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Mr Michael Rawstron
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Dear Michael,

NECA Code changes — rebidding

AGL supports the intentions of the NECA Code changes regarding rebidding that were forwarded to you on 21 September 2001. The NECA changes are intended to:

- ensure that a participant's bids, offers and rebids reflect the participant's best intentions at the time the bid or offer is made to ensure the market is fully informed and can respond with confidence as conditions change
- prevent bids and rebids that are intended to, or have the effect of, "... materially prejudicing the efficient, competitive or reliable operation of the market..." so that participants and the public have confidence in the market
- reduce market price, and fluctuations in price, by allowing some relaxation of the time for NEMMCO to restore the secure operating state after a contingency and by introducing economic criteria into the purchase of NCAS.

The actual changes are markedly different from those consulted by the Code Change Panel in August of this year. In those changes the aspects of rebidding to be monitored by NECA were clearly defined. The proposed changes now use less precise terms like "good faith" or put the detail outside of the Code in guidelines. AGL therefore cannot support the changes as presented.

The costs of compliance with the Code rise whenever an unclear requirement exists or is introduced into the Code. These costs are borne by customers. Additionally, lack of clarity in the areas of bidding and re-bidding will reduce competition in the markets by unnecessarily restraining participant actions. AGL considers, therefore, that adoption of these changes in their current form will both reduce competition and lower customer benefits.

Good faith

NECA's Code changes now require bids, offers and rebids to be made in good faith. NECA states this term is used to "... put the issue [of generators' concerns that they would be prevented from rebidding] beyond doubt...". The term is however so imprecise that it makes compliance difficult if not impossible. Previously NECA had proposed:

“(a) A *Market Participant* must not make a *dispatch offer, network dispatch offer, dispatch bid* or *rebid* unless the *Market Participant* has reasonable grounds for believing, based upon the latest information available and including where appropriate the *pre-dispatch schedule*, that the *dispatch offer, network dispatch offer, dispatch bid* or *rebid* will not be varied by a subsequent *rebid* under clause 3.8.22.”

NECA argues that good faith is a generally used legal term and is sufficiently defined by use to avoid the need for a definition. While that may be true in the context of legal contracts and leases, it is not defined sufficiently to allow traders or operators to use it as a guideline for day to day use. NECA should be required to either define what they mean by the term in the context of bids, offers and rebids or use phrases that state what they intend — as was the case in the original Code changes.

Onus of proof

The NECA changes also reverse the onus of proof for the requirements that bids be submitted in good faith. This is despite NECA's statement that:

“In deciding whether or not to initiate a proceeding for a breach of this proposed clause NECA would first need to be satisfied that the market participant had *prima facie* acted in bad faith in submitting its bid or rebid.”

Reversing the onus of proof is a major step for proceedings before the tribunal and is contrary to the general philosophy of the market and the Australian legal system. It should only be adopted where compelling reasons exist. NECA, and the Code Change Panel, have not advanced any reasons. NECA simply states that it is “a matter of judgement” whether or not to reverse the onus of proof.

AGL considers that the onus of proof should remain with NECA, particularly since NECA admits that it must gather its evidence before proceeding. NECA must be required to present its evidence to the Tribunal and a participant allowed to answer that evidence for natural justice to be ensured. The ACCC should therefore reject clause 3.8.22A(b).

Conduct prejudicial to the market

NECA has proposed that:

“(a) A *Market Participant* must not submit a *dispatch bid, network dispatch offer, dispatch offer* or *rebid*, if such conduct has the purpose, or has or is likely to have the effect, of materially

prejudicing the efficient, competitive or reliable operation of the *market* in accordance with the *market objectives* and the purpose of the market rules as set out in clause 3.1.2, unless the *Market Participant* has reasonable cause for the *dispatch bid, network dispatch offer, dispatch offer or rebid.*”

This clause is complex and broad in effect. AGL accepts, however, that the clause needs to be of this form to capture the variety of poor behaviours possible in the market. NECA has, correctly, determined that guidance is required on how the clause is to be interpreted and used by proposing to publish guidelines on NECA’s application of the clause.

The guidelines for this clause may, in themselves limit competition or lead to customer dis-benefits. AGL considers that the guiding provisions, or at least clauses that limit the scope of the guidelines, should be subject to authorisation. AGL would therefore ask the ACCC to require that the guidelines be included in the Code itself, perhaps as a schedule to the chapter.

NECA has inexplicably voided the effect of the guidelines by putting in the Code that neither the operation of the clause nor NECA are limited by the guidelines. This means that participants cannot rely on the guidelines to determine whether they are acting within the Code. Since NECA states in its report that it will request that breaches of these clauses be classified at the most serious level (category C), an open-ended provision of this form represents a serious regulatory risk for participants. AGL believes that NECA must be bound by any guidelines developed under this clause, unless they can show good cause why the guidelines should be waived for specific cases.

The ACCC should, before it authorises the Code changes, require them to be modified so that they meet the espoused objectives of NECA without adding significantly to the regulatory risks of participants or unduly restricting competitive behaviour.

If you have any questions regarding the above matters, please contact Alex Cruickshank, Manager NEM Development, on (03) 9201 7694 or e-mail acruicks@agl.com.au.

Yours sincerely,

Un-signed electronic copy

Phil James
General Manager Business Strategy