

15 August 2007

Mr Mike Buckley
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Dear Mr Buckley

Proposed Negotiated Transmission Service Criteria for ElectraNet

AGL, Flinders Power, International Power Australia, Loy Yang Power Marketing Management Company and TRUenergy (together, the "Southern Generators") welcome the opportunity to comment on the Australian Energy Regulator's (AER) Proposed Negotiated Transmission Service Criteria (NTSC) for ElectraNet.

This response outlines the combined views of the Southern Generators on the NTSC. We urge the AER to give serious consideration to the issues that we raise in response to the release of the NTSC.

I would note that these issues have also been raised by the above parties in response to the separate consultation the AER is undertaking into the NTSC proposed for SP AusNet and VENCORP.

For further information on this submission, please feel free to contact the undersigned in the first instance on 08 8372 8706 or at appleby.simon@flinderspower.com.au.

Yours sincerely



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Encl.

SOUTHERN GENERATORS

NEGOTIATED TRANSMISSION SERVICE CRITERIA SUBMISSION

This submission is made by AGL, Flinders Power, International Power Australia, Loy Yang Power Marketing Management Company and TRUenergy (together, the **Southern Generators**). It is a response to the call for submissions made by the Australian Energy Regulator (**AER**) on the negotiated transmission service criteria proposed by the AER for SP AusNet and VENCORP in Victoria and ElectraNet in South Australia.

THE CRITERIA GENERALLY

The Southern Generators have three broad submissions to make regarding the criteria:

- (a) While it is plain that clause 6A.9.4(b) of the National Electricity Rules (**Rules**) requires negotiated transmission service criteria to give effect to and to be consistent with the negotiated transmission service principles set out in clause 6A.9.1 of the Rules, the Southern Generators do not consider it follows that the criteria should be limited to being a mere re-statement of the principles. Instead, to be of real value in access negotiations, the criteria should inform both transmission network service providers (**TNSPs**) and their customers, in a direct and practical sense, as to what prices and other terms and conditions should be included in their agreements. Put another way, the criteria should spell out what the terms and conditions of access should and should not include.¹
- (b) Many of the criteria bear out the corresponding negotiated transmission service principles that the TNSPs prices for negotiated transmission services should be based on (or otherwise) reflect costs. This is the case with criteria 5, 6, 7, 8 and 9. However, this does not impose any efficiency related discipline on TNSPs as to the amount of those costs. The Southern Generators submit that all of these criteria should spell out that prices should be based on (or otherwise reflect) the **efficient cost only** of providing the relevant service.² It is only if the criteria deal with costs this way that TNSPs' customers will enjoy any buyer power that might countervail the TNSPs' market power. Furthermore, such an approach is consistent with the Rule Determination made by the Australian Energy Market Commission (**AEMC**) in support of the National Electricity Amendment (Economic Regulation of Transmission Services) Rule 2006 No. 18, where, at p41, the AEMC said:

*Moreover, requiring generators and large end-users to negotiate with TNSPs about the recovery of costs directly incurred by the TNSP as a consequence of their connection will ensure that the **efficiency** of those costs is subject to increased scrutiny.*

¹ In the submissions on each particular criterion that follow, the Southern Generators have indeed included, where possible, their views on what the terms and conditions of access should and should not include.

² Criterion 11 already refers to efficient costs, presumably because clause 6A.9.1(7) of the Rules and section 35(3)(a) of the National Electricity Rules also do.

Put another way, there would seem to be little point in allowing a customer to establish that the costs the TNSP was seeking to build into price were excessive, in the sense that they were not incurred efficiently, if the TNSP's response can be that that does not matter because the criteria allow prices to be based on costs inefficiently but in any event actually incurred.

- (c) A further issue affecting many of the criteria is their wording. To the extent that the criteria are to be a re-statement of the negotiated transmission service principles set out in clause 6A.9.1 of the Rules, the Southern Generators submit that the wording of the criteria should match the wording in clause 6A.9.1 as closely as possible. Any differences in wording will create uncertainty and doubt and may even be used by TNSPs as a lever to bring about an unfair, unreasonable or unreasonably onerous result in negotiating with their customers. Below we have extracted the text of the proposed criteria from the AER's call for submissions in respect of the criteria for SP AusNet and VENCORP. We have also marked up the changes we consider should be made to ensure the wording of the criteria properly gives effect to and is consistent with the principles set out in clause 6A.9.1.

SUBMISSIONS ON EACH PARTICULAR CRITERION

The Southern Generators also have submissions to make on each particular criterion, as follows.

1. **The terms and conditions of access for a negotiated transmission service, including the price that is to be charged for the provision of that service and any access charges, should promote the achievement of the market objective.**

The Southern Generators support this criterion.

2. **The terms and conditions of access for a negotiated transmission service must be fair and reasonable and consistent with the safe and reliable operation of the power system in accordance with the NER.**³

The Southern Generators generally support this criterion.

However, the Southern Generators consider that it should be clear under criterion 2 (and indeed also under criterion 3) that:

- (a) Terms and conditions of access for a negotiated transmission service proposed by a TNSP must state in clear, simple terms what services the TNSP is to provide. For example, there should be a clear simple statement of relevant performance characteristics such as the capacity of the shared network to receive generator output and support power transfer.
- (b) Terms and conditions of access must not limit any of the TNSP's obligations to 'reasonable endeavours only.' In particular, the Southern Generators submit:
- Many obligations imposed on TNSPs under the NER are 'must ensure' obligations. For example, clause 5.2.3 of the Rules imposes a 'must ensure' obligation on network service providers to comply with the power system performance and quality of supply standards described in schedule 5.1 of the Rules.

³ In the AER's call for submissions on the proposed criteria for ElectraNet there is an error, in that proposed criterion 1 and 2 are the same. Proposed criterion 2 for ElectraNet should be in the same form as proposed criterion 2 for SP AusNet and VENCORP.

- If a TNSP was unable to provide a service to a customer and that was because, for example, a third party had breached its contractual obligations to the TNSP, the TNSP should be able to bring a claim against the third party. The proceeds of that claim would cover any damages the TNSP would be liable to pay the customer for breach of a 'must ensure' obligation.⁴
- Alternatively, in those circumstances the TNSP may not be liable to the customer for any breach of a 'must ensure' obligation because the TNSP may enjoy relief from liability under the force majeure provisions of their agreement. That is, the TNSP's inability to provide the service may in the circumstances be due to any event or cause beyond the reasonable control of the TNSP.
- Furthermore, even where the TNSP is liable to a customer for breach of a 'must ensure' obligation, that liability may be limited by virtue of statutory immunities enjoyed by the TNSP.

For example, under sections 117 of the Electricity Industry Act 2000, each of SP AusNet and VENCORP will not be liable for any failure to supply electricity arising through accident, drought or unavoidable cause or any cause that is not due to its fault. Likewise, under sections 119 and 120 of the National Electricity Law, TNSPs do not incur any civil monetary liability in the performance or exercise of a system operations function or power nor for any failure to supply electricity unless the failure is due to their bad faith or negligence.

- (c) Terms and conditions of access must not limit the TNSP's liability to any greater extent than that enjoyed by the TNSPs under their statutory immunities. In particular, the Southern Generators submit:

- The Victorian and South Australian Parliaments have now considered several times the matter of TNSPs' liability and have, as already mentioned, included or accepted the inclusion of statutory immunities in the Electricity Industry Act 2000 and the National Electricity Law. The line on liability therefore has been drawn by the Parliaments. The Southern Generators consider it would be unfair, unreasonable and unreasonably onerous for the TNSPs to seek to shift that line in their own favour using limitations of liability or indemnities in the terms and conditions of access.
- Any proposal that a TNSP should have no liability for the indirect losses its breaches may cause a customer like the Southern Generators which generate electricity for sale into the NEM is not fair and not reasonable, and is unreasonably onerous, because most of the loss that the TNSP may cause the customer will be indirect. This is certainly so where the TNSP's breach will prevent the customer from selling its electricity into the NEM. Therefore such a limitation of liability in effect would deprive the customer of any meaningful remedy for breach by the TNSP of the terms and conditions of access; and

⁴ This is the case even insofar as SP AusNet and VENCORP are concerned. The SGs consider that too much is made of the relationship between them giving rise to circumstances in Victoria which are said by them to be 'unique.' If either one of them prevents the other from providing a service to a customer, then it should be the first of them, not their mutual customer, that bears the consequences. The network agreement between SP AusNet and VENCORP should provide for this.

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- (d) Terms and conditions of access must not confer on the TNSP a right to disconnect the customer's facilities. In particular, the Southern Generators submit:
- Nowadays under the Rules it is NEMMCO that has system security responsibilities, not the TNSPs. In particular, under the Rules NEMMCO is charged with maintaining power system security, with interrupting connections during emergency situations and with issuing directions or instructions, which may require the disconnection of facilities, if NEMMCO is satisfied that is necessary to maintain or re-establish the power system to a secure, satisfactory or reliable operating state.
 - Given that framework, the TNSPs should not be entitled to disconnect their customer.
 - This is so even where a TNSP considers that a customer may be jeopardising the safety or integrity of the transmission system. In those circumstances it would be open for the TNSP to take the matter up with NEMMCO which, if persuaded, could direct or instruct the customer to disconnect.
 - Likewise, the terms and conditions of access should not provide a TNSP with a right to disconnect the customer in circumstances where the TNSP may consider, but it has not yet been proven, that the customer has breached their agreement and that that breach has caused the TNSP to breach obligations it may owe others or to breach the Rules. Because disconnecting a customer is such an extreme step to take, the TNSP should be required to satisfy a court that disconnection was in order. The TNSP could do this by commencing a proceeding against the customer for breach of their agreement and, if the circumstances were urgent, by seeking interim relief against the customer that might require the customer either to remedy its breach or to disconnect its facilities.
- (e) Terms and conditions of access must not otherwise be one-sided. In particular, the Southern Generators submit that:
- Terms and conditions of access should not require the customer to indemnify the TNSP in respect of the customer's breach of their agreement or negligence if they do not also require the TNSP to indemnify the customer in respect of the TNSP's breach or negligence.
 - Terms and conditions of access should not permit the TNSP to unilaterally terminate their agreement.
 - Terms and conditions of access should not penalise the customer but not the TNSP for a breach or termination of their agreement.
 - Terms and conditions of access should not permit the TNSP but not the customer to unilaterally vary the terms of their agreement.
 - Terms and conditions of access should not permit the TNSP but not the customer to unilaterally renew or not renew their agreement.
 - Terms and conditions of access should not permit the TNSP to unilaterally set or vary prices.
 - Terms and conditions of access should not permit the TNSP unilaterally to vary the performance characteristics of the service to be supplied under their agreement.
 - Terms and conditions of access should not permit the TNSP unilaterally to determine whether their agreement had been breached or to interpret its meaning.

- Terms and conditions of access should not limit the TNSP's vicarious liability for its agents.
- Terms and conditions of access should not permit the TNSP to assign their agreement to the customer's detriment without the customer's consent.
- Terms and conditions of access should not limit the customer's right to sue the TNSP.
- Terms and conditions of access should not limit the evidence the customer can lead in proceedings on their agreement.
- Terms and conditions of access should not impose the evidential burden on the customer in proceedings on their agreement.

3. The terms and conditions of access for a negotiated transmission service (including, in particular, any exclusions and limitations of liability and indemnities) must not be unreasonably onerous taking into account the allocation of risk between the TNSP and the other party, the price for the negotiated transmission service and the costs to the TNSP of providing the negotiated transmission service.

The Southern Generators generally support this criterion.

However, it should be clear that any terms and conditions of access of the sort detailed above in respect of criterion 2 will also offend against criterion 3.

4. The terms and conditions of access for a negotiated transmission service must take into account the need for the service to be provided in a manner that does not adversely affect the safe and reliable operation of the power system in accordance with the NER.

The Southern Generators generally support this criterion.

However, the TNSPs should not be able to take advantage of this criterion by seeking to impose on their customers any obligations that are more onerous than those their customers have under the Rules or jurisdictional electricity legislation. The Southern Generators therefore consider that:

- (a) Terms and conditions of access should not seek to impose on the customer any technical requirements beyond those included in applicable registered performance standards, the Rules or jurisdictional electricity legislation;
- (b) Terms and conditions of access should not seek to 'clarify' what is required of a customer under any applicable registered performance standards, the Rules or jurisdictional electricity legislation;
- (c) Terms and conditions of access should not seek to impose a compliance program on the customer in respect of any technical requirement that is already the subject of a compliance program in accordance with the requirements of any applicable registered performance standards, the Rules or jurisdictional electricity legislation;
- (d) Terms and conditions of access should not seek technical information about the customer's facilities that is not directly required in connection with the provision of the service by the TNSP; or
- (e) Terms and conditions of access should not seek to confer on the TNSP a right to inspect the customer's facilities if, under clause 5.7 of the Rules, the TNSP already has a right of inspection.

5. The price for a *negotiated transmission service* must be based on the costs incurred in providing that service, determined in accordance with the principles and policies set out in the *Cost Allocation Methodology* for the relevant TNSP.

The Southern Generators generally support this criterion.

However, as already submitted, the criterion ought to require the price to be based on **efficient** costs.

Furthermore, the criterion also ought to address the reallocation of costs between prescribed and negotiated transmission services. In particular, the Southern Generators submit that:

- (a) If costs which have been allocated to prescribed transmission services are reallocated to negotiated transmission services, then, under the terms and conditions of access, there should be no increase in prices based on those reallocated costs unless that price increase is agreed to by the TNSP's customer. The Southern Generators are particularly concerned about this possibility since, as they understand it, the principle against such cost reallocation in clause 6A.19.2 of the Rules could be interpreted as being confined to cost allocation within regulatory periods. The term of agreements for the provision of negotiated transmission network services, such as connection agreements, can extend across multiple regulatory periods.
- (b) On the other hand, to avoid double recovery by TNSPs, if costs initially allocated to a negotiated transmission service are reallocated to the prescribed transmission service, and so are to be covered by the TNSPs tariffs, then, under the terms and conditions of access, there should be a corresponding decrease in prices based on those reallocated costs (reflecting the operation of clause 6A.9.1(6)).

6. Subject to criteria 7 and 8, the price for a *negotiated transmission service* must be at least equal to the avoided cost of providing it but no more than the cost of providing it on a stand alone basis.

The Southern Generators generally support this criterion.

However, as already submitted, the criterion ought to require the price to be based on **efficient** avoided or stand alone costs.

Furthermore, to avoid any uncertainty, the criterion should further articulate exactly what is meant by avoided costs and stand alone costs. In particular, the Southern Generators submit that:

- (a) The avoided costs of providing a service are worked out on the basis that the customer is provided a service using assets that are also used by the TNSP to provide services to other customers. Where the customer is already being provided with the service, avoided costs are those decremental costs the TNSP would avoid efficiently incurring if the customer was no longer provided with the service. Where the customer is yet to be provided with the service, avoided costs are those incremental costs the TNSP would efficiently incur in providing the customer with the service.
- (b) The stand alone cost of providing a service are the costs the TNSP would efficiently incur if the customer was provided with a service using assets of the TNSP that were dedicated to the customer alone.

7. **If the *negotiated transmission service* is the provision of a *shared transmission service* that:**

- (i) **exceeds any *network performance requirements* (if any) which that *shared transmission service* is required to meet under any *jurisdictional electricity legislation*; or**
- (ii) **exceeds the *network performance requirements* set out in schedule 5.1a and 5.1 of the NER**

then the differential between the price for that service and the price for the *shared transmission service* which meets (but does not exceed) the *network performance requirements* under any *jurisdictional electricity legislation* or as set out in schedule 5.1a and 5.1 (as the case may be) must reflect the TNSP's incremental cost of providing that service.

The Southern Generators generally support this criterion.

However, as already submitted, the criterion ought to require the price to reflect **efficient** incremental costs and should only permit the negotiation of services requested or agreed to by the Transmission Network User.

8. **If the *negotiated transmission service* is the provision of a *shared transmission service* that does not meet (and does not exceed) the *network performance requirements* set out in schedule 5.1a and 5.1 of the NER, the differential between the price for that service and the price for the *shared transmission service* which meets (but does not exceed) the *network performance requirements* set out in schedule 5.1a and 5.1 must reflect the amount of the TNSP's avoided cost of providing that service.**

The Southern Generators generally support this criterion.

However, as already submitted the criterion ought to require the price to reflect **efficient** avoided costs and should only permit the negotiation of services requested or agreed to by the Transmission Network User.

Furthermore, to avoid any uncertainty, the criterion should further articulate exactly what is meant by avoided costs in a manner similar to that submitted in respect of criterion 6.

9. **The price for a *negotiated transmission service* must be the same for all *Transmission Network Users* unless there is a material difference in the costs of providing the *negotiated transmission service* to different *Transmission Network Users* or classes of *Transmission Network Users*.**

The Southern Generators generally support this criterion.

However, as already submitted, the criterion ought to require the price to reflect **efficient** costs.

Furthermore, the Southern Generators consider that criterion 9 should also state that Transmission Network Users or classes of Transmission Network Users may be regarded as different based on factors such as the volume or quantity of the service provided, the places to or from which the service is provided, the time of day at which the service is provided and the performance characteristics of the service.

10. **The price for a *negotiated transmission service* must be subject to adjustment over time to the extent that the assets used to provide that service are subsequently used to provide services to another person, in which case such adjustment must reflect the extent to which the costs of that asset are being recovered through charges to that other person.**

The Southern Generators generally support this criterion.

However, the Southern Generators consider that criterion 10 should require the terms and conditions of access to confer on the customer a right to require a review for the purposes of ascertaining whether other persons have begun to be serviced using assets initially used to service only the customer, with mandatory adjustments to follow.

Furthermore, the Southern Generators support that criterion 10 only contemplates adjustments in favour of Transmission Network Users when TNSPs begin to service other persons, the result being that price reductions only may result. A Transmission Network User is to suffer no price increase if a TNSP ceases to provide services to another person using assets that had been used to service both the Transmission Network User and that other person. Criterion 10 should be expanded so that this point is put beyond doubt.

11. **The price for a *negotiated transmission service* must be such as to enable the TNSP to recover the efficient costs of complying with all *regulatory obligations* associated with the provision of the *negotiated transmission service*.**

The Southern Generators support this criterion.

12. **Any *access charges* must be based on costs reasonably incurred by the TNSP in providing *transmission network user access* and (in the case of compensation referred to in clauses 5.4A(h) to (j)) on the revenue that is likely to be foregone and the costs that are likely to be incurred by a person referred to in rule 5.4A(h) - (j) where an event referred to in those paragraphs occurs.**

The Southern Generators generally support this criterion on the basis that, as already submitted, the criterion ought to require the access charge to be based only on costs **efficiently** incurred by the TNSP.

However, the Southern Generators consider that criterion 12 should also state that, in the case of a customer of a TNSP which is a generator or MNSP selling its electricity in the NEM, under the terms and conditions of access the compensation payable or receivable as the case may be by the TNSP in respect of a constraint as contemplated by clause 5.4A(h) of the Rules should be based on foregone spot market revenue net of generator avoided costs, calculated having regard to information published by NEMMCO about the impact of constraints on power station output and the level of shared network power transfer capability provided to the relevant generator or MNSP under their respective transmission use of system agreements. The TNSP's obligation to pay this compensation should not be reduced by any statutory immunity or other limitation of liability. Furthermore, it is a matter for the TNSP to source this compensation from whichever new or incumbent network users have caused or contributed to the constraint.

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for the SOUTHERN GENERATORS
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