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11 June 2015

Mr John Pierce  
Chairman  
Australian Energy Market Commission  
PO Box A2449  
SYDNEY SOUTH NSW 1235

Dear Mr Pierce *John*

**Re: Submission on National Electricity Amendment - Bidding in Good Faith (Draft Determination)**

The AER welcomes the opportunity to respond to the AEMC's Draft Determination on Bidding in Good Faith. Broadly speaking, the AER supports the AEMC's draft Rule as a means to address late rebidding.

We have reviewed the draft rule in detail. The draft rule addresses several key areas of concern arising from the *AER v Stanwell* case. Specifically, we welcome the inclusion of clauses in the draft rule to address the areas of timeliness of response and portfolio bidding.

However, the AER has identified several areas where we consider the drafting of proposed clauses 3.8.22 and 3.8.22A could be enhanced in terms of enforceability. The changes, some of which were raised at the AEMC forum on 18 May in Brisbane, are discussed below (and reflected in the suggested revised rule at Appendix A).

***The general prohibition***

Clause 3.8.22A(a) places a general prohibition on bids that are false, misleading or likely to mislead. Whether an offer, bid or rebid will be found to be misleading should be assessed by determining what the relevant conduct represents and then comparing that representation to the true position. In accordance with established competition law principles, the representation is determined by assessing the message conveyed to the target audience rather than by assessing the maker's intention.

In the present context where the AEMC is the rule maker, we consider that the question of what an initial offer, bid or rebid represents is a matter of market design that should be

determined in the rules rather than being left to a Court to decide in each individual case. To this end, we consider that this clause could be improved by stating what an initial offer, bid or rebid represents. The draft rule determination decision provides the following guidance on what the AEMC considers a bid to represent:

a continuing representation of their willingness to provide supply at the prices specified in them (page iv) or

the provisions would treat all bids and rebids as a continuing representation of a generator's intentions to supply electricity at particular prices. If a generator were to change its intentions for dispatch, and wished to make a rebid to reflect its changed intention, then its original offer would become misleading for so long as it failed to make such a rebid. (see page 8 and 30) or

This should encourage generators' offers to remain at all times reflective of their true intentions for dispatch and do not become misleading (see page 31).

However, a Court is not bound by this guidance and may not agree with it. Our suggested drafting is contained in (marked-up) clause 3.8.22A(a1) at Appendix A. Our drafting reflects the concepts from the draft rule determination that an offer, bid or rebid is final and will not be changed unless there is a change in material conditions and circumstances upon which it was based, in which case any further rebid will be made in accordance with the Rules.<sup>1</sup> If this change is accepted, the market will be entitled to rely upon this representation being made and any participant that does not honour the representation is at risk of being found to have engaged in false or misleading conduct.

### ***Deeming a bid as false or misleading***

The draft rule requires that in order to deem that a bid is false or misleading both limbs of the test in clause 3.8.22A(b) of the draft Rule would need to be satisfied. That is, to prove that a bid is false or misleading, the AER would need to be able to establish that the generator did not have a genuine intention to honour the bid **and** did not have a reasonable basis to represent to other participants that it would honour the bid, if the material conditions and circumstances on which a bid was based remained unchanged.

However, requiring both limbs to be satisfied is at odds with the application of the concept of false or misleading under established competition law principles, where only one limb of the test would need to be satisfied to establish that the relevant behaviour was false or misleading.

Accordingly, in draft clause 3.8.22A(b)(1) in Appendix A, "and" has been replaced with "or".

### ***Reasonably practicable***

Draft clause 3.8.22A(d) would require participants to submit a rebid as soon as "reasonably practicable" after the participant decides to submit a rebid in response to a change in material conditions. We consider that the obligation could be strengthened by removing the word "reasonably". "As soon as practicable" has been interpreted by the Courts and is not novel language. The expression means as soon as it is capable of being carried out or as soon as it is feasible to be done. It is slightly more absolute than reasonably practicable.

Further, we consider that "as soon as practicable" would be more consistent with market design principle 3.1.4(a)(2) i.e. the "maximum level of market transparency" rather than a "reasonable level of market transparency". Although there may only be a slight difference

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<sup>1</sup> We also made consequential changes to draft clauses 3.8.22A(b) and (b1).

between the two standards, given the nature of the dispatch cycle in the NEM the assessment of the conduct in these cases will involve conduct taking place in relatively short periods of time. In these circumstances, we consider that rebids should be made as soon as practicable.

Accordingly, in the attached suggested drafting, the "reasonably" has been removed from clauses 3.8.22A(d) and 3.8.22A(e).

### ***Patterns of behaviour***

Draft clause 3.8.22A(d) would be greatly assisted in proceedings if the AER were able to point to a provision similar to draft clause 3.8.22A(c), which confirms that in determining a matter the Court can have regard to, amongst other things, inferences that naturally arise from the conduct (including any pattern of conduct). Accordingly, in the attached suggested drafting, a parallel provision has been included as draft clause 3.8.22A(f).

### ***Late rebid reporting requirement***

The proposed requirement for participants to submit late rebid reports (subject to exemptions) for rebids submitted in the so-called "late rebidding period" raises a number of practical concerns for the AER.

The AER considers that the proposed requirement for participants to submit late rebid reports and for the AER to review such reports has the potential to place a heavy regulatory burden on participants and the AER alike. The proposed requirement would be likely to place an unrealistic expectation on the AER, given the likely high volume of information received. Furthermore, the AER considers that developing ex-ante guidelines to exempt participants from the reporting requirement under certain conditions would also be problematic.

As an alternative, an important element of our proposal is the requirement for participants to keep contemporaneous records of certain information relating to late rebids, to be kept in accordance with existing record-keeping requirements (see clause 1.9, i.e. for a period of seven years). This information would only be required to be provided to the AER upon receipt of a written request. We consider that this requirement would reduce the burden on participants, and allow the AER to target its reviews of late rebidding in determining potential breaches of clause 3.8.22A. We consider that without this requirement, it would be difficult for participants and the AER alike to accurately determine a trader's intentions at the time of making a rebid, absent any objective/readily observable change in material conditions.

Revised draft clause 3.8.22(d) in Appendix A seeks to give effect to the above. Giving weight to the importance of this proposed record keeping provision, it is suggested draft clauses 3.8.22(d) and (f) be civil penalty provisions.

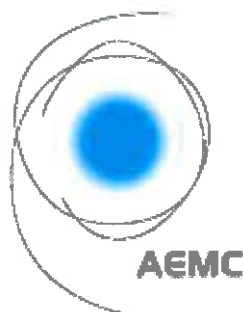
We would be pleased to provide further assistance to the AEMC on this important area of work. Please contact Peter Adams, General Manager, Wholesale Markets, on (03) 9290 1465 if you would like to discuss any aspect of this submission.

Yours sincerely



Paula Conboy  
Chair  
Australian Energy Regulator

## Appendix A



### **Draft National Electricity Amendment (Bidding in good faith) Rule 2015**

under the National Electricity Law to the extent applied by:

- (a) the National Electricity (South Australia) Act 1996 of South Australia;
- (b) the Electricity (National Scheme) Act 1997 of the Australian Capital Territory;
- (c) the Electricity - National Scheme (Queensland) Act 1997 of Queensland;
- (d) the Electricity - National Scheme (Tasmania) Act 1999 of Tasmania;
- (e) the National Electricity (New South Wales) Act 1997 of New South Wales;
- (f) the National Electricity (Victoria) Act 2005 of Victoria; and
- (g) the Australian Energy Market Act 2004 of the Commonwealth.

The Australian Energy Market Commission makes the following Rule under the National Electricity Law.

**John Pierce**  
Chairman  
Australian Energy Market Commission

## **Draft National Electricity Amendment (Bidding in good faith) Rule 2015**

### **1 Title of Rule**

This Rule is the *Draft National Electricity Amendment (Bidding in good faith) Rule 2015*.

### **2 Commencement**

This Rule commences operation on [COMMENCEMENT\_DATE].

### **3 Amendment of the National Electricity Rules**

The National Electricity Rules are amended as set out in Schedule 1.

## Schedule 1      Amendment to the National Electricity Rules

(Clause 3)

### [1] Clause 3.1.4      Market Design Principles

Omit clause 3.1.4(a)(2), and substitute:

- (2) maximum level of *market* transparency in the interests of achieving a very high degree of *market* efficiency, including by providing accurate, reliable and timely forecast information to *Market Participants*, in order to allow for responses that reflect underlying conditions of supply and demand;

### [2] Clause 3.8.22      Rebidding

Omit clause 3.8.22 in its entirety, and substitute:

#### 3.8.22      Rebidding

- (a) Prices for each *price band* that are specified in *dispatch bids*, *dispatch offers* and *market ancillary service offers* are firm and no changes to the price for any *price band* are to be accepted under any circumstances.
- (b) Subject to clauses 3.8.3A, 3.8.7A, 3.8.19(a) and 3.8.22A, a *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* may submit a *rebid* to vary:
  - (1) its *available capacity*, *daily energy constraints*, *dispatch inflexibilities* and *ramp rates* of *generating units*, *scheduled network services* and *scheduled loads*; and
  - (2) the *response breakpoints*, *enablement limits* and response limits of *market ancillary services*,  
  
previously notified in a *dispatch offer*, a *dispatch bid* or a previous *rebid*.
- (c) A *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* must provide:
  - (1) all *rebids* to *AEMO* electronically unless otherwise approved by *AEMO*;

#### Note

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

- (2) to *AEMO*, at the same time as the *rebid* is made:

- (i) a brief, verifiable and specific reason for the *rebid*; and
- (ii) the time at which the event(s) or other occurrence(s) adduced by the relevant *Generator* or *Market Participant* as the reason for the *rebid*, occurred;\_

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

**Note**

~~Clause 3.8.22(c)(2) applies in respect of any *rebid* submitted during the late rebidding period.~~

- (3) to the *AER*, upon written request from the *AER*, in accordance with the guidelines published by the *AER*, the information referred to in paragraph (c)(2), within the time specified in the *AER*'s request.

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

- (2a)-(d) A *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* must cause a contemporaneous record to be made, to the *AER*, in respect of any each *rebid* made during the *late rebidding period* by each individual responsible for the decision to *rebid*, which contains the following information: (unless an exemption granted under paragraph (ea) applies), a more detailed report (a *late rebid report*), to be submitted within the time after the *rebid* specified in, and otherwise to be prepared in accordance with, guidelines published by the *AER*, explaining:

- (i1) the material conditions and circumstances giving rise to the *rebid*;
- (ii2) the *Generator*'s ~~*Scheduled Generator*, *Semi-Scheduled Generator*~~ or *Market Participant*'s reasons for making the *rebid*;
- (iii3) the time at which the relevant event(s) or other occurrence(s) occurred; and
- (iv4) the time at which the *Generator* or *Market Participant* first became aware of the relevant event(s) or other occurrence(s).

**Note**

~~This AEMC will be recommending to the COAG Energy Council that this clause be classified as a civil penalty provision under the National Electricity (South Australia) Regulations.~~

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

- ~~(3)(e)~~ A Scheduled Generator, Semi-Scheduled Generator or Market Participant must retain the information referred to in paragraph (d) in accordance with the requirements of clause 1.9.

**Note**

Clause 1.9 is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations

- ~~(f)~~ to the AER, upon by may require, via written request, written request, in accordance with guidelines published by the AER, the information referred to in paragraphs (e) and (d); from the Generator or Market Participant and any such additional information to substantiate and verify the reason for a rebid as the AER may require from time to time, and the Generator or Market Participant must provide the required information to the AER within the time specified in the AER's written request.

**Note**

This clause is classified as a civil penalty provision under the National Electricity (South Australia) Regulations. (See clause 6(1) and Schedule 1 of the National Electricity (South Australia) Regulations.)

- ~~(ca)~~ The AER may, in accordance with guidelines published by the AER, exempt a Scheduled Generator, Semi-Scheduled Generator or Market Participant, or a class of Generators or Market Participants, from the obligation to submit a late rebid report under paragraph (e)(2a), subject to such conditions as the AER deems appropriate.
- ~~(dg)~~ The AER must, in accordance with any guidelines published by it, provide information provided to it in accordance with paragraphs (e)(2a) or (e)(3) (c)(3) and (f) to any Scheduled Generator, Semi-Scheduled Generator or Market Participant that requests such information, except to the extent that the information can be reasonably claimed to be confidential information.
- ~~(eh)~~ The guidelines referred to in paragraphs (e)(2a), (e)(3) and (ca) (f) (g) must be developed in accordance with the Rules consultation procedures and must include:



- (1) the amount of detail to be included in the information provided to *AEMO* under paragraph (c)(2), ~~and-~~
  - ~~(1a) the format and prescribed content of the late rebid reports to be provided to the AER under paragraph (e)(2a);~~
  - ~~(1b) criteria for the AER to grant any exemption under paragraph (ca) from the requirement to provide a late rebid report; and~~
  - (2) procedures for handling claims by *Scheduled Generators*, *Semi-Scheduled Generators* or *Market Participants* in accordance with paragraph (g) or clause 3.8.19(b)(2) that the information provided to the *AER* by such *Generators* or *Market Participants* under those clauses is *confidential information*.
- (fi) The *AER* must *publish* the guidelines developed under this clause 3.8.22 and may amend such guidelines from time to time.
- (gj) *AEMO* must:
- (1) subject to the *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* complying with paragraphs (c)(1) and (c)(2)(i) and (ii), accept the *rebid*; and
  - (2) *publish*, in accordance with clause 3.13.4(p), the time the *rebid* was made and the reason provided by the *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* under paragraph (c)(2)(i).

### [3] Clause 3.8.22A Variation of offer, bid or rebid

Omit clause 3.8.22A in its entirety and the heading, and substitute:

#### 3.8.22A Offers, bids and rebids must not be false or misleading

- (a) A *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* must not make a *dispatch offer*, *dispatch bid* or *rebid* that is false, misleading or likely to mislead.
- (a1) Without limiting paragraph (a), the making of a *dispatch offer*, *dispatch bid* or *rebid* is deemed to represent to other *Generators* or *Market Participants* through the *pre-dispatch schedules* published by *AEMO* that:
- (1) the offer, bid or *rebid* is the final offer, bid or *rebid* for the relevant *dispatch interval* and will not be changed, unless;
  - (2) the *Generator* or *Market Participant* decides to vary the offer, bid or *rebid* because it becomes aware of a change in the material conditions and circumstances upon which the offer,

bid or rebid are based, in which case any rebid or further rebid by the Generator or Market Participant will be made in accordance with the Rules.

(b) Without limiting paragraph (a) or (a1), a *dispatch offer, dispatch bid or rebid* is ~~taken deemed~~ to be false or misleading if, at the time of making such an offer, bid or *rebid*, a *Scheduled Generator, Semi-Scheduled Generator* or *Market Participant* does not have:

- (1) a genuine intention to honour; ~~and or~~
- (2) a reasonable basis to represent ~~to other Market Participants, through the pre-dispatch schedules published by AEMO,~~ that it will honour,

that offer, bid or rebid if the material conditions and circumstances upon which the offer, bid or rebid are based remain unchanged until the relevant dispatch interval. the representations made at the time of making the offer, bid or rebid, including but not limited to the representations made by reason of paragraph (a1).

(b1) In any proceeding in which a contravention of paragraph (a) is alleged, in determining whether a *Scheduled Generator, Semi-Scheduled Generator* or *Market Participant* made a dispatch offer, dispatch bid or rebid that is false, misleading or likely to mislead ~~had a reasonable basis to represent to other Market Participants that it would honour a dispatch offer, dispatch bid or rebid~~, a court must have regard to the market design principle set out in clause 3.1.4(a)(2).

(c) A *Scheduled Generator, Semi-Scheduled Generator* or *Market Participant* may be taken to have contravened paragraph (a) notwithstanding that, after all the evidence has been considered, the false or misleading character of the *dispatch offer, dispatch bid or rebid* (including the absence of either of the matters referred to in subparagraphs (b)(1) ~~and (2)~~) is ascertainable only by inference from:

- (1) other *dispatch offers, dispatch bids* or *rebids* made by the *Generator* or *Market Participant*, or in relation to which the *Generator* or *Market Participant* had substantial control or influence;
- (2) other conduct (including any pattern of conduct), knowledge, belief or intention of the relevant *Generator* or *Market Participant*;
- (3) the conduct (including any pattern of conduct), knowledge, belief or intention of any other person;

- (4) information published by *AEMO* to the relevant *Generator* or *Market Participant*; or
  - (5) any other relevant circumstances.
- (d) A *rebid* must be made as soon as ~~reasonably~~ practicable after the *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* becomes aware of the change in material conditions and circumstances on the basis of which it decides to vary its *dispatch offer* or *dispatch bid*.
- (e) In any proceeding in which a contravention of paragraph (d) is alleged, in determining whether the *Generator* or *Market Participant* made a *rebid* as soon as ~~reasonably~~ practicable, a court must have regard to:
- (1) the market design principle set out in clause 3.1.4(a)(2); and
  - (2) whether the *rebid* was made in sufficient time to allow reasonable opportunity for other *Market Participants* to respond (including by making responsive *rebids*, by bringing one or more *generating units* into operation or increasing or decreasing the *loading level* of any *generating units*, or by adjusting the *loading level* of any *load*) prior to:
    - (i) the commencement of the *trading interval* to which the *rebid* relates; or
    - (ii) the commencement of any *dispatch interval* within that *trading interval*.

**Note**

The AEMC will be recommending to the COAG Energy Council that clause 3.8.22A continue to be classified as a rebidding civil penalty provision for the purposes of the National Electricity Law. (See clause 6(2) of the National Electricity (South Australia) Regulations.)

- (f) A *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* may be taken to have contravened paragraph (d) notwithstanding that, after all the evidence has been considered, a determination of whether the *Generator* or *Market Participant* made a *rebid* as soon as practicable is ascertainable only by inference from the matters of the kind referred to in paragraph (c)(1) to (5).

## [4] Chapter 10      New Definitions

In chapter 10, insert the following definitions in alphabetical order:

~~late rebid report~~

~~A report provided by a *Scheduled Generator*, *Semi-Scheduled Generator* or *Market Participant* to the *AER* pursuant to clause 3.8.22(c)(2a).~~

*late rebidding period*

In respect of a *trading interval*, the period beginning 15 minutes before the commencement of the *trading interval*.

**[5] Chapter 10            Substituted definitions**

In chapter 10, substitute the following definition:

*rebid*

A variation to a bid or offer made in accordance with clause 3.8.22(b).

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