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11 June 2015

Mr John Pierce
Chairman
Australian Energy Market Commission
PO Box A2449
SYDNEY SOUTH NSW 1235


Dear Mr Pierce

**Re: Submission on National Electricity Amendment - Bidding in Good Faith
(Draft Determination)**

The AER welcomes the opportunity to respond to the AEMC's Draft Determination on Bidding in Good Faith. Broadly speaking, the AER supports the AEMC's draft Rule as a means to address late rebidding.

We have reviewed the draft rule in detail. The draft rule addresses several key areas of concern arising from the *AER v Stanwell* case. Specifically, we welcome the inclusion of clauses in the draft rule to address the areas of timeliness of response and portfolio bidding.

However, the AER has identified several areas where we consider the drafting of proposed clauses 3.8.22 and 3.8.22A could be enhanced in terms of enforceability. The changes, some of which were raised at the AEMC forum on 18 May in Brisbane, are discussed below (and reflected in the suggested revised rule at Appendix A).

The general prohibition

Clause 3.8.22A(a) places a general prohibition on bids that are false, misleading or likely to mislead. Whether an offer, bid or rebid will be found to be misleading should be assessed by determining what the relevant conduct represents and then comparing that representation to the true position. In accordance with established competition law principles, the representation is determined by assessing the message conveyed to the target audience rather than by assessing the maker's intention.

In the present context where the AEMC is the rule maker, we consider that the question of what an initial offer, bid or rebid represents is a matter of market design that should be

determined in the rules rather than being left to a Court to decide in each individual case. To this end, we consider that this clause could be improved by stating what an initial offer, bid or rebid represents. The draft rule determination decision provides the following guidance on what the AEMC considers a bid to represent:

a continuing representation of their willingness to provide supply at the prices specified in them (page iv) or

the provisions would treat all bids and rebids as a continuing representation of a generator's intentions to supply electricity at particular prices. If a generator were to change its intentions for dispatch, and wished to make a rebid to reflect its changed intention, then its original offer would become misleading for so long as it failed to make such a rebid. (see page 8 and 30) or

This should encourage generators' offers to remain at all times reflective of their true intentions for dispatch and do not become misleading (see page 31).

However, a Court is not bound by this guidance and may not agree with it. Our suggested drafting is contained in (marked-up) clause 3.8.22A(a1) at Appendix A. Our drafting reflects the concepts from the draft rule determination that an offer, bid or rebid is final and will not be changed unless there is a change in material conditions and circumstances upon which it was based, in which case any further rebid will be made in accordance with the Rules.¹ If this change is accepted, the market will be entitled to rely upon this representation being made and any participant that does not honour the representation is at risk of being found to have engaged in false or misleading conduct.

Deeming a bid as false or misleading

The draft rule requires that in order to deem that a bid is false or misleading both limbs of the test in clause 3.8.22A(b) of the draft Rule would need to be satisfied. That is, to prove that a bid is false or misleading, the AER would need to be able to establish that the generator did not have a genuine intention to honour the bid **and** did not have a reasonable basis to represent to other participants that it would honour the bid, if the material conditions and circumstances on which a bid was based remained unchanged.

However, requiring both limbs to be satisfied is at odds with the application of the concept of false or misleading under established competition law principles, where only one limb of the test would need to be satisfied to establish that the relevant behaviour was false or misleading.

Accordingly, in draft clause 3.8.22A(b)(1) in Appendix A, "and" has been replaced with "or".

Reasonably practicable

Draft clause 3.8.22A(d) would require participants to submit a rebid as soon as "reasonably practicable" after the participant decides to submit a rebid in response to a change in material conditions. We consider that the obligation could be strengthened by removing the word "reasonably". "As soon as practicable" has been interpreted by the Courts and is not novel language. The expression means as soon as it is capable of being carried out or as soon as it is feasible to be done. It is slightly more absolute than reasonably practicable.

Further, we consider that "as soon as practicable" would be more consistent with market design principle 3.1.4(a)(2) i.e. the "maximum level of market transparency" rather than a "reasonable level of market transparency". Although there may only be a slight difference

¹ We also made consequential changes to draft clauses 3.8.22A(b) and (b1).

between the two standards, given the nature of the dispatch cycle in the NEM the assessment of the conduct in these cases will involve conduct taking place in relatively short periods of time. In these circumstances, we consider that rebids should be made as soon as practicable.

Accordingly, in the attached suggested drafting, the "reasonably" has been removed from clauses 3.8.22A(d) and 3.8.22A(e).

Patterns of behaviour

Draft clause 3.8.22A(d) would be greatly assisted in proceedings if the AER were able to point to a provision similar to draft clause 3.8.22A(c), which confirms that in determining a matter the Court can have regard to, amongst other things, inferences that naturally arise from the conduct (including any pattern of conduct). Accordingly, in the attached suggested drafting, a parallel provision has been included as draft clause 3.8.22A(f).

Late rebid reporting requirement

The proposed requirement for participants to submit late rebid reports (subject to exemptions) for rebids submitted in the so-called "late rebidding period" raises a number of practical concerns for the AER.

The AER considers that the proposed requirement for participants to submit late rebid reports and for the AER to review such reports has the potential to place a heavy regulatory burden on participants and the AER alike. The proposed requirement would be likely to place an unrealistic expectation on the AER, given the likely high volume of information received. Furthermore, the AER considers that developing ex-ante guidelines to exempt participants from the reporting requirement under certain conditions would also be problematic.

As an alternative, an important element of our proposal is the requirement for participants to keep contemporaneous records of certain information relating to late rebids, to be kept in accordance with existing record-keeping requirements (see clause 1.9, i.e. for a period of seven years). This information would only be required to be provided to the AER upon receipt of a written request. We consider that this requirement would reduce the burden on participants, and allow the AER to target its reviews of late rebidding in determining potential breaches of clause 3.8.22A. We consider that without this requirement, it would be difficult for participants and the AER alike to accurately determine a trader's intentions at the time of making a rebid, absent any objective/readily observable change in material conditions.

Revised draft clause 3.8.22(d) in Appendix A seeks to give effect to the above. Giving weight to the importance of this proposed record keeping provision, it is suggested draft clauses 3.8.22(d) and (f) be civil penalty provisions.

We would be pleased to provide further assistance to the AEMC on this important area of work. Please contact Peter Adams, General Manager, Wholesale Markets, on (03) 9290 1465 if you would like to discuss any aspect of this submission.

Yours sincerely



Paula Conboy
Chair
Australian Energy Regulator