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Dear Sirs,

## **Response to Exposure Draft National Electricity Law**

Thank you for the opportunity to offer an initial response to the exposure draft of the National Electricity Law (**NEL**).

### **Background**

Powercor Australia and CitiPower own and operate electricity distribution networks in Victoria. Key issues arising from the Energy Market Reform for Powercor/CitiPower will be the provisions of the NEL and Rules relating to access to services provided by energy infrastructure and the form of economic regulation by the Australian Energy Regulator (**AER**). We however understand that these reforms are being separately progressed through:

- the MCE response to the Productivity Commission's *Review of Gas Access Regime* and the development of a national approach to energy access to be agreed by the MCE in the second quarter of 2005; and
- the development of an agreed framework for distribution and retail, with an options paper being released for public consultation in the first quarter of 2005 and the new regime to be agreed by the final quarter of 2005.<sup>1</sup>

Powercor/CitiPower has, in its submission to the MCE dated 29 October 2004, already expressed the view that embodying an access regime in legislative instruments is inconsistent with the concept of a voluntary access undertaking by infrastructure owners and more

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<sup>1</sup> MCE Energy Market Reform Program – Implementation Milestones v. December 2004

consistent with the 'effective' access regime approach under Part IIIA of the Trade Practices Act 1974. We repeat this submission and the view that any national approach to energy access should adopt the approach currently in place for gas access as the current 'best practice' regulatory model.

We seek confirmation from the Standing Committee of Officials (**SCO**) that any proposed national approach to energy access will be subject to a full and open consultation process, so that the owner of affected assets be aware of, and have input into, its development.

## NEL Issues

The following submission adopts selected headings from the MCE December 2004 Information Paper provided with the exposure draft new NEL (**Information Paper**).

### AER economic regulatory functions

We note that section 15 and 91 of the NEL prescribes minimum requirements for the AER when exercising its economic regulatory functions and limits the AEMC Rule making in relation to this role. While it is not clear from the documents released to date, we assume similar minimum requirements will be inserted in the NEL for distribution price determinations by the AER.

The minimum requirements for transmission in section 15(1)(b) and Section 15(2) are too vague and therefore do not appropriately define the obligations of the AER. In particular we recommend that section 15(b) (i) NEL be amended as shown below:

'(b) if the function or power performed or exercised by the AER relates to the making of a transmission determination , ensure that the regulated transmission system operator to whom the determination will apply, and any affected Registered participant, are, in accordance with the Rules -

(i) informed of all material issues under consideration by the AER;...'

While section 15(2) (a), (c) & (d) be amended as shown below, to ensure that when making a transmission determination the AER must:

'(a) ~~Provide an opportunity for~~ ensure a regulated transmission system operator ~~to recover~~ the efficient costs of complying with a regulatory obligation; and

(c) ~~'make allowance for~~ ensure an economic return on the value of assets forming part of the transmission system owned, controlled or operated by a regulated transmission system operator and proposed new assets to form part of that transmission system;' and

(d) have regard to any valuation of assets forming part of any transmission system owned, controlled or operated by a regulated transmission system operator applied in any relevant determination or decision.

(e) have regard for the efficient costs incurred by a regulated transmission system operator in providing any particular level or standard of transmission services.'

We recommend the above amendments to s15 NEL and equivalent amendments to section 91 NEL, and further seek SCO/MCE confirmation that similar provisions will be enacted in the NEL to govern distribution price determinations.

We support the concept in section 15(2)(a) that a regulated business should be entitled to recover the efficient cost of compliance with the regulatory obligation. However it is important that the definition of regulatory obligation be amended to include regulatory safety standards and that a similar provision is enacted for distribution.

We recommend the definition of 'regulatory obligation' be amended to include compliance with system safety requirements and any other regulatory obligations that have the potential to impose significant costs upon regulated businesses.

### **Rules which the AEMC will be able to make**

We agree with the concept that the AEMC must have a 'sufficiently broad' power to make Rules.<sup>2</sup> We however question whether section 35(1), (2) and Schedule 1 give a broad enough power to encompass changes for ancillary matters that assist the efficient operation of the national electricity market. In particular, as the AEMC is properly constrained by section 94(1)(b) from making Rule changes that would not be 'within the powers conferred on it', if a Rule change was proposed that was supported by market participants, but was not within the powers of the AEMC, a resulting Rule change proposal would necessarily be refused by the AEMC.

An example might be a change such as that currently under consideration by NECA to accommodate the proposed B2B Governance structure and B2B procedures, which on the face of it may not fall within the proposed powers of the AEMC under either section 35(1)(a),(b) or (c).

We recommend that Schedule 1 be amended to include B2B Governance and B2B procedures.

### **Authorisation and the TPA.**

It is categorically stated in the MCE Information Paper that giving the Rules force of law will 'obviate the need for those Rules to be authorised by the ACCC under Part VII of the TPA.' We refer the MCE to our prior submission dated 29 October 2004, the submission's attached legal advice and commentary on the advice of Hutley SC and Sarah Prichard.

As outlined in that prior submission, we remain concerned that residual liability under Part IV TPA will exist, particularly as the advice of Hutley and Prichard states it is necessary to both give the Rules force of law and for market participants discretionary actions under the Code be either mandated or removed. As this second requirement of Counsel's advice appears not to have been implemented (except with respect to discretionary conduct of NEMMCO from the Rules), actions of market participants that are contemplated by the Rules and NEL, but not required by them, could still result in TPA liability for market participants.

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<sup>2</sup> Page 15 MCE Information Paper, December 2004.

We recommend that the NEL be amended to include an express exemption from liability under Part IV TPA, as allowed under section 51 TPA, for conduct of market participants that is required by, or is connection with, the NEL and NER. Alternatively we suggest that the MCE seek further advice from its Senior Counsel as to whether the approach adopted for the NEL and NER achieves the result sought.

### **Review of AER decisions**

We note that the Information Paper appears to make a distinction between rights of review of decisions of the AEMC and NEMMCO and those relating to decisions of the AER. In particular it is noted that 'further consideration' of merits review for decisions of the AEMC and NEMMCO is not precluded; while for the AER the statement is made that precluding merits review is justified as being 'consistent with the situation' for the ACCC's transmission determinations<sup>3</sup>. We submit that merits review is necessary for the decisions of the AEMC, NEMMCO and the AER, but they are clearly most necessary and appropriate for decisions of the AER as these are the decisions which impact upon the return network owners can derive from their regulated businesses.

The limitations of judicial review are generally acknowledge and include that, even if grounds for review are established, the likely remedy is that the decision will be remitted to the original decision-maker for re-consideration. This can create the perception that the original decision-maker will reach the same decision, albeit by a process better able to withstand judicial scrutiny.

Powercor Australia and CitiPower are strongly of the view that merits review of significant regulatory decisions remains a cornerstone of any best practice regulatory regime. This is particularly the case for a decision maker such as the AER, which will be making price determinations affecting the return on multi billion dollar assets for 5 year regulatory periods. We submit that the MCE should acknowledge that regulators can and do make mistakes, to have a regulator able to make a regulatory decision that may be effectively entrenched for 5 years, without allowing owner's of affected assets some right of merits review of that decision is contrary to natural justice and completely removed from accepted regulatory best practice.

By way of example of the potential for any regulator to make mistakes, in the Moomba to Sydney decision of the Australian Competition Tribunal,<sup>4</sup> the Tribunal stated that the ACCC had made "fundamental errors in principle", noting that "There is no logic or reason to [the ACCC's] approach and there is no material to suggest it has any support in the theory or practice of statistics".

We further note with concern that on the one hand the Information Paper states that the new NEL and Rules are 'not aimed at changing regulatory obligations', while also referring to the removal from the Rules the concept of reviewable decisions and the abolition of the National Electricity Tribunal. In addition NEMMCO's status as a market participant has been removed under the Rules, which means it is no longer subject to the Code (Rule) dispute resolution process, which is a further reduction in accountability and participants rights of review.

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<sup>3</sup> Page 23 MCE Information Paper, December 2004.

<sup>4</sup> *Application by East Australian Pipeline Limited* [2004] ACompT 8 (8 July 2004).

Removal of rights of review are a significant change in regulatory rights and directly analogous in significance to a change in regulatory obligations, but it is equally important that a failure to provide for rights of merits review is inconsistent with a number of the existing regulatory regimes and therefore would be a significant deprivation of existing rights. It would also inevitably result in a significant diminution of transparency of regulatory process and a commensurate reduction in regulator accountability.

We recommend that decision of the AER, AEMC and NEMMCO be made expressly subject to a form of merits review under, respectively, the TPA and NEL.
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Please do not hesitate to contact the signatory to discuss any of the issues raised in this letter.

Yours sincerely

Richard Gross

General Manager Regulation