

2<sup>nd</sup> November 2001

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

By Email: [electricity.group@acc.gov.au](mailto:electricity.group@acc.gov.au)

Bidding and Rebidding Code Changes

Dear Mr. Rawstron,

Edison Mission Energy Australia Limited (EMEAL) are pleased to be able to respond to this consultation, although in our view the matter should not have progressed to the ACCC at this stage.

EMEAL fully supports the National Generators Forum (NGF) submission on this issue and would like to reiterate what we see as some of the key concerns in relation to this consultation.

It is our view that NECA has failed to adequately consider the counsel offered to it through the various consultations they have run on this issue. Rather, they appear to have reached erroneous conclusions based on inconclusive evidence in an environment of noisy, vested interest, but ultimately misinformed lobby groups.

Further, we are concerned about the approach that NECA has chosen to pursue in setting up Guidelines that will sit outside the Code and will be controlled by NECA. Rather than put forward the full extent of their proposals in the Code Change, (and expose them to the ACCC Authorisation process), they have chosen instead to present for Authorisation a small subset of the changes that they actually intend to make and then look to strengthen these Code Changes through the interpretation and application of these Guidelines. In this sense NECA are seeking to set themselves up as a Competition Regulator for the wholesale electricity market, but without, the experience, resources and the prudent regulatory safeguards that exist within the Trade Practices Act.

In addition, we note that the proposals are contrary to the intentions of the Code as Authorised by the ACCC Clause 3.1.4 (b) of the Code states:

*“These market rules are not intended to regulate anti-competitive behaviour by Market Participants which, as in all other markets, is subject to the relevant*

*provisions of the Trade Practices Act, 1974 and the Competition Codes of participating jurisdictions.”*

NECA’s proposals must be considered to have the intention of regulating what is in its perception is “anti-competitive behaviour”. Yet NECA’s proposals allow it to create its own metrics and definitions for anti-competitive behaviour without reference to the substantial body of law and cases that exist in relation to such matters. Clause 1.4(b(1) states that the first key objective of the Code is:

*“to provide a regime of ‘light-handed’ regulation of the market to achieve the market objectives”*,

The proposals can only be seen as being heavy handed.

We have major concerns in regard to how NECA intend to apply the proposed Code Changes. We would very much like the ACCC to review the proposed Code Changes in light of the Guidelines that NECA has produced, as we see the proposed Code Changes and the Guidelines as being inextricably bound. We believe that the Guidelines are so critical and fundamental that they should have been presented to the ACCC as part of the Code Change, rather than a set of Guidelines developed, applied and revised by NECA outside of the Authorisation process.

### **What is the problem ?**

Fundamental to this whole debate is the question of ‘what is the problem that NECA is trying to solve?’. NECA have made several references to unacceptable generator behaviour at times of tight supply/demand balance and issues in regard to rebidding under interconnector constraint periods, yet by NECA’s own admission, these periods have by been very much in the minority while the vast majority of bids actually reduce price rather than increase it. NECA have produced no empirical modeling or analysis to show that the changes and interpretations they intend to introduce will improve the current situation. It is our contention that the proposed Code Changes to govern the Variation of offers, bids and rebids and Conduct prejudicial to the market and the interpretations as detailed in NECA’s guidelines are likely to be harmful to the public interest because the proposed prohibitions are unclear and onerous, leading to:

- delay or prevention of efficient rebidding particularly during periods of volatility in the NEM
- significant compliance costs including the need to frequently involve senior management in bidding and to frequently take legal advice; and

- risks in participating in the NEM particularly as a Generator and therefore higher risk adjusted costs of capital investments in the sector and higher long run costs.

Rather than try to address the concerns that NECA have through consultation with participants (some working groups already exist as forums for these discussion, e.g. 5&30 min working group and Network constraints working group) NECA have pursued an isolationist approach on these issues which is likely to be harmful to the public interest.

### **Market Objective:**

NECA has reference the market objectives in 3.1.2 of the Code. They are:

*“The purpose of these market rules is to create a regulatory environment which promotes an efficient, competitive and reliable market for the wholesale sale and purchase of electricity.”*

These NECA proposals will not result in a more efficient market, because they will interfere with the behaviour of market participants and are likely to reduce the efficiency of pricing outcomes in the NEM.

The NECA proposals will not result in a more competitive market as they are seeking to limit the behaviour of market participants.

*Reliable* is defined in the Code as:

*“The expression of a recognised degree of confidence in the certainty of an event or action occurring when expected.”*

Reliability is primarily about having a robust system which operates on known principles and which will produce predictable outcomes. The NECA proposals based on non-codified and easily changeable Guidelines will do no more to ensure reliability than already exists. There is no obligation on NECA to enforce particular price outcomes in the NEM. In fact to the contrary, sound economic arguments have been made by various parties from all parts of the industry, as to why artificially low prices are unlikely to be beneficial for the consumer in the medium to longer term.

### **Authorisation of bids:**

NECA has suggested an authorisation of rebids at a senior level before they are submitted. Generators currently have internal procedures to ensure that bids and rebids are made at an appropriate level of responsibility and authority. As such, the responsibility for bidding and rebidding has generally been delegated to line/operational

staff. This is accepted commercial and operational practice in large organisations across a whole raft of industries. Decisions as to the level of delegated authority and responsibility are for Company Boards and Senior Management to make as they have been assigned this duty by the owners/shareholders who have risked their capital in investing in the NEM. It is not something that NECA with its limited experience is equipped to opine on. To require each bid or rebid to be approved by senior management is impracticable and unworkable. It may also lead to needless delays in the start up of 'fast start' plant in times of system stress. In fact, given that NECA have already identified that the majority of rebids reduce price, delays or reductions in the ability to rebid are likely to increase the pool price generally with greater effect at times of system stress.

### **Reversal of Onus of Proof.**

It is inappropriate to reverse the onus of proof as it is often more difficult to prove something than disprove it. There is no logic in an innocent party having to carry the increased compliance costs in terms of legal advice, employee time and possible other expert or consultant advice to avoid vexatious and disruptive complaints simply because another party has not been happy with a legitimate market outcome. It would be better for the market regulator to identify a possible event or series of events and then demonstrate how this act has contravened the rules or applicable law. This avoids vexatious and disruptive complaints potentially brought by competitors in an effort to damage a competitor.

Further, whilst the onus of proof has been discussed, there is no mention of the degree of proof. That is, does the generator have to prove his innocence beyond reasonable doubt or on the balance of probabilities, or will it just come down to how the Panel/arbitrator feel(s) at the time?

Bidding and rebidding behaviours and actions are subject to Trade Practices legislation. If NECA or any other party feel that a participant is breaching this act, they are able to refer the case to the ACCC for investigation. What is the public benefit should participants be restricted in competing in what is designed to be an open and competitive market, and we note much more so than participants in other markets over which the ACCC has jurisdiction?

EMEAL believe that these Code Changes if introduced along with NECA being given the power to apply the Guidelines will only detract from the attractiveness of the NEM as an investment climate and represents a substantial anti-competitive detriment as barriers to new entrants will be increased.

The Code Changes should be withdrawn and NECA asked to work constructively with participants in defining the issues and developing practical and Code compliant solutions to them, if any prove to be required. This should be done whilst being cognisant of the stated market objectives and the nature of energy only market.

Should you have any queries or if you would like to discuss this issue further, please contact me on the numbers indicated or by email.

Yours faithfully

Terry Killen  
Manager Pool Trading and Regulation  
Edison Mission Energy Australia Limited