



Australian Energy Market Commission

Proposed Last Resort Planning Power Guidelines

Final Decision

(under clause 6A.20(b) of the National Electricity Rules)

The Last Resort Planning Power

The last resort planning power is provided for in clause 5.6.4(c) of the National Electricity Rules (Rules). It empowers the Australian Energy Market Commission (AEMC) to direct one or more Registered Participants to apply the regulatory test to a proposed transmission network investment project aimed at relieving forecast constraints in respect of national transmission flow paths between regional reference nodes (a potential transmission project). The AEMC may also direct a Registered Participant to identify such a potential transmission project for the purposes of applying the regulatory test. Clause 5.6.4 of the Rules also provides for other matters necessary for the exercise of the last resort planning power.

Last Resort Planning Power Guidelines

The last resort planning power guidelines (Guidelines) are made under Clause 5.6.4(o) of the Rules which require the AEMC to develop and publish guidelines for or with respect to certain matters which are set out in detail in that clause. In general terms, the Guidelines provide information about the AEMC's approach to exercising the last resort planning power under the Rules, and establish the framework within which the Inter-Regional Planning Committee (IRPC) may advise the AEMC in relation to the exercise of that power.

Clause 5.6.4(p) of the Rules requires the AEMC to develop and publish the Guidelines in accordance with the transmission consultation procedures contained in clause 6A.20 of the Rules.

Reasons for the Last Resort Planning Power Guidelines

During the course of the Rule change process for making the *National Electricity Amendment (Transmission Last Resort Planning) Rule 2007*

the AEMC identified a number of matters that it considered were matters of detail or implementation that were more appropriately the subject of guidelines (rather than inclusion in the Rules), or that were otherwise matters that would assist the market if the AEMC provided some guidance.

Clause 5.6.4(o) of the Rules sets out the areas for inclusion in the Guidelines. The proposed Guidelines include guidance on the following matters:

Appointment of persons to the Inter-Regional Planning Committee which includes the process the AEMC will undertake in identifying suitable persons that it will request NEMMCO to appoint to the Committee. This process is to ensure suitably qualified and experienced persons are appointed that are willing and able to assist in considering the issues associated with any decision to exercise the last resort planning power (section 4);

Advice provided by the Inter-Regional Planning Committee including the matters the AEMC may include in a terms of reference to the Committee in order to establish a transparent and robust framework for the advice that the Committee will provide to the AEMC. It is expected that the Committee's advice will play a key role in whether or not the AEMC exercises the last resort planning power (section 4);

Provision of information, public consultation and public reporting which addresses the procedure for public consultation, including on the Committee's advice, in order to ensure any exercise of the last resort planning power is transparent and all relevant issues are taken into consideration (sections 5, 6, 7). The Guidelines also reinforce the requirement in the Rules for the AEMC to report annually on any procedural steps it takes towards exercising the last resort planning power (section 8);

Nomination of a directed party in order to provide clear guidance to potential directed parties and other relevant persons as to how the AEMC and the Committee will make a decision as to which Registered Participant could be directed to apply the regulatory test to a potential transmission project (section 9). The Guidelines identify matters that the AEMC and the IRPC must consider when nominating or recommending a Registered Participant, including the location of the project and the benefits from the project.

The AEMC notes that the ability of directed parties to recover the costs of complying with the regulatory test is not addressed in the

Guidelines. This reflects the AEMC's decision in its Rule Determination on the *National Electricity Amendment (Transmission Last Resort Planning) Rule 2007* to assess claims for cost recovery on a case-by-case basis.

Consultation

On 15 March 2007 the AEMC published an explanatory statement and proposed Guidelines in accordance with clause 6A.20(b) of the Rules inviting submissions on the proposed Guidelines. The closing date for submissions was 1 May 2007. The AEMC received 3 submissions, from:

- TransGrid;
- Powerlink; and
- the Inter-Regional Planning Committee.

The AEMC has considered the matters raised in submissions. A summary of the relevant issues raised and the AEMC's response to those issues is contained in Attachment A to this final decision.

Changes between the proposed Guidelines and the Guidelines

The AEMC has adopted a number of the suggested amendments made in submissions and has amended the proposed Guidelines to give effect to these suggestions. The key amendments are:

- *An amendment to clause 4.2* of the proposed Guidelines that requires the AEMC to publish on its website any request it makes to NEMMCO to appoint any additional members to the IRPC under clause 5.6.4(f). This amendment was made in response to a request made in a submission to the AEMC.
- *An amendment to clause 4.3* of the proposed Guidelines to provide that the terms of reference requesting advice from the IRPC in relation to the LRPP, include the findings of the AEMC in respect of the matters listed in clause 5.6.4(h) of the Rules, and any other relevant considerations.

These amendments were made to the earlier draft of the guidelines to clarify concerns raised in submissions that the independence of the IRPC's advice to the AEMC may be called into question where the IRPC was required to have regard to the AEMC's earlier assessment of the matters under clause 5.6.4(h). Submissions also suggested that the Guidelines should provide guidance as to the matters the IRPC may consider in providing a description of the problem or a proposed transmission project.

The amendments reflect the AEMC's view that it does not envisage that the IRPC duplicate the AEMC's inquiries, but that it takes the AEMC's findings into account in forming its own views and providing advice. In matters to be included in a terms of reference the AEMC is seeking to achieve a balance between unduly limiting the IRPC's considerations, and creating concerns that it may have too wide (or too costly) a role in giving advice.

- *A new clause 4.5* requiring the AEMC to publish on its website any terms of reference in relation to a request to the IRPC for advice, and any extension of time and the reasons for the extension as agreed by the IRPC and AEMC. The new clause was inserted into the Guideline in response to a request made in a submission to the AEMC.
- *A new clause 7* that provides for confidential information to be treated in accordance with s 24 of the *Australian Energy Market Commission Act (SA) 2004*. The new clause was inserted into the Guidelines in response to a request made in a submission to the AEMC.

A summary of each of the relevant issues raised in submissions and the AEMC's response to those issues is contained in Attachment A to this final decision.

Attachment A

Issues Raised in Submissions and the AEMC's Response

Submitter	Issue	AEMC Response
Proposed Guideline Clauses 1.3 and 1.5	<p>1.3 <i>The LRPP Guidelines provide further guidance to Registered Participants and other interested stakeholders about the AEMC's processes when considering the exercise of the last resort planning power.</i></p> <p>1.4 ...</p> <p>1.5 <i>In addition to providing guidance to Registered Participants and other interested stakeholder about the AEMC's obligations when exercising the last resort planning power, the LRPP Guidelines also guide:</i></p> <ul style="list-style-type: none"> • <i>the IRPC in providing advice to the AEMC in relation to the exercise of the last resort planning power;</i> • <i>other persons from whom the AEMC may request information relevant to the exercise of the last resort planning power.</i> 	
TransGrid	<p>To ensure that the Guidelines are developed consistently with the Rules, clauses 1.3 and 1.5 should be amended to make it clear that the Guidelines are to be followed by:</p> <ul style="list-style-type: none"> • the AEMC (in the performance of its functions under Rules 5.6.4(d)(2) and 5.6.4(o)(1), (2) and (4)), • the IRPC (in the performance of its functions under Rule 5.6.4(o)(3) and (4)); and • a directed party (per Rule 5.6.4(l)(2)). 	<p>The AEMC is of the view that the Guidelines reflect that the Rules require the AEMC and directed parties to comply with the Guidelines. Clause 5.6.4(o) of the Rules imposes substantive obligations on the AEMC as to the matters to be included in the Guidelines, and the Guidelines provide guidance on these matters. A binding obligation on the IRPC to comply with the Guidelines can only be included in the Rules and, in any event, the AEMC does not wish to use the Guidelines to limit the role of the IRPC.</p>
Proposed Guideline Clause 4.2	<p>4.2 <i>"Where the AEMC decides to request NEMMCO to appoint any additional members to the IRPC under clause 5.6.4(f), the AEMC must:</i></p> <ul style="list-style-type: none"> • <i>Identify suitable persons who are capable of contributing additional expertise to the advice of the IRPC having regard to the matters in clause 5.6.4(f)(1) and (2);</i> • <i>Obtain the consent of any such persons prior to making a request to NEMMCO to appoint the person to the IRPC;</i> • <i>Consult with NEMMCO before making the formal request for appointment of a person to the IRPC".</i> 	
TransGrid	Insert an additional clause after clause 4.2 requiring the AEMC	The AEMC has decided to adopt Transgrid's suggestion and has amended

Submitter	Issue	AEMC Response
	to publish the formal request for appointment on its website.	clause 4.2 of the proposed Guidelines to incorporate a requirement that the AEMC publish its request for appointment on its website.
PowerLink	The transparency of appointments may be reduced if NEMMCO can reject an appointment of a member to the IRPC for the purposes of the LRPP advisory role. Therefore, the third bullet point in clause 4.2 should be amended to read: <ul style="list-style-type: none"> • <i>“Consult with the jurisdictional planning bodies, currently represented by the IRPC, before making the formal request for appointment of a person to the IRPC.”</i> 	The IRPC is constituted under clause 5.6.3 of the Rules which provides that NEMMCO may appoint other persons to the IRPC. The IRPC's existing membership currently represents the interests of any jurisdictional planning bodies. The purpose of appointing additional members to provide advice on the exercise of the LRPP is to ensure representation of wider market interests, in addition to the usual IRPC constituted under clause 5.6.3 (see clauses 5.6.4(f)(1) and (2) of the Rules). In light of this policy position the AEMC has decided not to adopt Powerlink's suggestion.
IRPC	The Guidelines should be amended to specify the process the AEMC will follow when identifying additional IRPC members and the capabilities it will look for in appointees. Specifically, the Guidelines should require any party appointed to the Advisory Panel to disclose any relevant financial interests in a potential project, or reveal any conflicts of interest.	The AEMC is of the view that the process for appointing additional IRPC members should not be specified in the Guidelines. This is a process issue that should be left with the IRPC and possibly NEMMCO. The AEMC has therefore not adopted this suggestion. Clause 5.6.3(b)(6) of the Rules was specifically added to deal with appointees under clause 5.6.4. in relation to conflicts of interest. This issue therefore has already been dealt with in the Rules.

Submitter	Issue	AEMC Response
Proposed Guideline Clause 4.3	<p>4.3 <i>The AEMC may, in a request to the IRPC for advice under clause 5.6.4(e), include:</i></p> <ul style="list-style-type: none"> • <i>a description of a problem relating to constraints in respect of national transmission flow paths between regional reference nodes ('the problem') or a potential transmission project that will address a problem ('the project');</i> • <i>the AEMC's assessment taking into account the factors listed in clause 5.6.4(h);</i> • <i>a request for the IRPC's view as to whether it is appropriate for the AEMC in all the circumstances, to exercise the last resort planning power in relation to that project or problem and the reasons for those views;</i> • <i>a request for the IRPC to provide recommendations as to which Registered Participants (if any) may be an appropriate directed party in the particular circumstances;</i> • <i>a date by which the advice is to be provided to the AEMC which is at least 3 months from the date of the request;</i> 	
TransGrid	<p>The process currently provided for in clause 4.3 may prejudice the independence of the IRPC's advice because it requires the IRPC to have regard to the AEMC's preliminary views on the matters under clause 5.6.4(h). To preserve the independence of the IRPC's advice to the AEMC and the AEMC's decision in accepting the advice, the second and third bullet points of clause 4.3 should be deleted and replaced with drafting that requires the AEMC to request:</p> <ul style="list-style-type: none"> • the IRPC's views on the factors listed in clause 5.6.4(h) of the Rules, having regard (among other things) to any information provided to the IRPC by the AEMC; • whether there are any other matters which, in all circumstances, the IRPC would recommend that the AEMC take into account in deciding whether or not to exercise its LRPP; and • the IRPC's recommendation on whether or not the AEMC should exercise its LRPP. 	<p>The AEMC has not, at the point of seeking advice from IRPC, formed a final view, but has carried out some inquiries that allow it to provide information to assist the IRPC. The views of the IRPC are sought, and are not dictated by the AEMC's initial findings.</p> <p>The AEMC does not intend that the IRPC would unnecessarily duplicate those inquiries but, rather, would take the AEMC's findings into account in forming its own views and providing advice.</p> <p>Clause 4.3 has been amended to clarify this issue. The clause now provides for the AEMC to submit a terms of reference to the IRPC to obtain advice, and include in those terms its initial findings for the IRPC's consideration.</p>

Submitter	Issue	AEMC Response
Powerlink	Amend the 5 th bullet point to read “a date by which the advice is to be provided to the AEMC not less than 3 months from the date of the request;...”	The objective of this clause is to ensure the IRPC has a minimum timeframe within which to provide its advice. Clause 4.3.5 has been amended to more clearly reflect this objective.
IRPC	The Guidelines should provide clear guidance on what the IRPC should consider in providing a description of the problem or a project. It is proposed that these be the same matters as the AEMC is required to consider by Rule 5.6.4(g) but clarifying the phrase “other matters that are relevant” to explain what it would capture. It should prevent any obligation upon the IRPC to consider extraneous matters or information that would impose unnecessary costs on the IRPC.	The proposed Guidelines sought to achieve a balance between unduly limiting the matters the IRPC can consider, and creating concerns that it may have too wide (or too costly) a role in giving advice. The AEMC considers that the amendments to clause 4.3 address the IRPC’s issue in part, but has otherwise formed the view that it is a matter for the IRPC to determine, on a case-by-case, the matters to which it should appropriately have regard in advising the AEMC
IRPC	Where the IRPC is asked to advise on the appropriateness of the AEMC exercising the LRPP, the Guidelines should clarify whether the IRPC is required to express an opinion on: <ul style="list-style-type: none"> • whether a practicable option exists to the identified problem; • whether alternative projects would need to be identified; • whether there is a practicable option, or alternative project, which is likely to satisfy the Regulatory Test. The IRPC submits that, if required to consider these matters, it will need to undertake an assessment similar to the Regulatory Test.	The proposed Guidelines sought to achieve a balance between unduly limiting the matters the IRPC can consider, and creating concerns that it may have too wide (or too costly) a role in giving advice. The AEMC considers that the amendments to clause 4.3 partially address the IRPC’s issue. The AEMC does not envisage that the IRPC undertake an assessment to the level that would constitute undertaking the regulatory test as this is a task for the directed party to undertake. Rather, the IRPC will undertake an assessment that would assist the AEMC in deciding whether to direct a party or parties to undertake the regulatory test in relation to a constraint on a national transmission flow path.
IRPC	In advising on the appropriateness of the AEMC exercising the LRPP, the Guidelines should specify that the IRPC can have regard to the ANTS and the transmission planning reports as well as applying their industry specific skill set to this and other information.	For the reasons noted above, the matters the IRPC is permitted to have regard to is not prescribed. Therefore, it is open to the IRPC to have regard to these classes of information. It is implicit that members of the IRPC are able to apply their industry-specific skills in preparing the advice to the AEMC..
IRPC	Due to the inherent conflicts of interest likely to arise in the IRPC being asked to advise as to who is an appropriate party, the preferable approach is to require the IRPC to provide advice on a range of possible parties that could undertake (or be involved in undertaking) the Regulatory Test, rather than identifying a single party.	Clause 4.3.4 of the Guidelines allows the IRPC to identify single, multiple or no party to be directed by the AEMC. Therefore, the AEMC considers this issue has already been addressed in the Guidelines.
IRPC	The Guidelines should be amended to provide that advice to be given by the IRPC to the AEMC is to be agreed by majority vote and that any dissenting opinions be documented within the publishable report or statement.	The decision making procedure to be followed by the IRPC is a matter to be addressed in the Rules. Therefore, although the Rules are silent as to the procedure to be followed, the AEMC is of the view that the Guidelines are not the appropriate avenue to resolve this matter.
Proposed	<i>If the IRPC, in preparing an advice to the AEMC, forms the view</i>	

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Guideline Clause 4.4	<i>that it requires further time, it may with the agreement of the AEMC, provide its advice on a later agreed date.</i>	
Powerlink	Clause 4.4 should be amended to require the AEMC to publish its reasons for approving a timeframe extension.	The AEMC has adopted this suggestion. The Guidelines have been amended to require the AEMC to publish on its website: <ul style="list-style-type: none"> • a request for advice to the IRPC and any terms of reference for that advice; • notice any extension of the time to provide the advice; • the reasons for the extension of time; and • the reasons given by IRPC for requesting an extension of time.
Proposed Guideline Clauses 5.2 and 5.3	<p>5.2 <i>If an advice of the IRPC includes a recommendation as to a person who may be nominated as a directed party, the AEMC must notify that person in writing of the IRPC advice and invite comment from that person.</i></p> <p>5.3 <i>If the AEMC considers that the advice of the IRPC affects other parties, it may notify those persons in writing of the IRPC advice and invite comment.</i></p>	
TransGrid	<p>The Guidelines should incorporate a requirement (on the basis of procedural fairness and in accordance with Rules 5.6.4(h)(2) & (3)) for the AEMC to:</p> <ul style="list-style-type: none"> • give notice to a person (and invite submissions from them) whenever the AEMC is itself considering giving the person an LRPP direction; • do this at a reasonable time (ie at least 28 days) before making any decision on whether or not to give that person a direction, and • take into account those submissions before it makes any such decision. <p>Alternatively, this could be achieved through amendments to clause 9.</p>	The AEMC does not decide to exercise the LRPP until after considering advice provided by the IRPC. The IRPC must undertake a consultation process in preparing its advice. The Guidelines provide for any directed parties to be contacted and invited to submit on the IRPC advice. The AEMC is of the view that there is no need for a further consultation process to be incorporated into the Guidelines and therefore has not adopted TransGrid's suggestion.
Powerlink	Amend clause 5.3 from "may" to "must" therefore requiring the AEMC to notify those parties that it considers are affected by the IRPC advice.	Clause 5 of the Guidelines provides for the IRPC's advice to be published on its website and for parties who may be nominated as a directed party to be notified. The AEMC position is that an express obligation to identify and notify all third parties who may be affected by the IRPC's advice is likely to be difficult to discharge. The AEMC considers that the publication requirements now incorporated into the Guidelines will enable third parties to assess whether they are affected by the IRPC's advice.
Proposed Guideline Clause 6	<p>6.1 <i>Provision of information for the exercise of the last resort planning power</i></p> <p>6.1 <i>The AEMC may, from time to time, request persons to provide information to inform the AEMC's decision</i></p>	

Submitter	Issue	AEMC Response
	<p><i>making in relation to the exercise of the last resort planning power.</i></p> <p>6.2 <i>The AEMC may request information from:</i></p> <ul style="list-style-type: none"> • <i>Registered Participants under consideration by the AEMC as a potential directed party;</i> • <i>other persons who may be affected by the exercise of the last resort planning power or who may be capable of providing relevant information to assist the AEMC in its decision making.</i> <p>6.3 <i>The AEMC will also seek expert advice where it considers this necessary, and will take into account information and comments received from interested stakeholders.</i></p>	
Powerlink	<p>The AEMC should initiate communications and try to resolve issues with affected participants before commencing the more formal process leading up to its use of the LRPP, such as seeking advice from external parties. Powerlink therefore recommends replacing Clause 6.2 of the guidelines with the following:</p> <p><i>6.2 Preliminary investigation in seeking advice on exercising the LRPP</i> <i>The Commission in determining the exercising of the LRPP must:</i></p> <ul style="list-style-type: none"> • <i>Notify and consult with relevant jurisdictional planning body/s.</i> • <i>Notify and consult with all jurisdictional planning bodies.</i> <p><i>6.2.1 Formal process in seeking advice on exercising the LRPP</i> <i>If the Commission requires further information after the execution of 6.2 the Commission must:</i></p> <ul style="list-style-type: none"> • <i>Notify and consult with the IRPC, as constituted by the LRPP.</i> • <i>Invite comments from other Registered Participants.</i> • <i>Publish the Commission's determination.</i> 	<p>The AEMC is of the view that the process provided for in the Guidelines is appropriate. The Guideline does not prevent the AEMC from endeavouring to resolve concerns about transmission network investment prior to initiating the process to exercise its last resort planning power. The AEMC has therefore not adopted Powerlink's suggestion.</p>
Powerlink	<p>The Guidelines should be informative as to how confidential information provided to the AEMC in its determination of exercising the LRPP will be treated.</p>	<p>The AEMC has amended the Guidelines to clarify that confidential information will be treated in accordance with the AEMC's obligations under s. 24 of the <i>Australian Energy Market Commission Establishment Act (SA) 2004</i>.</p>

Submitter	Issue	AEMC Response
Powerlink	Information published on preliminary investigations carried out by the Commission (ie suggested 6.2 above) should be aggregated to protect the reputation of organisation irrespective of whether or not it is subsequently found that the AEMC does not need to exercise the LRPP. The AEMC should only publicise participant information once a formal process in seeking advice on exercising the LRPP begins (see 6.2.1 above).	The AEMC has amended the Guideline to clarify that confidential information will be treated in accordance with the AEMC's obligations under s. 24 of the <i>Australian Energy Market Commission Establishment Act (SA) 2004</i> .
Cost recovery		
Powerlink	The Guidelines should inform participants on the cost recovery process of an LRPP directive. Therefore, the Guidelines should be amended to include criteria for assessing a claim for cost recovery by a directed party and, at a minimum, should include: <ul style="list-style-type: none"> • timeframes for the AER's approval of costs, the recovery of payment of the AER's approved costs; and for appeals; and • treatment of the payment eg as a capital expenditure; • rights for appealing against a decision in relation to costs. 	The reasons for not adopting this approach were set out in the Transmission Last Resort Planning Rule Determination that stated that the AEMC will consider applications for cost recovery on a case-by-case basis.