BEFORE	**THE ELECTRICITY RULINGS PANEL**
BETWEEN	**Solar City New Zealand Ltd, and** **Unison Networks Limited, and** **The Electricity Authority**
UNDER	**The Electricity Industry Participation Code 2010, and** **The Electricity Industry Act 2010, and** **The Electricity Industry (Enforcement)Regulations 2010**
IN THE MATTER OF	**A preliminary issue arising in a complaint to the Rulings Panel** by **Solar City New Zealand Ltd against Unison Networks Limited**

DECISION OF THE ELECTRICITY RULINGS PANEL

DATED: 16 January 2017

Rulings Panel Members

Peter Dengate Thrush - Chair
Nicola Wills - Panel member
Sue Roberts - Panel member

Background

1. On 1 April 2016 Unison Networks Limited (Unison) introduced new pricing for network customers with distributed generation.

2. On 8 May 2016, Solar City New Zealand Ltd (Solar) made a formal complaint to the Electricity Authority (EA) alleging that the new tariff adopted by Unison breached clauses 2 and 2(a) of Schedule 6.4 of the Electricity Industry Participation Code 2010 (Code).

3. In its complaint, Solar said that it related to a tariff imposed on distributed generation, and that consequently, Part 6 of the Code applied. Solar cited the wording of clause 2 (a) of Schedule 6.4 which deals with pricing principles:

   > " …connection charges in respect of distributed generation must not exceed the incremental costs of providing connection services to the distributed generation."

   Solar submitted (in its Description of Circumstances supporting the breach notice) that clauses 2 and 3 of Schedule 6.3 provided for the notification of disputes under that part and for progressing such complaints. It called for the appointment by the EA of an Investigator under regulation 12.

4. On 9 May 2016 Solar informed Unison that it had notified a breach with the EA.

5. On 10 May 2016 the EA replied that the provisions of Schedule 6.3 required a good faith attempt at settlement between the parties before the making of a complaint to the EA, and requiring evidence that this had been done.

6. On 11 May, Solar City replied, saying there had been "numerous exchanges with Unison in the media for over a month" prior to the making of the complaint. Further, Solar City said, there had been meeting of representatives of the companies on 15 March. No settlement had eventuated. Eventually, the complaint was treated by the EA as being on hold, while an attempt at settlement was explored.

7. On 26 July 2016 Solar City reported that it had completed its attempts at settlement, and the complaint should proceed. There is a dispute about whether the steps taken to arrive at a settlement comply with Schedule 6.3. We shall return to that later.

8. Under Schedule 6.3 a complaint to the EA is to be treated as a notification under the regulations of an alleged breach of the Code. The EA is not obliged to take action in relation to all reported breaches. Under regulation 11 it may decline to act on a reported breach. Various courses of conduct are open to it. To enable it to consider what steps to take, the EA caused a Senior Investigator to look into the matter and report to its Compliance Committee.

9. The Investigator's memorandum[1] to the Compliance Committee is dated 7 July 2016. It recommended that the EA take no action, as, in the Investigator's view, the Unison pricing complained of was a retail consumer tariff and did not fall within the provision of Part 6 of the Code (relating to distributed generation). The Investigator also took the view that Solar City had not complied with the requirements of the good faith negotiation provisions of Schedule 6.3. It made that finding out of an abundance of caution, in case the Compliance Committee took the view that Part 6 had been activated.

10. On 24 August 2016 the EA Compliance Committee wrote to Solar City explaining that the EA had "…decided to take no further action on the alleged breaches..." as it was entitled to do under regulation 11(1)(b). The EA reported that Part 6 of the Code does not apply to the aspect of Unison's pricing complained of.

11. On 6 September 2016 Solar City laid a formal complaint with the Rulings Panel under regulation 31, and seeking a hearing under regulation 34. Regulation 31 allows an industry participant[2] to lay a complaint with the Rulings Panel if three conditions have been complied with:

> (1) The participant laying the complaint either notified the Authority of the alleged breach (under r 7 or r 8) or has been joined as a party under r 17;
>
> (2) That participant has suffered loss from the alleged breach, and
>
> (3) The EA has informed the participant that it does not propose to lay a complaint with the Rulings Panel.

The present procedural dispute

12. The complaint to the Rulings Panel appears to re-state Solar's basic contention as contained in its notice of breach to the EA. It further develops its argument that the Unison tariff is, contrary to the view of the Investigator, a charge that is being levied on distributed generators, and is covered by the pricing principles set out in Schedule 6.4.

13. On 6th and 11th October 2016 lawyers acting for Unison made a number of procedural points about the Solar complaint to the Rulings Panel. Paraphrasing those for present purposes, Unison said:

> (1) The only avenue for "complaint" by Solar to the Rulings Panel was

[1] Note that this is not an "investigation" as required under regulation 12(a), although it was conducted by a senior investigator.

[2] It seems common ground that Solar City is an industry participant under section 7 of the Electricity Industry Act 2010. References to "sections" hereafter are to sections of that Act.

under r 31, which only applies when there has been a discontinued investigation. That, it says, is not the situation here. While the EA had "decided to take no further action" under r 11 that does not amount to notifying Solar that "it did not intend to lay a formal complaint" as required under r 31(1)(c).

(2) Unison submitted that the proper provision under which the Rulings Panel could hear the matter was as a "dispute" under Part 3 of the regulations. Regulation 76 (1) provides that the Rulings Panel may hear disputes of a kind identified in the Code. Under r 76(2) the procedure is that laid out in the applicable portion of the Code. The applicable part of the Code, submitted Unison, is Schedule 6.3, and that requires the Rulings Panel to treat the matter in the same manner as one of notification of a breach of the Code, and to apply sections 53-62 of the Act and most of the regulations, in the same way that those provision apply to an alleged breach of the Code. The Code also empowers the Rulings Panel, in applying those provisions, to make "…any further modifications to its procedures as the Rulings Panel considers necessary or desirable for the purposes of applying those provisions to the complaint." Unison asked the Rulings Panel to decline to apply r 34, and decline the hearing sought by Solar.

(3) Unison does not pursue the point that Solar was in breach of the dispute resolution procedure set out in Schedule 6.3, reserving its position as to costs on that point.

14. On 7th October 2016 Solar responded to the submissions by Unison. Solar submitted that r 31 applied, as notifying Solar that the EA was taking no further action was a way of saying no formal complaint would be laid, and, accordingly, the hearing provided for in r 34 was mandatory. It argued further that, even if the Rulings Panel were bound to follow the procedure in Schedule 6.3, there was no proper basis for exercising a discretion to preclude a hearing.

15. On 14 October 2016 counsel for the EA filed submissions essentially making the same procedural point as Unison; notice to Solar after the Compliance Committee meeting had decided not to take any further action did not constitute notification under r 31(1)(c). The EA further took the points that no evidence had been filed of any loss suffered by Solar as required by r 31(1)(b), and that Solar had not followed the Schedule 6.3 dispute resolution process.

16. On 21 October 2016 Solar replied to submissions by Unison and the EA. In summary, Solar continued to submit that r 31 applied, that it had complied with the dispute resolution procedure (as amended by agreement), that there was no justification for excluding a hearing in Schedule 6.3, and that a hearing will be necessary to deal with the issues.

17. On the same date (21 October 2016), Unison filed a response to the EA

submission, substantially agreeing that the issue was the (non-) applicability of r 31 to the complaint. Unison further noted that its previous submission that the Schedule 6 dispute process was an alternative to the complaints process was academic given that the disputes process also required Solar to get past regulation 31.

Discussion: Regulation 31

18. The principal issue between the parties is whether the situation is covered by the regulation 31 procedure, or whether the Rulings Panel may determine it's own procedure, and in either event, whether there should be a hearing. We have formed the view that the true construction is different from that advanced by either party.

19. In summary, our view is that the Rulings Panel has jurisdiction to deal with both appeals from certain decisions of the EA following notification of an alleged breach **and** jurisdiction to resolve certain kinds of disputes between industry participants. We find that the Rulings Panel's jurisdiction to deal with this matter falls within the latter (and that the resolution of disputes referred to the Panel is not subject to the Schedule 6.3 procedure).

20. Before setting out the basis for our conclusions on jurisdiction and procedure, it is useful to deal with the parties' arguments on the interpretation of regulation 31.

21. The position taken by Unison and the EA is that an approach to the Rulings Panel should not be available in cases of complaint of an alleged breach to the EA unless the EA decides to commence an investigation under regulation 12, and then fails to proceed to the laying of a complaint. We think there is some merit in this approach. It assumes that the wording in r 31(1)(c) that the EA "does not propose to lay a complaint " is highly specific; it requires an actual notice stating that there will be no formal complaint, not any lesser message saying a matter will not be proceeding.

22. We note that the wording in r 31 links the bringing of a complaint to the ending of an investigation in two places; in r 31(1)(c) and in r 31(2)(a). As we apprehend the submission for Solar, these provisions are to be read disjunctively. Regulation 31(1)(c) speaks of the EA informing the complainant that the EA does not intend to lay a formal complaint. Solar submits that this message, in whatever form it is received, is enough to qualify the complainant to bring a complaint to the Rulings Panel. This must be contrasted with the notice under r 31(2)(a) which only applies under r 28, which applies when the EA discontinues an investigation under rr 21, 23 or 27.

23. We are of the view that the wording in r 31(2)(a), which specifies that the complainant must lay its complaint with 10 days of receiving the notice under r 28,

qualifies the language in r 31(1)(c). The information that it "does not propose to lay a complaint" in r 31(1)(c) is the notice to be given under r 28 mentioned in r 31(2)(a). Support for this view can be found in the fact that, under the position advocated for by Solar, there would be no time limit for the filing of a complaint. If r 31 (1) and (2) are read disjunctively, there is a time limit for filing in the case of a r 28 notice, but not one for the more general message it submits would qualify under r 31(1).

24. We think that a qualification on the form of notice under r 31 (1) is expressly provided for in r 31 (2).

25. We think it clear that r 28 does not apply. The appointment of an investigator and the commencement of an investigation are substantive steps, with consequences for participants. No investigator was appointed, and no investigation took place. If there has been no investigation, it cannot be terminated in the manner referred to in r 28.

26. We think there may be merit also in the Unison submission that, in the absence of an investigation, a decision by the EA that for example, no prima facie case is made out should not be the subject of a complaint to the Rulings Panel. Some kind of screening of matters is suggested as being appropriate. The impact of this finding is that r 31 does not provide a mechanism for a notification of an alleged breach to the EA that is not investigated to come before the Rulings Panel. That does not, however, preclude a party from asking the Rulings Panel to resolve particular kinds of dispute (including this one).

The Panel's dispute resolution jurisdiction

27. Section 50 of the Act provides the Rulings Panel with jurisdiction to deal with appeals from complaints about breaches/possible breaches of the Code. Such appeals must be made to the EA in the first instance (s 50(1), the EA must deal with complaints (s 50(2) and only then may complaints be referred to the Rulings Panel (s 50(3). Section 50(4) of the Act empowers the Rulings Panel to "determine appeals against decisions made under the Code" – a result of a referral under s 50(3). It also empowers the Rulings Panel to "resolve disputes between industry participants that relate to the Code, that are of a kind identified in the regulations or the Code". There is no similar qualification on this aspect of the Rulings Panel's jurisdiction requiring disputes to first be referred to the EA.

28. Regulation 76 (1) empowers the Rulings Panel to hear disputes and appeals "of a kind identified in regulations made under the Act or in the Code". (We note that Unison originally conceded the applicability of Part 3 of the regulations including r 76, but subsequently resiled from this position). The Rulings Panel finds that this dispute is one that is of a kind identified in Part 6; it is an

allegation that a participant has breached the pricing principles, falling within clause 6.8 (1)(b). The matter remains in dispute, as it was not resolved by the complaints process, and it has been brought before the Rulings Panel. Accordingly, the Rulings Panel finds that it has jurisdiction under s 50(4) and r 76(1) to resolve this dispute.

29. We note that Schedule 6.3 provides for a default dispute resolution process but does not found jurisdiction. We discuss this further below.

Procedure to be followed.

30. As noted above, Part 6 (6.8) has identified a dispute brought under the Code. Section 53(2) says the Rulings Panel "may determine its own procedures, subject to this Act and the regulations, the requirements of natural justice, and, in relation to particular kinds of appeals and disputes, the Code."

31. R 76(2) provides that practices and procedures for dealing with disputes and appeals "…may be set out in the regulations or the Code". Section 50 (5) is to the same effect: where there are procedures provided, the Rulings Panel is to apply them.

32. The Rulings Panel has considered whether the Schedule 6.3 procedure applies in this case. We note at the outset that Schedule 6.3 (being subordinate to the Act) cannot be interpreted in order to limit the Rulings Panel's jurisdiction to resolve this dispute.

33. Schedule 6.3 (2) requires that a party must given written notice of a dispute (2(1)) and must attempt to resolve a dispute in good faith (2(2)). If the parties are unable to resolve the dispute, the party **may** invoke the default dispute resolution process by complaining in writing to the Authority (2(3)). If that approach is taken, then the process outlined in Schedule 6.3 (3) must be applied.

34. We find that Schedule 6.3 provides for a single procedure: a complaint is to be treated as a breach of the Code, and a specified subset of the available procedures for dealing with such a complaint are to be used. It is possible, but not inevitable that such a complaint may end up before the Rulings Panel. That will happen if an investigation is commenced, and then discontinued, and the complainant proceeds under r 31. For that reason, Schedule 6.3 mentions the powers the Rulings Panel will have "as the case may be" in Schedule 6.3 (3)(3)(c). That does not, on its own, empower the Rulings Panel to hear the matter if the complaint does not come before it under r 31.

35. The consequence of that approach, not addressed by the Parties, is that the Rulings Panel has no jurisdiction under Schedule 6.3 to hear a complaint made to the Rulings Panel as this one was, after a complaint has been dealt with by

the EA under r 11.

36. We do not consider that this process may be invoked by Solar to bring the matter before the Rulings Panel. For the reasons set out above, the Rulings Panel has no jurisdiction to deal with the dispute as a continuation of this complaint brought under Schedule 6.3 However we consider that we can treat Solar's application as a request to resolve the dispute (as provided for in s 50(4) of the Act), for which there is no procedure set out. That being the case, the Rulings Panel may determine it's own procedure.

37. We consider that the procedures laid out in Regulations 32 to 46 inclusive are appropriate for use in this complaint. Accordingly we direct that this complaint shall be conducted under those regulations, and the corresponding parts of the Rulings Panel Procedures.

38. Because the parties' submissions dealt with substantially similar procedures, (on the assumption that Schedule 6.3 empowered the Rulings Panel to modify the regulations) particularly the issue of a hearing under r 34, we now consider them in turn.

39. Unison's case proceeds on the basis that the Rulings Panel has a discretion to amend the procedures. The EA, by contrast, submits that the dispute cannot be brought before the Rulings Panel as the procedure for bringing such disputes before the EA has not been followed.

40. The procedure in clause 2 of Schedule 6.3 requires that two steps precede the bringing of a complaint to the EA:

    (1) Written notice of the dispute be sent;
    (2) A good faith effort be undertaken between the parties to resolve the dispute.

41. The EA submits that although Solar notified it of the breach on 8 May 2016, no evidence of compliance with the 2 steps was supplied. It acknowledges that it advised Solar to complete the process. It says that Solar again reported completing the procedures on 18 July, but says that as before, Solar did not supply evidence of compliance. It concludes it submissions on this point by referring to the letter sent by Solar to Unison on 9 May – the day after the filing of the breach notice. It says that it "cannot be correct" that this constitutes compliance.

42. With respect, this is somewhat disingenuous. It is at least incomplete. On 16 May 2016 EA staff (Mr Ehlert, who prepared the later report to the Compliance committee) offered to:

    "…rather than declining to pursue, I can put the complaint on hold."

This was to allow Solar time to comply with the provisions of Schedule 6.3. Solar relied on that offer by the EA. Although Solar continued to rely on its 9 May letter as constituting Notice, it appears to have sent a further letter to Unison on 26 May. A copy was sent to the EA. It clearly refers to the dispute and attaches the Description of Circumstances document attached to the breach notice, setting out the complainant's case. Mr Ehlert took objection to the nature of the letter describing it as a letter about the complaint, not about the dispute. He did repeat the offer:

> "I can put the case on hold but Solar City has to initiate the process...."

There were further letters between the parties, from which it is clear to the Rulings Panel that by the time of its letter of 20 June to Solar, Unison was aware of the nature of Solar's complaint, and the nature of the dispute. This was further clarified by the Solar letter to Unison of 23 June. It is also clear that the parties discussed a meeting to attempt to resolve the issue, but this was not in the end arranged.

43. On 26 July 2016 Mr Ehlert wrote, having received copies of the above mentioned and further correspondence between the parties:

> "Thank you for your letter and letting me know that Solar City has negotiated with Unison."

Mr Ehlert then prepared (or completed preparation of) his report, and the matter went before the Compliance Committee, with the result described above. In the circumstance of its repeated offer to treat the complaint as "on hold" for the express purpose of facilitating compliance with the requirement of Schedule 6.3, we do not think the EA can now raise the strict sequence of events against Solar. Solar has relied in good faith on the EA's ability to place the matter on hold, and carried out its obligation to provide notice. The EA must be taken to have effectively re-dated the complaint to the Authority to some date after the exchanges of information between the parties constituted notice of the dispute. Unison makes no challenge to the sequence of events as being non-compliant. We do not find anything in this conduct by the complainant that requires modification of the procedures to be adopted.

44. The EA makes no challenge to the "good faith" of the parties in attempting settlement. Unison, while not relying on the point, submits that the failure of a meeting is an indication of bad faith. There is no requirement in the rules for complaint resolution before the EA for the parties to meet. The parties had, in the Rulings Panel's view, a sufficient exchange of views between them in an attempt to settle the dispute. By the time of the possible meeting it is apparent that the parties had clear views about their positions, based it appears on legal advice. Neither seemed likely to change their minds at a meeting. We do not find the absence of a meeting to be an indication of lack of good faith. We do

not now require a meeting between the parties, or any further attempts to settle the matter as a pre-requisite to the matter proceeding before us.

45. We turn then to the request to disallow a hearing. We note the parties' submissions proceeded on the basis that the Rulings Panel could amend the procedures under the regulations, including r 34.

46. We have found that Schedule 6.3, with its power to modify the procedure under the regulations does not apply in this case. Under the power conferred by s 53(2) we have ruled that the procedure found in rr 32 to 46 inclusive shall apply. In considering what procedures we should employ in this dispute, we have found the procedures in r 32 to r 46 are well suited to dealing with a dispute of this nature. After considering, as s 53(2) requires us to do, the Code, the provisions of natural justice, the Act and the regulations, we observe that we would need considerable convincing that those procedures should be amended by removing the right to a hearing. We consider that a hearing is an opportunity for the issues to be fully tested by allowing the tribunal to observe the demeanour of witnesses, and to ask questions. The considerations are amplified by the fact that a hearing is mandatory under the regular application of r 34.

47. The EA made no submission on the appropriateness of a hearing, resting its case on the ground that the complainant failed under both the r 31 procedure and the Schedule 6.3 procedure to properly launch its complaint. Unison said simply that the issues were capable of resolution on the papers, and the costs of a hearing could be avoided. We find that does little to meet the force of Solar's argument that there are mixed questions of fact and law, that there may be other affected parties, and the matter may be of public interest.

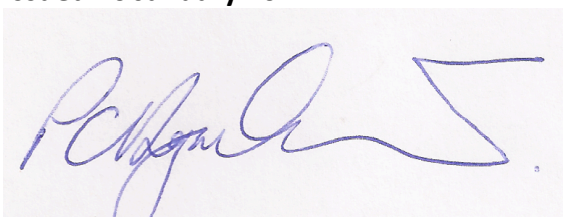
48. Accordingly we hold that r 34 shall apply, and the matter will be the subject of a hearing.

Costs

49. Costs should follow the event. Solar has prevailed on the issue of whether there should be a hearing, but on different grounds than it advanced. It was incorrect in bringing its case under r 31. The EA and Unison were correct to submit that r 31 was of no application. Unison originally considered the application of r 76, but came more to the view that only r 31 applied, and so as to bar the complaint. This may be a case where it is fair that costs lie where they fall. As we prefer costs to be determined and paid on interlocutory issues, we invite written submissions from the parties on costs, to be simultaneously filed and served within 15 working days of the date of this decision. A short period will be available thereafter for filing any responses to any other party's submissions. The parties may care to provide information on their actual costs and disbursements incurred in dealing with this matter.

50. We thank Counsel for their helpful submissions.

Issued 16 January 2017



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P.C. Dengate Thrush
Chair, Electricity Rulings Panel