

22 May 2014

Australian Energy Market Commission
PO Box A2449
SYDNEY SOUTH NSW 1235

Dear Commissioners

Re: Consultation Paper on Proposed Rule Change to the Good Faith Rebidding Provisions
Project Reference Code: ERC0166

Stanwell welcomes the opportunity to make a submission in response to the AEMC's consultation paper on the rule change request submitted by the South Australian Minister for Mineral Resources and Energy (proponent) proposing changes to the provisions in the National Electricity Rules (NER) in relation to the good faith rebidding provisions.

The purpose of our submission is not to respond to the technical aspects of the Rule Change Proposal (which we understand will be addressed in submissions made by various industry bodies of which we are members) but rather to respond to assertions made in the Rule Change Request relating to Stanwell's conduct during the Federal Court case between the Australian Energy Regulator (AER) and Stanwell.

The first assertion we wish to comment on is the one made on page 9 of the Rule Change Request where the proponent states:

'Determining the subjective intention of an individual is difficult at the best of times. However, the judge also placed particular weight on the trader's testimony in Court, which was not consistent with previous information provided to the AER.

Accordingly, the decision implies that for the AER to monitor compliance with the rebidding provision, they need information regarding an individual trader's state of mind.

The AER currently uses the powers set out in section 28 of the National Electricity Law (NEL) in relation to the conduct of investigations. The ability of the Federal Court to place weight on new information (the trader's testimony) suggests that these powers do not ensure that the AER is provided with accurate and complete information, with which to assess compliance.

The key issue with the bidding in good faith provisions in this area is therefore that the information provided to the AER, which is used to assess compliance, may not be complete and accurate.'

This passage implies that there were aspects of Stanwell's response to the AER and its evidence to the Federal Court that were unsatisfactory. This implication is neither accurate nor justified.

During the hearing of the AER's case against Stanwell, the AER did claim that some evidence being given on behalf of Stanwell was inconsistent with information provided to the AER under section 28 of the NEL. Justice Dowsett reviewed these allegations in detail, stating (at paragraph [351] of his judgement):

'In my view ... the most useful evidence of the traders' state of mind is their oral evidence and their log entries. When traders were called to give evidence, it was for the applicant to put to them aspects of its case which were inconsistent with that evidence. ***To some extent, that was done, but little real inconsistency emerged.***' (emphasis added)

At paragraph [305] Justice Dowsett also stated:

'the re-examination of Mr Wallace with reference to the s 28 response created a favourable impression in that, properly understood, ***the response seemed to reflect the log entries and support the witness's evidence.***' (emphasis added)

To the extent that the AER felt it was hearing evidence at trial not provided in response to its section 28 notice, Justice Dowsett's comments on the AER's notice, at paragraph [210], are relevant:

'In Section 6 of the s 28 notice, the applicant sought information concerning each rebid. I shall not set out the questions in detail. Whilst some are as to purely factual matters, others are more problematic. For example, concerning factors affecting rebids, the applicant asked that the respondent 'quantify' each factor, where possible, explaining how it assessed each factor and how it assessed the quantum of each quantifiable factor. It also asked that the respondent identify the effect which each factor had "individually or collectively" on deciding the extent of the change made by the rebid. This is not a process which any decision-maker could easily undertake. Section 7 was also problematic. It referred to the information provided in the June response and sought very detailed particulars of that information. Keeping in mind that 92 rebids were then challenged, the demands were substantial. Further, the questions had the effect of focusing attention upon the earlier explanations rather than those which might have been given in answer to the Section 6 questions.'

The proponent argues that section 28 of the NEL does not empower the AER to obtain accurate and complete information with which to assess compliance. This contention is simply untrue.

Section 28 of the NEL empowers the AER to seek and obtain whatever information it needs to assess and enforce compliance with any provision of the NEL. If the proponent believes there were problems in the Stanwell case, they arose not because of any limitations on the AER's power, but because the AER sought to use that power to force Stanwell, in effect, to prove its innocence. The AER invited the Court to infer that Stanwell had acted in bad faith without any regard to the actual evidence of its traders as to what they did and why.

As to this approach, Justice Dowsett stated:

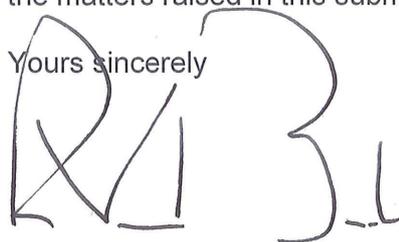
'[350] I must confess that I do not understand the first basis of the applicant's case. In the end, it seems to involve the complete dismissal of the traders' evidence and reliance only upon the facts **identified by the applicant** as being material to the impugned rebids, some of those facts being drawn from the June and s 28 responses. However the case must be decided on the **whole of the evidence**. ... (emphasis added)

The investigation tools given to the AER to enforce compliance with the NEL are, for the most part, consistent with the types of powers given to other regulators, including the ACCC. Parliaments do not confer these powers as a means of forcing market participants prove their innocence to the regulator. They are evidence-gathering tools which permit regulators to obtain the information needed to investigate and enforce compliance with the law.

On this basis, Stanwell reject the insinuations in the proponent's rule change request and do not believe they should be considered an appropriate source for initiating a change to the good faith bidding provisions.

Please do not hesitate to contact Tanya Mills on (07) 3228 4352 if you would like to discuss the matters raised in this submission further.

Yours sincerely

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

Richard Van Breda
Chief Executive Officer

