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Merits Review
C/- MCE Market Reform
Department of Industry, Tourism and Resources
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Victorian Energy Networks Corporation

14 November 2005

Dear Sir / Madam

Review of Decision Making in the Gas and Electricity Regulatory Frameworks

VENCorp welcomes the opportunity to comment on the MCE's consultation paper on regulatory decision-making in both gas and electricity. VENCorp is the electricity Transmission Network Service Provider responsible for directing augmentations to the Victorian Electricity Transmission System, and the Gas Market and System Operator for Victoria. As VENCorp's revenue is determined by the AER, it has an interest in the outcomes of this consultation into decision making in both gas and electricity.

VENCorp believes that there should be consistent regulatory processes in both gas and electricity. With the development of the new National Gas Law, and the proposed changes to the Gas Access Arrangements, this is an appropriate opportunity to align regulatory decision-making for both markets.

After considering the issues in the consultation paper VENCorp prefers the implementation of a judicial review (Model B) to a merits review (Model A).

The decision making process for economic decisions is explicit in the NEL and accordingly, the economic decisions made by the AER are, in any event, subject to judicial review by the Federal Court. Similarly, the proposed National Gas Law (NGL)¹ includes the key economic decision-making process, which would also make the AER decisions subject to judicial review under the NGL.

The judicial review option has the advantage of providing a consistent approach to reviews of decisions within the energy industry. Outcomes of a judicial review would be referred back to the relevant regulators for implementation and it would be expected that this would lead to improvements in the decision making processes used by regulators in making future decisions.

In contrast, the merits review being considered suffers from a number of limitations. Firstly, the Australian Competition Tribunal (ACT), which would likely undertake a merits review, has previously indicated its reluctance to review matters of law in the course of its reviews², and is expected to refer parties to the Federal Court for resolution of matters of law. Secondly, the merits review is purposely limited in scope³ and a number of decisions made by the various

¹ MCE SCO Statement of Approach: A New Legislative Framework for Gas, September 2005

² ACT: Application by Epic Energy, Gas Pipelines Access Law, 2002

³ MCE SCO, Review of Decision-Making in the Gas and Electricity Regulatory Frameworks, Oct 2005

regulators would not be open to merits review in any case. Thus, implementation of a merits review process would not obviate the need for a judicial review to deal with matters of law, and would add another layer of complexity and costs that could result in 'forum shopping' and unnecessary delays. Given that the decision-making requirements will be included in the legislation, it has been argued that the process of a merits review would be very similar in nature to a judicial review.

Therefore VENCorp considers that the merits review option would not be cost-effective for the industry and has the potential to increase regulatory uncertainty. For these reasons VENCorp supports the implementation of a judicial review (Model B) in both energy industries in a consistent manner.

Should you require any further information please contact Mr John Savage, ☎ (03) 8664 6568.

Yours sincerely

A handwritten signature in black ink, appearing to read "M. Zema". The signature is written in a cursive, flowing style.

MATT ZEMA
CHIEF EXECUTIVE OFFICER