

The Energy Users' Association of Australia (EUAA) is the peak body representing Australian commercial and industrial energy users. Our membership covers a broad cross section of the Australian economy including significant retail, manufacturing, building materials and food processing industries. Combined our members employ over 1 million Australians, pay billions in energy bills every year and in many cases are exposed to the fluctuations and challenges of international trade.

As large energy users, our members are highly exposed to movements in both gas and electricity prices and have been under increasing financial stress due to escalating energy costs. These increased costs are either absorbed by the business, making it more difficult to maintain existing levels of employment or passed through to consumers in the form of increases in the prices paid for many everyday items.

This submission is based on external legal advice provided to the EUAA.

### SUMMARY

Under s 95 of the National Electricity Law (NEL), Alinta Energy has lodged with the Australian Energy Markets Commission (AEMC) a rule change request known as the 'Amending the administered price cap' (Proposal). The Proposal seeks to amend the administered price cap (APC) by doubling it from \$300/MWh to \$600/MWh in every NEM region, with a sunset period of 12 months (or a suitable period as determined by the AEMC). Alinta Energy requested that the AEMC consider the Proposal as an urgent rule under section 96(1)(c) of the NEL.

On 4 August 2022, when publishing notice of the Proposal pursuant to s95 of the NEL, the AEMC notified that it intends to expedite the Proposal under s96 as it considers the proposed Rule is urgent, subject to requests not to do so.

The Energy Users Association of Australia (EUAA) requests the AEMC to not expedite the Proposal under s96 of the NEL.

The EUAA supports a review of the APC, but our proposition is that it should be done with the appropriate rigour that comes with a normal two stage process. Only in this way can the Commission properly answer the question Alinta poses that the 'trade-offs ...are sufficiently balanced to meet the long-term interests of consumers' (p.5).

The reasons why the EUAA requests the AEMC to not consider the proposal as an urgent Rule are:

- determining the Proposal on an urgent basis removes several opportunities for stakeholder consultation and contribution to the process;
- the existing level of the APC does not imminently prejudice or threaten the effective operation or administration of the national electricity market, or the safety, security or reliability of the national electricity system, in the absence of other extreme conditions;
- where the prejudice or threat relies on certain other conditions in the market arising, those conditions need to be also "imminently" coincident in order for the existing rule to imminently prejudice or threaten the market or the system, and in the EUAA's view those conditions are not "imminent";

- The decision that could have potentially large impacts on consumers should not be made on the basis of ‘qualitative judgement’ or ‘intuition’ - it also requires comprehensive modelling;
- the comprehensive modelling required to determine whether \$600/MWh (or another number higher than the existing APC) is an appropriate level for the APC (e.g. as part of the current Reliability and Standards Settings review) will not be completed by the time of the final decision on 29<sup>th</sup> September; there should be an opportunity for that to be undertaken;
- there should be an opportunity for stakeholders to consider and make submissions upon the results of that modelling - under the expedited timetable this will not even be possible for the incomplete modelling that will be undertaken;
- there are many factors which will need to be considered and determined by the AEMC in order to make a Rule which is consistent with the National Electricity Objective, and stakeholders should have an opportunity to both make submissions in relation to those factors and also comment on the AEMC’s draft conclusions in respect of those factors;
- there are other alternatives that could be adopted to the proposed rule, and stakeholders should have the opportunity to both propose those alternatives and also consider the alternative proposals put forward by others;
- we do not consider that the situation is urgent enough or the risks so great that the Commission should make a decision based on incomplete information, just because the applicant’s proposal is for a ‘temporary’ increase for 12 months;
- given the application is for a ‘temporary’ increase, it seems inevitable that the process for reviewing the APC at the end of the ‘temporary’ period the AEMC chooses would again be expedited - we wish to avoid yet another ‘expedited’ process to set the APC for another ‘temporary’ period perhaps up to 1<sup>st</sup> July 2025 when the rule change from the current Reliability Panel review process applies;
- the chances of this subsequent expedited review to reduce the ‘temporarily’ higher APC are very low given that again there would be no time for the comprehensive modelling required and it would be argued that any reduction would be inconsistent with the Commission’s assessment criterion of “Principles of good regulatory practice: Predictability and stability: how do the proposed changes provide the market with predictability and regulatory stability?”;
- as there is opportunity for the AEMC to make an alternative rule, stakeholders should have the opportunity to consider any alternative rule proposed by the AEMC; and
- there is sufficient time and opportunity for the AEMC to consider the Proposal on a non-expedited basis and conclude its determination prior to the winter quarter of 2023, which at the present time is the earliest that the coincident market conditions could be said to be more likely than not to arise.

## DISCUSSION

### (i) Differences in process

Section 96(1) of the NEL permits the AEMC on an expedited basis (that is, as if the period of time within which the final Rule determination in respect of the relevant Rule must be published were 8 weeks from the date of publication of the notice under s95), where the AEMC considers one of the 3 grounds in s96(1) are established. The AEMC's notice under s95 notifies that the AEMC considers the Proposal is a request for an "urgent Rule", which is the ground in s96(1)(c).

Where a Rule change is made on a non-expedited basis:

- (a) the AEMC has an opportunity to hold a preliminary hearing in relation to the Proposal<sup>1</sup>
- (b) the AEMC has an opportunity to publish a draft Rule (within 10 weeks after the s95 notice of the Proposal)<sup>2</sup>
- (c) interested parties have the opportunity to make written submissions and comments on the draft Rule within a period specified by the AEMC, being a period not less than 6 weeks from the date of publication of the notice of the draft Rule<sup>3</sup>
- (d) interested parties have the opportunity to request a hearing in relation to the draft Rule<sup>4</sup>
- (e) the AEMC may (but need not) hold a pre-final rule determination hearing (not later than 3 weeks after the publication of the draft determination)<sup>5</sup>, and
- (f) the AEMC must make the final determination as to whether to make the Rule within 6 weeks after the period for written submissions or comments in relation to the draft Rule determination ends.<sup>6</sup>

Where the Proposal is considered on an expedited basis:

- (a) there is no requirement for a draft Rule determination and reasoning to be published by the AEMC;
- (b) there is no requirement for a public hearing prior to the publication of the draft Rule determination;
- (c) there is no requirement for the AEMC to allow for submissions on the draft Rule determination; and
- (d) there is no opportunity for stakeholders to request a pre-final Rule determination hearing.

The EUAA considers these to be valuable steps for consultation in order to ensure that this Rule is made in accordance with the National Electricity Objective.

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<sup>1</sup> Section 98(1) of the NEL

<sup>2</sup> Section 99(1)(a) of the NEL

<sup>3</sup> Section 99(4)(a) of the NEL

<sup>4</sup> Section 99(4)(b) of the NEL

<sup>5</sup> Section 101(1) of the NEL

<sup>6</sup> Section 102(1a) of the NEL

Instead of an 8 week timetable for the expedited process, the non-expedited process allows for an additional 6 weeks of consultation, and a further period for considering and determining the final Rule, of up to (but not necessarily) 6 weeks. Even if the non-expedited process took up the full additional 12 weeks, the determination could be complete well before winter 2023.

(ii) Imminent prejudice or threat

*An “urgent Rule” means a Rule relating to any matter or thing that, if not made as a matter of urgency, will result in that matter or thing imminently prejudicing or threatening-*

- (a) the effective operation or administration of the wholesale exchange operated and administered by AEMO; or*
- (b) the safety, security or reliability of the national electricity system.<sup>7</sup>*

The existing level of the APC does not imminently prejudice or threaten the effective operation or administration of the national electricity market, or the safety, security or reliability of the national electricity system, in the absence of other extreme conditions.

The existing level of the APC has operated for many years without prejudicing or threatening the national electricity market or the electricity system.

The administrative price threshold has been rarely breached in any region for many years now.

The Proposal does not describe the circumstances giving rise to the Proposal, or the need for its urgency. The Proposal only refers to “the current energy challenge in eastern Australia”, without saying what that is.

Nor has the AEMC described the circumstances which make the consideration of the Proposal urgent.

The EUAA considers the circumstances which arose recently in the market, and which perhaps constitute the “current energy challenge”, involved the coincidence of:

- (a) higher than normal winter demand;
- (b) high spot gas prices that exceeded the gas price cap on occasions;
- (c) a significant number of coal-fired generation plants being unavailable due to a combination of planned/unplanned maintenance exacerbated by COVID constraints and lack of coal ;
- (d) coal supplies being affected by flooding and wet weather conditions;
- (e) spot coal prices being higher than usual;
- (f) renewable energy outputs being lower than usual due to weather conditions;
- (g) hydro plant output limited by dam capacity; and

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<sup>7</sup> Defined in s87 of the NEL (emphasis added)

- (h) generator confusion on the market compensation process in the absence of an AEMO direction, leading some generators to withdraw capacity in order to be directed to generate.

The Macquarie Dictionary defines “imminent” as:

“likely to occur at any moment; impending”.

The Macquarie Dictionary defines “impending” as:

“about to happen; imminent”.

The legal advice given to the EUAA is that where the prejudice or threat posed by the existing Rule relies on certain other conditions in the market arising, those conditions need to be also “imminently” coincident in order for the existing rule to imminently prejudice or threaten the market or the system.

In the EUAA’s view the conditions which would cause the administered price threshold to be exceeded are not presently “imminent”. Particularly:

- (a) the current medium term PASA does not show any breach of the reliability standard over the next 12 months;
- (b) coal-fired generation availability is much improved and expected to continue that way for the foreseeable future (we assume that Alinta is not expecting any adverse reduction in its coal plant availability);
- (c) the availability of coal supplies has recovered;
- (d) recent measures agreed by Energy Ministers give further confidence about the availability of sufficient gas supply over the summer period when demand from non-generation consumers is considerably lower than winter; and
- (e) renewable energy outputs are expected to continue growing due to new connections and spring weather and do not show any imminent risk to the system or the market.

Even if some or all of those conditions were to arise, they would not necessarily prejudice or threaten the effective operation or administration of the national electricity market, or the safety, security or reliability of the national electricity system. The APC would apply, and compensation would be available on the terms of the Rules.

The Australian Energy Regulator (AER) has already written to Market Participants reminding them that they should not withhold capacity in order to be directed on by AEMO. Specifically, the AER has reminded participants that “they must not cause or significantly contribute to the circumstances causing a direction to be issued, without reasonable cause”.<sup>8</sup>

If the AER is correct, the circumstances of generators withholding capacity during the application of the APC should not arise again, and is certainly not “imminent”.

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<sup>8</sup> AER letter to Market Participants [23 June 2022](#)

What happens to consumer confidence in the Commission's expedited decision if the results of the current AER/ACCC review of generator behaviour is published after the 29<sup>th</sup> September and concludes that one or more generators acted in ways contrary to the rules during certain periods?

To summarise, the application of the APC is not imminent; the circumstances which would give rise to the application of the APC are not imminent, and the threat to the market or the system from the withdrawal of generating capacity if the APC was applied at \$300/MWh is no longer imminent.

(iii) \$600/MWh level, and modelling

The Proposal bases the \$600/MWh on a \$40/GJ gas price and this is used in the initial AEMC modelling presented in the Consultation Paper. The basis for using this number is that it is the gas price cap.

Whether or not the \$40/GJ is the appropriate gas price to be used in the modelling is a matter for debate. We note AEMO's announcement this week of its commencement next months of the five yearly review of the gas market parameters including the gas price cap which is wishes to complete before winter 2023. It appears that AEMO has not seen a risk to NEM operation from gas market parameters during summer 2022/23.

Whether or not \$600/MWh is the appropriate level will require modelling, analysis and contribution by all stakeholders. The Consultation Paper proposes a range of criteria in its assessment framework, the first of which is:

**Outcomes for consumers:** Will consumers face lower costs as a consequence of changes to the APC?

This requires comprehensive modelling to assess. The Consultation Paper discusses some results of very early modelling saying that 'further analysis' is required (p.14). The AEMC reported to the Forum on 17<sup>th</sup> August on progress with that modelling encouraging stakeholders to engage with the Commission. The EUAA is doing that, but we are limited in our ability to answer the questions the Commission has asked of us by the expedited timetable.

We expect further modelling results to be presented in the final decision. However, we believe that stakeholders should have the opportunity of considering the results of that modelling and analysis, testing it against their own analysis, submitting comments on the modelling and analysis, and also considering and responding to the submissions of others.

The expedited process will not sufficiently allow this to be certain that the National Electricity Objective will be met.

(iv) Alternative Rules

There is a considerable likelihood that \$600/MWh will not be the level of APC that meets the National Electricity Objective in all regions of the NEM.

There is a considerable likelihood that the AEMC will need to make an alternative Rule in order to meet the National Electricity Objective in all regions of the NEM. Stakeholders should have an opportunity of considering and making submissions upon any alternative Rule determined by the AEMC.

The expedited process will not sufficiently allow for this.

(v) What happens at the end of the 'temporary' increase in APC?

Alinta has proposed the increase apply to (p.4):

“...a sunset period of 12 months (or a suitable period as determined by the AEMC with consideration of other processes underway, such as the 2022 Reliability Standard and Settings Review)”

It is unclear how that would work in practice. Let's say the AEMC decides on an increase in the APC for a period of 12 months. What happens in the interregnum period, from the end of that 12 months until 1<sup>st</sup> July 2025 when the rule change resulting from the Reliability Standard Settings Review comes into force?

Will the Commission, in its 29<sup>th</sup> September decision, announce another (normal or expedited?) review to start at a date to ensure any further revision to the APC is in place when this 'temporary' increase ends? And will that review then proceed in parallel with the Reliability Panel's rule change for the period from 1<sup>st</sup> July 2025?

We would suggest that this complicated outcome is not consistent with many of the Commission's assessment criteria.

(vi) Other factors impacting on and impacted by the APC

There are many factors to be considered in the determination of the APC. These include:

- the impact upon OTC and ASX swap hedge markets;
- the impact upon OTC and ASX cap markets;
- the impact on the size of compensation payments and the consequent impact on consumers – is there an optimum level of compensation payments? And how much above zero is it?;
- the impact on retailers, their existing hedge book and future hedging strategies;
- the impact on direct market customers and others who have spot price exposure;
- the impact on residential and small business consumers of higher hedge prices, that will increase pressure for an inter-period adjustment in the Default Market Offer, with subsequent impacts on unregulated retail market offers;
- how the APC would operate under different gas price scenarios, different gas plant efficiencies and the gas generator gas contracting strategy;
- how the usage of distillate fuel would be impacted by a change to the APC, or drives the need for a change to the APC;
- coal contract prices and coal plant efficiencies; and
- the differences between regions.

A decision as important as this cannot be based on qualitative analysis and 'intuition'. The AEMC recognises this by their efforts to undertake quantitative research. But what can be achieved under an expedited process is very limited. Perhaps the AEMC may argue in its final decision on 29<sup>th</sup> September that there is a net benefit to consumers i.e. the increase in hedge prices from a higher APC is less than the costs of increased compensation payments, but consumers will not have the chance to understand how they came to that conclusion and test it.

These factors require detailed analysis, submissions from all stakeholders, the opportunity to consider the AEMC's draft conclusions on the relevance and influence of these factors, and the opportunity to make submissions on the AEMC's draft conclusions. An expedited process will not properly allow for this.

Do not hesitate to be in contact should you have any questions. We look forward to engaging with the AEMC over the coming months.

Kind regards,

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

Andrew Richards  
Chief Executive Officer