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Mr John Martin
Commissioner
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Sent by email to john.martin@accc.gov.au

Dear Mr Martin

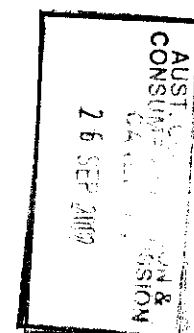
Draft Determination of Proposed National Electricity Code Changes - Bidding and Rebidding Rules (Application No. A90797, A90798, A90799)

1. Introduction

InterGen (Australia) Pty Ltd ("InterGen") as an interested party to this matter welcomes the opportunity to comment on the Australian Competition and Consumer Commission's ("ACCC") Draft Determination of the National Electricity Code Administrator's ("NECA") application for authorisation of changes to the rebidding rules contained in the National Electricity Code ("the Code").

InterGen, in conjunction with its partners has invested in the order of \$2.5 Billion in almost 1,800 MW of new generation since the National Electricity Market has commenced. When deciding to proceed with our investments we understood that the market was new and further development was likely.

The Code changes proposed by NECA and the ACCC's Draft Determination "suggestions" shift the electricity market towards greater reliance on regulators and away from markets for establishing the price of electricity. It creates a role for NECA associated with economic regulation that the Code expressly did not intend and for which its governance structures are inappropriate. The changes require arbitrary economic judgments to be made and the "suggestions" and associated Code changes are unnecessarily intrusive.





More importantly, the process associated with the Code changes unfortunately cannot be described as regulatory “best practice”. Lack of proper problem definition, unjustified assertions regarding market power, lack of robust analysis, no meaningful review of alternatives, last minute changes with no consultation and no cost/benefit analysis create a worrying precedent for current and potential investors in generation.

Although new, the market and associated Code has been successful in maintaining security and reliability of electricity supply to consumers by attracting new generation investment. Attempting to change the nature of the Code to manage economic outcomes through arbitrary, ill-considered and unjustified regulatory means after companies such as InterGen have responded with considerable capital investment is in our view not acting in regulatory “good faith”.

InterGen is a member of the National Generators Forum (“NGF”) and endorses the submissions and representations made by the NGF on the matter at the Pre-determination Conference on 13 August 2002, including the related written submissions made afterwards. Whilst acknowledging and agreeing with the comments of the NGF member submissions, this submission is intended to discuss key points that are of concern to InterGen.

2. Background

It is InterGen's understanding that the ACCC proposes to authorise NECA's application in a modified form. The ACCC Draft Determination dated 3 July, 2002 includes requiring Market Participants being required to make bids and re-bids in “Good Faith”. The other elements of the NECA proposed Code change have been rejected, including the Reversal of Onus of Proof and Conduct Prejudicial to the Market Code changes as the ACCC considered that they do not deliver a net public benefit. In addition the ACCC has made a number of “suggestions” to NECA as part of the Draft Determination process.

A conference was convened by the ACCC on 13 August 2002 to allow “interested parties” to put forward their views on the Draft Determination. During the conference NECA made a presentation based on what it intended to do regarding the ACCC's suggestions”. Later a paper entitled “Bidding and re-bidding, some ideas for a way forward” on which the presentation was based was published on NECA's web site.



3. Key Issues of Concern

3.1 NECA attempting "Market Development"

The Code changes proposed were not industry initiated and lack support. Early and subsequent consultations clearly identified that there was no serious support for the changes or the approach being taken by market participants. Even when a few industry participants supported NECA's assertion that there was a problem, most disagreed with the approach of making Code changes and positioning NECA with an economic regulation role.

3.2 The ACCC and Jurisdictional View

We note the ACCC's chairman, Alan Fels comments in a paper¹ he recently presented in Melbourne relevant to the proposed Code changes. In this paper Professor Fels stated that if there is market power being exercised in the market the ACCC has previously argued this should be addressed by structural reform, further investment in interstate interconnection and completion of the move to full retail contestability.

We note Professor Fels stated "the Commission is concerned that the [NECA] proposals would create a significant additional cost burden for participants in the market and create uncertainty for them and potentially even deter investment". He also stated in proposing a principle for market development that "Market Participants are the ones who have first hand experience and this experience should be utilized in the development of the rules under which industry operates".

We also note that the Federal Minister for Industry, Ian Macfarlane, has stated recently that the level of regulation in the market can confuse and discourage international investors. InterGen, as a significant investor in Australia concurs. The Code change activity by NECA and associated regulatory intrusion has a cost to the industry and ultimately the public. We agree with the analysis of NECA and others that the benefits have not been demonstrated to outweigh these costs.

3.3 Regulatory Process & Analysis

We understand the ACCC is primarily concerned with the specific application made by NECA when assessing net public benefit. InterGen also considers the regulatory process itself should be considered when assessing the net public benefit.

¹ Paper presented by Professor Alan Fels to the Utility Congress "Reforming Australia's Electricity Market", Melbourne 3 September, 2002



linkage between the “problem” NECA was attempting to address and the “suggestions” the ACCC made. Importantly, the ability of the ACCC to objectively assess Code changes associated with its own suggestions would appear compromised.

4. Suggested Actions

With respect to the specific Code change proposals in the Draft Determination, InterGen recommends the ACCC:

- Modify the Draft Determination and remove the “good faith” elements of the determination, as the net public benefit has not been demonstrated and is practicably unworkable creating an environment for arbitrary decision making by NECA, an entity not equipped nor structured for an economic regulation role.
- Remove its suggestions from the Draft Determination - they are overly intrusive and not justified and appear to place the ACCC in a position of approving its own suggestions in subsequent Code change proposals.
- Maintain the proposal for a market forum - this contributes to an environment where market participants and other interested parties can directly discuss and seek consensus on market issues.

ACCC should clarify the status of NECA’s “Bidding & Re-bidding, some ideas for a way forward” with respect to current proposed Code changes. InterGen understands from the comments made by the ACCC at conference held to discuss the Draft Determination that it views this paper as simply an input by NECA to the draft determination, not a modification to the original application.

More broadly, we consider it appropriate that the ACCC consider providing guidance to market participants and NECA in particular, on Code changes it will consider for Authorisation while NEMMF and CoAG reviews are determining market governance and policy development frameworks. Code changes which pre-empt structural changes by the jurisdictions are clearly inappropriate. The jurisdictions have already put forward the notion of a moratorium on changes in certain areas. We believe this is a necessary contribution by the ACCC to greater certainty in the NEM regulatory environment.



A company such as NECA has an impact on market certainty, particularly through the approach that it adopts in making changes to the market rules. The perception of investors of regulatory certainty contributes to the “risk premium” they attribute to a market when making investment decisions. We believe the process involved in this proposal to change market rules has contributed to increasing the NEM “risk premium”.

Firstly, Code changes of this nature should not have been proposed by NECA. NECA, initiated a Code change that directly impacts itself, and required NECA Board approval and CCP agreement. It is difficult to contemplate how there could not be a conflict of interest or at least a serious diminishing of checks and balances when NECA’s CEO is also a director on the Board of NECA and Chairman of the Code Change Panel (CCP).

With respect to the Code change proposal we consider the following were flaws in the process:

- A definition of the problem was never clearly articulated;
- Criteria for assessing options for addressing the alleged problem were never established;
- Alternative approaches or options for dealing with the alleged problem were never developed or canvassed for consultation;
- A costs/benefits of alternatives and recommended “solutions” was not performed; and
- As a result of the consultation process, the concerns of the industry were only used to modify the details of the changes proposed by NECA. Criticisms associated with process or analysis were not directly or adequately addressed.

With respect to the ACCC’s process, the Draft Determination contained little in the way of analysis supporting conclusions. Many serious assertions were made without substantiation.

We are disappointed that the ACCC as the economic regulator for the NEM did not coherently discuss or introduce evidence of market power, it simply states via a number of assertions that Market Power exists. We note that this is contrary to the majority of economic analysis in submissions presented to the ACCC, notably NECG, that clearly shows that market power by generators does not actually exist or is transient.

The ACCC made a series of “suggestions”, which would involve very significant changes to the Code. There did not appear to be a logical basis for the development of the suggestions nor adequate justification for them. There was no



5. Conclusion

We urge the ACCC to reconsider its Draft Determination as per our comments and suggested actions. The proposed Code changes and ACCC's "suggestions" for Code changes introduce unnecessary regulatory arbitrariness and therefore uncertainty into the market for no compelling reason.

Further, the process under which this Draft Determination has been brought about is, in our opinion, not reflective of regulatory "best practice", further increasing risk to participants.

As has been demonstrated by various market participants, the market has successfully responded to price outcomes. If there are any issues associated with market power, we support the ACCC's Chairman when he proposes structural changes such as greater transmission interconnection and demand side participation rather than Code changes which are potentially costly and the results uncertain.

Regulatory intervention should be the last resort and should be specifically and clearly aimed at a systemic problem of either misuse of market power or a fundamental flaw that prevents the market from responding. Market power has been asserted but not supported by evidence or proven. It is clear that that NEM has been very successful in attracting significant capital investment in generation up to this point in time. It would be a costly mistake to jeopardize future investment by introducing unnecessary regulatory risk and cost which will be ultimately borne by the consumer.

Yours sincerely

A handwritten signature in black ink, appearing to read "C. Botto".

Carlo Botto
Head of Energy Risk Management