

23 October 2001



Mr Michael Rawstron
General Manager
Regulatory Affairs - Electricity
Australian Competition and Consumer Commission
PO Box 1199
Dickson ACT 2602

By e-mail: electricity.group@acc.gov.au

Dear Mr Rawstron

**Proposed Changes to the National Electricity Code -
Generator Bidding and Rebidding**

Duke Energy International (DEI) notes the application by the National Electricity Code Authority (NECA) for authorisation of changes to the rebidding rules of the National Electricity Code (the Code).

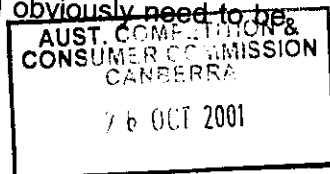
According to the information provided by NECA, the proposed Code changes will:

- address inefficiencies that have resulted from short-term price spikes that are not based on the underlying market dynamics;
- ensure that generator bids and rebids are made in good faith; and
- impose a prohibition on bids that would materially prejudice the efficient, competitive or reliable operation of the market.

Whilst DEI supports the intent of the proposed changes, we have concerns with the manner in which the intent is proposed to be given effect. Based on a careful analysis of previous industry submissions to NECA, and our own assessment of the proposals, DEI calls on the Commission not to authorise the proposed changes for the reasons set out below.

In DEI's view, NECA has consistently failed to adequately demonstrate that the anti-competitive behaviours the changes are designed to address warrant this level of response. NECA does not appear to have responded to one of the primary arguments advanced by industry: that bidding and rebidding behaviour falls within the jurisdiction of the *Trade Practices Act 1974* (TPA).

DEI subscribes to the arguments previously advanced to NECA by the National Generators Forum, and other individual market participants, that a definitive ruling on the application of the TPA to bidding and rebidding behaviour is required before proceeding with changes to the Code. If, as has been strongly argued by industry, the TPA does apply, then the proposed Code changes appear to have the potential to create a 'double jeopardy' situation of breaching the Code and the TPA. This would obviously need to be clarified if the proposals are adopted.



DEI is also strongly concerned at the proposal to reverse the onus of proof in any proceedings that allege bids and rebids have not been made in good faith. Notwithstanding NECA's proposed consultation process for investigating a breach of the good faith provisions, given that NECA is proposing that the maximum penalty category would apply to a breach, DEI believes it should be incumbent upon NECA to present the National Electricity Tribunal (the Tribunal) with persuasive evidence of the inappropriate behaviour, and argue its case.

In DEI's view, NECA has not been able to demonstrate that the proposed changes would result in easily identifiable benefits. Further, the proposed reversal of the onus of proof has the potential to result in increased costs for industry as supporting evidence for bidding and rebidding will need to be developed and maintained to protect against any proceedings brought by NECA.

DEI believes that, as previously argued by industry to NECA, the focus should be on increased surveillance and enforcement of the existing Code provisions and examining the applicability of the TPA. If NECA can then demonstrate that the behaviour in question cannot be addressed through the existing means (eg the Code and the TPA), there may then be some justification to implement changes to the Code along the lines proposed. Nevertheless, even then, DEI would be opposed to the reversal of the onus of proof and the interplay between the Code and the TPA would still need to be clarified.

Until this occurs, DEI as a market participant would encourage the Commission not to authorise the proposed Code changes.

Yours sincerely



Peter Staveley
Group Manager, Government Policy