

10 September 2012

Mr John Pierce
Chairman
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

via email: aemc@aemc.gov.au

Dear Mr Pierce

Draft National Electricity Amendment Rule 2012 – Transitional Arrangements

The Energy Networks Association (ENA) wishes to make a submission to the Australian Energy Market Commission (AEMC) in regards to the transitional arrangements associated with the Draft National Electricity Amendment Rule 2012 (Draft Determination).

Given the broad range of issues still under consideration by the AEMC, the rule changes process creates significant risks and uncertainty for those business preparing regulatory proposals in the short to medium term. Many of our members are well into the process of developing their regulatory proposals based on the existing National Electricity Rules (NER). We are aware that during the consultation period numerous businesses have raised the issue of transitional arrangements.

The need for transitional arrangements is compounded by the substantial shift in discretion and introduction of numerous guidelines. These wide-ranging changes are acknowledged by the Commission¹:

“The draft rule provides for significant changes regarding capital expenditure incentives, the determination of the rate of return and the overall determination process.”

In the AEMC’s draft determination, it has been noted that a paper addressing the transitional arrangements would be provided by mid-September. It was also noted that it is the intention of the Commission to apply the provisions contained in the draft rules²:

“to the maximum extent possible for each NSP’s next regulatory determination, once a final rule determination is made in mid-November 2012.”

As such, there is a genuine concern amongst our members that the transitional arrangements have not been given a high enough priority in the consultation process to date and that businesses

¹ AEMC 2012, Economic Regulation of Network Service Providers, and Price and Revenue Regulation of Gas Services, Draft Rule Determinations, 23 August 2012, pg 218

² AEMC 2012, Economic Regulation of Network Service Providers, and Price and Revenue Regulation of Gas Services, Draft Rule Determinations, 23 August 2012, pg 218

will be procedurally disadvantaged in preparing proposals without a set of comprehensive rules or guidelines in place.

We note as part of the AEMC's Economic Regulation of Transmission revenues review and rule change process, the Commission was very keen to ensure that businesses were not jeopardised by the coincidence of the Rule change process with current determination cycles. Furthermore, the AEMC noted with respect of Powerlink that:

“the concurrent revenue reset process and the review of the transmission revenue rules has presented significant challenges for all parties”³ and “substantial investment in long term assets should not face unnecessary regulatory risk from lack of clarity or certainty about the transition to the new regime.”⁴

Therefore, in addition to providing transitional arrangements to NSPs in a timely manner it is important to assess them on principles that have already been established by the AEMC in previous processes. These proposed principles can be found as an attachment to this submission. It is important to note that these principles are provided as an initial list and there will be further issues that require consideration in due course.

If you have any questions in relation to this submission, or we can be of further assistance, please contact Jim Bain on 02 6272 1516.

Thank you for your consideration.

Yours sincerely



Malcolm Roberts
Chief Executive

³ AEMC, *Final Determination – Economic Regulation of Transmission Services*, November 2006, p126

⁴ AEMC, *Final Determination – Economic Regulation of Transmission Services*, November 2006, p123.

Proposed principles when considering how to appropriately transition from current Rules to Rules as amended by the AEMC in response to AER / EURCC Rule change proposals

The ENA believes that in respect of this Rule change it is important to reflect the statutory obligation that any amendment or repeal of a rule should not affect the previous operation of that rule in relation to past behaviour and should not apply to anything done or begun under that rule (i.e. consistency with NEL, Schedule 1, clause 33). The AEMC has previously interpreted this to mean that a Rule change should not apply to processes in which participants have proceeded on the premise that a prior provision of the Rules applies.⁵

The above provision is a reflection of the following principles:

1. people should have certainty as to the requirements that apply to them when undertaking actions, particularly where acting inconsistently with particular requirements has consequences (for example, non-compliance can lead to exposure to a penalty or some other kind of detriment); and
2. the fact that changes in a framework may be occurring should not result in any disadvantage to a person subject to the framework during the time that the framework is changing.

The principles set out above are for the benefit of the person undertaking the particular action or is particularly caught up in a change from one framework to another. In these circumstances, it may be open to the person who benefits from the principle to waive the benefit of that principle (for example a business may consent to the application of a Rule change which commences part way through its review process).

Specifically in respect of the AEMC current Rule change, the following principles should also apply:

3. The appropriate timing for the application of each element of the Rule change needs to be considered separately, having regard to when the relevant activity to which it applies is in fact performed, done or begun.
4. For activities undertaken for or as part of a regulatory determination process and that are activities which are central to the determination that will be made (e.g. forecasting of expenditure and determination of the rate of return), a Rule change should not apply to those activities where the relevant review process has already started as at the commencement date for the Rule change. For this purpose, the relevant review process starting point should be no later than the start of consultation of a Framework and Approach Paper, since preparation of the regulatory proposal is likely to commence no later than this.

⁵ AEMC, *Draft Rule Determination – National Electricity Amendment (Parameter values, equity beta and gamma) Rule 2008*, Rule Proponent – Energy Users Association of Australia, 28 August 2008, pp v-vi, 14.

5. Consistent with the above principles, without the consent of the party affected by the change in requirements, none of the new Rules, schemes or guidelines being proposed should apply to behaviour that was required to be undertaken before those Rules, schemes or guidelines were finalised (including preparation to comply with the requirement before it was amended): that is, any scheme / guideline should only apply to the actions or behaviour of an NSP to the extent that it was known that the scheme / guideline would apply at the time the relevant actions or behaviour was undertaken. For example:
 - the existing provisions for roll-in of actual capital expenditure at the end of a regulatory period should continue to apply to capital expenditure undertaken at least up until any repeal or amendment takes effect (and potentially later than this, until the expiry of any regulatory period in which this expenditure is undertaken), with any new scheme / guideline only to apply to expenditure undertaken after it takes effect; and
 - any new guideline for preparation of expenditure forecasts should only apply to forecasts for which preparation commenced after the new guideline has taken effect (and not to forecasts which are in the process of being prepared or are being reviewed by the AER).
6. It follows from the above that any assessment of compliance with a particular requirement must also be performed against the requirements that were actually in place at the time the activities undertaken to comply with the requirement (including preparatory activities) were in fact performed.
7. There should be an opportunity for adequate consultation on any proposed mechanisms before they are imposed.
8. An NSP should not be disadvantaged relative to other NSPs simply as a result of its reset process (or any part of that process) following on more closely from the commencement of Rule changes. All NSPs should have sufficient time to adapt their activities to accommodate any Rule changes.