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Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

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Improving consultation procedures in the Rules

The Snowy Hydro Group (Snowy Hydro Limited, Red Energy and Lumo Energy) welcome the opportunity to comment on the consultation paper from the Australian Energy Market Commission (the Commission) on proposed changes to consultation procedures in the National Electricity Rules (NER) and National Gas Rules (NGR).

The Snowy Group agrees that the prescribed processes to amend subordinate instruments under the NER and NGR can appear complex to some stakeholders due to differences across these Rules and there may be scope to simplify these procedures. We also see merit in a consistent process across the NER, NGR and National Energy Retail Rules (NERR).

However, we do not agree with **any** proposal to reduce the formal opportunities for market participants and other stakeholders to comment on changes to subordinate instruments. AEMO's rule change proposal would do this by defaulting to a single round of consultation on a draft instrument, except in very specific circumstances. Furthermore, we do not support changes that grant considerable discretion to regulatory authorities about the process they must follow when progressing regulatory initiatives.

Effective consultation is transparent and allows all interested stakeholders to consider how to respond to a specific problem or market failure in the most efficient and cost effective way. This has been a key feature of the electricity and gas markets' governance framework since they were established. Furthermore, a stable regulatory framework—which includes a transparent, predictable and accountable process for amending that framework—provides confidence to participants about the competitive and investment environment in which they are operating.

The Commission and AEMO cite a more dynamic external environment as a reason to streamline processes. However, we disagree and believe it is even more important to test views with stakeholders within this context. Regulatory authorities cannot be expected to understand how specific proposals may impact operations, commercial strategies or investment decisions in a rapidly changing competitive environment. Therefore, they must rely on input from stakeholders who understand the operational and commercial impacts, to make decisions that are in the best interests of consumers. It is the latter who ultimately will pay the price for the decisions made within the rapidly changing environment.

Preferred framework

The Snowy Group's preference is for a two stage consultation process in the vast majority of instances, and it should remain the default. We also maintain that this should apply equally to subordinate instruments. Compliance with changes to these instruments can generate significant costs for market participants. Furthermore, subordinate instruments have become a more common way of implementing regulatory measures, particularly in the retail space in recent years (with the Better Bills, Hardship and Benefit Change Guidelines as examples).

The purpose of the initial round should be to confirm the decision maker's understanding of the nature and extent of the problem and how best to proceed. This reflects the inherent information asymmetry between decision makers (i.e. regulatory authorities) and market participants about their systems, operations and processes, including how changes might affect market participants in different ways (depending on their business model and previous or planned investments, for example). This is an important step in assessing whether the benefits of any change to subordinate instruments is likely to outweigh the costs.

As such, the first stage allows participants to explain why a response might not be necessary, to propose other options for addressing the issue or to better plan ahead and implement changes to comply with revised obligations or processes in the most efficient way. A further benefit here is that the decision maker can better understand the broader context for the proposal, including how it aligns with the broader program of regulatory reform and with other commercial priorities. For example, a specific proposal could be delayed to allow industry to implement it at the same time as other measures or to avoid crowding out other initiatives that will generate benefits for consumers.

The second round of consultation on a draft solution then allows participants to assess the likely costs and benefits and for the decision maker to reach a more informed final decision. Starting a consultation at this point, as AEMO proposes, is highly problematic as it does not allow for the early identification and assessment of a broad range of feasible options. Not only is this likely to increase costs to consumers in the long term, single consultation processes also increase the likelihood that important details are missed. Further, it only provides a short turnaround period for participants to assess the changes and little transparency on when these changes are occurring.

We note a recent example where AEMO sought greater flexibility to amend Short Term (ST) Projected Assessment of System Adequacy (or ST PASA) obligations for market participants (ERC0332) by moving to a more principles based approach. The Commission suggests that a full rules consultation procedure is not necessary when changes to ST PASA procedures are 'minor or administrative'. As a first point, the Draft Determination does not indicate what minor or administrative changes entail and this creates uncertainty for market participants. Secondly, AEMO cannot realistically assess this without consulting directly with market participants. What AEMO perceives to be a minor change may actually generate a significant administrative burden or result in system changes for some or all market participants or have other unforeseen impacts.

Aside from this information asymmetry, however, decision makers have their own incentive structures, strategic plans, priorities and focus areas, which may not always be consistent with best-practice market design nor industry expectations. Furthermore, a



streamlined process could create an incentive for decision makers to select an approach based on the ease of implementation or the minimum resourcing requirement rather than what is the optimal response. An unintended consequence of this rule change would be that the Commission or other decision makers choose to implement more significant measures through subordinate instruments for ease, when it may be more appropriate to do so through rules.

This is also relevant in the context of the Energy Security Board's (ESB's) ongoing work to develop detailed recommendations for post 2025 NEM design. There is some ambiguity at present about the consultation process that the ESB must undertake when contemplating rule changes. For many, there is a sense that key decisions have been made by the ESB without industry engagement and that whatever solution is proposed may be inadequate for the market, riskier, and ultimately more expensive for consumers. This is relevant for transmission access and the implementation of some form of capacity mechanism in the wholesale market.

Within this context, the Snowy Group believes it is important to maintain appropriate governance arrangements in the NER, NGR, and NERR that entrench consultation and rigorous analysis of regulatory proposals. This would provide an important signal to market participants about the stability of the regulatory framework. Correspondingly, it would signal to consumers that their long term interests remain the cornerstone of the regulatory framework, where changes have a clear benefit to them.

The Commission's consultation paper refers to instances where the number of submissions in the first round of consultation has been small and suggests this could be justification for streamlining the process (at least in some situations). However, this should not necessarily be taken as a waste of resources. Participants tend to respond when they have significant concerns or believe a perceived problem has been mischaracterised. A limited number of responses could simply indicate that the decision maker has accurately and clearly explained the rationale for action and is proposing a reasonable and proportionate measure.

Expedited process

The Snowy Group's strong preference is for two rounds of consultation, with a streamlined process as the exception, rather than the default. Decision makers should only be able to avoid a two stage process if there is widespread agreement that an issue can be expedited on the grounds it is largely immaterial or particularly urgent.

We recommend there should be strict obligations on the decision maker to clearly explain why it believes it is appropriate to avoid an initial round of consultation. The decision maker must have regard to a clear set of principles that minimise its discretion as far as possible. There should also be a very low bar for stakeholders to object and therefore, revert to a two-stage process. The Commission's current process to expedite a rule change request under the NER, NGR and NERR is an example of how this could occur and we maintain it is equally applicable to subordinate instruments.

The consultation paper outlines AEMO's proposed principles for additional consultation within a framework where the default is a single round of consultation. The principles are reasonable but still rely on the decision maker's judgment. AEMO and other regulatory agencies will often have a different or incomplete view of the *'impact on persons likely to*



be affected by [the proposal]', the 'urgency of resolving the issue' and the 'complexity of the associated issues and the potential for alternative options'.

The following are additional factors that the Commission should consider when identifying an appropriate consultation process and could be included as additional principles:

- Whether a change would alter the competitive market landscape such as broadening or narrowing of potential industry players.
- Whether service or information provision characteristics for participants are materially altered.
- If changes have the potential to materially increase or decrease costs or earnings.
- Whether market transparency, information disclosure, accountability and reporting by decision makers is reduced.
- If the regulatory burden is likely to increase.


This would need to be tested with industry in some way at an early stage. The Commission points out that AEMO didn't include any details about the consultation plan that decision makers would need to prepare at the start of the process. At a minimum, that plan would need to take account of the additional factors we have listed above.

A further concern for us is AEMO's proposal to give more discretion to the decision maker about the consultation process it must follow. More specifically, AEMO proposes that industry should no longer be able to request an individual meeting, and that the decision maker can decide on the type of consultation it will undertake beyond written submissions. This means it could avoid input from working groups or advisory panels, or holding information sessions, for example, which have been common mechanisms for considering regulatory issues. This proposal grants too much discretion to a decision maker to determine the appropriate process and will reduce transparency about how a decision has been reached.

Consultation procedures under the NERR

The consultation paper also seeks views on consultation procedures under the NERR. The Snowy Group sees considerable merit in prescribing more detail about the factors that the Australian Energy Regulator (AER) must consider and the process it must follow when it develops a subordinate instrument. As mentioned, there have been numerous instances in recent years where the Commission has implemented a Rule that requires the AER to subsequently enact a regulatory initiative through a subordinate instrument. These determinations have covered significant issues with a substantial impact on market participants, such as hardship management and the structure and content of bills.

There should be similar opportunities for stakeholders to comment on proposed regulatory obligations, especially where the consequences of non-compliance are often the same as they are for the NERR. The Commission should also consider amending the Retail Consultation Procedure (Rule 173) to require the AER to consider factors such as the cost of implementation for market participants, and the potential impact on competition. There should be a very clear focus on the consumer impact of subordinate instruments, including the cost to retailers of implementation and then any contribution to retailers' cost to serve. These costs flow directly through to consumers in the form of higher prices and need to be accounted for, relative to any estimated benefits.



We acknowledge that the Commission's initial determination in these cases would have included cost benefit analysis of the final determination. However, a subsequent subordinate instrument is typically focussed on a more specific issue within that broader determination and is often more prescriptive. In our view, deeper analysis of the more specific proposal is warranted and this should occur through a prescribed process of consultation. At present, Rule 173 states that the AER must prepare a draft instrument *'after such consultation (if any) as the AER considers appropriate.'*

In the case of the AER's Better Bills Guideline, the AER and interested stakeholders were able to consider additional research on the issue that wasn't available to the Commission at the time of the final determination. This is another input to the broader assessment of the nature and extent of the problem the determination was trying to address and provides further guidance on feasible options. It would have been reasonable for the AER to undertake additional consultation prior to releasing a draft guideline. The Commission should consider enshrining this in the NERR if it continues to make Rules that instruct the AER to implement regulation through subordinate instruments.

Evaluation criteria

The Commission discussion of its evaluation framework for AEMO's proposal suggests that a more flexible consultation process that can be tailored to circumstances could lead to better quality subordinate instruments. It also acknowledges the importance of core principles of good regulatory practice, such as predictability and stability, simplicity, efficacy and transparency.

In our view, regulators could achieve a better balance of these factors and address concerns about whether regulation remains fit for purpose in a dynamic external environment through regular formal reviews. The ability for any entity to propose a change to a Rule or subordinate instrument is also important (and the latter should be retained, noting the Commission's questions about this point in its consultation paper).

Other mechanisms to ensure regulations remain fit for purpose include automatic sunset clauses or formally incorporating reviews into regulatory instruments, subordinate or otherwise. For example, the Department of Industry, Science, Energy and Resources committed to reviewing the Default Market Offer Code two years after its implementation and is now recommending another review after a further 3 years. This is due to the evolving nature of the competitive market and a range of other regulatory measures that are occurring simultaneously. We also note that some of the AER's retail guidelines were developed prior to the introduction of the Default Market Offer and should be updated to reflect the more recent policy initiative.

About Snowy Hydro

Snowy Hydro Limited is a producer, supplier, trader and retailer of energy in the National Electricity Market ('NEM') and a leading provider of risk management financial hedge contracts. We are an integrated energy company with more than 5,500 megawatts (MW) of generating capacity. We are one of Australia's largest renewable generators, the third largest generator by capacity and the fourth largest retailer in the NEM through our award-winning retail energy companies - Red Energy and Lumo Energy.



The Snowy Group appreciates the opportunity to respond to the consultation paper and any questions about this submission should be addressed to me by phone on 0438 671 750 or by email to geoff.hargreaves@snowyhydro.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'G Hargreaves', written in a cursive style.

Geoff Hargreaves
Wholesale Regulation
Snowy Hydro

