11 June 2015

Mr John Pierce
Chair, Australian Energy Market Commission
Level 6, 201 Elizabeth Street
Sydney NSW 2000

Lodged via www.aemc.gov.au

Dear Mr Pierce,

RE: National Electricity Amendment (Bidding in good faith) Rule 2014

GDF SUEZ Australian Energy (GDFSAE) appreciates the opportunity to make a submission in response to the National Electricity Amendment (Bidding in good faith) Rule 2014 Draft Determination (the draft rule).

GDFSAE owns and operates 3540MW of brown coal, gas fired and renewable generating plant in Victoria, South Australia and Western Australia, with its retail arm, Simply Energy, serving markets in Victoria, New South Wales, South Australia and Queensland.

GDFSAE notes that rules around bidding and rebidding are critical to the design of the National Electricity Market. GDFSAE welcomes changes that improve or clarify existing arrangements. GDFSAE does not welcome proposals that have the effect of undermining flexibility in how participants operate or reduce volatility which is an inherent and necessary feature of the National Electricity Market.

Similarly, the purpose of rules around bidding and rebidding should be focused on the permissible actions that a participant can take when responding to the market and should not introduce highly subjective concerns or prioritise secondary objectives.

Finally, while the Australian Energy Market Commission (AEMC) and interested stakeholders have affirmed the importance of volatility and flexibility, the commitment to these principles can only be judged via the content of the National Electricity Rules and not general supporting commentary. Any proposal and subsequent rule change that sought to preference one form of market outcome over another, for instance disincentivising rebids or bids (together referred to as 'bids' forthwith) that create price volatility, would represent a fundamental move away from the existing market design.

Summary of GDFSAE's position on the proposed rule

GDFSAE believes there are number of potential improvements to the existing rule that arise from the draft determination; however, some of the proposed changes appear ill-suited to their objective, undermine and misdirect the focus of the provisions, and introduce provisions which would create significant uncertainty.

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GDFSAE high-level position on the draft rule is summarised here.

The changes that GDFSAE supports in-principle are set out immediately below.

- GDFSAE supports in-principle the move to a behavioural statement characterised as an obligation on generators not to make offers or bids that are "false, misleading or likely to mislead" as a replacement of the existing requirement to bid in "good faith".
- GDFSAE agrees that consideration of matters, as listed in draft clause 3.8.22A, including any pattern of conduct, should be relevant to the consideration of whether bids are false or misleading.
- GDFSAE supports in-principle the clarification that a bid "must be made as soon as reasonably practicable" as provided in 3.8.22A(d).

GDFSAE has strong concerns and recommends the removal of a number of clauses as set out below.

- GDFSAE does not support the additional reporting obligations to be placed on generators.
- GDFSAE does not support a delegation of powers to the Australian Energy Regulator to develop additional guidelines for the purpose of further reporting on bidding.
- GDFSAE does not support elevating the role of the market design principle in consideration of an offer or bid and therefore strongly recommends the removal of clause 3.8.22A(b1).
- GDFSAE recommends the removal of 3.8.22A(e) and does not support the elevation of the market design principles or other participants ability respond as the primary considerations the court *must* have regard to in assessing whether a bid was made as soon as reasonably practicable.

The rational for these positions is set out below.

Discussion

Use of a behavioural statement

The redrafting of the good faith obligation into a behavioural statement that participants must not bid in a manner that is false, misleading or likely to mislead provides potential and understandable public policy benefits.

The draft provision more clearly expresses behaviour that a generator cannot undertake as opposed to outlining general behaviour that a generator should undertake. The effect of this change, and the explicit interaction with the genuine intention to honour, may be very similar to the existing provision; however, the draft provision has the potential to provide an additional degree of clarity to participants and stakeholders. This is of itself valuable given the issues with the good faith provision.

It should be noted there is a view that the draft provision could be read wider than the existing good faith provision. While GDFSAE notes this position, in the absence of court interpretation this remains unknown. Some observers may consider this is potentially problematic, GDFSAE does not. GDFSAE does not have concerns with the provision capturing a potentially wider category of behaviours where it can be proven those behaviours are false, misleading or likely to mislead.

Clause 3.8.22A(c) and patterns of conduct

GDFSAE's appreciates the policy rational for expressing the elements contained in 3.8.22A(c) of the draft rule. This extends to the potentially more controversial 3.8.22A(c)(3) which cites "including any pattern of conduct".

In any circumstance where a participant is the subject of an investigation or action and more than one bid is under consideration, the juxtaposition of those bids and comparison of those bids is a natural outworking of that matter. Given a participant is responsible for each of the bids in question such a comparison returns to questions of whether those bids were false, misleading or likely to mislead. This is an appropriate consideration of actions within the control of the participant.

Therefore, unless the provision explicitly prohibits consideration of groups of bids by the court then providing a reference to 'patterns of conduct' is in GDFSAE's view unlikely to create a level of scrutiny on patterns of behaviour than would already likely to be necessary in determining a matter.

As soon as reasonably practicable

GDFSAE understands the policy basis for 3.8.22A(d) and believes it is appropriate that participants make bids as soon as reasonably practicable after the generator had decided to vary its offer to the market.

While GDFSAE is not convinced this issue is currently a relevant concern in the market, the draft provision signals the importance the market places on taking part in a just in time bidding process in a manner that reflects the actual intentions of the participant at all times. This is how the market should function.

While GDFSAE supports the policy intent it is noted that there is some uncertainty with regard to the words used. GDFSAE believes the objective of the clause should be for the participant to bid as soon as practicable after the participant has concluded that it will vary the bid. This is an event which comes *after* a participant observes or becomes aware of a material change in conditions, and *after* the participant determines that their initial bid may or is sub-optimal.

If the AEMC is satisfied this is the impact of the current drafting, GDFSAE implores the AEMC to explicitly state this as its interpretation within any further determination or documentation. If it is not, then the AEMC is encouraged to recast the draft provision accordingly.

Additional reporting obligations

GDFSAE shares the view of other industry participants and the Energy Supply Association of Australia that at no point has a strong case been made that the Australian Energy Regulator requires additional powers and at no time has a case been made that further reporting obligations would improve market efficiency, the ultimate test by which the AEMC should assess all proposals.

The existing powers of the Australian Energy Regulator allow it to target specific generators or events as soon as practicable after an event. If the Australian Energy Regulator is not acting upon its concerns regarding specific bids or participants behaviours quickly enough this is a matter for the regulator to consider not an invitation for the AEMC to introduce a burdensome new reporting obligation on the whole market. It needs to be made abundantly clear that participants, including GDFSAE, do not see the

obligations as light-handed and despite repeated suggestions otherwise the AEMC's views on them being so are incorrect.

If the purpose of the new reporting obligations are to create a ready-made source of contemporaneous notes that the AEMC has to clearly articulate that this additional burden, which would need to be significant in order to furnish the regulator with a useful level of information, will lead to more efficient market outcomes as well as being the telling factor in enforcement outcomes. Neither of these possibilities has been proven and both are highly doubtful.

Finally, the suggestion that the reporting obligations create a de facto 'soft' gate closure is alarming. The AEMC should be seeking to minimise administrative burdens and arguably exists so ill-conceived policies and proposals of this nature can be subjected to a rigorous assessment against the National Electricity Objective and be judged accordingly. For the AEMC to identify and then promote this idea, of its own volition, in the complete absence of a cost benefit analysis or empirical analysis raises doubts about the progress of this rule making process.

On the contrary, GDFSAE is of the view that as well as additional costs which will ultimately be borne by consumers additional reporting obligations will create perverse incentives whereby traders, or compliance officers engaged to fill out these reports, seek to minimise workload by not making minor bids that have minimal impacts on price and in turn revenue for a participant. This is because minor bids that do not go ahead will be less noticeable during any internal ex-post analysis. Bids that have a major impact on price, so bids that might spike the wholesale price, will continue to be made as during any ex-post analysis there will be greater scrutiny on a failure to bid where revenue could have been otherwise generated. Market efficiency is improved by both varieties of bids, whether or not the revenue benefits for an individual participant are large or small, and any disincentives to bid should be avoided.

GDFSAE believes that section 28 of the National Electricity Law is already sufficiently broad for the Australian Energy Regulator to fulfil its obligations as market regulator. If the AEMC is minded to clarify the powers of the regulator a new provision which clarifies the types of information that can be required or limiting the time by which such information can be requested would be of more benefit.

<u>Market design principle</u>

Any changes to the market design principle 3.1.4(a)(2) would only have the effect of clarifying the purpose of that specific principle and would not change the manner in which bids are assessed at the time of an investigation or court proceeding. In that regard a change is neither beneficial or problematic and the value of proceeding with draft clause 3.1.4(a)(2) turns on the degree to which the AEMC believes the market will benefit from words of clarification.

This differs dramatically to provisions, for instance 3.8.22A(b1) and 3.8.22A(e)(1), which seek to elevate the importance of the market design principle in considering whether a bid was false, misleading or likely to mislead or a bid was made in a timely fashion.

GDFSAE is discomforted by the AEMC's position that the court *must* have regard to a principle that requires significant subjective interpretation and is secondary to the purpose of amending offers. It is not clear how obligating consideration of the market principle is likely to influence the considerations of the court or interpretations of misleading, false or likely to mislead.

GDFSAE favours clear provisions that are open to consideration of the court based on the facts of the matter at hand, not clauses which pre-dispose the court to give greater consideration to subjective (and currently topical) principles over evidenced actions.

To this end, all references to the market design principle should be removed.

Assessing contraventions – the role of 3.8.22A(e)

Draft provision 3.8.22A(e)(1) has been touched upon above.

Draft provision 3.8.22A(e)(2) is unworkable and does not allow the participants to know with confidence what behaviour is legal or illegal at any point in time. Even before reflecting on the poor policy rationale for the draft provision, it is clear that a decision, or series of decisions, would be required by the court in order to be able to apply the draft provision which would lead to years of uncertainty.

GDFSAE recommends 3.8.22A(e) be removed from the draft rule as it does not believe it enhances the operation of 3.8.22A(d) but confuses its operations, obligates the court to give priority consideration to a number of technical and subjective considerations which cannot be known prior to a bid or without further investigation ex-post, and is not consistent with the National Electricity Objective.

First, while 3.8.22A(d) provides a clear obligation on a participants the impact of 3.8.22A(e) is uncertain and places a participant in a position where they cannot know whether they are acting lawfully or not at the time a bid is made. This is because they will have to act in the absence of the required knowledge to know if they will be compliant. This is untenable and if enforced will severely impact the operation of the market.

Second, the AEMC has not explained how the market would be more efficient in a world where participants are mindful of other participant's ability to respond before bidding. While it is understood that bids and bids in response aid efficiency (although limited by dispatch deadlines) placing such an obligation on participants creates uncertainty in bidding and would appear counter to the expected competitive process. At the AEMC public forum in Brisbane it seemed to be the case that the AEMC didn't think this provision would obligate consideration of other participant's action before bidding and therefore would not be anti-competitive. Whether the AEMC holds that view or not is in some ways irrelevant as the draft provisions *require* the participant to give consideration of other participant's ability to respond. GDFSAE believes this clause is inconsistent with the operation of the National Electricity Market and anti-competitive.

Finally, there is a perverse conflict created when certain real world examples are considered in the context of 3.8.22A(d) and 3.8.22A(e). For example, if a generator wished to bid close to an interval commencing it may be consistent with clause (d) to bid immediately, but not leaving time for a participant to respond may open up a line of inquiry pursuant to clause (e). Whereas, if a participant delayed a bid they would be contravening clause (d) but a line of inquiry regarding the time of the bid under (e) would not be considered where other generators had time to respond. The participant would need to make a calculated guess as to which issue the regulator is more likely to consider *in practice*. Given (e) is elevated as central to consideration of satisfying clause (d) it is not unlikely bids may be delayed, which is inefficient, to minimise regulatory inquiry. This may give the appearance of an efficient outcome but it is not consistent with the National Electricity Objective and again interferes with the competitive bidding process.

As an aside, GDFSAE notes that it is not inconceivable for bids, like trades in other markets, to be undertaken via automated systems. Such innovation is possible and has appeal in an environment of cost

cutting. An automated system could respond precisely to changes that are measureable, for instance price, demand, temperature, but would have no way of incorporating the subjective uncertainties inherent in 3.8.22A(e). Whatever rules are developed should work irrespective of technology platform. This is not the case with the draft provision.

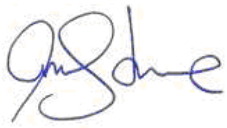
Conclusion

GDFSAE welcomes the AEMC's work in this area and encourages the AEMC to make a final determination consistent with the positions outlined in this submission and as documented in the amended rule affixed to the Energy Supply Association of Australia's recent submission.

Should the AEMC be minded to progress or consider alternatives to a scaled back version of the draft rule then GDFSAE suggests it would be appropriate for the AEMC to undertake a further round of consultation including a further public forum so that the AEMC can fully explain the full suite of objectives against which it is seeking to progress change. This is critical as the draft rule has moved some way from the proposal lodged by the proponent at initiation.

GDFSAE welcomes further discussions and engagement with the AEMC and is available to discuss these matters. In that regard, should you have any queries in relation to this submission please do not hesitate to contact me on, telephone, 03 9617 8415

Yours sincerely,



Jamie Lowe
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