

6 March 2009

Dr John Tamblyn
Chairman
Australian Energy Market Commission
Level 5
201 Elizabeth Street
SYDNEY NSW 2000



Office of the
Chief Executive Officer

Dear Dr Tamblyn

AER RULE CHANGE PROPOSAL – WACC REVIEWS EXTENSION OF TIME (Project No ERC0083)

Please find attached ENERGEX Limited's (ENERGEX) submission on the proposed treatment of the National Electricity Rule (Rule) Change requested by the Australian Energy Regulator (AER) on 16 February 2009 as a "non-controversial" Rule Change. This Rule Change is with respect to an extension of time until 1 May 2009 for the AER to make its initial Statement of Regulatory Intent (SoRI) final decision that is otherwise due under the Rules by 31 March 2009, and for a permanent extension for subsequent SoRI decisions to 1 May each 5 years thereafter.

ENERGEX is a party that is directly and significantly affected by the proposed Rule Change because ENERGEX must submit its Regulatory Proposal to the AER no later than 31 May 2009. The AER's SoRI final decision will be integral to decisions that ENERGEX must make in order to prepare its Regulatory Proposal in accordance with the Rules and on the data and explanations that must be included in the Regulatory Proposal. The proposed Rule change as it is currently drafted will significantly diminish ENERGEX's rights under the Rules.

ENERGEX acknowledges the AER's problem and while reiterating that this problem is of the AER's own making, recognises the AER's need for additional time to consider all issues and form its final decision. It is on this basis and the impact on the market overall that ENERGEX does not object to the progression of the Australian Energy Market Commission's (AEMC) consideration under the non-controversial provisions. ENERGEX's expectation is that the AEMC will consider the impact of the proposed Rule change and make a decision that does not disadvantage the distribution entities.

Please do not hesitate to contact myself or Kevin Kehl, Director Revenue Strategy on (07) 3223 1703 should you wish to discuss this submission or the attached supporting information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'T. J. Effeney', written in a cursive style.

Terry Effeney
Chief Executive Officer



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Background and Requirements of the Rules

The National Electricity Rules' (Rules) amended Chapter 6 came into effect on 1 January 2008, the same day the Australian Energy Regulator (AER) formally commenced its role as the national regulator for electricity distribution entities.

The distribution entities and the AER have in common an obligation to comply with the Rules.

The Ministerial Council on Energy and its Standing Committee of Officials (MCE /SCO) conducted broad consultation in the development of the amended Chapter 6 of the Rules and considered a range of issues in regards to obligations, timing and linkages. The Rules explicitly require that the initial rate of return review be concluded by 31 March 2009 and that in consequence of the review a Statement of Regulatory Intent (SoRI) be issued (Clause 6.5.4).

Further the Rules require that a Regulatory Proposal must be submitted at least 13 months before the expiry of a distribution determination that applies to a service provider. In ENERGETX's case the Regulatory Proposal must be submitted on or before 31 May 2009.

The Rules as finalised by MCE/SCO provide a minimum of 2 months between the conclusion of the rate of return review and the submission of the ENERGETX Regulatory Proposal. It should be noted that this is a materially shorter period than that afforded to other distribution entities.

Clause 6.5.4 of the Rules and Schedule 6.1.3(9) requires that a distribution entity seeking to depart from the SoRI must include persuasive evidence for the departure in the Regulatory Proposal. There is no opportunity for subsequent submission of persuasive evidence, including the transitional arrangement provisions for the Queensland distribution entities (specifically clause 11.16.7).

The key issues are that:

- The AER has had 15 months to complete the rate of return review, but knowing the impact and criticality of the rate of return review did not initiate consultation on this matter until 6 August 2008.
- The Rules provide a minimum period of 2 months for the Queensland and South Australia distribution entities to assess and address the SoRI prior to the lodgement of their Regulatory Proposals.
- The Rules do not provide any option to depart from the SoRI outside of the Regulatory Proposal.

AER Rule Change Proposal

The AER on the 16 February 2009, with no prior notice to or consultation with the immediately affected distribution entities, lodged a request for changes to the Rules to extend the date for the release of the SoRI.

In their Rule Change Request the AER, without any consultation with the affected parties, stated that "The AER expects that a one month extension will not materially affect the ability of the Queensland and South Australia electricity businesses to prepare building block proposals to be lodged by 31 May 2009".

Further, the AER's Rule change request results in a permanent change with the effect of impinging on every future Regulatory Proposal to be submitted by the distribution entities if the regulatory control period is to be 5 years. This places the Queensland and South Australia distribution entities at a distinct disadvantage in relation to the timing of the current and future reviews. All other entities have more time available to them to address the SoRI and propose departures in the relevant Regulatory Proposals as envisaged by the Rules.

It is ENERGEX's belief that in addition to the National Electricity Objective the AER and AEMC must have regard to the revenue and pricing principles set out in the NEL. The proposed Rule change will have a direct and material impact on the Regulatory Proposal (covering direct control network services) to be submitted by the three distribution entities.

The substantive matters for ENERGEX are that:

- The AER at no time consulted with ENERGEX as an affected party prior to the lodgement of the Rule Change request and therefore has no factual evidence upon which to base its statement that it expects that ENERGEX will not be materially affected by the proposed Rule change. Indeed the AER does not appear to appreciate the very material and detailed governance processes necessary to meet the various requirements and obligations of the Rules and the AER's own Regulatory Information Notice;
- The reduction in time between the finalisation of the SoRI and the date for the submission of the Regulatory Proposal materially and significantly diminishes ENERGEX's rights under the Rules to assess the SoRI and to develop and incorporate persuasive evidence to depart from the SoRI in the Regulatory Proposal and then progress that Proposal through the necessary (and organisationally dependent) governance and sign off framework;
- The Rule change proposed as requested, would have the effect that this diminution of rights would repeat every 5 years for the Queensland and South Australia distribution entities.
- In ENERGEX's view the AER in putting forward the Rule change has not considered or recognised the impact of the Rule change on the distributors, particularly in respect of the revenue and pricing principles.

Recognition of the Importance of the Rate of Return Review

ENERGEX recognises and appreciates the significance of the rate of return review and the extensive material that has been developed and assessed through the consultation process. ENERGEX is also very keen to provide the opportunity for the AER to issue a well consulted and considered decision.

ENERGEX recognises the AER's requirement for additional time but firmly believes that such additional allowance must not compromise or limit the rights of the distribution entities afforded by the Rules. Indeed in developing their review timetable the AER themselves assessed the necessary resources and consultation periods and had the choice to commence earlier. ENERGEX is unable to comprehend why the inability of the AER to deliver this review, which was entirely within their control, should compromise or impinge on the rights provided to the distribution entities under the current Rules.

In view of the current status of the rate of return review, the three affected distributors have commenced discussions with the AER with the objective of developing solutions that are acceptable to all parties but will not impinge on the rights of the parties under

the Rules. At this time there have been no options developed that are acceptable to all parties.

ENERGEX's Proposed Option

In recognition of the problem the AER finds itself in, and having regard for the National Electricity Objective set out in the NEL (in particular the promotion of efficient investment in electricity services), ENERGEX proposes that the AER's Rule Change be amended such that:

- Any extension of time is a once-off (and the SoRI cycle will revert to at least every 5 years, but not later than 31 March); and
- The 3 immediately affected distributors could agree they will not be disadvantaged and are able to commence their next regulatory control period as scheduled under the current Rules.