Australian Energy Market Commission

Draft Rule Determination

National Electricity Amendment (Dispute Resolution for Regulatory Test) Rule 2006

Rule Proponent: **Ministerial Council on Energy**

Date: **20 April 2006**

Signed: .....

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For and on behalf of:
Australian Energy Market Commission

Commissioners: Tamblyn
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Summary

The Ministerial Council on Energy (MCE) lodged a Rule change proposal on 12 October 2005 to implement a streamlined dispute resolution process for the regulatory test.

The MCE's Rule change proposal seeks to implement a streamlined, single stage process, with the aim of expediting the resolution of disputes arising from the application of the Regulatory Test. It also seeks to limit the matters that may be disputed to exclude personal detriment or personal property rights. The MCE's Proposal does not address dispute resolution under the Rules more broadly.

The Rule change proposal reflects the transmission policy position adopted by the MCE in its December 2003 MCE report to the Council of Australian Governments (COAG) and confirmed in its May 2005 Statement on NEM Electricity Transmission. Reform of the dispute resolution process for the Regulatory Test forms part of this policy position.

Under the current dispute resolution arrangements, the Dispute Resolution Panel (DRP) is required to hear disputes raised by specified market participants with regard to the contents, assumptions, findings or recommendations of the final report prepared by the proponent of a new large transmission network asset. Irrespective of the outcomes of the DRP process and the preparation of the final report by the project proponent, these same matters can be referred to the Australian Energy Regulator (AER) for resolution.

Under the MCE's proposal, matters currently heard by the DRP would be heard directly by the AER. As a result of this change, disputes would be heard through a single stage process, thus reducing the time taken to resolve disputes compared to the current dual stage process. In addition, the resolution of disputes would also be subject to prescribed timeframes.

Nine submissions were received at the initial consultation (section 95) stage. These submissions were supportive of the proposal to streamline the dispute resolution process, but suggested a number of clarifications and enhancements. In adopting the MCE's Rule change proposal, the Commission has been mindful of the enhancements suggested by submissions and has made a number of drafting amendments that have been incorporated into the MCE's proposal.

The Commission has also made a number of drafting changes to clarify the functioning of the dispute resolution process and to improve the draft Rule's ability to achieve the MCE's stated policy intention.

The Commission is satisfied that the modified Rule is likely to contribute to the National Electricity Market objective, and that it therefore satisfies the Rule making test, by reducing the amount of potential duplication and inefficiency in the resolution of disputes and thereby encouraging transmission investment. This draft Rule determination sets out the Commission's reasoning in accordance with the requirements of the National Electricity Law.

1. The Ministerial Council on Energy's Rule Change Proposal

On 12 October 2005, the Ministerial Council on Energy (MCE) requested the Australian Energy Market Commission (AEMC) make a Rule, pursuant to section 91 of the National Electricity Law (NEL), to implement a streamlined dispute resolution process for the Regulatory Test.

Under the current dispute resolution arrangements, Registered Participants, NEMMCO and interested parties may dispute the contents, assumptions, findings or recommendations of the report prepared by the project proponent for the new large transmission network asset prepared under clause 5.6.6(f) with respect to:

- alternatives considered and their ranking;
- whether the project will have a material inter-network impact;
- the basis on which the applicant has assessed that the new large transmission network asset satisfies the Regulatory Test; and
- whether the project is a reliability augmentation.

Disputes are initially brought before the Dispute Resolution Panel (DRP) for reliability augmentations (non-reliability augmentations are referred to the Australian Energy Regulator (AER) for dispute resolution). The DRP cannot determine whether the new large transmission network asset (augmentation) satisfies the Regulatory Test, but is allowed, under the Rules, to settle the assumptions upon which the Regulatory Test is applied.

Irrespective of the outcomes of the DRP process and the preparation of the final report by the project proponent, the same matters considered and resolved by the DRP can be disputed through clause 5.6.6(1) and are referred to the AER for determination. If the network asset is not a reliability augmentation, Registered Participants, NEMMCO and interested parties may dispute the conclusion in the project proponent's report that the new large transmission network asset satisfies the Regulatory Test. If a dispute is raised, the proponent must apply to the AER for a determination that the proposal satisfies the Regulatory Test.

The MCE's Rule change proposal seeks to implement a streamlined, single stage process, with the aim of expediting the resolution of disputes arising from the application of the Regulatory Test. The MCE's proposal does not address dispute resolution under the Rules more broadly.

Clause 5.6.6 of the Rules relates to the mechanism for resolving disputes in respect of the Regulatory Test. The general dispute resolution provisions are contained in section 8.2 of the Rules.

1.1 Summary of the Proposed Rule Change

The MCE's Rule change proposal incorporates the following:

- Matters currently heard by the DRP under clause 5.6.6(h) will be heard directly by the AER only. As currently occurs, the AER will also have the power to hear and determine whether a new large transmission network asset satisfies the Regulatory Test (a matter not within the authority of the DRP). As a result of this change, disputes would be heard through a single stage process only, thus reducing the time taken to resolve disputes compared to the current dual stage process.

- The AER will determine disputes as to whether a new large transmission network asset is a reliability augmentation.

- The current clause 5.6.6(h) will be expanded to allow a dispute regarding whether the augmentation satisfies the criteria for a material inter-network impact published by the Interregional Planning Committee (IRPC).

- Where the project is not a reliability augmentation and the report provided by the project proponent is not in dispute, the project proponent may apply to the AER to determine whether the project satisfies the Regulatory Test.

- Disputes on whether a new network investment satisfies the Regulatory Test will continue to be limited to non-reliability new large transmission network assets.

- The AER may refuse to determine a dispute on the basis that the dispute is based on personal detriment or personal property rights rather than network issues and the operation of the NEM.

- The implementation of strict timeframes to apply to the dispute resolution process:

    - 30 business days from when the final report is published on the NEMMCO website to lodge a dispute with the AER and give notice of the dispute to the applicant;
    - 30 business days for the AER to resolve disputes regarding reliability augmentations; and
    - 120 business days for the AER to resolve disputes regarding non-reliability augmentations.

- Dispute notices are required to be lodged directly with the AER (with a copy to the applicant). The AER must consider the dispute from the day it receives the dispute notice.

- Parties permitted to raise a dispute with the AER under the streamlined process will be limited to Registered Participants, the AEMC, Connection Applicants, Intending Participants, NEMMCO and interested parties. The definition of interested party relevant to the dispute resolution process in Chapter 10 is amended to include an

additional party, namely a person (including an end user or its representative) who, in the AER's opinion, has or identifies itself to the AER as having the potential to suffer a material and adverse market impact from the new large transmission network asset identified in a report under the current clause 5.6.6(f) and clause 5.6.5B. Clause 5.6.5B refers to the Regulatory Test under the Last Resort Planning Power provisions.

- The AER will have discretion to allocate its consultancy costs to either or both the applicant (project proponent) and/or disputing party and the AER will not be required to publish its determination until payment for the costs have been received.

2 Draft Rule determination

The Commission has determined in accordance with section 99 of the NEL to the draft Rule. A draft of the Rule to be made (the draft Rule), which is the proposed Rule put forward by the MCE, is attached to this determination. The modifications have been designed to maintain the MCE's intent in the proposal.

This determination sets out the Commission's reasons for making the Draft Rule. The Commission has taken into account:

1. The Commission's powers under the NEL to make the Rule;
2. The proponent's Rule change proposal and proposed Rule;
3. Submissions received;
4. The Commission's analysis as to the way(s) in which the draft Rule will or is likely to contribute to the achievement of the national electricity market objective so that it satisfies the statutory Rule Making Test; and
5. Relevant MCE statements of policy principles.

The Commission has applied the statutory Rule making test and, for reasons set out in section 2.2 of this draft Rule determination, is satisfied that the draft Rule is likely to contribute to the achievement of the NEM objective.

2.1 The Commission's power to make the Rule

The Commission is satisfied that the draft Rule falls within the subject matters for which the Commission may make Rules as set out in s.34 of the NEL and in Schedule 1 of the NEL.

The draft Rule relates specifically to item 30 of Schedule 1 of the NEL relating to disputes which is given effect by s.34(2) of the NEL. Item 12 of Schedule 1 of the NEL also states that the "*augmentation of expansion in the capacity of transmission systems and distribution systems*" is an allowable subject matter for the National Electricity Rules.

Given that the MCE's Rule change proposal relates to the process of regulation of proposed investment in the transmission system the draft Rule can be made by the Commission.

2.2 Assessment of the Draft Rule: the Rule making test and the national electricity market objective

The Rule making test requires the Commission to be satisfied that a proposed Rule will contribute to the NEM objective. The test requires the Commission to consider the implications of the proposed Rule, for the efficient investment in, and efficient use of

these electricity services, in respect of specified elements which impact on the long term interests of end users of electricity.
The Rule making test states:

> *"(1)The AEMC may only make a Rule if it is satisfied that the Rule will or is likely to contribute to the achievement of the national electricity market objective.*
>
> *(2) For the purposes of subsection (1), the AEMC may give such weight to any aspect of the national electricity market objective as it considers appropriate in all the circumstances, having regard to any relevant MCE statement of policy principles."* (s.88 NEL)

The NEM objective is at the centre of the Rule making test, and is set out in s.7 of the NEL:

> *"The national electricity market objective is to promote efficient investment in, and efficient use of, electricity services for the long term interests of consumers of electricity with respect to price, quality, reliability and security of supply of electricity and the reliability, safety and security of the national electricity system."*

The Commission has applied the Rule making test to the Draft Rule, as modified by the outcomes of analysis and discussion in sections 2.3 and 2.7.

The Commission recognises that it is important that there be an efficient and effective dispute resolution process in place for the consideration of transmission network augmentations through the Regulatory Test. In order to maintain reliability of the national electricity market, it is important for there be an effective process for the assessment of reliability augmentations. The Regulatory Test is an integral part of this, and so, an effective dispute resolution process around that Regulatory Test process is imperative.

In order to ensure that there is appropriate investment in transmission infrastructure, project proponents, NEMMCO, market participants and interested parties require certainty and clarity. An effective and timely dispute resolution process will also contribute to that level of certainty and clarity. The MCE's intent in bringing forward the proposal for consideration by the Commission is to streamline the dispute resolution process. The proposal to move to a single stage, from a dual stage, process is designed to improve the certainty and efficiency of the process for approval of transmission augmentations.

This streamlining must be balanced with the need to ensure robust dispute resolution processes. The Commission considers that the Proposal maintains an appropriate balance between an efficient process and adequate consideration of disputes. There is still ample opportunity for interested parties to raise concerns with a proponent's proposal, and for those concerns to be considered through the dispute resolution process to be administered by the AER, thereby contributing to the NEM objective.

The Proponent's inclusion of clear timeframes for the consideration of disputes by the AER is another specific element that will ensure certainty for project proponents and consumers alike.

The Commission is satisfied that the changes to the current Rules proposed by the MCE will contribute to the NEM objective. The MCE's proposal, as modified by the Commission, will help to ensure the promotion of efficient investment in transmission, thereby contributing to the long term interests of consumers through reliability and price of electricity services.

2.3 Amendments to the proposed Rule

The Commission has made a number of modifications to the MCE's Rule change proposal. The Commission considers that these modifications align with the MCE's policy intent in lodging the proposal, and assist in contributing to the NEM objective.

These modifications range from minor drafting amendments designed to correct typographical errors, to the more significant amendment to the process for dispute resolution in order to ensure that the streamlining intent is maintained. Many of these were originally raised in submissions.

The following modifications to the proposed Rule have been made:

- The process for payment of costs by dispute parties no longer has the potential to delay the issuing of a determination by the AER and consequently the resolution of a dispute. Under the revised drafting, payment of any invoice issued by the AER to parties to the dispute is treated as a separate issue to the issuing of the AER's determination.
- Timeframes have been prescribed around the AER's power to request additional information and the amount of time allowed to disputing parties to respond to any request.
- The draft Rule has been restructured to improve clarity and correct typographical and drafting errors in the MCE's proposal and in the current clause 5.6.6.
- Cross references to a clause created by the Last Resort Planning Power Rule change have been removed.

The final point in the above list refers to clauses in the MCE's proposed draft Rule that seeks to impose the same dispute resolution process and requirements where the Regulatory Test is undertaken as a result of the use of a Last Resort Planning Power (LRPP). The LRPP does not currently exist in the Rules, however it is the subject of a Rule change proposal by the MCE. That proposal is currently under consideration by the Commission and a draft determination is due by November 2006. The Commission has determined that the provision in the dispute resolution Rule change proposal relating to the LRPP will be considered further in preparation of the draft determination for the LRPP Rule change proposal.

The modifications listed above have been proposed to improve the draft Rule's ability to achieve the MCE's stated policy intention and to reduce the possibility for misinterpretation of the Rule. The MCE's proposal emphasised that any changes should be made that would achieve the proposed reforms.

2.4 *Submissions received*

A section 95 notice relating to the Rule change proposal was issued by the Commission on 22 December 2005, inviting submissions from interested parties. First round consultation on the proposed Rule closed on 24 February 2006. The Commission received nine submissions from:

- Australian Energy Regulator
- CS Energy
- EnergyAustralia
- Ergon Energy
- National Generators Forum
- Powerlink
- TransGrid
- TRUenergy
- VENCorp

Submissions were generally supportive of the overall intent and methodology of the MCE proposal to streamline the dispute resolution process. However a number of issues were raised by respondents with regard to the specifics of the proposal and were addressed by the Commission in its consideration of the proposal. These issues are discussed in Section 2.7.

2.5 *Relevant MCE statements of policy principles.*

The MCE adopted four key principles to underpin transmission policy in the NEM in the December 2003 MCE report to the Council of Australian Governments (COAG). Within these principles, the MCE agreed to a package of transmission reforms, including the development of a new streamlined dispute resolution process for the Regulatory Test.

The MCE's policy position arising from the adoption of these principles was confirmed in its May 2005 Statement on NEM Electricity Transmission, and encompasses:

- the creation of a streamlined, one stage dispute resolution process for the Regulatory Test;
- restricting those that can raise a dispute to rule participants (as defined) and interested parties (as defined); and
- directing disputes based on personal detriment or personal property rights to be heard through existing environmental and land planning appeal processes.

2.6 *The Public Hearing*

No public hearing was held during first round consultation in relation to this Rule change proposal.

2.7 Matters arising from consultation and the Commission's analysis

2.7.1 Potential for delays in an AER determination

MCE proposal

Clause 5.6.6 (qb) of the MCE proposal allows for the AER to withhold its determination over a dispute until full payment of costs by a party to a Regulatory Test dispute.

Submissions

In the view of a number of submissions, this has the potential to create a situation where the AER determination, and consequently transmission investment, over a dispute could be artificially or strategically delayed by the actions of a party to the dispute. The possibility of a delay in resolution was seen by respondents as contrary to the MCE's policy intent to streamline the dispute resolution process.

This view was exemplified by the TransGrid submission, which noted that:

This clause as written could result in material delays to the AER making its determination and consequently result in delays to efficient transmission investment. Inclusion of the clause would allow a party to a Regulatory Test dispute to delay payment of any costs if they saw this as beneficial to them. If s.72 of the NEL is deemed relevant for the default payment period, then the determination could be delayed for a month.

CS Energy, Powerlink and Ergon Energy also drew attention to this as a potential problem.

TransGrid put forward an alternate proposal which would require the AER to indicate at the commencement of a dispute which parties will pay costs, and for a timeframe for payment to be indicated in the Rules.

Powerlink put forward an alternate proposal whereby a separate binding timeframe be included in the Rules relating to the payment of costs.

Commission's analysis and finding

The proposal, as drafted by the MCE, includes maximum timeframes for the AER to issue its determination. If the dispute relates to a reliability augmentation the maximum time for resolution is 30 days, whereas if it is a market augmentation the maximum time for resolution is 120 days. However these could be rendered meaningless if costs are not paid by the relevant parties in an appropriate timeframe.

The Commission has considered several options for dealing with this issue, including that:

1. the MCE Rule proposal remains unchanged, and the possibility of delays to the issuing of a determination by the AER remain; or

2. the MCE Rule proposal is modified so that AER dispute determination must be issued within the maximum timeframes (30 and 120 days), regardless of payment by the relevant party.

The Commission has determined that the MCE's draft Rule be modified so that the payment can not hold up a determination, and the failure of a party to pay becomes a breach of the Rules, which the AER can seek the appropriate legal remedy by exercising its enforcement powers under the NEL. The Commission has made this determination on the basis that the overarching policy intent of the MCE is to streamline the dispute resolution process. This modification will contribute to the streamlining of the dispute resolution process.

2.7.2 Appropriateness of the AER to determine disputes

MCE proposal

The MCE Rule change proposal includes matters currently heard by the DRP under clause 5.6.6(h) will be heard directly by the AER. As currently occurs, the AER will also have the power to hear and determine whether a new large transmission network asset satisfies the Regulatory Test (a matter not within the authority of the DRP). As a result of this change, disputes would be heard through a single stage process only, thus reducing the time taken to resolve disputes compared to the current dual stage process.

Submissions

EnergyAustralia questioned whether it was appropriate or efficient for the AER to determine disputes, arguing that the AER is not in a position to provide an independent review of the relevant issues. EnergyAustralia's submission indicates that it believes that the proposal will create a situation where the AER would use its own resolution in the dispute to subsequently assess the justification of the project under the Regulatory Test.

While EnergyAustralia came to the conclusion that streamlining of process and the increase in regulatory certainty was an appropriate circumstance to diverge from the principle of separation of powers, the Rule change should require the AER to seek advice from NEMMCO and the IRPC, as appropriate, in deciding disputes.

TRUenergy was strongly in favour of the AER hearing all disputes on the Regulatory Test directly due to its regulatory experience and possession of, or access to, the requisite economic skills. TRUenergy also argued that the publication of the AER's regulatory dispute decisions would create regulatory precedent and hence greater investor certainty.

The separation of powers within the regulatory framework was not raised by any other submissions.

Commission's analysis and finding

The Commission has determined that it is appropriate for the AER to hear disputes relating to the contents, assumptions, findings or recommendations of the final report prepared by the proponent of a new large transmission network asset. The Commission's

consideration of this issue highlighted that the AER is not reviewing its own decision, but rather the inputs from the proponent that forms its application report.

2.7.3 Adequacy of proposed timeframes

MCE proposal

The MCE has proposed timeframes for resolving reliability and non-reliability disputes to be 30 days and 120 business days respectively. These timeframes apply from the day the AER receives the notice of the dispute.

Submissions

In its submission, the AER has questioned the feasibility of the 30 day deadline for reliability augmentation disputes, given the complexities surrounding the definition of a reliability augmentation and the variation in jurisdictional reliability requirements. In the AER's view, undertaking a comprehensive review of disputed matters within the specified timeframe would require the clarification of a number of issues, particularly the definition of a reliability augmentation.

TRUenergy stated that the same 120 day timeframe should apply to both reliability and non-reliability augmentation disputes as they both reflect "*comprehensive assessments of economic efficiency*".

The only other submission to directly address this aspect of the MCE proposal was CS Energy, which considered the two timeframes appropriate.

Commission's analysis and finding

The Commission has considered that the timeframes as proposed by the MCE are appropriate as they provide a balance between the need to streamline the dispute resolution process and providing the AER sufficient time to consider the dispute.

The imposition of the maximum timeframes also contributes to the NEM objective as it provides a further level of certainty for proponents and interested parties alike. The shorter timeframe for reliability augmentations reflects the necessity of expediting reliability augmentations and the lesser time available to assess the proposal as compared to non-reliability augmentations.

2.8 Additional matters

The Commission has also considered several matters that have arisen outside the submission process in considering the MCE's Rule change proposal.

2.8.1 Timeframes on information requests

Under the MCE Rule proposal, and consistent with the current Rules, the AER has the power to request additional information from the project proponent or the disputing party,

and may extend the timeframes for making a determination by the time taken to receive the additional information.

Given that there are no time limits imposed upon the request for additional information, there is the potential for either the AER or the parties to the dispute to extend the timeframe for an undetermined period of time if it was to their benefit. This would be at odds with the MCE intention to streamline the dispute resolution process.

To avoid this situation, the Commission has modified the draft Rule to stipulate that:

- the AER must request additional information no later than seven business days prior to the expiry of the relevant timeframe for resolution of the dispute stipulated in the Rule; and
- the request for information must be responded to within 14 business days of receipt.

2.8.2 Scope of disputes

MCE has proposed to include an amendment that people cannot dispute the proponent's application report on the basis of an individual's personal detriment and property rights. The MCE has indicated in its proposal that this is required to give the AER the discretion to dismiss frivolous and vexatious claims that may slow down the process of an augmentation and therefore delay the reliability or market benefits associated with an augmentation.

The Commission has determined that the intent of the clause should be retained, noting that while there are clearly some benefits in giving the AER the ability to limit and manage such disputes in an appropriate manner, the Commission considers that this clause may present some practical difficulties. These concerns are based on the wide scope of such a limitation.

The Commission has, however, reinstated the current Rule's reference to externalities to the Regulatory Test in place of the MCE's use of "economic side-effects that are periphery to the Regulatory Test". The MCE's proposal does not indicate a reason for this change, and the Commission has some concern that the wording may have an impact on the promulgation of the Regulatory Test. The Commission would welcome stakeholder views on this issue.

2.8.3 Last Resort Planning Power

As noted in section 2.3 of this draft determination, the MCE's proposal assumes that the MCE's LRPP Rule change proposal, and the resulting new clause, has been approved and promulgated by the Commission. The draft determination on the LRPP Rule change has been delayed (which the Commission gave notice of under section 107) until late November 2006.

The MCE dispute resolution proposal refers to a clause that would ensure that the same dispute resolution process is applied where the LRPP is invoked and a proponent is

required to undertake the Regulatory Test. This would appear to be sensible to ensure consistency in the application of the Regulatory Test. However it should not commence until and unless the LRPP Rule change proposal is made.

The Commission has determined that the relevant references to LRPP be removed (specifically, references to clause 5.6.5B(h)). Removal of these references will not have a material impact on the operation of the draft Rule. In the event that the LRPP Rule is made, a provision should be considered in the LRPP Rule which would trigger a consequential amendment to clause 5.6.6 that would reinstate the references to LRPP.

Attachment 1: Draft Rule