

11 May 2011

Mr John Pierce  
Chairman  
Australian Energy Market Commission  
PO Box A2449  
Sydney South NSW 1235

Dear Chairman

#### Rule change proposal – Potential Generator Market Power in the NEM

I refer to the Rule proposal by Major Energy Users Inc dated 15 November 2010 (MEU Rule Proposal) and the consultation paper released by the AEMC on 14 April 2011 titled, National Electricity Amendment (Potential Generator Market Power in the NEM) Rule 2011 (AEMC Consultation Paper).

The National Generators Forum (NGF) represents the interest of 23 major generators in the National Electricity Market, each of which has a close interest in the subject matter of the MEU Rule Proposal. In particular the MEU Rule Proposal, if introduced, would establish new Rules regulating, in certain circumstances, the amount of energy submitted and the price at which energy is submitted by so called “dominant” generators.

Section 94 of the National Electricity Law (NEL) requires the AEMC, on receipt of a Rule change proposal, to consider whether the subject matter of the proposal is one in respect of which the AEMC has the power to make Rules.

I note that in its Consultation Paper the AEMC states that:

*The Commission is required to commence the Rule change process in relation to any Rule change request that it receives that meets the requirements of section 94 of the NEL. We have carefully considered whether the Rule change request meets the statutory requirements, including whether the Commission has power to make the Proposed Rule... We have concluded that the Rule change request meets the statutory requirements and that, subject to the issues noted in section 4.3.1, the Commission has the power to make the Proposed Rule.<sup>1</sup>*

The NGF is interested to understand the basis for the AEMC’s conclusion that it has the power to make the Proposed Rule. This is particularly the case given what the Forum understood to be an accepted proposition that the NEL and the Rules were not intended by Parliament to regulate the competitive behaviour of market participants.

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<sup>1</sup> Australian Energy Market Commission, Consultation Paper: National Electricity Amendment (Potential Generator Market Power in the NEM) Rule 2011, 14 April 2011, page 2.

When the New Electricity Law was introduced in 2005 the Honourable P. Holloway (Minister for Industry and Trade) addressed concerns raised by other members in the South Australian Legislative Council in the parliamentary debate:

*At no stage has it ever been contemplated that any body other than the ACCC would undertake the role of competition regulation under the Trade Practices Act. That said, it follows that the provisions of section 46 of the Trade Practices Act [now the CCA] will continue to apply to the NEM and industry participants.<sup>2</sup>*

This position was then reflected in the first set of Certified Initial Rules made by the Minister and in place from 1 July 2005. Specifically, Rule 3.1.4(b) states in relation to the Chapter on Market Rules:

*This Chapter is not intended to regulate anti-competitive behaviour by Market Participants which, as in all other markets, is subject to the relevant provisions of the Trade Practices Act 1974 and the Competition Codes of participating jurisdictions.*

In light of these matters the NGF would appreciate the opportunity to understand the basis of the AEMC conclusion recorded at page two of the Consultation Paper. Consequently, on behalf of the Forum, I request that the AEMC provide a copy of the advice or analysis upon which the AEMC concluded that it has the power to make the proposed Rule.

If you have any questions please don't hesitate to contact me on (02) 6232 7789 or on 0419 835 218.

Yours sincerely



Malcolm Roberts  
Executive Director

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<sup>2</sup> The Hon. P. Holloway (Minister for Industry and Trade) in parliamentary debate re the National Electricity (South Australia) (New National Electricity Law) Amendment Bill.