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1 November 2001

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

Bidding and Rebidding Code Changes

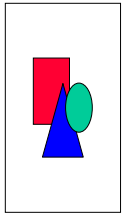
NRG Asia Pacific and NRG Flinders (NRG) takes this opportunity to provide comment on the NECA proposed changes (“the Proposed Change”) to the National Electricity Code (“the Code”) concerning rebidding and conduct allegedly prejudicial to the market.

NRG believes that the Proposed Change and the draft guidelines for “ensuring the efficient, economic and reliable operation of the national electricity market”, which are currently subject to the consultation procedure in the Code, are intrinsically linked and cannot each be considered in isolation. It is our view that the ACCC cannot properly consider the Proposed Change in relation to clauses 3.8.22, 3.8.22A and 3.8.22B without considering the final guidelines. The guidelines should form part of the Proposed Change and should not exist outside the protection of the ACCC’s authorisation

Also, NRG is of the view that the Proposed Change put forward by NECA is materially different from the proposal that has been consulted with market participants. NECA have significantly modified the proposal after participant consultation was complete; effectively eliminating participants’ opportunity to comment on the proposal finally put forward to the ACCC. This is contrary to the intentions of the code change process (chapter 8 of the Code).

One of the features in the Proposed Change is the concept of “good faith” rebidding. However, considerable legal uncertainty exists in such a concept, especially in relation to non-consumer transactions. This will likely result in the introduction of substantial risks and compliance costs for market participants to the detriment of the efficient operation of the market. If this expression is to be adopted in the Code then it should be defined more precisely to avoid unnecessary certainty.

The reversal of the onus of proof negates the presumption of innocence until proven guilty. In the context of the Proposed Change the burden of proof shifts to the accused (in this case the market participant). The effect of this is that the complainant (in this case NECA) need only



make an allegation of breach without providing evidence and, “...unless the Market Participant satisfies the tribunal...” the defendant will be found to have breached the Code. NECA has not provided any reasonable evidence in support of this extraordinary proposal.

The language used in proposed clause 3.8.22B has both moral and subjective connotations and lead to substantial uncertainties, risks and compliance costs for market participants. The words “has the purpose, or has or is likely to have the effect” impose an unreasonably onerous “effects” based measure, with fines, in a market in which the effects of an action are difficult to predict. The phrase “prejudicing” has uncertain subjective moral connotations in the context of a sophisticated and competitive wholesale market. To minimise market participants’ regulatory risk it’s meaning should be put beyond doubt. “Efficient, competitive and reliable” provides NECA with powers in relation to reliability that are properly the province of NEMMCO and should not be regulated by both. The Proposed Change does not define “reasonable cause”.

It is the view of NRG that the Proposed Change is inconsistent with key objectives of the Code. Specifically:

- (a) the Proposed Change runs counter to the first key objective of the Code (clause 1.4b(1)) which is:

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

- (b) is inconsistent with a key design principle of the Code (clause 3.1.4(b):

“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”

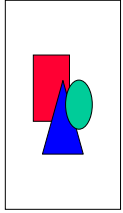
and,

- (c) to the extent that the proposed changes impose a competition regime which will apply to only one segment of the Australian economy, is inconsistent with the recommendations of the Hilmer Committee.

The Proposed Change will require NECA to adopt a policy enforcement function. This is clearly in conflict with the ACCC’s role in enforcing industry-wide competition laws and NECA’s primary function, which is to administer, propose and implement changes to the Code.

The role adopted by the Chief Executive Officer of NECA in being a strong public proponent of these changes appears to be in conflict with the function of “administer[ing] the ongoing development of, and changes to, the Code” (clause 1.5.2).

NRG believe that the Proposed Change is not in the public interest because it is both unclear and onerous; likely to result in increased compliance costs, inefficient rebidding due to the need to involve senior management in the rebidding process and a need to regularly seek legal advice. It would also increases the sovereign risk in new capital projects. This will lead to material



increases in long term costs for market participants and ultimately increased costs for end use electricity customers.

Conclusion

NRG reiterates our position that rebidding under the Code is an effective and efficient energy trading mechanism, which ensures the best utilisation of market resources.

The draft guideline along with the Proposed Change attempts to regulate anti-competitive behaviour in the energy market. We believe that this is in contradiction with NEC clause 3.1.4 (b). The TPA is the natural authority that presides over anti-competitive behaviour and attempts to codify this is inappropriate.

NRG fully endorses the submission being made separately by the National Generators Forum.

If you would like to discuss this matter further please contact Mark Williamson (General Manager Marketing and Strategy) on (08) 8372 8635.

Yours sincerely

Mark Williamson
General Manager Marketing and Strategy