



27 August 2004

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

By email: MCEMarketReform@industry.gov.au

Dear Sir/Madam

**MCE MARKET REFORM – PROPOSED NATIONAL ELECTRICITY
RULE CHANGE PROCESS – CONSULTATION PAPER**

Tarong Energy Corporation Limited (*Tarong Energy*) is pleased to make the following submission in respect of the MCE Consultation Paper on the Proposed National Electricity Rule Change Process dated August 2004 (*the Consultation Paper*).

Further to our submission regarding the March 2004 Discussion Paper, Tarong Energy wishes to again express its broad support for the Ministerial Council on Energy's (*MCE's*) focus on reducing the current duplication that exists in the National Electricity Code (*the Code*) change process. However, we stress that this support is qualified to the extent that this streamlining does not increase any residual legal or regulatory risk or limits the ability for aggrieved Code participants to request merits review of an AEMC decision.

More specifically, Tarong Energy wishes to express the following concerns:

Referral of Code Change Proposals to the ACCC

It remains a concern for Tarong Energy that while the proposal requires all access related Code changes to be submitted to the ACCC for approval under Part IIIA of the TPA, the AEMC will have the discretion to refer competition related changes to the ACCC for Part VII authorisation. It remains our belief that all competition related changes should be referred to the ACCC for authorisation or at the very least the AEMC should involve the ACCC in deciding whether or not the Code change does in fact relate to either competition and/or the access regime. It is often difficult to determine whether a proposed Code change may have a competition or access impact. A clear example of this is the recent debate on the question of whether the whole of Chapter 3 of the NEC should be included as part of the access code.

The Code as a Statutory Instrument

We understand that in an attempt to adequately address this issue, the MCE has obtained QC advice and instructed its legal advisers to redraft the Code into a set of rules which are mandatory for all Code participants. While this may sound like a straightforward task Tarong Energy foresees

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some real practical difficulties in doing this. Our primary concern is that where the Code sets out a list of principles that NEMMCO must consider in preparing a procedure, the procedure itself, which may have potential competition related implications, does not benefit from the protection afforded to the new Rules "as a statutory instrument".

An example of this can be found in clause 3.15.6A of the Code. This clause requires NEMMCO to prepare a procedure for determining contribution factors for use in allocating ancillary services costs to Market Generators and/or Customers having regard to a set of principles. Under the existing authorisation arrangements the ACCC authorises that NEMMCO develop a procedure consistent with those principles. In contrast, it is unclear whether such a procedure would be afforded the same protection if the "Code as Statutory Rules" option to managing TPA risk is adopted.

Merits Review

It continues to be the position of the MCE that decision making of the AEMC on a proposed Code change will only be subject to judicial and not merits review. The Legislative and Regulatory Framework Information Paper also released in August 2004 appears to justify this stance by providing that "the AEMC is subject to substantial consultation obligations and accountability requirements" which means that "the merits of its decisions will be subject to public and transparent debate" (pp14-15). This does not however provide us much comfort in circumstances where despite extensive consultation the AEMC errs in making a decision in relation to a proposed Code change.

Under the current authorisation arrangements aggrieved code participants have access to defacto merits review through the Australian Competition Tribunal (*the Tribunal*). As you would know, a review by the Tribunal is a re-hearing or a re-consideration of a matter and it may perform all the functions and exercise all the powers of the original decision-maker for the purposes of review. The Tribunal can therefore hear applications for review of determinations of the ACCC to either grant or revoke authorisations relating to proposed Code changes.

The "Net Benefit" Test

In making a decision on a proposed code change, the AEMC will be required to apply a "net benefits" test based on the achievement of the Market Objectives. It is still unclear whether this test is analogous to the test currently applied by the ACCC under the TPA for competition and access related authorisations. This point still requires clarification.

NEMMCO Involvement

In our submission on the March 2004 Discussion Paper we highlighted a concern that NEMMCO had not been mentioned as a body that should be consulted at least in relation to proposed code changes that may negatively impact the ongoing operation of the market. We acknowledge that this point was addressed at 2.3.2 of the Consultation Paper, however, a position on the matter was not provided. It would be helpful if this could be clarified.

If you have any queries regarding any matter raised in this letter please do not hesitate to contact us.

Yours sincerely



Greg Hesse

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