



**NATIONAL ELECTRICITY CODE
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Date:	18 June, 2004	Pages:	10 (incl. this page)
Subject:	NATIONAL ELECTRICITY CODE: CHAPTER 9 DEROGATIONS		

Dear Kaye

Please find following correspondence to Sebastian Roberts from Stephen Kelly regarding the proposed amendments to Chapter 9, Part E of the National Electricity Code.

Best regards,

**Dominique Chivers
OFFICE ASSISTANT**



**NATIONAL ELECTRICITY CODE
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18 June 2004

Mr S Roberts
General Manager
Regulatory Affairs - Electricity
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

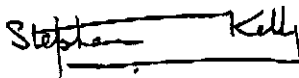
Dear Sebastian,

NATIONAL ELECTRICITY CODE: CHAPTER 9 DEROGATIONS

I enclose proposed amendments to Chapter 9, Part E of the National Electricity Code relating to derogations in New South Wales.

The application relates to the New South Wales regulatory framework for transmission regulation. In particular, New South Wales is seeking a derogation to clarify the basis for transmission pricing in New South Wales which, for TransGrid and Energy Australia, is to be based on the draft decisions of the ACCC for the five year period commencing 1 July 2004. Details of the proposed changes are contained in the attached letter of 17 June 2004 and application from the Honourable Frank Sartor, Minister for Energy and Utilities. You will note that the derogations are required prior to 30 June 2004 so that this is a matter of some urgency.

The Minister has formally consulted on these proposed derogations with the corresponding designated Ministers of the other participating jurisdictions and will forward any comments received in due course. As discussed by officers of the Minister's Department with members of our respective staff, NSW has requested that the derogation be treated as a minor variation and I submit it accordingly for the Commission's consideration.

Yours,

Stephen Kelly
Managing Director



New South Wales
TREASURY

Mr Stephen Kelly
Chief Executive Officer
NECA Limited
Level 5
41 Currie Street
Adelaide SA 5000

Contact: G Higham
Telephone: (02) 9228 5879
Our Reference:
Your Reference:

17 JUN 2004

Dear Mr Kelly

National Electricity Code Transmission Revenue Cap Derogation

The Hon Frank Sartor, Minister for Energy and Utilities, has written to you proposing a jurisdictional Code derogation from the National Electricity Code to clarify the basis for transmission pricing in NSW in the absence of an ACCC revenue cap decision before 1 July 2004.

New South Wales has an existing Chapter 9 derogation covering Transmission Network Service Pricing - interim arrangements. I request that NECA process the derogation proposed by Minister Sartor and present it to the Australian Competition and Consumer Commission as a minor variation to the existing derogation. Accordingly, NECA will not be required to forward a cheque to the value of \$10,500 to the ACCC that would otherwise be payable if NECA made an application for a derogation.

Staff from ACCC, NECA and NSW Treasury have discussed the proposed derogation and have agreed that it should be treated as a minor variation.

Yours faithfully

Peter Hoogland
Director
Energy Policy and Implementation



New South Wales

**MINISTER FOR ENERGY AND UTILITIES
MINISTER FOR SCIENCE AND MEDICAL RESEARCH
MINISTER ASSISTING THE MINISTER FOR HEALTH (CANCER)
MINISTER ASSISTING THE PREMIER ON THE ARTS**

Mr Stephen Kelly
Chief Executive Officer
NECA Limited
Level 5
41 Currie Street
Adelaide SA 5000

Dear Mr Kelly

National Electricity Code Transmission Revenue Cap Derogation

I am writing to propose a jurisdictional Code derogation from the National Electricity Code to clarify the basis for transmission pricing in NSW in the absence of an ACCC revenue cap decision before 1 July 2004.

The ACCC's current decision setting transmission revenue caps for TransGrid and EnergyAustralia expires on 30 June 2004. The ACCC has made draft decisions on TransGrid's and EnergyAustralia's revenue caps for the five year period commencing 1 July 2004. However, the ACCC will not make final determinations until after 1 July 2004.

The National Electricity Code sets out a methodology for setting transmission pricing such that the aggregate annual revenue requirement of the Transmission Network Owner does not exceed the maximum allowable revenue determined by the ACCC.

The ACCC has proposed that TransGrid and EnergyAustralia use its draft decision as the basis for setting 2004-05 transmission prices. However, if TransGrid and EnergyAustralia set prices on a basis not contemplated in the Code they face risk that their prices will not be validly charged to network users.

TransGrid and EnergyAustralia also face uncertainty about 2005-06 prices if any difference in the 2004-05 revenue cap between the ACCC's draft and final decision is adjusted in 2005-06 transmission prices.

The Code requires the ACCC to set a revenue cap for a minimum of five years. There is uncertainty whether the ACCC's final decision will meet the Code requirement if the decision is made after 1 July 2004 and expires on 30 June 2009. In the absence of an express provision in the Code empowering the ACCC to set a revenue cap retrospectively, this also creates a risk.

**New South Wales**

It is appropriate that the risks created by the ACCC's delay in making a final decision on the transmission revenue cap after the commencement of the regulatory period be addressed.

I seek a jurisdictional derogation under Chapter 9 of the National Electricity Code to remove the uncertainty for TransGrid, EnergyAustralia and their network customers that transmission prices may not have been set on the basis contemplated in the Code and to ensure that the ACCC's draft and final decisions can take effect under the Code.

The draft derogation is enclosed for NECA's consideration. The ACCC has been consulted in drafting the derogation and all matters raised by the ACCC have been incorporated.

I consider that there is significant public benefit from the derogation by:

- providing transmission price certainty for network users;
- ensuring that there is no overall detriment to network customers if there is a difference in the 2004-05 revenue cap between and the ACCC's draft and final decision, which will be adjusted in 2005-06 in accordance with the existing "unders and overs" mechanism in the Code; and
- enabling resolution of issues raised in the ACCC's draft decision in an appropriate timeframe in the ACCC's final decision.

I have written to other NEM Ministers seeking their comments they may have on the proposed derogation. I undertake to forward the Ministers' responses to NECA and the ACCC.

Please forward the draft derogation to the ACCC for its approval. For the reasons explained above, the derogation will need to be approved before 30 June 2004 to fully address the identified risks.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Frank Sartor', with a long horizontal stroke extending to the right.

Frank Sartor

Draft Revenue Cap Derogation

- (a) For the purposes of clause 6.2.4 of the Code, in respect of the regulation of *transmission service pricing* in New South Wales, the *revenue cap* for the financial year commencing on 1 July 2004 (the "Period") will be deemed to be:
- (1) for TransGrid, the *maximum allowed revenue* for the Period in the ACCC's "Draft Decision NSW and ACT Transmission Network Revenue Caps - TransGrid 2004/05-2008/09" dated 28 April 2004 (the "Draft TransGrid Revenue Cap Decision"); and
 - (2) for EnergyAustralia, the *maximum allowed revenue* for the Period in the ACCC's "Draft Decision NSW and ACT Transmission Network Revenue Cap - EnergyAustralia 2004/05 - 2008/09" dated 28 April 2004 (the "Draft EA Revenue Cap Decision").
- (b) For the purposes of clauses, 6.3 to 6.4, 6.5.1 to 6.5.6, 6.7.4 and 6.8 to 6.9 of the Code, the prices applying in the Period for *prescribed services* by means of the *transmission networks* and associated *common assets* in New South Wales applying to individual *transmission networks* in New South Wales during the Period, will be determined on the basis of:
- (1) the *aggregate annual revenue requirement* for TransGrid, the *maximum allowed revenue* for the Period specified in the Draft TransGrid Revenue Cap Decision; and
 - (2) the *aggregate annual revenue requirement* for EnergyAustralia will be the *maximum allowed revenue* for the Period specified in the Draft Energy Australia Revenue Cap Decision.
- (c) For the purposes of applying clause 6.4.3C for the financial year commencing on 1 July 2005, EnergyAustralia and TransGrid must subtract the *maximum allowed revenue* determined in the following paragraphs from:
- (1) in the case of TransGrid, the "Maximum Allowed Revenue" for the Period in any final decision which is expressed to apply to the Period; and
 - (2) in the case of EnergyAustralia, the "Maximum Allowed Revenue" for the Period in any final decision which is expressed to apply to the Period,
- and then:
- (3) if the result of that subtraction is an amount less than zero then, in addition to the other amounts mentioned in clause 6.4.3C(b), the absolute value of that amount must be deducted from the portion of the *aggregate annual revenue requirement* referred to in clause 6.4.3C(b); and
 - (4) if the result of that subtraction is an amount greater than zero then, in addition to the other amounts mentioned in clause 6.4.3C(c), that amount must be added to the portion of the *aggregate annual revenue requirement* referred to in clause 6.4.3C(c),
- prior to the application of interest in accordance with clause 6.4.3C(b) or 6.4.3C(c) as the case may be.
- (d) For the purposes of clause 6.2.4 of the Code, in respect of the regulation of *transmission service pricing* in New South Wales, a *revenue cap* applying to a *Transmission Network*

Service Provider determined by the ACCC in accordance with clause 6.2.4 of the *Code* for the period commencing on 1 July 2004 until the end of 30 June 2009 will be deemed to be for a period of five years notwithstanding that such *revenue cap* did not take effect until after 1 July 2004 or that such *revenue cap* was determined by the ACCC after 1 July 2004.

Draft

**Application to the
Australian Competition and Consumer Commission
for Minor Variation to Authorisation granted in respect of
National Electricity Code**

Application is hereby made under Section 91A of the *Trade Practices Act 1974* (Cth) for a minor variation of Authorisation described in section 1 below.

- | | | |
|-----|--|--|
| (a) | Name of applicant | National Electricity Code Administrator Limited (NECA). |
| (b) | Short description of business carried on by applicant | Administration of the National Electricity Code (the Code). |
| (c) | Address for service of documents on the applicant | Mr Stephen Kelly
Managing Director
National Electricity Code Administrator Limited
Level 5
41 Currie Street
ADELAIDE SA 5000
Phone: (08) 8231 6307
Fax: (08) 8213 6300. |
| (d) | Names and addresses | See Annexure B |
-

1 Introduction

Background

This application for a minor variation of an authorisation is made by NECA to the Australian Competition and Consumer Commission (**Commission**) pursuant to section 91A of the *Trade Practices Act 1974* (Cth) (**Trade Practices Act**).

On 10 December 1997, the Commission made a determination under subsections 88(1) and 88(8) of the Trade Practices Act granting authorisation to contracts, arrangements or understandings entered into by Code participants in the National Electricity Market, including NEMMCO, pursuant to the Code (**Original Determination**). That authorisation expires at the end of 31 December 2010. The Code is a code of conduct approved by the Ministers of the participating jurisdictions in the National Electricity Market as the initial code for the purposes of the National Electricity Law.

The Original Determination has been varied by subsequent Authorisations which, when taken together comprise the Authorisation (the **Authorisation**).

2 Summary of the Code changes

NECA proposes the following Code changes:

a jurisdictional derogation by New South Wales to clarify the basis for transmission pricing in New South Wales which, for TransGrid and Energy Australia, is to be based on the draft decisions of the ACCC for the five year period commencing 1 July 2004

The changes and the reasons for them are set out in more detail in the letter from the Hon. Frank Sartor, Minister for Energy and Utilities, New South Wales which is annexed at Annexure A to this application.

The Proposed Code Changes will change the effect of the Authorisation, but not materially. Accordingly, NECA seeks a minor variation to the Authorisation.

3 Code Changes require minor variation of Authorisation

NECA submits that, to the extent that the Proposed Code Changes detailed in the annexed Code Change Panel Report result in a change in the effect of the Authorisation, the change is not material.

Accordingly, NECA seeks a minor variation to the Authorisation in order to make the Proposed Rule Changes.

The Authorisation that needs to be varied because of the Proposed Rule Changes authorises:

- 1 the making and giving effect to contracts, arrangements or understandings entered into by Code Participants, including NEMMCO, pursuant to the Code as amended by the Code changes authorised by the Authorisation, where a provision of those contracts, arrangements or understandings would or might be an exclusionary provision within the meaning of section 45 of the Trade Practices Act and section 45 of the Competition Code;
- 2 the making and giving effect to contracts, arrangements or understandings entered into by Code Participants, including NEMMCO, pursuant to the Code as amended by the Code changes authorised by the Authorisation, where a provision of the proposed contracts, arrangements or understandings would or might have the effect of substantially lessening competition within the meaning of section 45 of the Trade Practices Act and section 45 of the Competition Code (including any deemed lessening of competition through price fixing arrangements within the meaning of section 45A of the Trade Practices Act); and
- 3 conduct engaged in relation to the sale of electricity in the National Electricity Market by Code Participants, including NEMMCO, pursuant to the Code as amended by the Code changes authorised by the Authorisation, that would or might constitute the practice or exclusive dealing within the meaning of section 47 of the Trade Practices Act and section 47 of the Competition Code.

The term "minor variation" is defined in subsection 87D(1) of the Trade Practices Act in the following terms:

minor variation, in relation to an authorization, is a single variation that does not involve a material change in the effect of the authorization.

NECA submits also that section 91A was inserted into the Trade Practices Act precisely to allow the Commission to deal with circumstances such as those presented in the present case. As stated in the Explanatory Memorandum to the Gas Pipelines Access (Commonwealth) Act 1998:

'There are, however, a number of shortcomings with Part VII which impede the ACCC's procedural flexibility to authorise certain conduct.' (paragraph 21).

'Amendments are proposed to address these deficiencies, and are particularly relevant to network industries (such as electricity), where industry codes are in effect or being effected. The amendments will enable the Commission to extend authorisation of an industry code to all new parties to the code without conducting a full re-examination of the Code. The amendments will also streamline the process for varying, revoking and substituting authorisations which will enable the Commission upon request to grant minor variations to an authorisation to encompass code variations or, at the request of the industry, revoke an authorisation and substitute a new one.' (paragraph 22).

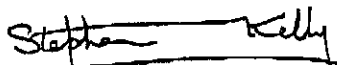
Further, subsections 91A(4) and (5) of the Trade Practices Act require the Commission not to make a determination authorising the minor variation:

- 1 If the application were an application for a new authorisation and subsections 90(6) and (7) were to apply to the application, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the extent to which the benefit to the public of the authorisation outweighs any detriment to the public caused by the authorisation;
- 2 if the application were an application for a new authorisation and subsection 90(8) were to apply to the application, unless the Commission is satisfied that, in all the circumstances, the variation would not result, or would be likely not to result, in a reduction in the benefit to the public that arose from the original authorisation.

Subsections 91A(4) and (5) contemplate that minor variations may involve some change to either the public benefit or the public detriment. They effectively provide that if the balance of benefit and detriment that existed at the time of the Authorisation is not tilted more towards detriment by the proposed variation in the application, the variation constitutes a minor variation for the purposes of section 91A.

NECA submits that the variation to the Authorisation sought by it for the purposes of the Proposed Rule Changes will not materially change the effect of the Authorisation because the Proposed Rule Changes

- do not materially alter the nature of the contracts, arrangements, understandings or conduct which are authorised by the Authorisation or the effect, application or intention of the Code;
- will not result in any reduction of the net benefit to the public obtained as a result of contracts, arrangements, understandings or conduct under or pursuant to the Code.



18 June 2004

Stephen Kelly
Managing Director