

2 November 2001

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

Dear Mr Rawstron

NECA's New Rebidding Proposals

Our Submission to NECA

Tarong Energy refers the Commission to our submission to the NECA Code Change Panel dated 28 August 2001.

Although that submission was in the context of the then current three-hour rebidding proposal, much of our commentary on the requirements for an efficient electricity market and the absence of any cogent case for regulatory intervention regarding rebidding remain pertinent.

Tarong Energy also supports and adopts the submission in relation to this matter to be made by the National Generator's Forum (NGF).

NECA's Approach to the ACCC is Premature

The proposals that NECA has put to the Commission are, in effect, new proposals upon which the market has not been consulted. The assumption is that NECA continues to focus on the same perceived problem but its previous proposals have been dropped and replaced with a new set of proposals, which give rise to a totally different set of problems and issues. It is again most disappointing that NECA did not bring its new proposals back to the market before putting them to the ACCC, given that these changes have a significant impact on future investment risk in energy infrastructure.

The new "good faith" test does not contain any clear and workable *a priori* guide as to what conduct is and is not objectionable.

NECA has issued some draft "guidelines" but there is still no clear normative standard apparent. Without firm and normative guidelines the proposal being put to the ACCC has, in our view, no meaning and is certainly premature.

If guidelines are to be established, TEC believes they should certainly not be allowed to exist outside of the Code or indeed outside the protection of any authorisation the ACCC sees fit to give.

“Good Faith” Rebidding

“Good faith” cannot be an appropriate test for market behaviour in a competitive, wholesale market in which only the most sophisticated players participate.

Vigorous competition assumes that one person’s gain will be another’s loss and that the opportunity of profit and the fear of loss is supposed to drive efficient market outcomes. What place can good faith have between competitors in a wholesale market?

Good faith is about subjective intent, motive or purpose. Not what is done, but the motivation for what is done. To act in good faith is to act *bona fide* (with good intentions) and is the antithesis of acting in bad faith or *mala fides* (with bad or wrongful intentions or maliciously).

The examples given by NECA in its draft guidelines might lead one to deduce that NECA believes financial optimisation, opportunistic pricing, market arbitrage or gaming to be objectionable and / or that it believes any bid “greatly” above the cost of generation or bidding at or close to VoLL is bad or not in good faith. Can opportunistic price-taking (not involving any anti-competitive conduct) be described as having a malicious intent in a competitive market? Is pricing at VoLL in circumstances of interconnector constraint objectionable or is such pricing valuable as a signal to investment?

NECA’s concerns are pricing concerns, not system security concerns, and they have no existing mandate to control prices through this or any other mechanism.

There might be a case for prohibiting conduct detrimental to system security, but that is not the proposition being put by NECA in these proposals.

Reversed Onus of Proof

The reversal of the onus of proof sought by NECA through the proposed Code changes, in support of its powers to initiate and prosecute regulatory breaches, is unprecedented and unwarranted.

In conjunction with a near meaningless or, at least, non-normative good faith test, NECA would be put in the position of being able to say “We’ll know objectionable conduct when we see it”. Such unfettered power in the hand of a regulator would amount to an unacceptable regulatory risk and would be a strong and clear positive disincentive to investment in this market. Encouraging investment requires clear and unambiguous rules for that investment, and for the expected operating life of the investment.

NECA has made no case for any change in the current position, let alone an arrogation to itself of such power.

Conduct Prejudicial to the Market

The TEC position is similar in relation to the proposal regarding Conduct Prejudicial to the Market.

A “has the likely effect” test is uncertain and impractical. “Prejudice” has uncertain and subjective moral connotations.

The supposed exculpatory value of “unless with reasonable cause” is so imprecise as to be worthless.

Again, no clear norm of behaviour appears.

Economics

TEC agrees with the analysis provided as part of the NGF submission, which demonstrates that:

- the spot market response to periodic short term volatility demonstrates an effective competitive response to the demand, supply and competitive conditions ruling at the time of the events NECA is concerned by; and
- the spot market events identified by NECA have had no effect on the contract market, and therefore are treated by the market as normal events.

While NECA administers the Code that provides the rules for the operation of the spot market, the total electricity market encompasses both the spot market and the forward contract market. With only a partial viewing of the functioning of the electricity market it appears that in this instance NECA has misinterpreted the total market outcome.

In summary, Tarong Energy is not supportive of the proposed changes to rebidding put forward by NECA. No real problem will be solved. The efficiency of the market will not be improved. An additional and unnecessary risk to market participants engaging in normal competitive bidding and rebidding will be introduced, for no countervailing benefit that we have been able to identify.

We look forward to being able to discuss any of these issues with you if you believe that this would be helpful.

Yours sincerely

Alan du Mée
CHIEF EXECUTIVE OFFICER