

POWERLINK QUEENSLAND

RESPONSE TO: MINISTERIAL COUNCIL ON ENERGY – STANDING COMMITTEE
OF OFFICIALS

Review of Decision-Making in the Gas and Electricity Regulatory Frameworks

7 NOVEMBER 2005

INTRODUCTION

Powerlink Queensland is pleased to make this submission to the Standing Committee of Officials in response to the consultation document “Review of Decision-Making in the Gas and Electricity Regulatory Frameworks” (the Discussion Paper).

Powerlink is a Transmission Network Service Provider (TNSP) operating under the National Electricity Law and National Electricity Rules. In this role Powerlink is principally interested in decision-making that impacts on the Maximum Allowable Revenue for TNSPs.

NEED FOR A REVIEW REGIME

The Discussion Paper highlights that review of decision-making is not an end in itself but is part of the overall framework for delivering effective and efficient investment in the electricity transmission network. The role of the economic regulator is to determine the revenue cap for a TNSP taking into account the obligations placed on the TNSP and the circumstances in which those obligations have to be met. Because there are mandated obligations to expand, maintain and operate the network to meet growth in electricity demand (and sanctions for failing to do so), the TNSP is faced with an environment of “forced” investment. In that context, a revenue cap decision essentially determines the financial viability of the party being regulated.

If the revenue cap is inadequate to meet the mandated obligations, the TNSP cannot avoid the investments and, as a consequence, would have its financial viability threatened. In short, the consequences are very serious.

The goal of the regulatory framework for revenue determinations should then be to ensure that the decision that is ultimately reached is the correct decision for the TNSP, having regard for the efficient delivery of its obligations, rather than a decision that simply achieves some lower threshold of reasonableness. However the grounds for judicial review are directed at ensuring a rational legal exercise of power rather than a technically and economically correct exercise of power. As judicial review is basically confined to review of questions of law and does not extend to review of the merits of administrative determinations it has inherent limitations as a remedy in this context.

For these reasons Powerlink is strongly of the view that there must be an effective mechanism for reviewing whether revenue determinations of regulators are correct. Given the serious consequences of an incorrect determination, Powerlink strongly supports the adoption of a merits review regime.

Degree of Discretion in Decision-Making

The regulation of transmission revenue involves the exercise of a large degree of discretion on the part of the decision-maker. The decision-maker is required to form a view on a variety of matters, over a wide range of possible parameters. In these

circumstances the possibility of relevant evidence being overlooked or discounted in the setting of these parameters is very real. As the goal is to arrive at the correct decision it is critical that such discretionary decision-making be subject to review.

Impact on Businesses if Mistakes are not Corrected

Regulated network businesses are almost completely dependant on the decisions of regulators for their financial well being. Powerlink has clearly mandated reliability of supply obligations and operating practice requirements that must be met. These are accompanied by sanctions for non-performance. It is imperative that a revenue decision supports the fulfilment of these obligations, while maintaining the financial health of the corporation.

If an erroneous revenue decision is made by a regulator it must be able to be reviewed, because the impact on the regulated business from an incorrect decision can be severe. This would necessarily result in impacts on customers due to the financial constraints imposed on the TNSP.

Incentives on the Decision Maker

Depending on the form of review of decision-making that is adopted, the incentives placed on a regulator will be quite different.

If the form of review is largely confined to correcting errors in procedure or process then the incentive on the decision-maker is to ensure that the correct process is followed. If a decision merely follows from the mechanistic application of the process then there is no guarantee that the decision will bear even a passing resemblance to a correct decision. Rather, it will be a decision made in accordance with the rules.

Alternatively, if the correctness of the decision, as opposed to the correctness of the process, is the touchstone for review, then the decision-maker will have a greater incentive to achieve the correct decision in the first instance.

DECISIONS THAT ARE SUITABLE FOR REVIEW

As noted earlier Powerlink is primarily concerned to ensure that revenue decisions for TNSPs can be reviewed. Powerlink believes this should be limited to the final determinations made and that intermediate steps prior to a final decision are adequately covered by existing legal avenues such as judicial review.

[This addresses question 2(a) of the Discussion Paper]

REQUIRED CHARACTERISTICS OF A REVIEW REGIME

Standing to Initiate Review

Standing to initiate a review of a revenue decision should be limited to those parties who have a material financial interest in the decision. This would normally be the TNSP who has received the decision, as well as perhaps the two or three largest customers connected to the TNSP's network who are directly adversely impacted by the decision.

[This addresses question 2(b) of the Discussion Paper]

Standing to Participate in Review

Given that the initial decision is arrived at through a public consultation process, any review of the decision should similarly have wider stakeholder input. However,



Powerlink strongly believes that only those parties with standing to initiate a review process should be able to raise grounds for review beyond those used to initiate the review. That is, intervening parties who wouldn't have standing to initiate a review should not be able to raise additional grounds for review.

[This addresses question 2(c) of the Discussion Paper]

Grounds for Review

The grounds for review must be sufficient to ensure there is an opportunity for correcting an erroneous decision. The formulation suggested in the Discussion Paper based on s.39(2) of the Gas Pipelines Access Law appears appropriate, that is:

- An error of the fact finding by the decision maker; and
- That the exercise of discretion by the decision maker was incorrect or unreasonable, having regards to all the circumstances.

Powerlink does not agree that the grounds for review be limited so that only wholly unreasonable decisions can be reviewed. Such a limitation is not consistent with the goal of a review mechanism, which is to ensure that revenue decisions are correct.

[This addresses question 2(d) of the Discussion Paper]

Powerlink agrees with the suggested remedies outlined in the Discussion Paper for Model A. In the interests of delivering the correct decision the review body must be able to stand in the shoes of the original decision maker and be able to vary the decision.

Evidentiary and Other Procedures

The Discussion Paper proposes a two tier model for the use of new or updated information. The proposal is that evidence used to establish grounds for review be limited to the information available to the decision maker at the time of making the original decision. Once the grounds for review have been established it is proposed that new evidence could be considered. Powerlink supports this proposal as it prevents gaming of the original decision that could occur if material were able to be withheld from the original decision maker and then used to establish a ground for review. Once a ground for review has been established it still allows the correct decision to be reached based on the best information available at the time of the review.

In the interests of consistency and reliability of decision making Powerlink agrees it is appropriate for the review body to have regard to the policy documents of the original decision maker. However the review body must not be bound to these documents as the documents themselves may be in error. This is especially the case for documents that have been developed and adopted by the decision maker without public consultation.

[This addresses question 2(e) of the Discussion Paper]

Powerlink generally agrees with the proposal put forward in the Discussion Paper in paragraph 6.67 on the basis that intervening parties cannot raise additional grounds for review. If this is not adopted, Powerlink believes there must be scope for costs to be awarded against those parties if they fail to make out their additional grounds for review.

[This addresses question 2(f) of the Discussion Paper]



PREFERRED MODEL FOR REVIEW OF DECISION-MAKING

Powerlink is concerned to ensure that the regulatory framework for making and reviewing revenue decisions for TNSPs is directed to achieving correct decisions for the revenue associated with provision of existing and future network services.

For such review to be effective under a judicial review model the legislative provisions must be sufficiently clear and specific to identify the relevant factors against which to assess the decision. General or wide discretions may not provide sufficient detail for effective review.

The current NEL provisions on economic regulation of transmission do not fully meet these criteria. One example is found in sections 16 and 35 of the NEL, which provide that the regulator must provide for "a reasonable opportunity for a regulated transmission system operator to recover the efficient costs of complying with a regulatory obligation". The only costs allowed are costs of "complying with a regulatory obligation". While regulatory obligation is defined broadly to include most activities that a transmission operator undertakes by law, there are many costs that are not incurred as a result of legal obligations. For example, costs incurred in performing head office functions or relating to matters such as insurance are not required to be incurred to comply with regulatory obligations. While a decision to not allow recovery of these costs would clearly not be a correct decision, it may not constitute a ground for judicial review.

A further example potentially applicable to transmission revenue determinations is rule making under section 88 of the NEL, which allows the AEMC to determine the weight given to particular aspects of the national electricity market objective. This means that the AEMC effectively has an almost unfettered discretion in exercising its Rule-making functions.

During the finalisation of the NEL, Powerlink, with the other Transmission Network Owners, raised concerns on these deficiencies and proposed amendments to address them. Those amendments were not accepted. However the current provisions relating to regulation of transmission revenue are still restricted in the opportunity they provide for judicial review. Judicial review, even with the framework for decision making set out in the National Electricity Law, remains principally concerned with ensuring the correct process is followed. Whether the decision is correct is not the primary purpose of judicial review.

In contrast, merits review is concerned with reviewing decisions to ensure their correctness. This places a stronger incentive on the original decision-maker to ensure their decision is correct in the first instance. Given the criticality of revenue decisions for the delivery of network services and the financial health of the TNSPs Powerlink is strongly in favour of the SCO's proposed Model A being adopted in the energy market.

[This addresses Question 1 of the Discussion Paper]

