

Submission to the: Ministerial Council on Energy Standing Committee of Officials

Re: Streamlining the Code Change Process

Response to Discussion Paper



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1.0 Introduction

This submission responds to the Discussion Paper *Streamlining of the Code Change Process* released by the Ministerial Council on Energy Standing Committee of Officials (MCE) in March 2004.

This submission is from United Energy (Vic), Multinet Gas (Vic.) and Alinta Gas Networks (WA) ('the companies' hereafter). United Energy is an urban electricity distributor supplying some 600,00 customers in Melbourne's eastern suburbs. Multinet Gas is an urban distributor servicing some 626,000 gas connections in Melbourne's eastern suburbs and Alinta is a gas distributor which serves more than 440,000 gas customers in Western Australia.

The companies strongly endorse the move to a national regulatory approach as long as sufficient consultation is undertaken with the industry and the national approach is based on efficient and effective regulation.

2. Broad Policy Issues

The Ministerial Council on Energy December 2003 report commits Australian governments to strengthening the role of industry participants in electricity and gas Code change processes, consistent with recommendations of the Council of Australian Governments Energy Market Review.¹ The MCE Senior Committee of Officials has now issued its Discussion Paper *Streamlining the Code Change Process*.

The companies note that the Discussion Paper states that the proposed model is intended for changes to initially the National Electricity Code but that the model may be adapted for gas following considerations of outcomes of the Productivity Commission *Review of the Gas Access Regime*.² The company's comments in this submission are limited to comments on the appropriate Code change arrangements under the existing National Electricity Code with some general principles that may be used in gas.

The Ministerial Council on Energy has identified the need to clearly and transparently separate out the rule making and rule enforcement functions in the energy market, assigning these to an Australian Energy Market Commission (AEMC) and an Australian Energy Regulator (AER) respectively.³

¹ Ministerial Council on Energy *Report to the Council of Australian Governments – Reform of Energy Markets*, December 2003, p.5 and see also Council of Australian Governments Energy Market Review *Towards a Truly National and Efficient Energy Market – Final Report*, December 2002, p.92

² Ministerial Council on Energy Standing Committee of Officials *Streamlining the Code Change Process – Discussion Paper*, March 2004, p.6

³ Ministerial Council on Energy *Report to the Council of Australian Governments – Reform of Energy Markets*, December 2003, p.8-9

3. Objectives of the Code Change Process

The companies consider it is appropriate for the AEMC to manage the Code change process, subject to adequate input from industry participants impacted by Code amendments.

The companies fundamental concern with the section of the Discussion Paper on management of the Code change process relates to the proposed objectives of the AEMC. The Discussion Paper states:

The process for Code change needs to be considered within the context of the primary objective of the AEMC, which is to promote the long-term interests of consumers with regards to the price, quality and reliability of electricity and gas services.⁴

The companies consider that it is appropriate for industry participants to be given an opportunity to comment on any proposed objectives for the AEMC and AER and anticipates that this consultation will take place as the underpinning legislation is developed.

There are a number of concerns with the proposed objectives clause in the Discussion paper as the proposed objectives do not:

- specifically refer to the issue of adequate long-term investment in essential infrastructure;
- take into account the Government Response to Productivity Commission Report on the Review of the National Access Regime on access regulation;
- deal with the proposal for regulatory objectives in the Draft Report of the Productivity Commission on the Gas Access Regime;
- mention safety as a key issue for infrastructure development; and
- are more linked to access regulation than the code change process.

In light of these criticisms of the proposed objectives in the Discussion Paper a new set of objectives is needed which should be based on the following. To ensure that in gas and electricity markets:

- changes to the code result in a net public benefits to the public;
- code changes should be based on best regulator practice that encourages light handed regulatory options;
- the code change process will be cost effective and efficient;
- investment in essential long term infrastructure is encouraged;

⁴ Ministerial Council on Energy Standing Committee of Officials (March 2004), p.6

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- access is provided on sound commercial criteria
 - a cost-effective framework for dispute resolution is developed;
 - safety of employees and users is adequately protected in the context of a net benefit test.

The objectives of the AEMC and the code change process should be developed with greater industry consultation than currently available in this Discussion Paper and needs to take into account the latest regulatory developments and the relevant case law.

The company recommends that the MCE adopt a broader view of regulatory objectives for the AEMC and the AER based on the objectives outlined above.

4. Initiation of a Code Change Process

The companies generally support the intention of the Discussion Paper to allow multiple participants in the energy market to initiate Code changes. However there are a number of issues in the Discussion Paper, which require amendment.

Industry bodies representing energy market participants are not specifically included in the indicative listing of potential initiators of Code changes, where other parties with a less direct relationship to energy market participants are (ie. conservation organisations). The companies presume this is an oversight, which should be remedied in the final draft.

The Discussion Paper makes it unclear whether the AER or the ACCC can initiate Code changes. The companies consider that as rule enforcement or competition law assessment bodies this would be inappropriate, and the companies understand that it was the intention of Australian governments to separate these functions from market rule making.⁵

5. The Net Benefit Test

While the companies support the use of this test as the key hurdle for code changes to be accepted the companies' believe that the Discussion Paper should set out criteria for the linking of the cost benefit analysis with the level of the code change proposed.

This is required to ensure that small code changes are not required to have full cost benefit analysis that would increase the cost of code development. In the companies objectives for the AEMC and the Code Change process the objective of a cost effective code change process would ensure that these amendments must be made.

6. The AEMC and the Code Change Process

The companies do not support the AEMC having a pre-emptive right to reject a Code change proposal put forward on any grounds other than that the proposal is trivial or

⁵ Ministerial Council on Energy *Report to the Council of Australian Governments – Reform of Energy Markets*, December 2003, p.8-9

vexatious or would obviously not pass the net benefit test. The companies also support the provision of appropriate appeal arrangement to such AEMC decisions.

The Discussion Paper suggests that the AEMC will be granted wide discretion to reject a proposed Code change, under the broad criteria listed in the Paper.⁶ The companies note that many of these criteria involve the exercise of considerable subjective judgement, which potentially allows the AEMC to exercise an unaccountable 'veto right' over Code changes which is inconsistent with the proposed net benefit approach.

All Code changes should have the opportunity to be assessed by the wide range of market participants potentially impacted by the proposal. Providing scope for the AEMC to reject or amend Code changes without the consent of the original proponent creates accountability and governance issues and has the potential to undermine the principle that Code changes should be driven by market participants, not the AEMC who manage the process.

7. Working Groups and Industry Consultation

The companies consider that the Discussion Paper does not provide sufficient detail on the role, operation, membership and accountability of the Code change working groups referred to through the paper.⁷

The limitation of industry involvement in the Code change process to a right to make submissions and participate in *ad hoc* working groups formed at the discretion of the AEMC does not appear to be consistent with the clear policy intention of the MCE and Australian governments generally to strengthen the scope of industry participation in the development of the regulatory framework.⁸

Given the substantial capital investment and private property rights impacted on by the energy codes adequate consultation and participation is a critical aspect of best practice regulation. The Parer Energy Market Review strongly endorsed the position that a Code change process focused on the needs of industry and users and involving these players in those changes is critical for best practice regulation.⁹

8. Appeal arrangements

The companies support the proposals that decisions of the AEMC should be subject to judicial review on questions of law.

The Discussion Paper sets out the proposal to roll the existing access regimes for electricity and gas into the future AER – that is, that existing appeal provisions will not be altered.¹⁰

⁶ Ministerial Council on Energy Standing Committee of Officials (March 2004), p.9

⁷ See Ministerial Council on Energy Standing Committee of Officials (March 2004), Section 7.2 and Section 9.3

⁸ Ministerial Council on Energy *Report to the Council of Australian Governments – Reform of Energy Markets*, December 2003, p.5

⁹ Council of Australian Governments Energy Market Review (December 2002), p.92

¹⁰ Ministerial Council on Energy Standing Committee of Officials (March 2004), p.15

However, the companies believe that such an approach will lead to different appeal arrangements across regulated industry sectors and may not adequately take into account current state based appeal arrangements, especially when this is in different legislation.

The companies consider that the policy question of what is the appropriate scope for appeal rights is an important separate issue, that should be taken forward in the contexts of the Draft Recommendations of the Productivity Commission's *Review of the Gas Access Regime* and the future development of the national energy access framework.

The Productivity Commission's *Review of the National Access Regime*, broadly accepted by Australian governments, and the Draft Report of the Productivity Commission *Review of the Gas Access Regime*, both strongly endorsed the benefits of merits review in protecting and promoting investment, protecting private property rights, minimising regulatory error, and increasing transparency and accountability.¹¹

The companies consider that these benefits would be maximised by access pricing decisions across gas and electricity being subject to both merits and judicial review. The companies recommend that a position on appeal arrangements in the national market should be subject to a separate and detailed review with full industry consultation.

¹¹ Productivity Commission (September 2002), p.xxxix, Productivity Commission *Review of the Gas Access Regime – Draft Report*, December 2003, p.xlviii, and see also *Government Response to Productivity Commission Review of the National Access Regime*, February 2004 <www.treasurer.gov.au>