



Australian
Competition &
Consumer
Commission

Application for minor variation of authorisations A91205 to A91207

lodged by
Rio Tinto Aluminium Ltd and others

in respect of

amendments to the Operation and Maintenance
Agreement for the Gladstone Power Station

Date: 12 February 2016

Authorisation numbers: A91205 to A91207

Commissioners: Rickard
Cifuentes
Court
Featherston

Summary

The Australian Competition and Consumer Commission has decided to vary the conditional authorisations A91205 to A91207 granted to Rio Tinto Aluminium and seven other companies in 2010, concerning agreements relating to electricity generated by the Gladstone Power Station.

The variation allows the Applicants to put into effect amendments to the Operation and Maintenance Agreement for the power station. The amendments principally relate to a revised fee structure for paying the power station's operator, NRG Gladstone Operating Services, beyond the agreement's current term.

The application for minor variation

1. On 5 November 2015 Rio Tinto Aluminium Ltd, as manager of the Gladstone Power Station joint venture and also on behalf of the seven joint-venture participants (together, the Applicants), applied to the Australian Competition and Consumer Commission (ACCC) for a minor variation to authorisations A91205 to A91207.¹ These authorisations relate to agreements concerning the electricity generated by the power station.
2. The Applicants state that, similarly to an application for minor variation approved by the ACCC in 2011, this application concerns an adjustment to the price payable to the Gladstone Power Station's operator, to reflect that the operator's engagement is being extended for a further five-year period.
3. A minor variation, as defined by Section 87ZP of the *Competition and Consumer Act 2010* (Cth) (the CCA), is a single variation to an authorisation that does not involve a material change in the effect of that authorisation.
4. As background, in 1979 the ACCC's predecessor, the Trade Practices Commission (TPC), authorised the formation of a joint venture for the construction and operation of the Boyne Island aluminium smelter, near Gladstone in Queensland. In 1994 the TPC authorised further arrangements for the smelter's expansion and the formation of a joint venture for the acquisition and operation of the Gladstone Power Station, which supplies power to the smelter and the National Electricity Market or NEM.²
5. On 2 June 2010 the ACCC granted conditional authorisations to the Applicants for certain amendments to the agreements about the electricity generated by the power

¹ Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the Competition and Consumer Act 2010 (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at www.accc.gov.au/publications/authorisation-guidelines-2013

² The participants in the unincorporated joint venture are (with parent entities in parentheses): GPS Energy Pty Ltd and GPS Power Pty Ltd (Rio Tinto Aluminium (Holdings) Ltd), Sunshine State Power BV and Sunshine State Power (No.2) BV (NRG Energy Inc), Southern Cross GPS Pty Ltd (Sumitomo Corporation, Sumitomo Light Metal Industries Ltd and Marubeni Corporation), Ryowa II GPS Pty Ltd (Mitsubishi Corporation and Mitsubishi Materials Corporation) and YKK GPS (Queensland) Pty Ltd (YKK Corporation).

station (the GPS Agreements).³ The authorisations expire on 29 March 2029. It is these authorisations that the Applicants now wish to vary. In particular, the Applicants seek authorisation for amendments to one of the GPS Agreements, called the Operation and Maintenance Agreement or OMA.⁴

6. The OMA is effectively the contract under which NRG Gladstone Operating Services Pty Ltd (NRGGOS) operates the power station for the Applicants. The OMA commenced in 1994. After the OMA's initial term expired, it was extended, with a 'rolling option' to extend it again.
7. This variation application principally relates to a revised fee structure for the payments the Applicants make to the operator, to apply beyond the OMA's current term (which is called the 'first secondary term'). Schedule 6 of the OMA sets out the fee payable to the power-station operator. Schedule 6, as amended, will now provide for a new, confidential form of payment for the operator and feature amendments to the existing fee-calculation formula. In addition to the changes to Schedule 6, there are certain minor drafting amendments to the OMA. Further details of the proposed changes are set out in paragraph 21 below.
8. The Applicants have already amended the OMA but state that these amendments will not take effect unless and until the ACCC has granted the variation sought. The Applicants provided the ACCC with a copy of the OMA, as amended.⁵
9. The Applicants also applied for a minor variation to amend the fee schedule in November 2010. The ACCC accepted and assessed that application as a 'minor' variation and, on 19 January 2011, granted the variation sought. The ACCC found that the amendments:
 - were mechanical in nature and did not materially change the nature of the conduct and
 - would not change the likely benefits or detriments of the conduct.⁶

Consultation

10. Before the ACCC consults on an application for a 'minor' variation, for the purposes of consultation it must first satisfy itself that the proposed variation is consistent with the definition of a minor variation in the CCA. The ACCC did so in this case.
11. The ACCC then invited submissions on the application from 28 parties, including bauxite/alumina/aluminium and energy businesses and state and Commonwealth government departments and regulators. No submissions were received.

³ The two conditions required the Applicants to notify the ACCC of any change to the Gladstone Power Station agreements' parties and, if that occurred, the ACCC could require the Applicants to furnish related information.

⁴ Other GPS Agreements are the Joint Venture Agreement, Interconnection and Power Pooling Agreement, Capacity Purchase Agreements, Power Purchase Agreements and Power Sales Administration Agreements.

⁵ At the Applicants' request, the ACCC has excluded the OMA from its public register. See the ACCC's letter of 11 November 2015 at <http://registers.accc.gov.au/content/index.phtml/itemId/1190778/fromItemId/278039/display/acccCorrespondence>

⁶ That application and the ACCC's determination are available at <http://registers.accc.gov.au/content/index.phtml/itemId/957346/fromItemId/401858>

ACCC assessment

12. The ACCC has assessed the application for a minor variation to authorisations A91205 to A91207 in accordance with the tests in section 91A of the CCA.
13. Broadly, the ACCC may vary an authorisation if it is satisfied that:
- the proposed variation is minor and
 - the variation would not result or would not be likely to result in a reduction in the net public benefit that arises from the authorisation.

The proposed variation is minor

14. The ACCC is satisfied that the proposed variation is minor. The ACCC considers that the proposed variation will not involve a material change in the effect of the authorisations. The changes to Schedule 6 merely change the terms of payment to the power-station operator for the next term of the OMA. The other proposed changes are minor drafting amendments to the OMA: for example, updates to some definitions and inclusion of a new organisational chart.

No reduction in the net public benefit of the arrangements

15. The assessment of the effect of the variation on the net public benefit takes account of the likely benefits and detriments of the arrangements as reflected in the ACCC's determination of 2 June 2010 to grant authorisation. In that determination, the ACCC considered that the power-station agreements were mechanisms:
- to provide a secure, reliable and cost-effective supply of power to the smelter (and achieving this would, in turn, be likely to contribute to the value of exports and the development of the Australian economy) and
 - that facilitated the supply of electricity into the NEM.
16. The ACCC was satisfied that the likely benefit to the public would outweigh the detriment to the public, including the detriment constituted by any lessening of competition that would be likely to result.
17. The ACCC considers that the proposed variation is minor in its operation and will not involve a material change in the effect of the authorisations. There will be no change in the parties to the conduct or the nature or scope of the conduct. The changes to the payment terms are a commercial arrangement between the parties, which the ACCC does not consider change the operation of the OMA or the agreements between the Applicants (the GPS Agreements) more broadly.
18. The ACCC considers that the variation would not result or be likely to result in a reduction in the net public benefit that arises from the authorisations.

Determination

19. The ACCC is satisfied that the variation is minor.
20. The ACCC is also satisfied that the public benefit test under section 91A(4) of the CCA is met. That is, the variation would not result, or would be likely not to result, in

a reduction in the extent to which the benefit to the public of the authorisations outweighs any detriment to the public caused by the authorisations.

21. Pursuant to section 91A(3) of the CCA, the ACCC makes this determination varying authorisations A91205 to A91207 to enable the Applicants to give effect to the following amendments to the OMA:

- amendments to Schedule 6 of the OMA, to:
 - set out a new fee to be paid to the power-station operator, NRG Gladstone Operating Services Pty Ltd, for a further secondary period of the OMA and for any subsequent extension of the operator's appointment
 - introduce a new form of payment for the operator
 - amend the fee-calculation formula and
- updates to the name and address details for the power-station joint-venture participants
- updates to certain definitions in OMA clause 1.1
- provision in clause 8.1 (c)(iii) for a new particular form of payment to the operator and
- inclusion of an updated organisational chart for the operator.

22. This determination is made on 12 February 2016. If no application for a review of the determination is made with the Australian Competition Tribunal, the determination will come into force on 5 March 2016.