



Ministerial Council on Energy (MCE)
“Legislative And Regulatory Framework”
“Proposed National Electricity Rule Change
Process”

TransGrid Submission

27 August 2004

Legislative and Regulatory Framework Proposed National Electricity Rule Change Process

TransGrid offers the following response to the Legislative and Regulatory Framework, Information Paper ('Framework Paper') and the Proposed National Electricity Rule Change Process, Consultation Paper ('Rule Change Paper') issued by the Ministerial Council on Energy ('MCE'). TransGrid is appreciative of the work of the MCE Standing Committee of Officials ('SCO') and the time frame for market reform set by the MCE.

Legislative and Regulatory Framework

TransGrid supports the transition of the National Electricity Code ('Code') to mandatory rules made under the National Electricity Law ('NEL'). By amending the energy market legislative and regulatory framework at this time, participants in the market have a unique opportunity to clarify the operation of the energy market, the roles and functions of the new industry regulators, and provide greater regulatory certainty to participants.

It is important at this stage to also consider the requirements and principles which may need to be addressed to cover the subsequent expected extension of the national regulatory arrangements to the coverage of the distribution network.

TransGrid also supports the adoption of a primary objective to guide the decisions of the Australian Energy Market Commission ('AEMC') and the Australian Energy Regulator (AER). To date, market arrangements have lacked clarity due to multiple objectives having equal importance. In this regard the proposed primary objective, to "promote the long term interests of consumers of electricity with respect to price, quality and reliability of electricity services, and economically efficient investment and innovation", becomes very important. TransGrid would suggest that this could be simplified further to "promoting safe, reliable supply of electricity at efficient price levels and service quality". The serious consequences to modern digital economies of major power system failures events in the US, Europe, Western Australia and Queensland are timely reminders of the importance to the community of reliable electricity systems.

- **Service Standards**

Based on the information released to date, it is unclear how the 'quality and reliability of electricity services' will be determined under the new legislative and regulatory framework. Presently, each jurisdiction has separate legislative requirements relating to their transmission and distribution network reliability of electricity service and the Reliability Panel is to "determine, on the advice of NEMMCO, the *power system and reliability standards*" (cl. 8.8.1(2) of the Code).

Under the proposed regulatory arrangements, the Reliability Panel is an advisory body only to the AEMC on service standards. The AEMC will determine NEMMCO's *power system security and reliability standards* following advice from the Reliability Panel, and a principal initial function of the AER will be developing and publishing service standards to be applied to transmission networks (as contemplated by clause 6.2.4(a) of the Code). These arrangements tend to confuse the roles and functions of the respective bodies and need to be addressed to provide clarity, responsibility and accountability for all concerned.

The underlying principles of the proposed new governance arrangements entail the separation of policy making (which is the responsibility of the MCE) from rule-making and energy market development (which is the responsibility of the AEMC), and from economic regulation and market rule enforcement (which is the responsibility of the AER). The proposed amendments to the NEL and the Rules must reflect these governance arrangements. When viewed in this context, the AER as the economic regulator and rule enforcer should not determine service standards. This position

is also consistent with clause 6.2.4(a) of the Code, whereby the ACCC does not determine service standards, but rather it may set revenue incentives for TNSPs taking into account the performance of TNSPs in meeting their service standards.

Governments in the NEM should retain the right to determine network reliability standards for electricity service in their jurisdiction, whereby they will continue to be held accountable for reliability of both the transmission and distribution systems by their electorates. That right and the role of a jurisdiction to set network reliability standards in their jurisdiction should be explicitly offered in the NEL.

- ***Statement of Regulatory Principles and Practice***

TransGrid supports the initiative stated in the Framework Paper that the NEL include minimum requirements as to the content of the statements of regulatory practice and principles made by the AER. TransGrid considers clear statements of principle and practice in the NEL will provide much needed guidance and clarity to both the AER and TNSPs in preparing and determining regulated revenues of TNSPs.

Being the only TNSP experiencing a second revenue determination by the ACCC whilst the “Draft Statement of Regulatory principles for the Regulation of Transmission Revenues” is being developed, TransGrid has experienced the difficulties of this form of regulatory uncertainty first hand. Previous decisions have been reinterpreted and an evaluation of TransGrid’s resource needs has been conducted in the absence of clear and settled arrangements. Incentive mechanisms have been changed and remain uncertain. The ACCC has signalled its intention to significantly ‘write down’ the value of assets essential to the provision of reliable transmission services now and in the medium term. There is no effective or meaningful framework (including the absence of clear criteria and relevant appeal mechanism) to have these vital decisions independently reviewed. This is not a sensible basis on which to achieve regulatory consistency for operating and developing nationally significant infrastructure essential to the interests of electricity customers.

- ***Merits Review***

The Framework Paper states “provision will be made for judicial review (but not merits review) of decisions of the AER and AEMC” and that “in the case of the AER, this is consistent with the existing situation where there are no avenues for merits review of the ACCC’s electricity revenue determinations”. Consequently, it was both pleasing and reassuring to find that in the course of SCO consultations following the release of the Framework and Rule Change papers, the SCO statement that merits review for AER regulatory decisions (including transmission revenue decisions) has not been precluded from the legislative and regulatory framework.

Investment in transmission infrastructure is reflective of the regulatory climate in which investment decisions are made. The transmission revenue determinations by the AER will have a direct bearing on network investment and impact on reliability of electricity services.

The MCE communiqué and report to COAG of 11 December 2003, explicitly recognised the critical nature of transmission infrastructure in the NEM and the need to invest \$37 billion in energy infrastructure over the next decade to ensure Australia’s energy needs are met.

Shareholders and persons facilitating infrastructure investment are entitled to some certainty that their reliability investments will not be stranded and their investment decisions are not captive or subject to the whims of an unaccountable economic regulator.

Representatives of both the ACCC and the Victorian Essential Services Commission recently publicly acknowledged the need for accountability of economic regulators, and further stated that they had no objection to a merits review of decisions by their respective bodies.

The Commonwealth Administrative Review Committee, in commenting on the inadequacy of judicial review alone for administrative decisions, has said:

“It is generally accepted that this complex pattern of rules as to appropriate courts, principles and remedies is both unwieldy and unnecessary. The pattern is not fully understood by most lawyers; the layman tends to find the technicalities not merely incomprehensible but quite absurd. A case can be lost or won on the basis of choice of remedy and the non-lawyer can never appreciate why this should be so. The basic fault of the entire structure is, however, that review cannot as a general rule, in the absence of special statutory provisions, be obtained “on the merits” — and this is usually what the aggrieved citizen is seeking”.

(Administrative Review Council, Better Decisions: Review of Merits Tribunals, Report No 39, September 1995)

TransGrid agrees with the above comments made by the Commonwealth Administrative Review Committee. We consider a merits review of AER decisions will, among other things, improve the quality and consistency of decisions made by the AER, and enhance openness and accountability of the AER in its decision making.

AER network revenue decisions directly affect the certainty of Industry participants and their investment decisions, and have significant implications for reliability of electricity service.

Accordingly, it is both undesirable and inappropriate for consideration of merits review to be deferred until 2005. The NEL should be amended to include merits review for AER network revenue decisions at this time, particularly where the AER (previously the ACCC) also has the ability to modify the rules through adjustment or reinterpretation of its own Regulatory principles document.

Proposed National Electricity Rule Change Process

TransGrid supports streamlining the Code Change process and agrees that the Code be made ‘statutory rules’ under NEL, thus becoming National Electricity Rules (NE Rules).

We note that under the proposed NE Rule Change Process, the AER will be consulted on enforcement or regulatory issues and the ACCC will be consulted on competition and access issues. As a matter of transparency and accountability in decision-making, TransGrid submits that all communications made between the AEMC, the ACCC and the AER in respect to a proposed Rule change and during the Rule change process should be published and made publicly available.

TransGrid also considers that the AER should be consulted on rule enforcement and economic regulatory issues only, consistent with its function, in the Rule change process. Consultation other than this limited form of consultation should not occur in the Rule change process if the integrity of the proposed governance principles that separate rule-making and energy market development from economic regulation and market rule enforcement is to be maintained.

TransGrid considers that consultation with both the ACCC and the AER need not be ongoing during the Rule change process. The ACCC should only be consulted at the initial Rule change proposal and at the final form of the Rule change for competition and access issues, and the AER only consulted when the Rule change process is near completion, but prior to any final amendment, to consider how the Rule change will be enforceable. This would avoid any unfavourable perceptions of rule making by both bodies, whilst allowing them to ensure the practicability and progression of Rule changes.

Should you wish to discuss any of the issues raised in this response, please feel free to contact TransGrid’s Manager/Regulatory Affairs, Mr. Philip Gall on (02) 9284 3434 or via e-mail at phil.gall@transgrid.com.au

(sent electronically)