

27 August 2004



NE Rule Change Process  
C/- MCE Market Reform  
Department of Industry, Tourism and Resources  
GPO Box 9839  
CANBERRA ACT 2601

By e-mail to [MCEMarketReform@industry.gov.au](mailto:MCEMarketReform@industry.gov.au)

Our Ref: BN008/0849/0025

Dear Sir or Madam,

### **COMMENTS UPON MCE CONSULTATION PAPER "PROPOSED NATIONAL ELECTRICITY RULE CHANGE PROCESS"**

Ergon Energy Pty Ltd ("Ergon Energy") welcomes the opportunity to comment on the "Proposed National Electricity Rule Change Process" consultation paper ("Consultation Paper") recently released by the Ministerial Council on Energy's Standing Committee of Officials ("SCO"). We have also taken the opportunity to comment where relevant on the Legislative and Regulatory Framework Information Paper ("Information Paper") also recently released by the SCO.

Ergon Energy is a retailer in the National Electricity Market ("NEM"). Subject to the specific concerns outlined below, Ergon Energy generally supports the proposed National Electricity Rule change process outlined in the Consultation Paper, as it has the potential to streamline the existing code change process.

#### **1. Legislative and Regulatory Framework Information Paper**

##### **1.1 Judicial vs Merits Review**

Ergon Energy is concerned that the proposed framework outlined in the Information Paper will remove rights of appeal that are currently available to market participants.

Market participants currently have a right of appeal to the Competition Tribunal from a decision of the ACCC. This will no longer be available under the proposed framework.

The proposed framework provides that decisions of the AER will only be subject to merits review. Ergon Energy's concerns are twofold:

1. We do not believe that the reform process should change the substantive legal rights of parties. Whilst we agree that the new framework has the potential to streamline and improve current arrangements, this should not be undertaken at the expense of the substantive legal rights of market participants.
2. It is not yet clear exactly what roles will be transferred to the AER in the long term, particularly with reference to retail licensing. It would be imprudent to lock market participants into an appeals process that limits merits review, when it is not yet clear of

the scope and nature of the decisions that the AER will be required to make over the long term, once further responsibilities are transferred from jurisdictions to the AER.

We note the comments in the Information Paper that the above position with respect to the AER is consistent with the existing situation where there are no avenues for merits review of the ACCC's electricity transmission review determinations under the Code. This statement does not take into account the wider functions and roles that will be undertaken by the AER in addition to electricity transmission review determinations that the ACCC currently undertakes. In our view the fact that the AER will have wider functions (which will not clearly be understood until all the proposed jurisdictional functions have indeed been transferred as contemplated) is a strong case for not limiting merits review of AER decisions.

## **2. Proposed National Electricity Rule Change Process**

### **2.1 Any Person Can Initiate a Code Change**

We note that the position in the Consultation Paper with respect to "any person" being able to initiate a Code Change has remained the same since the previous Code Change Information Paper. This is a clear change from the current regime.

We note that it is proposed that the AEMC act as a rule change "gatekeeper". Ergon Energy's preferred approach is that a minimum number of participants should be required to support a proposal before consideration by the AEMC. In our view this mechanism would ensure that code changes have desirable market outcomes. This approach would operate to ensure that only sound code changes are progressed and considered by the AEMC as a minimum number of market participants would need to agree prior to it being accepted for consideration.

Concomitant with the above, the failure of a rule change proposal to have sufficient support from market participants would be a ground for the AEMC rejecting a rule change proposal.

### **2.2 Rule Making Criteria - Net Benefits Test**

It is proposed that the AEMC will apply a net benefit test based on the achievement of the Market Objectives and any MCE Statement of Policy Principles and that the net benefit test will be conducted on a "with or without" basis.

In our view the method of calculation of the net benefits test needs to be precisely defined to ensure that the AEMC can appropriately apply this test. The market has seen first hand from the Regulatory Test that open-ended definitions of net benefit can lead to dispute about how such benefits are calculated.

### **2.3 Conversion of the National Electricity Code to Statutory Rules**

The process of converting the wording of the Code into mandatory language of Statutory Rules should be approached with extreme caution to ensure that there is no change of intent. Whilst on the face of it this may seem a relatively simple process we anticipate that there may be differing interpretation amongst market participants.

It will be necessary to manage this process carefully. Sufficient time must be allowed in the consultation process to enable market participants to adequately consider the raft of changes that will be required to implement this change.

#### **2.4 Process to Expedite Code Change Process**

We note that one of the proposed triggers to “fast track” the rule change process is that the change is likely to be unopposed. It is unclear from the Consultation Paper how the AEMC will make this determination. We suggest that further clarity and subsequent consultation is required around this definition.

#### **2.5 Composition of Working Groups**

We note that the AEMC will have the ability to convene working groups to consider rule change proposals. We request that SCO provide further details on the proposal. In particular it is unclear whether these working groups will be formally constituted, who will constitute the membership and whether any associated rules are proposed. Once these details have been determined there should be further consultation on these issues.

#### **2.6 Pre- Determination Hearing**

The process for the pre-determination hearing outlined in the Consultation Paper provides that only those who have participated in the rule change procedure by making a submission may request a pre-determination hearing. In our view this process should not be limited to those parties who have made submission on the rule change, but should also be open to other “interested parties”. The Consultation Paper provides that the purpose of the pre-determination hearing is to provide an explanation of the Draft Determination, analysis of the Draft Rule and an opportunity to ask questions and seek clarification. Interested parties other than those who have made submission may have an interest in seeking such further clarification and the opportunity to ask questions. Accordingly we recommend that pre-determination conferences be open to all interested parties.

We would be pleased to discuss the comments contained in this submission if required. In this regard, please do not hesitate to contact me on 07 3228 8134 or Michael Callow on 07 3228 8259.

Yours sincerely

**Rebecca Pickering**  
**Manager Regulation**