

# **Determination**

## **Application for a Minor Variation of Authorisation**

Lodged by NECA in respect of the

### **National Electricity Code**

#### **Site-Specific Distribution Loss Factors for Smaller Generators**

**17 November 2004**

**Authorisation Nos:**

A40074  
A40075  
A40076

**Commissioners:**

Samuel  
Sylvan  
Martin  
McNeill  
King  
Smith

**File no:** C2004/1533

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## Glossary

ACCC	Australian Competition and Consumer Commission
Act	Trade Practices Act 1974
code	National Electricity Code
DLF	Distribution Loss Factor
DNSP	Distribution Network Service Provider
GWh	Gigawatt-hour
MW	Megawatt
NECA	National Electricity Code Administrator
NEM	National Electricity Market

# 1. Introduction

On 29 September 2004, the Australian Competition and Consumer Commission (ACCC) received an application under section 91A of the *Trade Practices Act 1974* (Act) for a minor variation to the existing authorisations (Nos A40074, A40075 and A40076) of the National Electricity Code (code). The application was submitted by the National Electricity Code Administrator (NECA).

The existing authorisations were granted by the ACCC on 10 December 1997, and have been subsequently amended by a number of authorisations of amendments to the code, details of which can be found on the ACCC's website. The authorisations granted in respect of the code extend to all current and future participants in the National Electricity Market (NEM).

The application from NECA proposes a new clause 3.6.3(b1) to be incorporated into the code. The proposed code change will allow small generators of less than 10MW or 40GWh generating capacity per annum, to request a site-specific distribution loss factor (DLF) from the distribution network service provider (DNSP). The code change will require the generator to meet the reasonable costs of the DNSP performing the necessary calculation for a site-specific DLF.

The code change is designed to ensure that small generators have the ability to acquire a site-specific DLF on the same basis that currently applies under clause 3.6.3(b) of the code to large generating units (more than 10MW or 40GWhr capacity per annum).

The ACCC is satisfied that the proposed code change is suitable for authorisation using the minor variations provision of the Act.

Authorisation under Part VII of the Act provides immunity from court action for certain types of market arrangements or conduct that would otherwise be in breach of Part IV of the Act.

The ACCC has prepared this determination outlining its analysis and views on the application for authorisation of the code changes. Chapter 2 of this determination sets out the statutory test that the ACCC must apply when assessing an application for authorisation. Chapter 3 contains an outline of the ACCC's public consultation process. The ACCC's analysis of the proposed code changes is set out in chapter 4 and the ACCC's determination is in chapter 5.

## 2. Statutory test

The original authorisations were granted under sub-sections 88(1) and 88(8) of the Act.

Applications made under sub-section 88(1) of the Act are for authorisation to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act; and to give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the Act. Further sub section 88(6) provides that an authorisation made under sub-section 88(1) has effect as if it were also an authorisation in the same terms to every other person named or referred to in the application.

Applications made under sub-section 88(8) of the Act are for authorisation to engage in conduct that constitutes, or may constitute, the practice of exclusive dealing in accordance with the provisions of section 47 of the Act. Further, sub-section 88(8AA) provides that where authorisation has been granted under sub-section 88(8) and this particular conduct is expressly required or permitted under a code of practice, the authorisation applies in the same terms to all other persons named or referred to as a party or proposed party to the code. Authorisations may also apply to any corporation who becomes a party in the future.

The Act provides that the ACCC shall only grant authorisation if the applicant satisfies the relevant tests in sub-sections 90(6) and 90(8) of the Act.

Sub-section 90(6) provides that the ACCC shall grant authorisation to arrangements with the purpose or affect of substantially lessening competition or exclusive dealing arrangements (other than third line forcing) only if it is satisfied in all the circumstances that:

- the provisions of the proposed contract, arrangement or conduct would result, or be likely to result, in a benefit to the public; and
- that benefit to the public would outweigh the detriment to the public constituted by any lessening of competition that would, or would be likely to result from the proposed contract, arrangements or conduct.

Sub-section 90(8) provides that the ACCC shall grant authorisation to exclusionary provisions or third line forcing arrangements only if it is satisfied in all the circumstances that the proposed provision or conduct would result, or be likely to result, in such a benefit to the public that the proposed contract, arrangement, understanding or conduct should be allowed.

In considering whether or not to grant authorisation the ACCC must consider what the position is likely to be in the future if authorisation is granted and what the future is likely to be if authorisation is not granted.

If the ACCC determines that the public benefits do not outweigh the detriment to the public constituted by any lessening of competition, or that the public benefits likely to result from the proposed conduct or arrangements are not such that the proposed conduct or arrangements should be allowed, the ACCC may refuse authorisation or grant authorisation subject to conditions.

Section 91A of the Act provides that the ACCC may make a determination to vary an existing authorisation, to which sub-section 90(6) applies, if it is satisfied that the variation would not 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. Further the ACCC may make a determination to vary an existing authorisation to which sub-section 90(8) applies if it is satisfied that the variation would not result in a reduction to the public benefit arising from the existing authorisation.

The value of authorisation for the applicant is that it provides protection from action by the ACCC or any other party for potential breaches of certain restrictive trade provisions of the Act. It should be noted, however, that authorisation only provides exemption for the particular conduct applied for and does not provide blanket exemption from all provisions of the Act. Further, authorisation is not available for misuse of market power (section 46).

A more expansive discussion about the ACCC's authorisation process and the statutory test that the ACCC applies can be found in the *Guide to authorisations and notifications*, ACCC, November 1995.

### **3. Public consultation process**

The ACCC has a statutory obligation under the Act to follow a public process when assessing an application for authorisation.

The ACCC received the application to vary the existing authorisation on 29 September 2004. Notification of the applications and a request for submissions was placed on the ACCC's website<sup>1</sup> on 14 October 2004. Although not required under the Act, interested parties were asked to make submissions to the ACCC regarding their views on the issues of public benefit and anti-competitive detriment arising from implementation of the proposed amendments to the code. The ACCC did not receive any submissions.

A person dissatisfied with the final determination may apply to the Australian Competition Tribunal for its review.

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<sup>1</sup> [www.accc.gov.au](http://www.accc.gov.au)

## **4. Site-specific distribution loss factors for small generators**

### **4.1 Background**

Clause 3.6.3(a) of the code defines distribution losses as the electrical energy losses incurred in the conveyance of electricity over a distribution network. A DLF is defined in clause 3.6.3(b)(1) of the code as the average electricity energy losses for electricity transmitted on a distribution network between a distribution network connection point and a transmission network connection point or vital transmission node for the financial year in which they apply.

The code change originated with a derogation request from Hydro Power Pty Ltd (a small generator in Queensland). The derogation request was to allow it to receive a site-specific DLF from Energex Ltd (a Queensland DNSP) provided it met Energex Ltd's reasonable costs.

The NECA Code Change Panel decided to recast the derogation to a general code change enabling all small generators to request a site-specific DLF.

The code currently provides under clause 3.6.3(b) that all small generators receive an average DLF. This provision will remain. The cost associated with performing the average DLF calculation is not explicitly included in the connection costs for small generators.

### **4.2 Issues for the ACCC**

The ACCC believes the proposed changes to the code do not involve a material change to the market rules that have been authorised in respect of the provisions for distribution losses. The ACCC notes that the proposed amendments do not introduce substantially new procedures or remove existing procedures in relation the provisions of the code dealing with distribution losses.

The ACCC considers that the proposed code change does not give rise to significant benefits or detriments in terms of the overall authorisation of the NEM. Hence the ACCC considers the proposed amendments to the code can be dealt with under s91A of the Act as a minor variation to the existing authorisations of the code.

### **4.3 What the applicant says**

The NECA Code Change Panel agreed to extend the derogation requested by Hydro Power Ltd to all small generators. It states that doing so will have the desirable effect of making the code more readable for other generators in a similar situation.

NECA notes that Hydro Power Pty Ltd advised that if the code change is accepted the additional cost to them is minimal in comparison to the benefit of obtaining a site-



specific DLF. However NECA also notes that a number of small generators will receive little or no benefit relative to the cost of obtaining a site-specific DLF and for very small generators it may never be economically viable.

#### **4.4 What the interested parties say**

The ACCC did not receive any submissions from interested parties.

#### **4.5 ACCC's considerations**

The ACCC has considered NECA's application for a minor variation of the authorisations to the code and is satisfied that the variations would not involve a material change in the effect of the existing authorisations.

The ACCC notes that the code change provides for additional rights and obligations which derive benefits to the public. The ACCC considers the change will provide an efficient and more accurate outcome for small generators that choose to receive a site-specific DLF. A site-specific DLF will provide the small generator greater accuracy in calculating electricity supply costs. The ACCC believes such an outcome will enable those generators to effectively reduce their costs and increase their efficiency.

The ACCC does not believe there are any detriments associated with the proposed code change. The code change does not remove any existing rights and obligations. The small generator is required to meet the reasonable costs of the DNSP. Therefore the ACCC notes that no additional costs are imposed upon the DNSP as a result.

The ACCC believes the code change will provide increased clarity regarding the rights and obligations of market participants in relation to the market rules for distribution losses.

The ACCC has also reviewed the submissions made to NECA's Code Change panel and notes the issues that were raised. However the ACCC believes that the Code Change Panel had responded adequately to these matters in its report.

## 5. Determination

The ACCC is satisfied that the variations proposed to the authorisations A40074, A40075, A40076 (as amended) are minor variations as none of the proposed changes involve a material change in the effect of the existing authorisations.

The ACCC is satisfied that the minor variation proposed to authorisations A40074, A40075, A40076, which are subject to this application, 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 authorisations outweighs any detriment to the public caused by the authorisations; or
- the benefit to the public that arose from the original authorisations.

The ACCC therefore varies authorisations A40074, A40075, A40076 to include authorisation of conduct in relation to the proposed code changes and implemented changes, which are the subject of these applications.

The authorisations shall remain in force until 31 December 2010.