

BEFORE THE COMPETITION AND MARKETS AUTHORITY

IN THE MATTER OF AN APPEAL

UNDER ARTICLE 14B OF THE ELECTRICITY (NORTHERN IRELAND) ORDER 1992

B E T W E E N : -

SONI LIMITED

Appellant

and

THE NORTHERN IRELAND AUTHORITY FOR UTILITY REGULATION

Respondent

**RESPONDENT'S REPRESENTATIONS & OBSERVATIONS
ON THE APPELLANT'S APPLICATION FOR SUSPENSION OF THE DECISION**



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Reference: 2634114/JAC/RKR/KXL3**

1. By its notice date 12 April 2017, SONI Ltd (**SONI**) made an application to suspend the Decision of the Utility Regulator (**UR**) to modify the price control conditions of its TSO Licence, until such time as its appeal against that Decision has been determined (the **Application**).
2. The Application was made by SONI under paragraph 2(2)(a) of Schedule 5A to the Electricity (Northern Ireland) Order 1992 (the **Electricity Order**). These are the UR's representations and observations in response to the Application, made in accordance with paragraph 3(2) of Schedule 5A to the Electricity Order.
3. Words and expressions defined by SONI for the purposes of its Application have the same meaning here, unless otherwise stated.

The Statutory Background

4. The power of the Competition and Markets Authority (**CMA**) to suspend the Decision pending determination of the appeal is exercisable only where four statutory tests are met – these are set out respectively at paragraphs 2(2)(a) - (d) of Schedule 5A to the Electricity Order.
5. The first two of these tests ((a) and (b)) are procedural and are satisfied by the Application and this response. The second two tests ((c) and (d)) are substantive, and SONI must establish that they are met before its Application can succeed.
6. Even if those substantive tests were met, the CMA has a residual discretion (a 'power' in the statutory language¹) whether or not to suspend. SONI does not draw attention to this fact, or make any submissions as to why that discretion should be exercised in its favour.

¹ Paragraph 2(2) of Schedule 5A to the Electricity Order. See also Paragraph 2(1) of the Schedule – 'The CMA may direct...'

Introduction

7. As SONI notes², the language of the 'balance of convenience' in the fourth statutory test ((d)) is drawn from case law on interim injunctions.
8. This gives a clear indication of the character of an application for suspension. It is, in essence, a request for interim injunctive relief. In other words, it is a request for an order reversing the position that normally applies, in spite of the fact that the determining body (in this case the CMA) has not yet had the opportunity to give proper scrutiny to the issues. The request for such interim injunctive relief has to be clearly justified by the particular circumstances of the case. The burden of proof lies squarely with the applicant.
9. The normal position in the case of licence modifications is established by the statute – the modification is treated as valid, and so takes effect, unless and until the CMA determines otherwise. The CMA will determine otherwise only if it has first granted permission for an appeal, and then carried out a detailed examination of the case having full regard to the submissions and evidence of both parties.
10. SONI wishes to displace this normal position and prevent the Decision from taking effect. But it has not discharged the burden of proof placed on it; nor indeed has it come close to doing so. In particular, for reasons given below, it fails to get over the first hurdle, since it cannot establish that the substantive test at (c) is met.
11. The CMA will note that in none of the three appeals so far brought under the current statutory framework³ has an appellant sought the suspension of the decision under appeal. By itself, this fact is not relevant to SONI's Application. However, it does mean that the CMA's determination of the Application will be the first such determination and will set a precedent for the future.

² Application, para 15.

³ The two Ofgem ED-1 appeals in Great Britain (British Gas Trading and Northern PowerGrid) and the Firmus Energy appeal in Northern Ireland.

12. It is therefore important that the determination is carefully grounded in the language of the statute, and is based on the requirement for an appellant to demonstrate that the statutory tests are met.
13. If those tests are properly applied on their terms, the UR's position is that the Application cannot succeed.

The First Substantive Test – Significant Costs

The Nature of the Test

14. The first substantive test which is set out at paragraph 2(2) of Schedule 5A to the Electricity Order reads as follows –

'(c) the relevant licence holder, the licence holder or consumers whose interests are materially affected mentioned in Article 14B(2) (as the case may be) would incur significant costs if the decision were to have effect before the determination of the appeal'

15. It should be noted that this test must be satisfied. The second substantive test (at (d)) and the residual discretion of the CMA are additional hurdles. But all of these requirements are additive. No suspension is possible unless this test (c) is met.
16. The test creates a potential exception to the rule that a decision to modify a licence takes effect unless and until the CMA, after full consideration of the issues, quashes that decision.
17. However, so far as a licence holder is concerned, the exception may be made only if the company would, while the appeal is ongoing, be required by the newly-modified conditions to do things causing it to incur significant costs.
18. The purpose of this is clear. It assumes a situation in which the modifications impose an obligation which must be met during the appeal period, and which has a significant compliance cost. In these circumstances, if the appeal were to succeed but the cost had already been incurred, there would be wasted expenditure. Either the company would have to bear the cost or (if it was price controlled or could otherwise pass that cost to consumers) consumers would.

19. In such a case, the suspension of the decision, to avoid the risk of any wasted expenditure, may be desirable. In such a case an application to suspend may well not be opposed by the UR.

SONI's Arguments

20. The fundamental problem which SONI faces in its Application, and which it cannot overcome, is that this is not such a case and bears no resemblance to any such case. SONI's various attempts to divert attention from this problem or to sidestep it are obvious and unsuccessful.
21. **First**, SONI misquotes the statutory test – *'The test for suspension is whether in the absence of suspension the Applicant might be expected to face or incur significant costs'*⁴ (emphasis added).
22. In fact the test (properly quoted above) is whether the company would incur significant costs. This is a question of fact, which requires to be established by the applicant. Speculation as to what the company *'might be expected to face'* is insufficient to satisfy the statutory test. It must be clear as a matter of fact that significant costs would be incurred.
23. SONI apparently frames the test in the way it does because even on its own case it cannot satisfy the statutory wording – *'...it may be difficult to assess what extra costs [SONI] would have to bear if it was obliged to give effect to the Decision during the conduct of the Appeal...'*⁵.
24. **Second**, SONI implies that the Decision does at least impose some costs on it - *'...it is uncertain how, in the absence of suspension, [SONI] can deliver the required activities and outputs under the Decision'*⁶ (emphasis added).
25. The problem with this (essentially undeveloped) line of argument is that the Decision relates to the price control conditions of the TSO Licence. It does not impose duties to

⁴ Application, para 10.

⁵ Application, para 10.

⁶ Application, para 2.

carry out activities or deliver outputs – these sit elsewhere in the regulatory framework – but is concerned only with the revenues that are to be allowed for fulfilling the transmission system operator function.

26. In fact, nothing in the Decision creates substantive new obligations on SONI as to the activities or outputs it is required to deliver.
27. **Third**, perhaps in anticipation of this point, SONI seeks to reclassify ‘costs’ as something else – ‘...it is clear that there will be significant costs in the form of lower revenues’⁷ (emphasis added).
28. There are two responses to this – one legal and one factual.
29. The first is that the expression ‘significant costs’ is undefined in the Electricity Order. Applying the usual rules of interpretation it therefore has its ordinary meaning in English. On any natural meaning of the language, lower revenues are not significant costs. If the statute meant to include reductions in revenue within the scope of the exception, it would have said so expressly.
30. This is not just a linguistic point. Revenues which are foregone can always be allowed for at the end of the process. SONI itself refers to the ability to ‘true-up’ at the end of the appeal⁸. This is quite distinct from a case of costs which have been spent, where the expenditure may be wasted and the money not recoverable. It is only this latter case for which the statute provides.
31. Second, the UR does not accept SONI’s statement that the Decision will result in lower revenues than under current tariffs⁹. It is unnecessary to consider this statement in detail for the purpose of responding to the Application – SONI’s argument cannot in any event be a valid one for the reason given immediately above – but it is demonstrably untrue if the D_t allowances under the price control are taken into

⁷ Application, para 10.

⁸ Application, para 13.

⁹ Application, para 3.

account. The categories of cost to which SONI expressly refers¹⁰ are either already allowed within the Decision or subject to allowances under the D_t mechanisms.

32. There is no reason why SONI cannot seek those allowances during any appeal period, and indeed it has been previously encouraged to apply for them by the UR. If the purpose of its Application is to avoid using that process – and thereby demonstrating, *contra* SONI's case, that it works perfectly well – that is a misuse of the statutory procedure for suspension.
33. **Fourth**, SONI seeks to relate the question of revenues to the argument that it makes at length in the appeal about its alleged inability to raise debt finance. These are matters which, if the appeal is given permission, the CMA would no doubt wish to consider more fully. But they are contentious and contested, and cannot properly form the basis for a suspension Application.
34. In any event, the argument does not advance SONI's case. In the first place, the question of debt finance is entirely unrelated to the statutory test about 'significant costs', and therefore does not support the case for suspension.
35. Second, SONI says that '*The period in which the CMA will consider the Appeal is therefore a critical timeframe for implementing stability into the financial arrangements*'¹¹. However, by the mere act of bringing the appeal, SONI itself has introduced uncertainty. There is no reason to believe – nor is any offered – that the suspension of the Decision for several months is likely to change the position in relation to its ability to raise medium or long term debt.
36. Third, with regard to its short term debt (the Revolving Credit Facility) SONI says that its lenders had '*agreed as an interim measure to continue to provide this facility to the Applicant while the Price Control process is ongoing*'¹². As to the alleged problem with this arrangement, it says only that '*it is not clear to the Applicant that the lenders would still be willing to proceed*' and then later (with added rhetoric) '*it is wholly*

¹⁰ Application, para 3.

¹¹ Application, para 9.

¹² Application, para 6.

*unclear whether and, if so, from whom, the Applicant will acquire the necessary temporary funds'*¹³.

37. Again, none of these points have any bearing on the test of 'significant costs'. But even if they did, supposed lack of clarity is entirely insufficient to support an application for injunctive relief in the form of a suspension of the Decision.

Conclusion

38. Taking all of these points together, the UR says that SONI has come nowhere close to demonstrating that the first substantive test for suspension is met.
39. The circumstances of the current case are different from those envisaged by the statute in paragraph 2(2)(c) of Schedule 5A. That statutory wording can neither be ignored nor interpreted to mean something it does not say. There is nothing in the circumstances of this appeal which requires the usual rule to be reversed, and for the Decision to be suspended.

General Conclusion

40. Since SONI fails to clear the first substantive statutory hurdle posed by the test at limb (c), it also fails to meet the statutory tests as a whole. Questions of the balance of convenience and exercise of the CMA's discretion therefore do not arise, and consequently the UR need not make submissions in relation to them. There is no statutory basis for the CMA to apply an exception to the usual rule and suspend the effect of the Decision.
41. The UR notes that SONI makes a number of other points under its opening heading '*Reasons underlying the Applicant's application for the suspension of the decision*'¹⁴ which are drawn from its appeal documents and are unrelated to the statutory tests for suspension. For present purposes, the UR does not respond to them. But that

¹³ Application, para 9.

¹⁴ Notably at Application, paras 7 and 8.

should not be seen as an admission or acceptance of the points made; merely an indication of their irrelevance in the current context.

42. However, one final point needs to be addressed. SONI criticises the UR in its Application, as it has at length in its appeal documents, for the time taken to make the Decision. That criticism is curious, since the UR was using that time to engage at length with SONI, in good faith, to understand its concerns and seek to avoid any necessity for the current proceedings. In doing so, the UR was acting as a responsible regulator should, with the active participation in, and encouragement of, that process by SONI.
43. But it is doubly curious that SONI seeks to use that criticism as a ground for the suspension of the Decision (oddly, under the heading 'Significant Costs'). SONI claims that one reason that its *'case for suspension is a strong one'* is that *'the Utility Regulator has shown no urgency at all in adopting the Price Control'*¹⁵.
44. In other words, SONI seeks simultaneously to: (i) criticise the UR for allowing the old price control to carry on for a period; and (ii) apply to the CMA for an order allowing the old price control to carry on for a period. Moreover, SONI uses the very thing it is criticising as a justification for its application.
45. This is an incoherent combination of arguments and lacks credibility. SONI's position is apparently that the new price control should have applied sooner. Now that the Decision has been made, there is no reason for it not to have effect unless and until the CMA grants permission to appeal and concludes following a full investigation of the issues that it should not.
46. The UR respectfully invites the CMA so to find.

Gowling WLG (UK) LLP

for the Respondent

28 April 2017

¹⁵ Application, para 14.