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Australian Energy Market Commission
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Dear Sir/Madam

Thank you for the opportunity to provide comments on the consultation paper released by the Australian Energy Market Commission regarding the bidding in good faith rule change.

In order to assist in the Australian Energy Market Commission's consideration of this rule change proposal, the South Australian Department for Manufacturing, Innovation, Trade, Resources and Energy considers this an appropriate time to clarify the intent of the rule change in regard to a number of specific issues raised in the consultation paper and by stakeholders.

Burden of Proof

It was not intended that the proposed rule change reverse the burden of proof or to imply that a generator has automatically bid without good faith unless it can provide records that prove otherwise. Rather the intent of the proposed rule change was to provide greater clarity regarding the meaning of the term good faith by limiting its interpretation to certain behaviour. Accordingly, the proposed Rules specifically state when a dispatch offer, dispatch bid or rebid would not be considered to have been made in good faith.

In the Federal Court's 30 August 2011 decision, clause 3.8.22A(b) was not considered to provide a thorough list as to what constitutes acting in good faith. The proposed rule change was intended to address this issue rather than reverse the burden of proof.

Further the Federal Court considered that the mere possibility that a participant could make a rebid did not mean that they had no genuine intention to honour the first bid if nothing changed and no such inference could be drawn merely because there had been a rebid in circumstances where nothing had changed.

Recasting clause 3.8.22A(b) in the negative is also intended to address this problem. If a trader makes a rebid when nothing has changed from the earlier bid, the new

wording more clearly allows an inference to be drawn that the original bid was not made in good faith.

The Department considers that these amendments do not, and were never intended to, reverse the burden of proof. The amendments only seek to provide greater certainty to the Australian Energy Regulator and market participants regarding the operation and interpretation of bidding in good faith.

Provision of Information

The rule change request seeks to provide a clear requirement for participants to provide the Australian Energy Regulator with accurate information to substantiate compliance with the bidding in good faith provisions. This proposal seeks to address issues with the accuracy and detail of information provided to the Australian Energy Regulator during an investigation.

In preparing this proposal it was expected that participants should already be keeping records of the reasons for submitting rebids, noting that participants may require those records at a later time.

The intent of the proposed rule change was not to require participants to significantly change existing practices relating to the information they keep. Rather it was to ensure that the Australian Energy Regulator is provided with accurate information and justification relating to any rebids.

The term 'complete' was used to express the Department's view that it is in the best interests of consumers for the Australian Energy Regulator to have sufficiently detailed information to allow them to conduct a robust investigation. It is not appropriate for a participant to use reasons to justify its bidding and rebidding at a later date, for example during court proceedings, which were not provided to the Australian Energy Regulator during the investigation stage.

Requirements for rebids

The proposed rule change is seeking to prevent a participant from varying its bids unless it does so in response to a significant and quantifiable change in material circumstances.

It was not the intent of the proposed rule change to introduce a requirement for participants to vary their bids only in response to publicly available data published by the Australian Energy Market Operator. For the avoidance of doubt significant and quantifiable changes in data published by the Australian Energy Market Operator was included as a justifiable reason for a rebid to occur. It intended to provide clear guidance that the non-occurrence of forecast changes might justify a rebid.

The inclusion of this specific justifiable reason also seeks to clarify that the non-occurrence of a forecast change might justify a rebid, however, the non-occurrence of a subjectively expected change should not justify a rebid.

The intent of the amendments was not for changes to the Australian Energy Market Operator's data to have any pre-eminence over changes in other material circumstances.

In relation to the timing of the rebid, it was not the intent of the rule change proposal to prohibit a participant from relying on a combination of circumstances to justify a significant and quantifiable change in material circumstances. The 'as soon as practicable' terminology was intended to operate once material circumstances come to the participants attention. Accordingly, if a combination of circumstances is used to justify material circumstances, the intent of the rule change proposal is that the 'as soon as practicable' apply in relation to the occurrence of the last circumstance being relied on in the combination.

I thank you again for the opportunity to provide comment on the AEMC's consultation paper and hope that the above information clarifies the intent of a number of specific aspects of the proposed Rule change.

Yours sincerely



Vince Duffy

EXECUTIVE DIRECTOR

18 June 2014