DECISION

Application to vary an access code

Variation to the National Electricity Market access code

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Commissioners:
Fels
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Shogren
Bhojani

Contents

Glossary

BCA/EWG	Business Council of Australia / Energy Working Group
Colin Taylor	C. Taylor & Associates Pty Ltd
EGA	Exempt Generation Agreement
NEC	National Electricity Code
NECA	National Electricity Code Administrator
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company Ltd
NRF	National Retailers' Forum
QCA	Queensland Competition Authority
QERU	Queensland Electricity Reform Unit
QNI	Queensland — New South Wales Interconnector
TPA	*Trade Practices Act 1974*

1. Introduction

On September 16 the Commission accepted as an industry access code chapters 1, 2, 4, 5, 6, 7, 8, 9 and 10 of version 2.3 of the National Electricity Code (NEC).

At the time of the Commission's access code decision, the Commission was also assessing an application to authorise a number of other code changes. As a number of matters in the authorisation process still had to be resolved, and as an access code decision was required in sufficient advance of the start of the National Electricity Market (NEM), the outstanding code changes were not included in the version 2.3 of the NEM code that was accepted as an access code. The basis of the advice was that the Commission should not accept elements of the NEM code, for the purposes of a Part IIIA access code, which the Commission had identified were problematic in an authorisation draft determination and were under consideration as part of a determination. On 19 October 1998, the Commission conditionally authorised these code changes. These authorised code changes were included into the market start, version 1.0, of the NEC.

Subsequently, on 5 November 1998, the National Electricity Code Administrator (NECA) lodged, under s 44ZZAA(6) of the *Trade Practices Act 1974 (TPA)*, an application to vary the NEM access code. As previously anticipated, the purpose of the variations are to bring the NEM access code into line with the authorised, market start version of the NEC. The current application to vary the NEM access code includes the code changes that were authorised on 19 October and those additional code changes that were required in order to meet the authorisation conditions. The code changes fall into four groups:

(a) Amendments to implement the authorisation conditions;

(b) Queensland derogations;

(c) Chapter 8 derogations; and

(d) An amendment to clause 1 of schedule 9G.

The code changes which NECA has included in their application to vary the NEM access code have all been recently assessed as part of the Commission's authorisation determination or they are the result of NECA complying with the Commission's authorisation conditions. These code changes have been subject to public comment through out NECA's code change processes and through the Commission's authorisation process.

2. The statutory test

Section 44ZZAA(6) of the TPA states that:

> The industry body may withdraw or vary the code at any time, but only with the consent of the Commission.

Section 44ZZAA of the TPA does not stipulate what statutory test the Commission is to apply, nor what public consultation procedures the Commission is to follow, to applications to withdraw or vary an already accepted access code.

However normal administrative law principles would apply. In this context it is relevant that in assessing whether to accept an access code, the Commission is required to follow a public process, by publishing the code and inviting submissions, and to have regard to

a) the legitimate business interests of providers who might give undertakings in accordance with the code;

b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

c) the interests of persons who might want access to the services covered by the code;

d) whether the service is already the subject of an access regime;

e) matters specified in regulations, in particular:

   i) government legislation and policies relating to ecologically sustainable development;

   ii) social welfare and equity considerations, including community service obligations;

   iii) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;

   iv) economic and regional development, including employment and investment growth;

   v) the interests of consumers generally or of a class of consumers;

   vi) the competitiveness of Australian businesses;

   vii) the efficient allocation of resources; and

f) any other matters the Commission thinks are relevant.

Part IIIA of the TPA does not provide a separate mechanism for parties to appeal the Commission's decision relating to an application to accept, withdraw or vary an access code. More generally, however, a person can apply to the Federal Court for an order or declaration concerning the validity of any action performed under the TPA [s.163A]. Furthermore, the Commission's decisions are subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1976*. Such a review would not go to the question of merit of the NEM access code but rather how the Commission's decision was made in terms of the provisions of the TPA and application of administrative law.

3. The application

The code changes that NECA have submitted impact, to varying degrees, on the access arrangements to the transmission and distribution networks. Some of the code changes relate to chapter 3 of the NEC and are beyond the scope of the NEM access code. Other of the code changes fall within the scope of the NEM access code but largely deal with matters relating to the operation of the wholesale spot market and not to the terms and conditions for network access. However, there are a range of code changes, such as the Queensland derogations, which do have an impact on the terms and conditions of access to the wires networks. This paper concentrates on these latter access code variations.

NECA state that, in order to comply with the authorisation conditions, the NEC was amended and that they are seeking to make consistent variations to the access code. Relevant amendments include:

- encompassing NECA within the codes dispute resolution procedures, except in relation to NECA's exercise of its enforcement powers and any of NECA's decisions which would otherwise be reviewable by the National Electricity Tribunal;

- changes to the definition of intending code participants from a person that has entered into binding commitments to a person that can reasonably satisfy NEMMCO that it intends to carry out an activity that would entitle it to be registered as a code participant; and

- ensure that decisions made by NECA and NEMMCO prior to market start, which would have been reviewable after the code commencement date, are deemed to be reviewable decisions at the code commencement date.

The variations also seek to include into the NEM access code the transitional arrangements governing the terms and conditions for access to the Queensland transmission and distribution networks. In general, the Queensland derogations:

- stipulate that the Queensland Competition Authority (QCA) is the regulator of distribution network pricing (in accordance with Queensland laws) and is the regulator for transmission network pricing, until 1 January 2002;

- clarify the QCA's responsibilities for the regulation of access and connection to the Queensland transmission and distribution networks, in particular that the QCA is to resolve disputes (in accordance with code rules) and regulate connection (the QCA's role in transmission regulation continues until 1 January 2002);

- modify certain network obligations and deem certain agreements to be connection agreements;

- deem the Queensland-New South Wales Inter-connector (QNI) to be a regulated inter-connector; and

- establish transitional arrangements for metering installations and metering standards (these metering derogations cease to have effect on a range of different dates but most cease on 31 December 2002).

The Queensland derogations also include transitional arrangements for network standards (eg frequency variation, voltage fluctuations and distortions, stability and fault clearance times). In order to comply with the Commission's earlier authorisation conditions, these derogations cease to have effect at the earlier of: the beginning of the interconnection date; or the end of 31 December 2002. The arrangements for regulating transmission network pricing in the period to 1 January 2002, were amended to require the QCA to publish the methodology prior to market start.

The access code variations also include a number of chapter 8 derogations, which generally stipulate technical requirements for generators in South Australia and New South Wales and that these derogations cease on 31 December 2002.

4. Views of interested parties

In early December 1998 the Commission sought public comment on NECA's application to vary the NEM access code through advertisements in the national press and by publication on the Commission's web site. The closing date for submissions was 21 December 1998. No new comments were received other than that which had been submitted in the course of the earlier authorisation process.

4.1 Dispute resolution procedures

In the authorisation application, it was argued that including NECA in the dispute procedures may undermine its enforcement role by giving participants an avenue to challenge enforcement actions taken by NECA.

In response to this application, Snowy Hydro Trading Pty Ltd stated that it did not support the removal of NECA from the dispute resolution regime:

> There are many instances when participants could have disputes with NECA, particularly in the areas where NECA approves NEMMCO recommendations or manages reviews itself. These areas can substantially affect participants and the market as a whole. Thus NECA should be subject to the same dispute resolution process as anyone else.

The National Retailers' Forum (NRF) also expressed concern that NECA would be less accountable for its formal and informal decisions and processes. The NRF pointed out that NEMMCO would be subject to the Code's breach and dispute provisions and that making NECA subject to the dispute process 'would increase the depth of transparency in NECA Code violation investigations and ensure that is subject to Code procedures and processes'. The NRF was also concerned that:

> there is little incentive on NECA to operate efficiently and little recourse if NECA's actions, intentionally or otherwise, cause commercial damage to a participant. By subjecting NECA to the dispute resolution procedure, as a means for Code participants to raise concerns, it may have the desirable effect of influencing the market behaviour of NECA.

4.2 Queensland derogations

In its submission to the authorisation decision, the Business Council of Australia'a Energy Working Group (BCA/EWG) indicated that it opposed the extension of the period of State regulation from that specified in the existing Code because of the effect this would have on the arrangements relating to the treatment of the QNI as a regulated interconnector. BCA/EWG argued that the earlier authorisation of QNI as a regulated interconnector is effectively conditional upon the Commission taking over regulation on 1 July 1999.

The BCA/EWG also argued that non-standard fault clearance times could be used to discriminate against new generation entrants and impose unacceptable technical constraints and operating limitations. The BCA/EWG requested that the proviso of 'as long as these times do not have material effect on power system stability and security' and similar provisions be extended to explicitly protect against the use of technical shortcomings inhibiting new participants from entering the industry.

South West Power argued that, to comply with clause 9.37.12, it and other rural network providers will have to incur large development costs that will impact severely on the corporations involved and their customers.

The Commission's technical consultant, Colin Taylor, highlighted a number of proposed clauses where standards would need to be reviewed when Queensland connects with the other States. Colin Taylor argued that these clauses are acceptable while Queensland is an isolated system but that they will need to be reviewed as part of the interconnection agreement.

5. The Commission's considerations

5.1 Dispute resolution procedures

In its 16 September 1998 acceptance of the NEM access code, the Commission noted that chapter 8 of the code deals with the responsibilities both NECA and code participants have for dispute management, code enforcement and code changes. All of these areas may affect the operation of the connection, use of system, augmentation and pricing aspects of the access code. In this light, the Commission noted that the code dispute resolution processes need to be adequate in terms of serving the public interest in establishing and maintaining the confidence in the administration and implementation of the code. Adequate dispute resolution processes would not only benefit code participants but all people affected by the use of electricity.

The Commission also noted that the dispute management and code breach processes need to establish fair and efficient processes. The Commission added that these processes need to be conducive to fair and workable outcomes which reinforce the objectives of the code, respect the interests of involved parties and take account of the wider interests of network providers and users, including the public interest. It is most likely that this can be achieved by ensuring these processes reflect established principles of natural justice and effective dispute management.

By including NECA in the coverage of the dispute resolution regime, these objectives can be seen to have been met by the proposed variation to the access code. The variations, which are NECA's response to the Commission's earlier authorisation condition, also take into account NECA's view that not all of its functions should be subject to the code's dispute resolution procedures (ie NECA's enforcement functions and decisions which are reviewable by the National Electricity Tribunal). Nevertheless, despite the positive nature of these code changes the Commission maintains its earlier concerns on the need for explicit principles and procedures of natural justice to guide NECA's enforcement actions.

5.2 Intending participants

As part of the Commission's initial decision on the NEM access code, the Commission argued that it should be clear that existing and intending code participants (including new connection applicants) are covered by the code and its dispute resolution procedures. From the original drafting of the code it was not clear that this was the case. The Commission required additional clarity as dispute resolution is likely to play an important role in the context of new connections. In particular, as the connection process is likely to be prone to disagreements, new connection applicants are likely to have disadvantages in bargaining power and new connections may represent new entry into the electricity market.

In response to these concerns, NECA altered clause 8.2.1(a) of the code to make it clear that the dispute resolution procedures include connection applicants and intending participants. However, revised wording in clause 2.7(a) would have required that any intending participant must satisfy NEMMCO that 'it has entered into binding commitments to commence an activity such that it would be entitled to be registered as a Code Participant'.

As part of the Commission's 19 October 1998 determination, the Commission expressed concerns that the term 'binding commitments' is not defined and that this may preclude

intending participants from initial registration under the Code and therefore from the rights and obligations outlined in clause 2.7(d). The Commission believed that this had the potential of undermining the benefit of registering as an intending participant if it entails that, until binding commitments of some kind are executed, such participants are not able to rely on the access or dispute procedures to protect their interests. Accordingly, the Commission imposed an authorisation condition that required the reference to 'binding commitments' be removed from clause 2.7(a).

In response to this authorisation condition, NECA has amended the wording of clause 2.7(a) so it now states:

> (a) Any person intending to act in any Code Participant category may register with NEMMCO an Intending Participant if that person can reasonably satisfy NEMMCO that ~~has entered into binding commitments to commence an activity such that~~ it intends to carry out an activity that would ~~be~~ entitle~~d~~ it to be registered as a *Code Participant*.

The Commission believes that the revised wording of clause 2.7(a) is in the interests of access seekers in particular in their ability to gain access to the code's dispute resolution procedures.

5.3 Validity of certain actions prior to market start

To make it consistent with the National Electricity Code, NECA has proposed to vary the access code so that actions taken by NECA, NEMMCO and other bodies prior to market start are deemed to be valid at market start.

The variation requires that the actions of the code bodies must be consistent with the obligations imposed on those bodies by the Code. Also, as part of the 19 October 1998 authorisation determination, the Commission indicated that these code bodies should be accountable in the same way for actions taken prior to market start as they are accountable after market start. To this effect, the Commission imposed a condition of authorisation. To comply, NECA have proposed an amendment to clause 1.13(c) which deems the actions of the code bodies to be reviewable decisions, where this is relevant.

The Commission believes that these code changes provide a seamless administrative regime from the period prior to market start and following the commencement of the NEM on 13 December 1998. In addition, code participants, where appropriate, are able to seek review of such actions (or improper failures to take action) under the same processes that would be available had the action been taken after market start. For these reasons the Commission believes that the variations to the access code are in the interests of network owners, access seekers and the broader Australian community.

5.4 Queensland derogations

On 17 September 1997, the Commission granted interim authorisation to the initial Queensland market arrangements. The term of the interim authorisation ran from 1 October 1997 until the earlier of either the commencement of the NEM or 31 December 1998.

On behalf of Queensland, NECA has included a range of derogations into chapter 9 of the Code that took effect from 13 December 1998 when the Queensland market became subject to the Code and the earlier interim arrangements ceased.

The Queensland derogations were authorised by the Commission on 19 October 1998, but were the subject of a number of conditions. NECA's application to vary the access code encompasses Queensland's original derogations as well as amendments to comply with the authorisation conditions.

The Commission's earlier concerns with the Queensland derogations centred largely on length of some of the derogations while other concerns included:

- the methodology to be used by the QCA in determining network pricing;
- the use of customer charges to subsidise transmission pricing arrangements in specific generator agreements; and
- technical and metering derogations.

5.4.1 Transmission network pricing

Regulation of transmission network pricing in Queensland will be undertaken by the QCA according to the methodologies applicable in that State immediately prior to market commencement (clause 9.38.1). The derogation expires on 31 December 2001.

As part of the Commission's 19 October 1998 authorisation determination, the Commission questioned whether the public benefit of the market arrangements would be enhanced by Queensland extending the transitional pricing arrangements for its transmission network, from 1 July 1999 to the end of 2001, and by not including the proposed regulation methodology into the code. These issues are also pertinent in the Commission's assessment of NECA's application to vary the access code.

In responding to the Commission's earlier concerns, the Queensland Electricity Reform Unit (QERU) argued that it was unnecessary to include such detail in the Code and that it is more appropriate for regulatory documents to be incorporated into the Code by reference. QERU provided the Commission with a confidential draft of the proposed network pricing methodology. It stated that the document reflects the network pricing arrangements in the Code and that the methodology, once final, would be public when gazetted under Queensland law.

Even though the requirements governing network pricing is a central part of any access arrangement, the Commission is satisfied that the regulatory methodology be incorporated into the Code by reference. The Commission also notes the BCA/EWG's concerns but accepts that the proposed transitional period lasting until 31 December 2001 is consistent with the transitional arrangements in the other jurisdictions and is not excessive. On this basis, the Commission believes that a re-examination of the QNI derogation is not warranted.

5.4.2 Transmission pricing arrangements for exempt generation agreements

Queensland's derogations (clause 9.38.5) establish the arrangement whereby Queensland transmission customers will fund the amount of any difference between the transmission charges applicable under an exempt generation agreement (EGA) and those under the transmission pricing methodologies contained in the code.

QERU argued that the derogation reflects the pre-existing arrangements in Queensland's interim market that were necessary given the operation of the EGAs and that the levy is

imposed on all transmission customers. QERU claimed that the derogation will increase the transparency of the arrangements and that the Queensland electricity industry and Queensland customers will be in the same position they were in prior to the advent of the NEM.

The Commission maintains its view that while the derogation is not ideal, it reflects the arrangements already in place. The parties to the EGA, the Queensland electricity industry and Queensland customers are therefore in the same position they were in prior to the advent of the market.

5.4.3 Technical derogations

The Queensland derogations establish a number of technical standards for the networks, generators and meters which differ from those technical requirements set out in the code. QERU argued that the derogations are necessary as some plant in Queensland may never, for technical reasons, be able to meet the code requirements.

In its 16 September 1998 decision to accept the access code, the Commission sought to determine whether the cost of compliance and/or enforcement of the code's technical requirements would:

- create any unjustified costs or inefficiencies for participants;
- unduly favour some participants relative to others;
- lead to inconsistent or discriminatory treatment of participants; or
- otherwise hinder access without yielding any net public benefit.

The Commission is concerned that entry barriers could be created by grand fathering existing facilities while requiring new facilities to meet code requirements. To minimise the entry barriers such technical derogations may create, the Commission believes that the participants should be obliged to upgrade their facilities to bring them more into line with Code requirements, but only where such upgrades are commercially justifiable. Moreover, new entrants should not be required to compensate for existing equipment that does not meet Code requirements.

This approach has been consistently applied by the Commission in examining the technical derogations of the other jurisdictions, which are already included into the NEM access code, and as part of the Commission's consideration of Queensland's derogations in its 19 October 1998 authorisation determination.

The purpose of chapter 9 of the code is to allow for derogations that enable participants to effect an orderly transition to the requirements of the code. For derogations of a more permanent or non-transitory nature, code participants can apply for a derogation under clause 8.4 of the code.

Consequently, in its earlier authorisation determinations and decision to accept the NEM access code, the Commission has concluded that the derogations should cease after a short transitional period, thereby allowing the facility owners (code participants) to seek a derogation under chapter 8 of the code.

In the current context, the Commission's 19 October 1998 authorisation determination noted that some of Queensland's technical derogations did not appear to have a sunset clause, meaning in some instances incumbents would have been derogated from the code indefinitely. The Commission was of the view that over the long term the anti-competitive effects of these derogations would outweigh any public benefits, and determined that they include a reasonable end date. The Commission also noted that inter-connection with the New South Wales, Victoria and South Australia system is likely to change system operating requirements in Queensland and some of the derogations may no longer be appropriate (eg those relating to equipment and supply standards and system security).

The Commission's purpose in imposing end dates on the technical derogations has not been to unilaterally decree that all facilities must upgrade to the code standards. Rather, the Commission notes that an alternative process for derogations exists and has recommended that if the technical derogations currently set out in chapter 9 of the code need to be extended (and QERU claimed some will) then the processes outlined in clause 8.4 of the Code should be followed.

In order to comply with the Commission's earlier authorisation conditions, Queensland's technical derogations have been amended to include an end by date that is the earlier of: the beginning of the interconnection date; or the end of 31 December 2002.

On the basis of the inclusion of the end dates, the Commission accepts the variation of the access code to include Queensland's technical derogations as they recognise the existing arrangements in Queensland and allows them to be modified in an orderly manner in the period to the interconnection or the end of December 2002.

As noted above, South West Power argues that clause 9.37.12 will impose enormous costs on rural network service providers. The Commission maintains the view, expressed in its authorisation determination, that it does not consider that it is in a position to amend technical derogations. However, it believes that NECA and/or the Queensland Government should consider reviewing the impact of the derogation on South West Power and the other distributors to which it has referred.

6. The Commission's decision

On 16 September 1998 the Commission accepted as an access code chapters 1, 2, 4, 5, 6, 7, 8, 9 and 10 of version 2.3 of the National Electricity Code. The Commission's decision was made on the basis that the access code forms an integral part of the reform of the electricity supply industry in southern and eastern Australia. The Commission also maintains its view that the NEM access code provides an acceptable balance of the legitimate business interests of network owners, access seekers and the broader public. Nevertheless, the Commission commented that there is much that could be done to improve the access arrangements in the NEM.

Consistent with this view, and as anticipated at the time, on 5 November 1998 NECA lodged an application to vary the NEM access code. In accordance with section 44ZZAA(6) of the TPA, the Commission consents to these variations of the NEM access code on the basis that the variations:

- act to protect the interests of network owners and access seekers by including NECA in the coverage of the dispute resolution regime;
- act to protect the interests of access seekers by removing the requirement that they need to enter binding commitments before NEMMCO can register them as intending participants;
- acts to promote the interests of network owners and users by deeming as valid those decisions taken by NECA, NEMMCO and other bodies that were made prior to market start. This variation seeks to provide a seamless administrative regime from the period prior to market start and following the commencement of the NEM on 13 December 1998;
- recognise the existing network connection and use arrangements that apply in Queensland and allows them to be modified in an orderly manner in the transitional phase through to either the beginning of the interconnection date or the end of December 2002.