

National Electricity Law (Schedule to the National Electricity (South Australia) Act 1996) and the National Electricity Rules applied as a law of New South Wales by the National Electricity (New South Wales) Act 1997

IN THE DISPUTE RESOLUTION PANEL AT SYDNEY

Between

Macquarie Generation

Applicant

and

National Electricity Market Management Company Limited ACN 072 010 327

Respondent

MACQUARIE GENERATION'S SUBMISSION TO

THE DISPUTE RESOLUTION PANEL

A. Operation of Participant compensation fund

Funding of Participant compensation fund

1. The *Participant compensation fund* is maintained by NEMMCO [clause 3.16.1(a) of the Rules].
2. The funding requirement for the *Participant compensation fund* for each *financial year* is the lesser of (1) \$1,000,000; and (2) \$5,000,000 minus the amount which NEMMCO reasonably estimates will be the balance of the *Participant compensation fund* at the end of the relevant *financial year*. [clause 3.16.1(c) of the Rules].
3. A *financial year* is the period commencing on 1 July in one calendar year and terminating on 30 June in the following calendar year [defined in Chapter 10 of the Rules, as applied by clause 1.1.2 of the Rules].
4. NEMMCO must prepare and publish before the beginning of each *financial year* a budget which takes into account the funding requirements of the *Participant Compensation Fund* [clause 2.11.3(b)(8) of the Rules].
5. NEMMCO must also develop, review and publish the structure of *Participant fees*, payable by the *Registered Participants* in the National Electricity Market (NEM), to recover the budgeted revenue requirements that NEMMCO has determined by its budget process [clause 2.11.1 of the Rules].
6. The Rules do not prescribe a due date for payment of the *Participant fees*, except for the general timing requirements set down in Rule 2.11.1, and the grant to NEMMCO of a power to charge the *Participant Fees* to a *Registered Participant* by giving the *Registered Participant* a statement setting out the amount payable and the date for payment [clause 2.11.2(b) of the Rules].

7. Where the *Registered Participant* liable to pay the *Participant Fees* is a *Market Participant*, NEMMCO may include the *Participant Fee* in the statements issued by NEMMCO under clause 3.15.15 of the Rules [clause 2.11.2(b) of the Rules]. These statements are the weekly statements for spot market trading in the NEM.
8. *Participant Fees* to meet the budgeted revenue requirements for the *Participant Compensation Fund* may only be charged to *Scheduled Generators* and *Scheduled Network Service Providers* [Clause 2.11.3(b) of the Rules].
9. In its determination of *Participant Fees*¹, NEMMCO has determined that *Participant Fees* to meet the budgeted revenue requirements for the *Participant Compensation Fund* should be charged to *Scheduled Generators* and *Scheduled Network Service Providers* as a fee per dollar of energy sold by those parties through the NEM spot market.
10. Those *Scheduled Generators* and *Scheduled Network Service Providers* that sell energy through the NEM spot market are Market Participants and subject to weekly settlements for spot trading in the NEM.
11. That is, *Participant Fees* for the *Participant Compensation Fund* are collectable by NEMMCO on a weekly basis and, subject to payments out of the fund for compensation, taxes and bank fees, the *Participant Compensation Fund* is able to increase in size each week.
12. The *Participant Compensation Fund* also accrues any interest earned from investment of the fund by NEMMCO [clause 3.16.1(e) of the Rules].
13. For the *financial year* ending 30 June 2008, NEMMCO has determined that the fee payable by *Scheduled Generators* and *Scheduled Network Service Providers* to meet the budgeted revenue requirement of the *Participant Compensation Fund* is \$0.0000 per dollar of energy sales. That is, a zero or nil charge.²
14. The conclusion to be drawn from the zero charge is that, for the *financial year* ending 30 June 2008, for the purposes of clause 3.16.1(c) of the Rules NEMMCO reasonably estimated the balance of the *Participant Compensation Fund* would be at least \$5,000,000. That is, that compensation payments out of the fund would not exceed interest income accruing to the fund during the *financial year*.

Cap on aggregate liability

15. In determining the level of compensation payable to Macquarie Generation in this dispute, the Dispute Resolution Panel must:
 - (a) take into account the current balance of the *Participant compensation fund* and the potential for further liabilities to arise during the year [clause 3.16.2(h)(4) of the Rules]; and
 - (b) recognise that the aggregate liability in any year in respect of *scheduling errors* cannot exceed the balance of the *Participant compensation fund* that would have been available at the end of that year if no compensation payments for *scheduling errors* had been made during that year [clause 3.16.2(h)(5) of the Rules].

¹ See NEMMCO Annual Budget and Fee Determination 2007-2008

² <http://www.nemmco.com.au/registration/120-0027.pdf>

B. Meaning of "year" in Rule 3.16.2(h)

16. Clause 3.16.2(h) of the Rules uses the word "year" on four occasions. Is this intended to be a reference to a calendar year ending on 31 December, a *financial year* ending on 30 June, or some other period of 12 months ending on another date?
17. Clause 1.1.2 of the Rules applies the Glossary (Chapter 10) to define italicised expressions. The word "year" where used in clause 3.16.2(h) of the Rules is not italicised. The word "year" is not defined in the Glossary (Chapter 10) of the Rules anyway.
18. The expression "*financial year*" is defined in the Glossary, as the period commencing on 1 July in one calendar year and ending on 30 June in the following calendar year.
19. Clause 1.7 of the Rules governs interpretation of the Rules, but offers no guidance in respect of the construction of the word "year".
20. The Rules are made under the National Electricity Law, which is a law made under the National Electricity (South Australia) Act 1996, and adopted as New South Wales law by the National Electricity (New South Wales) Act 1997,
21. Section 3 of the National Electricity Law applies Schedule 2 of the National Electricity Law to the Rules.
22. Clause 10 of Schedule 2 to the National Electricity Law contains definitions applicable to the Law, and defines "calendar year" as a period of 12 months beginning on 1 January.
23. Clause 10 of Schedule 2 to the National Electricity Law does not contain a definition of "year".
24. Clause 7 of Schedule 2 to the National Electricity Law provides that "in the interpretation of a provision of this Law, the interpretation that will best achieve the purpose or object of this Law is to be preferred to any other interpretation".
25. The Rules use the expression "calendar year" on 7 occasions, and the definition in clause 10 of Schedule 2 to the National Electricity Law would apply to that usage.
26. The Rules use the expression "financial year" on over 130 occasions, and the definition of "financial year" in the Glossary would apply to that usage.
27. There are several occasions in clause 2.11 of the Rules, which relates to the budget setting process to be performed by *NEMMCO*, where the word "year" is used rather than "financial year", but in a sense which is obviously intended to correspond with the year of the budget or expenditure rather than necessarily a calendar year from 1 January.
28. The setting of the budget for contributions to the *Participant compensation fund* is done by *NEMMCO* on a *financial year* basis, and by reference to a forecast by *NEMMCO* as to the likely balance of the *Participant compensation fund* at the end of the *financial year* [clause 3.16.1(c) of the Rules].
29. The most appropriate interpretation to put on the word "year" where appearing in clause 3.16.2(h)(4) and (5) of the Rules is a meaning consistent with the reference to *financial year* where used in clause 3.16.1 of the Rules.
30. As with the use of the word "year" in clause 2.11 of the Rules, the proximity of the use of the undefined general expression adjacent to the defined expression ought to

encourage the interpretation that the general expression was intended as a reference to the same concept as that embodied in the defined expression.

31. The purpose for which the word "year" is used in clause 3.16.2 is similar to that for which it is used in clause 3.16.1 - being a forecast or estimate of the total payments during a period.
32. If the Rules had intended the meaning of the word "year" in clause 3.16.2 to depart significantly from the usage in the adjacent clause 3.16.1, clause 3.16.2 could always have adopted the defined expression "calendar year" which is available from Schedule 2 of the National Electricity Law. But "calendar year" was not adopted.
33. The purpose of clause 3.16.2(h)(4) and (5) is to restrict the payments over a time frame to the amount of funds which is available over the same time frame.
34. The amount which is available is effectively set by *NEMMCO*, pursuant to its fee setting process, and is performed on a *financial year* basis.
35. The purpose of the clause will not be achieved if the time frame over which the dispute resolution panel considers potential claims to be paid (under clause 3.16.2) is different than the time frame over which *NEMMCO* has determined the funds required to be collected for those payments under clause 3.16.1).
36. Therefore, a meaning which puts the obligation of the dispute resolution panel in clause 3.16.2 (to take account of potential claims) within the same time frame as the obligation of *NEMMCO* in clause 3.16.1 (to estimate the balance remaining after claims) will best achieve the purpose or object of the Law, and on the basis of clause 7 of Schedule 2 to the National Electricity Law, is to be preferred.
37. For those reasons, we submit that the word "year" in clause 3.16.2 of the Rules ought to be regarded as having the same meaning as *financial year* where used in clause 3.16.1.

C. Meaning of "liabilities" in clause 3.16.2(h)

38. Clause 3.16.2(h)(4) of the Rules requires the Dispute Resolution Panel to take account of "the potential for further liabilities to arise in the year"; and clause 3.16.2(h)(5) of the Rules requires the Dispute Resolution Panel to recognise that "the aggregate liability in any year cannot exceed the balance of the *Participant compensation fund* that would have been available at the end of that year if no compensation payments for scheduling errors had been made during that year."
39. Do the "liabilities to arise in the year" and "aggregate liability in any year" include contingent liabilities for claims which are not determined within that year, or actual liabilities for claims which are determined within that year but not payable until the next year, or should those expressions be confined to actual liabilities which are both determined and payable in that year?
40. It is submitted that because the balance of the test in clause 3.16.2(h)(5) is a cash test, having regard to the position if no compensation payments had been made during the year, then the consideration under clause 3.16.2(h)(5) ought also to be a cash test, having regard only to liabilities which arise and are payable within that year.
41. Because of its proximity and similar purpose, the reference in clause 3.16.2(h)(4) also ought to be confined to liabilities which arise for payment in that year.
42. A construction of clause 3.16.2(h)(4) and (5) which looks only to liabilities which would give rise to a funding requirement for payment within the current year would also be

consistent with clause 2.11.3(b)(7) of the Rules, which requires NEMMCO to have regard to the "funding requirement" of the *Participant compensation fund* when determining the revenue requirement for the fund each year.

D. Dealing with other claims

43. The obligations of the Dispute Resolution Panel (to take into account the balance of the *Participant compensation fund*, the potential for further liabilities to arise during the year, and the requirement that the aggregate liability for *scheduling errors* in a year cannot exceed the balance the *Participant compensation fund* that would have been available if no payments for *scheduling errors* were made in that year) can be satisfied by at least 2 alternative methods:
- (a) a forecasting methodology; or
 - (b) a pro-rating methodology.

Forecasting methodology

44. If using the forecasting methodology, the Dispute Resolution Panel would make these determinations:
- (a) the amount of payments already made this year for *scheduling errors*;
 - (b) the amount of compensation that otherwise ought to be paid this year to the present claimant for the *scheduling error* under consideration;
 - (c) a forecast of the potential amount yet to be paid this year for liabilities in respect of *scheduling errors*;
 - (d) a forecast of the balance of the Participant compensation fund that would have been available at the end of the year if no payments were made during the year for *scheduling errors*; and
 - (e) if (a)+(b)+(c) exceeds (d), that amount by which (b) ought to be reduced.
45. Under this methodology, it would be open to the Dispute Resolution Panel not to reduce amount (b) by the whole of the excess over the available amount (d), but by doing so this would constrain the amount that could be awarded for subsequent payments in this year by other Dispute Resolution Panels.
46. Note that the relevant forecast in (c) and (d) ought to be the amount to be paid this year for liabilities in respect of *scheduling errors*, rather than the amount which might be paid (in this year or subsequent years) for *scheduling errors* occurring in this year. The assessment ought to be driven by the date for payment, rather than the date of the *scheduling error*. This is because both clauses 3.16.1(c) and 3.16.2(h)(5) of the Rules are based on an assessment of the cash balance of the *Participant compensation fund*, rather than taking into account unpaid or undetermined potential liabilities which might have accrued due to a *scheduling error*.
47. It is submitted that the forecasting methodology is not the most appropriate methodology to adopt, because it is less advantageous than the pro-rating methodology proposed.
48. However, if the Dispute Resolution Panel wishes to adopt a forecasting methodology along these or other lines, we would like to put further material before the Dispute Resolution Panel in relation to those forecasts.

Pro-rating methodology

49. We propose that the Dispute Resolution Panel adopt a pro-rating methodology for the determination of compensation payable for *scheduling errors*. This methodology would operate so that, if the compensation award to the present claimant would cause the available funds in the *Participant compensation fund* at the year end to be exceeded, this award and others applying a similar methodology would be pro-rated so that the available funds are not exceeded.
50. Under this pro-rating methodology, the Dispute Resolution Panel would make these determinations:
- (a) the amount of compensation that ought to be paid to the present claimant for the *scheduling error* under consideration (but without consideration as to whether the aggregate liability limit in clause 3.16.2(h)(5) of the Rules will be exceeded) (the "Unapportioned Compensation Amount");
 - (b) a date for payment of the compensation, being the last Settlement Date occurring during the year (where "Settlement Date" is a date under which payments are due to NEMMCO under clause 3.15.16 of the Rules); and
 - (c) a manner for payment of the compensation, which is in accordance with this formula as calculated on the Settlement Date:

Where:

- A is the Unapportioned Compensation Amount determined for the Market Participant in this determination;
- B is the aggregate of other Unapportioned Compensation Amounts which at the Determination Date are unpaid but which by the Settlement Date have been determined to be payable on the Settlement Date or another date in the same year as the year in which the Settlement Date occurs, in respect of *scheduling errors* where the Dispute Resolution Panel has adopted a similar pro-rating methodology to that adopted in this determination;
- C is the aggregate of other liabilities (not within A or B) which by the Settlement Date are unpaid but which have been determined to be payable on the Settlement Date or another date later in the same year as the year in which the Settlement Date occurs, in respect of *scheduling errors* where the Dispute Resolution Panel has **not** adopted a similar pro-rating methodology to that adopted in this determination; and
- D is the available balance of the *Participant compensation fund* at the Determination Date;
- E is the amount of any interest accrued to the *Participant compensation fund* between the Determination Date and the Settlement Date;
- F is the amount of any payments from the *Participant compensation fund* in the nature of those referred to in clause 3.16.1(f) of the Rules, made between the Determination Date and the Settlement Date;
- G is $D + E - F$;

"year" means [*financial year* / calendar year];

"Determination Date" means the date of this determination;

Then

where $A + B + C$ is less than or equal to G , the amount of compensation to be paid to the Market Participant in these proceedings = A ; and

where $A + B + C$ is greater than G , the amount of compensation to be paid to the Market Participant in these proceedings = $(G - C) \times A/(A+B)$

51. If the Dispute Resolution Panel adopts this pro-rating methodology, it is to be hoped that subsequent Dispute Resolution Panels will also adopt the pro-rating methodology. However, as this Dispute Resolution Panel cannot bind subsequent Dispute Resolution Panels, the introduction of component "C" in the above formula will take account of compensation payments which, for some reason, a subsequent Dispute Resolution Panel determines ought not be subject to this pro-rating methodology.
52. Note that in the pro-rating methodology formula the opportunity is given for this Dispute Resolution Panel to select whether "year" for these purposes ought to be financial year or calendar year. As mentioned earlier in this submission, financial year is preferred.

Powers to adopt pro-rating methodology

53. The pro-rating methodology proposed in this submission:
 - (a) takes into account the current balance of the *Participant compensation fund* (required by clause 3.16.2(h)(4) of the Rules);
 - (b) takes into account the potential for further liabilities to arise during the year (required by clause 3.16.2(h)(4) of the Rules);
 - (c) ensures that the aggregate liability in any year in respect of *scheduling errors* does not exceed the balance of the Participant compensation fund that would have been available at the end of that year if no compensation payments for *scheduling errors* had been made during that year (required by clause 3.16.2(h)(5) of the Rules);
 - (d) relies upon the Dispute Resolution Panel's power to determine the amount of the compensation payable (clause 3.16.2(b) of the Rules); and
 - (e) relies upon the *Dispute Resolution Panel's* power to determine the manner and timing of payments from the *Participant compensation fund* (clause 3.16.2(i) of the Rules).

Advantages of pro-rating methodology

54. The pro-rating methodology proposed in this submission has these advantages over the forecasting methodology:
 - (a) by postponing the due date for payment until the end of the year, it enables an *ex-post* assessment of all claims on the *Participant compensation fund*, rather than being based on a forecast of matters of which it may be very difficult to forecast;

- (b) it treats all claims equally, on a pro-rata basis, whereas claims awarded and paid earlier in the year on other than a pro-rata basis may be advantaged or disadvantaged depending upon the forecasts made;
- (c) it enables the maximum amount to be collected and earned by the *Participant compensation fund* during a year, to support claims to be paid from the fund in that year;
- (d) by being based upon the actual balance of the *Participant compensation fund* at the end of the year it takes account of any unforeseen or unanticipated liabilities or losses from the fund during the year, such as non-collection of fees from defaulting participants, or fluctuations in interest rates earned by the fund; and
- (e) it objectively and equitably takes into account the potential for other claims and liabilities of the *Participant compensation fund* in the same year, rather than leaving this to the subjective forecast of the Dispute Resolution Panel.

Definitions

55. Note that italicised expressions in this submission have meaning defined in the Rules.

Macquarie Generation

4 April 2008