36 month supply period.

16. On 2 December 2008, the then sole shareholder of transferred her shares in the company to her former husband, Mr was appointed the sole director of that company the same day. On the next day, 3 December 2008, entered into a new contract with Akld Gas for the supply of gas. The key terms of the new contract were identical to those of the previous contract (albeit that the 36 month supply period recommenced from 1 December 2008), and was signed for the company by Mr . According to Akld Gas, it entered into the new contract out of an abundance of caution given the change in shareholding; in reality the consumer (the company) in fact remained the same throughout.

17. Again, the contract contains Akld Gas's standard terms and conditions for commercial consumers. I have read the standard terms and conditions that are currently in force (Akld Gas told me they came into force in or about July 2008, ie: prior to the date of the second contract between Akld Gas and . The standard terms and conditions provide for an automatic extension of the supply period by a further equivalent period, and define both periods together as the "Supply Period". They also provide a formula for calculating an early termination fee for termination prior to the end of the "Supply Period" (ie: in this case, 72 months). Additionally, the consumer has obligations to (for example) never interfere with gas metering equipment, and to protect Akld Gas's gas supply equipment on the site. The consumer is required to pay all invoices on time. If the consumer fails to pay on time (or otherwise materially breaches the contract), and fails to rectify the default after being given 5 working days written notice to do so, Akld Gas may suspend supply of gas.

18. Sometime in mid-February or thereabouts E-Gas approached Mr and persuaded him that would be better off getting gas from E-Gas. On 16 February 2009, E-Gas entered into a written contract with (albeit that "Ltd" was omitted from the name written on the contract). Mr signed the contract as owner of the company. The contract was expressed to commence "ASAP", with a supply period of 24 months.

19. The only hitch seemed to be that . owed money to Akld Gas, a debt that E-Gas understood pre-dated Mr share purchase. Akld Gas was threatening to disconnect the restaurant's gas supply until the arrears were paid. Mr told E-Gas that the debt was approximately $4,000. Not wanting this to delay a switch, and hoping to ensure a seamless gas supply to , E-Gas wrote to Akld Gas on 19 February 2009 pledging to "guarantee payment for the arrears to be paid by the 2nd business day in March" (at that stage E-Gas had no independent verification of the amount actually owing by the consumer to Akld Gas, although presumably E-Gas's intention was to recover whatever it paid from the consumer). But Akld Gas told E-Gas it had a contract with the consumer and that there was a credit issue; that the debt spanned several months of supply and multiple attempts to make payment arrangements. Mr then told E-Gas's General Manager, Syd Hunt, that Akld Gas had told him that because had a 36 month contract, there would be substantial termination fees.

20. On 18 February 2009, a "switching moratorium" that had been agreed (to give effect to transitional provisions in the Switching Rules) between Gas Industry Co, the Registry operator, and some Registry participants, came into effect, pending the "go-live" date for the Switching Rules. Switches not completed by close of business on 18 February had to be cancelled and re-initiated on or after 3 March. (The switch of had not been formally initiated by 18 February, but now it could not be initiated until 3 March at the earliest.)

21. On 23 February 2009, Akld Gas disconnected the supply of gas to . (E-Gas says that the reason given for the disconnection by Akld Gas was "safety concerns", that there were no legitimate safety concerns, and that Akld Gas was acting in a vindictive way because its consumer wanted to switch. Akld Gas says it disconnected supply for non-payment of money for gas consumed at the site, spanning several months. Akld Gas's position is borne out by invoices I have seen, which show that made only one payment towards its gas supply in a 6 month period, that payment being well short of what was required to clear the debt.) The next day Akld Gas discovered that the gas supply had been reconnected by persons unknown (E-Gas told me during this investigation that it had reconnected the supply, but that was not known to Akld Gas at the time). Akld Gas disconnected the supply again and warned the consumer against tampering with metering or gas connection equipment.

22. On 3 March 2009 (the first possible date following the switching moratorium), E-Gas initiated a switch for . It did so by giving the Registry a gas switching notice with a requested switch date of 12 March 2009. As outlined above, pursuant to Rule 67.3, a requested switch date must not be less than 7 business days after the date the gas switching notice is given to the Registry. Thus, 12 March was the earliest possible date on which the switch could have been effected.

23. Akld Gas opted to give a gas acceptance notice in response to the gas switching notice, and did so on 5 March 2009. The gas acceptance notice stated an expected switch date of 31 March 2009. On the same day, Akld Gas discovered that the gas supply had again been reconnected by persons unknown. Akld Gas again disconnected the supply, and then on 9

March instructed the meter owner, Contact, to remove the meter. On 18 March 2009, Contact removed the meter at [illegible]

24. On the afternoon of 18 March, after the removal of the meter by Contact, AMS installed an NGC meter at the site on the instruction of E-Gas. Akld Gas learned that another meter had been installed sometime between 18 and 20 March (AMS says that Akld Gas telephoned it on 18 March to complain about the installation; Akld Gas says it became aware of the installation on 20 March), and took steps to have the whole gas metering system (meter, regulator, and pipework, together the "GMS") removed.

25. E-Gas's response was to instruct AMS to install a replacement GMS at the site. AMS was concerned to protect NGC's asset, and asked E-Gas to provide some sort of protection for the meter. E-Gas asked the consumer to provide security, presumably at the consumer's cost.

26. Notwithstanding the consumer's security, on 28 March Akld Gas had the second NGC GMS removed from the site. The consumer (at the urging of E-Gas) made a complaint to the Police. I am not sure whether the Police have actioned the complaint but my understanding is they regard it as a civil matter and are unwilling to become involved.

27. Although by this time AMS was reluctant to place another GMS at risk, AMS did install a third GMS at the site on or about 29 March, E-Gas having assured AMS that the consumer would provide 24-hour security. The security was evidently found to be wanting because at some time between installation and the morning of 30 March, Akld Gas had the third GMS removed.

28. On 3 April 2009, the switch of the consumer from Akld Gas to E-Gas took place. 3 April was exactly 23 business days from the date on which Akld Gas received the gas switching notice from the Registry and therefore the last possible date on which the switch could have taken place. Akld Gas gave the Registry a gas transfer notice on the same day, specifying that day as the switch date.

29. Akld Gas still has in its possession the gas metering equipment belonging to NGC. AMS wants the equipment to be returned. However, Akld Gas says that there was a cost associated with removal of NGC's gas metering equipment. It has billed the consumer for that cost, but has yet to be paid. Akld Gas also has a concern that unknown quantities of its gas may have gone through the NGC metering systems, and it wants to be compensated for that. Accordingly, it will not release the metering equipment at this stage.

Statement of issues

[8] On 14 August 2009 a statement of issues was filed by the investigator, with the agreement of the parties. It raised the following questions for determination of the Rulings Panel:

Preliminary Issue – Jurisdiction

1. Does the Rulings Panel have jurisdiction in respect of any or all of the matters which gave rise to the alleged breaches, and if it has jurisdiction in respect of some of the matters but not others, to what extent does it have jurisdiction in respect of each participant allegedly in breach?

Breach 2009/21 – E-Gas Limited

2. Primary issue: when did E-Gas become the responsible retailer in respect of ICP0000208891QT864;

   Sub Issues:

   (a) Once a gas supplier has disconnected supply to a consumer and/or removed the meter, does an ICP then become "vacant"?

   (b) Should the interests of the customer have come before compliance with the Switching Rules?

3. Has E-Gas breached rule 34.1?

Breach 2009/22 – Advanced Metering Services Limited

4. When AMS received instructions from E-Gas regarding installation of a GMS at was it entitled to assume that E-Gas was the responsible retailer (and thereby in a position to issue such instructions), or should it have taken steps to verify for itself that E-Gas was the responsible retailer?

5. Even if AMS was entitled to assume that E-Gas was the responsible retailer when it first received instructions to install a GMS, should it have continued to follow E-Gas's instructions after it became aware of the dispute as to the identity of the responsible retailer?

6. Has AMS breached rule 34.1?

7. Has AMS breached rule 58.1?

Breach 2009/23 – The Auckland Gas Company Ltd

8. Should Auckland Gas have switched the customer on the requested switch date?

9. Has Auckland Gas breached rules 69.3 and 72.2?

10. Has Auckland Gas breached rule 34.1?

11. Has Auckland Gas breached rules 58.1 or 61.1?

[9] It will be seen that the breaches set out under 7 and 11 above were dismissed at the commencement of the hearing and no more need be said about them.

Jurisdiction

[10] The question of jurisdiction, and E–Gas's challenge to it, falls to be determined under the transitional provisions contained in part 4 of the Switching Arrangement Rules. The relevant rule is rule 88, which reads:

> **88. Treatment of Switches Initiated Before Go-live Date**
>
> 88.1 Except if the switch is not completed before the expiry date of the transitional functionality provided for in rule 89, where a switch between retailers has been initiated but not completed before the go-live date, the switch must be completed in accordance with the arrangements that existed on the date the switch was initiated.
>
> 88.2 In the event that a switch initiated before the go-live date is not completed before the expiry date of the transitional functionality provided for in rule 89, the initiating retailer shall cancel the switch and, if still required by the consumer, initiate a switch in accordance with rules 63 to 82.

[11] On behalf of E-Gas, Ms Ross argues that while the jurisdiction in respect of AMS and Auckland Gas is clear, it is not so clear in relation to her client. She says that E-Gas assumed responsibility to its customer on 24 February when it arranged for the connection of a gas supply. She argued that this was not a switch in the true sense of the word, but rather a connection of supply during the switching moratorium. She submitted all this meant was that the paperwork associated with the switch was not able to be carried out until such time as the moratorium was lifted. She argued that while E-Gas did not become the responsible retailer in terms of the rules until 3 April, in reality it became responsible to the customer on 24 February. The jurisdiction argument then segued into a submission that the behaviour of E-Gas was reasonable in all of the circumstances.

[12] The other parties submitted there was jurisdiction, as did the investigator. In my view they must be correct.

[13] This matter needs to be looked at in context. The customer owed substantial arrears to Auckland Gas. Auckland Gas was threatening to cease supply. It is no doubt for that reason that E-Gas and the customer entered into a contract on 16 February. But that cannot simply be looked at in isolation. On 19 February 2009 E-Gas emailed Auckland Gas. In that email they alleged that there was a new owner

of the business, a Mr , who had contacted E-Gas because Auckland Gas was threatening to disconnect because of arrears outstanding by the alleged previous owner. This scenario is fatally flawed. The owner was a company, and while the estranged wife transferred her shares to the husband, that company remained the customer, so legally there was no change of customer. In the email E-Gas stated it was happy to guarantee payment for arrears by the second business day in March. Auckland Gas responded by stating that their records showed there were signed contracts from both owners (apparently another fundamental misunderstanding), and noted that in the absence of a switch request they were unsure why E-Gas was intervening. They declined the offer of payment by 2 March because they were not sure what purpose/contractual nexus there was. E-Gas responded, stating that according to their customer there was a dispute regarding the ownership status which E-Gas have appeared to have accepted without making the most fundamental of enquiries. It goes on to note that according to the customer he had not signed with Auckland Gas under the new ownership, but instead signed across to E-Gas, but due to the switching hold this could not be processed. The last paragraph concludes:

> If there are legitimate contracts in place between this customer and Auckland Gas, E-Gas will respectfully leave this matter to be concluded between yourselves.

[14] Auckland Gas responded shortly thereafter by reiterating they believed there were contracts in place and the matter would be concluded as per the paragraph I have just set out. E-Gas obviously did not comply with the statement they made set out in [13].

[15] Contrary to Ms Ross's submission, paragraph 88.2 is not limited to paperwork. It seems to be common ground that the switching moratorium was in place from the close of business on 18 February, to 3 March 2009. In my view Ms Kean submitted correctly that during that period no switch could take place. The go-live date was 18 February. The contract was earlier than that, but the physical change of supplier itself took place on 24 February. That was the date when AMS, on the instructions of E-Gas, connected supply when it had been terminated by Auckland Gas for substantial arrears. It is a case that comes completely within 88.2. The switch was initiated before the go-live date, but was not completed before the

expiry date of the transitional functionality provided in rule 89. In such circumstances the obligation on E-Gas was to cancel the switch and, if still required by the customer, initiate a switch in accordance with rules 63-82 once the moratorium ceased. Indeed, in a formal sense it appears that no switching notice was given during the period in accordance with the regulations, and in the light of the moratorium that could not occur.

[16] I am satisfied that the Rulings Panel does have jurisdiction in relation to the actions of E-Gas from 3 March 2009 and the actions during the moratorium provide background circumstances relating to that. The transitional provisions do not remove the Rulings Panel jurisdiction. All it did was prevent a switch during the relevant period. This was, in fact, recognised by E-Gas when it issued a GNT on 3 March 2009, which tells strongly against their jurisdictional argument.

Breach 2009/21 – E-Gas

[17] Rule 39 of the Gas (Switching Arrangements) Rules 2008 reads:

> **39. Purpose of Registry**
>
> The purpose of the registry is –
>
> 39.1 To facilitate efficient and accurate switching of retailers by consumers; and
>
> 39.2 To provide an authoritative database of current and historical information on all ICP parameters, to facilitate accurate billing of consumers and allocation of charges to retailers; and
>
> 39.3 To provide a mechanism by which the accuracy and timeliness of information provided in relation to an ICP is controlled and recorded.

[18] Rule 34 imposes an obligation on registry participants to act reasonably in the following way:

> 34.1 In light of the purpose of the registry as set out in rule 39, every registry participant must act reasonably in relation to its dealings with the registry and, in doing so, must use its reasonable endeavours to co-operate with other registry participants.

[19] The question then arises, when did E-Gas become the responsible retailer? 'Responsible retailer' is defined in rule 5.2 as:

> ... for a particular ICP, the retailer whose retailer code is shown on the registry and who is thereby responsible for maintaining the values of the parameters for that ICP listed in Part B of the Schedule

[20] In this case it is not disputed that E-Gas's retailer code was not shown on the registry until 3 April 2009. However, on behalf of E-Gas, Ms Ross submitted there were two reasons why their actions in March connecting supply on more than one occasion to . were reasonable. The first is that once a gas supplier has disconnected supply to a consumer and/or removed the meter then that ICP becomes "vacant". The second reason is a submission that the customer's interests come before compliance with the Switching Rules.

[21] As Ms Kean submitted, it is hard to see how the view relating to the vacancy of an ICP could operate in conjunction with the old reconciliation code. But both AMS and E-Gas advised the investigator that there was a perception that this was industry practice. There was cl 5.6 in the reconciliation code, but that dealt with a new customer moving to vacant premises, which has no application here.

[22] In any event, the question arises whether such industry practice or perception could have survived the coming into force of the Switching Rules. I concur in those submissions that say it cannot. 'Switch' is defined in rule 5.2 as:

> ... the change of retailer supplying gas to a consumer installation, and the consequent change of responsible retailer for the ICP concerned

[23] I have already set out the definition of 'responsible retailer'. In view of the provisions of the regulations and the definition referred to, I conclude it is not permissible for a retailer to install meters or to supply gas at an ICP unless and until that retailer becomes the responsible retailer which requires the retailer's code to be shown on the registry.

[24] Essentially, what is submitted on behalf of E-Gas is that there were no safety reasons to disconnect supply and it was simply done because of the arrears due to Auckland Gas. I have no doubt the right to cease supply because of such arrears is

contained in most contracts between customers and retailers. E-Gas submits that, but for its action, the restaurant would have been without gas for a period of 35 days, which could have serious impact on the business. I do not consider there is any basis upon which E-Gas can effectively take the law into its own hands, as occurred here. If the gas was disconnected, it was clear that this was for reasons of non-payment. It would make a travesty of the new switching regulations if that entitled a new retailer to connect supply without reference to the switching regime that has been put into place after significant consultation with all relevant parties.

[25] In any event, the ICP was not vacant. Indeed, E-Gas has conceded that if there was an industry perception a retailer could take over an ICP if the incumbent disconnected supply, it was not industry practice to do so when the retailer was asserting the consumer owed money for gas and the supply was disconnected for that reason. Notwithstanding this, E-Gas submits that they were told the disconnection was for safety reasons and if it had been made clear it was for credit issues they would not have taken over the ICP. But the exchange of emails referred to earlier makes it quite clear that E-Gas were fully aware of credit issues with Auckland Gas, and their offer of guarantee had been rejected because the contractual relationship between E-Gas and the customer was not clear. Indeed, E-Gas went further and said they would not take additional steps in the light of there being contracts in existence. But the safety reason remains valid, as Auckland Gas discovered supply was reconnected without their knowledge or approval (despite being the responsible retailer) so they had the meter removed for safety reasons. That is explicable.

[26] Further, it appears E-Gas itself had some doubts about this matter, because in an email from Mr Chambers to Mr Miller of 30 March 2009, following the third GMS removal, he stated:

> Our current intention is not to install another GMS until the switch date, which is tomorrow.

[27] This suggests very strongly that E-Gas was well aware a switch had not occurred at the time it instructed AMS to install meters. That is hardly consistent with its argument that an ICP is vacant after any form of legitimate disconnection.

[28] Any suggestion that the responsible retailer could frustrate the completion of a switch is not tenable. The regime set out in the Switching Rules has processes in place for any such occurrence so that the "new" responsible retailer is able to allege a breach of the Switching Rules where there has been frustration of the switch date, seek completion of the switch and compensation for losses suffered as a result.

[29] There is no evidence before this Rulings Panel that there was an industry view that a vacant ICP was created when there was disconnection and any retailer could connect to it. In any event, even if that had been an industry practice, it has been overtaken by the Switching Rules. It is not until the retailer becomes the responsible retailer in terms of the rules that it is able to complete the switch.

[30] The subsidiary issue was that the interests of the customer should come before compliance with the Switching Rules.

[31] In paragraph 7.5 of her submissions Ms Ross states that if Auckland Gas's position was correct then it could have prevented the customer from taking gas, not only from Auckland Gas, but from any other retailer unless and until the customer's debt was paid off in full. It is submitted that that could not be acceptable in light of the purpose of the registry, the switching rules, and in the light of Auckland Gas's own contract with the customer.

[32] With respect, such a submission is misguided. Auckland Gas, in the terms of its contract, may have been entitled to withhold supply but only until the switch was completed in terms of the rules, but it could not have done so beyond that date. This is clear from the rules.

[33] I do not consider that E-Gas has acted reasonably in relation to its dealings with AMS and AGC. AMS, as a supplier of meters to both the other parties, was placed in a very difficult position and clearly had pressure placed on it by E-Gas. The reality here is that E-Gas, for whatever reason, misunderstood the effect of the new regulatory regime. Rather than carry out the switch in accordance with the rules, which is the only way a switch can now take place, it determined on a number

of occasions to simply require AMS to connect the supply to when in terms of the rules it had no right to do so.

[34] There is no direction contained in the Rules as to the applicable standard of proof. It would be appropriate to include such a direction in the first available relevant amendment. But assistance can be derived by reference to the Gas Act 1992. S 43T provides power for regulations made under the subpart to create a summary offence for breaches of regulations made under the subpart or under S 43Q. It also provides for fines not exceeding $20,000 for such offences. While no standard of proof is set out the creation of offences means the criminal standard would have to apply. One can immediately see the contrast with S 43X which empowers the Rulings panel to make certain orders. These include the power to order an industry participant to pay a "civil pecuniary penalty not exceeding $20,000". S 43Y(1) refers to the powers in 43X as "remedies" which strongly suggests a civil standard. The power to impose a "civil pecuniary penalty" leads to a similar conclusion as to the standard. I am satisfied that the applicable standard is the civil one of the balance of probabilities. Analogously, this is in accord with the standard applied by the courts in many areas. (E.g. Disciplinary hearings: Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1).

[35] On that standard I find the breach alleged against E Gas proved.

Breach 2009/22 – AMS

[36] On behalf of AMS, Mr Scott advanced an ingenious argument. This arose from his reading of rules 34 and 39 and the definition of 'Registry' in 5.1. There, 'Registry' is defined as "the database facility (including all relevant hardware and software) that meets the requirements set out in rule 40".

[37] Rules 34.1 and 39 have already been set out.

[38] Mr Scott submitted that the first obligation was for registry participants to act reasonably in their dealings with the registry, that being, in his argument, the database facility itself. The second obligation in rule 34, he submits, builds on that

by the use of the term "and in doing so", meaning that all industry participants must use their reasonable endeavours to co-operate to ensure the maintenance and operation of an authoritative database registry function. In his submission the effect of the rule is that the primary obligation is to act reasonably in relation to the dealings with the registry database, which is coupled with an obligation for registry participants to use reasonable endeavours to co-operate with each other in their dealings with the registry database.

[39] Such an interpretation did not find favour with the investigator or counsel for Auckland Gas. While the argument is ingenious, I concur in the views advanced by counsel for Auckland Gas, and the investigator. In my view, Mr Scott reads the regulation too narrowly. Rule 34.1 must be read in the light of the purposes set out in rule 39. The purpose set out in 39.1 to facilitate efficient and accurate switching of retailers is much wider than simply dealing with a registry database. What is required, in my view, under 34.1 is that the industry participants must use their reasonable endeavours to co-operate to effect an efficient and accurate switch. An efficient switch requires them to comply with the rules and the timelines set out in those rules. The accurate switch relates to their dealing with the registry. I agree with Ms Kean that that second obligation is not limited to the physical interaction with the registry, which would essentially be simply keystrokes. I am satisfied it encompasses all the actions connected with, and leading to, an interaction with the registry and the facilitation of an efficient switch. The reference in 39.1 satisfies me that 34.1 was to have a much broader application than simple data entry.

[40] If AMS was correct, the only co-operation required would be in relation to populating and maintaining the registry with data. This would cut across the whole provisions of the rules and, it is to be noted, that the rule we are concerned with is under the general provisions part of the Switching Rules, whereas there is a second part dealing with the gas registry. The difficulty with this narrow, semantic approach is that no circumstances were indicated in which registry participants would interact when inputting data into the registry. The second obligation would be otiose if this interpretation was correct.

[41] I am satisfied, therefore, that in terms of the regulations there is an obligation for the parties to use their reasonable endeavours to co-operate with other registry participants in the whole process of a switch.

[42] Mr Scott submitted that, even if his argument was not accepted, in the broader application of rule 34.1 there was no breach by AMS. He argues that AMS contacted the parties, sought clarification and indeed went to the Gas Industry Company for further assistance. He said AMS was in the middle of a dispute between two retailers that they were unable to resolve.

[43] I have every sympathy for AMS in the circumstances of this case. It is now accepted by them that a reasonable step would have been to check the registry, which apparently was not done initially. However, I am quite satisfied there has been a breach by AMS. AMS were aware of a dispute between E-Gas and AGC, and of a dispute between the customer and AGC over unpaid bills. In such circumstances it seems to me AMS was obliged to check the registry and, notwithstanding any contractual obligation with E-Gas, only deal with the responsible retailer, as determined by the registry. In this case this was AGC throughout. AMS was wrong to simply accept the assurances of E-Gas that they were the responsible retailer, when the registry showed the contrary. While I have sympathy for them, in the circumstances of this case I am satisfied that their actions constitute a breach, albeit, in terms of culpability, at a lower level.

[44] One further issue arose. Ms Kean recommended that the Rulings Panel should adopt her recommendation as part of its determination that "the registry is intended to be an authoritative and determinative record of the identity of the responsible retailer (and other information)." Mr Scott took issue with the use of the term "determinative". Rule 39.1 uses the term "authoritative", and Mr Scott properly pointed out the difference between that term and the term "determinative".

[45] I accept the distinction that Mr Scott drew between "authoritative" and "determinative". That means that there may be circumstances, truly exceptional circumstances, when it may be possible to go behind the face of the registry. The circumstances applying here were not exceptional. Exceptional circumstances will

rarely arise. One example may be where the registry was "down" for an extended period.

Breach notice 2009/23 – Auckland Gas

[46] Auckland Gas denies breach. Its submission focuses on the proper construction of the Switching Rules, in particular rule 72.2.2. Rule 72.2, where relevant, reads:

> 72.2 If the gas switching notice included a requested switch date, the responsible retailer must:
>
> 72.2.1 Use the requested switch date as the switch date and provide switch readings applicable to that date; or
>
> 72.2.2 If the responsible retailer has billed a consumer for the ICP up to a date after the requested switch date, use the day after the billed-to-date as the switch date and the billed readings as the switch readings.

[47] Both the investigator and Mr Palmer accepted that the requested switch date applies unless the responsible retailer has billed the customer beyond that date. The disagreement between them arose from what is meant by "has billed a consumer".

[48] Mr Palmer submitted it could be the date of the Gas Switching Notice, the Gas Acceptance Notice, or the Gas Transfer Notice. It was his argument, however, that on a proper construction of the regulations it must be the date of the Gas Transfer Notice. He said that the use of the present perfect in rule 72.2.2 supports the view that the GNT date is not the relevant timeframe, otherwise the clause would have read "had billed" (ie the past perfect). He further submitted that such an interpretation was logical because it would give the responsible retailer 23 business days to obtain switch readings and deal with the switch request in step with its ordinary billing cycle. He further submitted that this does not disadvantage new retailers because there is no issue of dragging the chain, because the switch must proceed within 23 business days.

[49] Mr Palmer further submitted that the investigator's interpretation is flawed, as it would apply to situations where the relevant customer pays in advance, which he submits were rare, although I note there was no evidence of this.

[50] Indeed, as I understood the argument, Mr Palmer went further and submitted that reference in 72.2.2 is a hangover from the rule dealing with a move switch. But with respect, as Ms Kean points out, that cannot be correct, because the drafters of the regulations clearly had in mind a requested switch date applying to both a move switch and a standard switch in rule 67. The difference is for a move switch there must be a requested switch date, whereas for a standard switch a requested switch date is something that may be nominated.

[51] Ms Kean submitted that Auckland Gas were incorrect in stating that 72.2.2 refers to the date at which a GTN is issued. She points to the introductory sentence to rule 72.2 which refers back to the Gas Switching Notice and lays down a regime for ascertaining switch dates where the Gas Switching Notice included a requested switch date.

[52] I consider Ms Kean's interpretation is correct. Once a Gas Switching Notice has been received under rule 69, the responsible retailer has two business days to give the registry a Gas Acceptance Notice that states the responsible retailer intends the switch to take place on an expected date; or a Gas Transfer Notice that includes all the information required to complete the switch; or a Gas Switching Withdrawal Notice that states the responsible retailer believes the Gas Switching Notice should be withdrawn. In this case it was the responsibility of Auckland Gas to give the registry, within two business days, either a Gas Acceptance Notice or a Gas Transfer Notice. In this case the responsibility was to file a Gas Acceptance Notice, and because E-Gas had nominated a requested switch date, rule 72.2 came into effect.

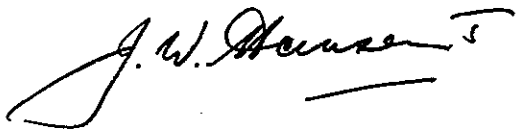
[53] While Auckland Gas's interpretation may be more efficient for a retailer losing a customer, the aim of the Switching Rules is to promote consumer choice. That must take primacy.

[54] The interpretation relied on by Auckland Gas would mean the relevant responsible retailer could disregard any requested switch date by simply sending a bill to a consumer after receiving the Gas Switching Notice and pushing the switch date out to 23 business days in every case. If this was so, as Ms Kean submitted,

there would seem to be little point in a rule such as 67.2.3 allowing the new retailer the option of requesting a switch date. If its real intention was to always provide a 23-business-day period for a switch, which would be the effect of Auckland Gas's interpretation, then the drafters of the rules would simply have stated that.

[55] Given these rules deal with consumer choice, I am satisfied that the words "has billed" in rule 72.2.2 refer to when the Gas Switching Notice has been issued. A retailer may only use a switch date other than the requested switch date if it has already billed a consumer to a date after the requested switch date. That accords with the consumer orientation of the rules. Accordingly, I am satisfied that Auckland Gas has breached rules 69.3 and 72.2. I am not satisfied they have breached rule 34.1, because it is apparent they were acting in accordance with what they considered to be the correct interpretation of the Switching Rules.

[56] Given that all three parties have been found in breach to varying degrees, it will be necessary to convene a telephone conference at a time suitable to the parties to timetable and set a hearing for the consideration of sanctions to be imposed.



The Honourable Sir John Hansen KNZM
Rulings Panel.

IN THE MATTER	of the Gas Act 1992 and the Gas (Switching Arrangements) Rules 2008
BETWEEN	Gas Industry Company Limited *Reporting Entity*
AND	E-Gas Limited *Participant allegedly in breach*
AND	Advanced Metering Services Limited *Participant allegedly in breach*
AND	The Auckland Gas Company Limited *Participant allegedly in breach*

Appearances:	J Kean – Investigator A for Gas Industry Company B Ross for E-Gas Limited B Scott for Advanced Metering Services Limited J Palmer – In-house counsel for The Auckland Gas Company Limited
Before the Rulings Panel:	The Honourable Sir John Hansen KNZM
Decision:	7 December 2009

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[1] In my decision of 10 November I found breaches of the regulations by E-Gas, AMS and Auckland Gas. It is unnecessary to repeat the details again.

[2] A hearing on the question of sanctions was set for 2 December 2009. However, the parties indicated they were happy for the Rulings Panel to deal with the question of sanctions on the basis of written submissions. Those submissions have now been received.

[3] Initially AMS claimed compensation from Auckland Gas for gas meters that had been retained by Auckland Gas. I understand from emails received that that issue has been resolved between the parties and nothing further need be said about it.

[4] Following breach, the Rulings Panel may make orders under s 43X of the Gas Act 1992:

> A Rulings Panel may, after considering any complaint or matter referred to it in respect of any allegation that an industry participant has breached any gas governance regulations or rules,—
>
> (a) decide that no action should be taken:
>
> (b) issue a private warning or reprimand to an industry participant:
>
> (c) issue a public warning or reprimand to an industry participant:
>
> (d) impose additional or more stringent record-keeping or reporting requirements under or in connection with any gas governance regulation or rule:
>
> (e) order an industry participant to pay a civil pecuniary penalty not exceeding $20,000:
>
> (f) order an industry participant to pay a sum by way of compensation to any other person:
>
> (g) order an industry participant that is found not to be complying with the gas governance regulations or rules to take any action that is necessary to restore it to a position of compliance:
>
> (h) make an order terminating or suspending the rights of an industry participant under any gas governance regulation or rule:
>
> (i) make orders regarding the reasonable costs of any investigations or proceedings:
>
> (j) propose to the industry body or the Commission that it recommends to the Minister that a change should be made to a regulation or rule.

[5] If the Rulings Panel determines to order a civil pecuniary penalty, pursuant to regulation 52 of the Gas Governance (Compliance) Regulations 2008, the Rulings Panel must:

a) take account of the level of civil pecuniary penalties it has previously ordered in similar situations; and

b) impose a civil pecuniary penalty that is commensurate with the seriousness of the case.

[6] This was the first hearing conducted by the Rulings Panel, so there are no earlier pecuniary penalties to consider. However, in assessing the seriousness of the case the Rulings Panel must have regard to the matters set out in regulation 52(3), which read as follows:

(a) the severity of the breach:

(b) the impact of the breach on other participants:

(c) the extent to which the breach was inadvertent, negligent, deliberate, or otherwise:

(d) the circumstances in which the breach occurred:

(e) any previous breach of the rules by the participant:

(f) whether the participant disclosed the matter to the market administrator:

(g) the length of time the breach remained unresolved:

(h) the participant's actions on learning of the breach:

(i) any benefit that the participant obtained, or expected to obtain, as a result of the breach:

(j) any other matters that the Panel thinks relevant.

[7] I am conscious that the breaches found proved arose within the context of the first hearing conducted by the Rulings Panel. The regulatory regime was new for industry participants, and a degree of confusion is understandable. I intend to approach the question of sanction against that background.

[8] The investigator submitted that I should impose a monetary penalty of $3000 on E-Gas and $1500 on Auckland Gas. In the circumstances that were applicable in this case, the investigator submits there should be no pecuniary penalty imposed upon AMS.

E-Gas

[9] E-Gas argues that the breach was inadvertent and not serious. It submits that its major focus was supplying the consumer with gas so that his business could continue to operate.

[10] I have read and considered the E-Gas submissions in detail, but have concluded that, even allowing the novelty of the new regulations, this was a serious breach. As I found at [24] of my decision, there was no "basis upon which E-Gas can effectively take the law into its own hands, as occurred here." Further, at [27], there was the finding that the email correspondence suggested that E-Gas was aware a switch had not occurred when it instructed AMS to install meters.

[11] However, I consider there is a significant mitigating factor in E-Gas's favour. If Auckland Gas has complied with its obligations, the switch would have occurred at an earlier date.

[12] Taking into account these submissions, the matters set out in regulation 52(3) and the behaviour that occurred here, I consider an appropriate penalty is one of $2000.

AMS

[13] As I recorded in my decision, I have sympathy for AMS in that it was caught between two important clients giving contradictory directions. The matter ought to have been resolved by a simple reference, and reliance, on the registry. AMS assures me that is now their practice, as it should have been from day one.

[14] However, taking into account the matters set out in regulation 52(3), the position AMS found itself in, and the novelty of the regulations, I agree with the investigator that no monetary penalty should be imposed on AMS. I order that the publication of my decision that AMS has breached the switching rules is sufficiently punitive in the circumstances of this case.

Auckland Gas

[15] Although I found against Auckland Gas, I accept they considered their interpretation of the relevant rules was the correct one, and this informed some of their actions. In that sense it can be seen that the breach was deliberate, but based on a genuinely held belief. However, the breach did hamper a consumer's ability to switch on a requested date, and I consider such action to be serious.

[16] Again taking into account the matters set out in the relevant regulations and the submissions of E-Gas, I consider an appropriate level of penalty to be one of $1000.

Costs

[17] Gas Industry Company Limited seeks costs of the hearing together with the Rulings Panel's expenses. They total $10,189.90.

[18] Auckland Gas proposed a cost allocation of 60 per cent to E-Gas, 20 per cent to AMS and 20 per cent to AGC.

[19] Ms Ross, for E-Gas, submits that costs should fall within the range of 20-30 per cent of the actual costs claimed, which should be divided into thirds.

[20] In the normal course of events I cannot see why industry participants in breach should not bear the full costs of the hearings of the Rulings Panel. However, in this instance I do not intend to take that approach. This is to recognise that the regulations were new, that there was some confusion because of this relative novelty, and that the parties here appear to have acted on their own mistaken belief as to an interpretation of the regulations.

[21] In the circumstances I propose to award costs of $5000 to Gas Industry Company Limited, to be met $2000 by E-Gas, $2000 by Auckland Gas and $1000 by AMS.

[22] I consider the approach taken by me in relation to both pecuniary penalty and costs is lenient. This is to recognize the factors set out at [7]. Industry participants should not assume that such a lenient approach will apply in the future, although I acknowledge that I am required to approach each case on the basis of the individual circumstances applying.

The Honourable Sir John Hansen KNZM

Rulings Panel