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27 August 2004

NE Rule Change Process  
C/ MCE Market Reform  
Department of Industry, Tourism and Resources  
MCEMarketReform@industry.gov.au

Dear Sir

**MCE consultation paper “Proposed National Electricity Rule Change Process”, August 2004**

AGL welcomes the opportunity to comment on the consultation paper on the proposed National Electricity Rule Change Process. We also take this opportunity to make some general comments on the current energy market reform program.

**General comments**

AGL notes that two key issues for industry, namely the industry levy and the issue of merits review, are not being consulted on at this stage. While AGL will participate in consultations on these two critical issues later in the energy market reform program, we remain concerned that these are important issues to participants and need to be addressed promptly.

The removal of the potential for merits reviews under the Code by the abolition of the National Electricity Tribunal is a removal of existing rights of participants and should be not be undertaken lightly. The consequential reduction in the discipline on market bodies to make correct decisions and consult appropriately on decisions currently defined in the legislative instruments as “Reviewable Decisions” lessens the accountability and quality of those bodies’ decisions.

Deferring discussion on the levy is also a concern to AGL since the costs for participants are being incurred. If participants are expected to pay all costs being currently incurred, then it is appropriate the bodies incurring the costs have some accountability to participants. The SCO should determine and publish budgets and target costs for the new bodies and indicating how the costs will be shared.

AGL still has concerns about the arrangements for information sharing between the regulatory bodies and the fact that information provided to one regulatory body for a particular purpose can be used by another regulatory body for any purpose. Currently regulatory bodies are bound by the common law principle of the ‘equitable duty of confidence’ established by Justice Gummow in the Smith Kline French case. Under this precedent, information provided in confidence can only be used for the purpose for which it was provided. AGL is concerned that the legislation abrogates this common law principle and does not put any equivalent controls on information use. The problem with legislating for the uncontrolled flow of information between regulatory bodies is that the regulatory bodies might not be supplied with the information needed to do their jobs properly because parties with information to supply decline to do so because they are unsure as to the use to which the information they supply may be put.



AGL notes that the timeframe for providing submissions on the proposed rule change process is very short. AGL considers that it is important that future consultations provide sufficient time for industry and interested parties to provide meaningful feedback. For example, it is important that there is an appropriate consultation process followed when developing the rule change process for gas and for the retail code.

### **Proposed Rule Change process**

AGL generally supports the proposed Rule change process detailed in the MCE consultation paper “Proposed National Electricity Rule Change Process”, August 2004.

We specifically support the replacement of the National Electricity Code, which can be construed as arrangement between registered participants, with the National Electricity Rules, which are an obligation on registered parties in the NEM. We accept that such an arrangement will allow a simpler Code change process.

AGL does, however, consider that there are areas of the process that could cause concern:

- Assessment of proposed Rule changes against the Market objectives
- Net benefits test
- Anyone can propose a rule change
- The AEMC can refuse a Code change or reword a change at its discretion
- The AEMC can apply a shorter or longer process at its discretion
- Obligation to publish proposed rule changes
- The transitional arrangements

Each of these is discussed below.

### ***Assessment of proposed Rule changes against the Market objectives***

AGL supports the proposal that the criteria for acceptance of a Rule change is that the change demonstrates a clear net benefit against the market objectives.

We are, however, concerned that the new objective included in the Market rules (apparently included with network regulation in mind) is very general in its wording. However, as it stands the objective would apply to all rule making affecting the activities of industry participants in the competitive sector such as the rules applying to competing generators and retailers. If the intention is limited to ensuring the appropriate development of network and related infrastructure, the objective should make that clear. Otherwise, the implications of extending that market objective to the competitive sectors of the industry need to be properly analysed and the relevant parties need to be consulted. Consequently, we would prefer that the current objective set be used unless its limited application is clear or there is a demonstrated need to include the additional general objective in the National Electricity Law.

AGL also notes that the recent work of the Productivity Commission in its review of the Gas Access regime expressly deals with issues that arise from multiple and conflicting objectives. AGL considers that it is important that the work of the Productivity Commission is taken into account in developing objectives for the national access framework. AGL considers that it is important that proper consideration is given to the appropriate objectives and that objectives in one regime are not simply transferred to another regime.

### ***Net benefits test***

AGL is concerned that while the existing net benefit test that is applied in the context of Code changes under section 88 of the Trade Practices Act is a settled regulatory standard, the net benefit test under the proposed legislation is neither the same test nor a well defined regulatory standard. The exact meaning of the net benefits test is not clear from the documents provided to the market. A simple assessment process, similar to the one used for transmission augmentation, will need to be developed to ensure that market participants and interested parties (including customers) can be sure that the process is robust.

At the recent presentations, it was explained that the AEMC will be required to consult on the net benefits test and AGL looks forward to participating in that process.



### ***Anyone can propose a rule change***

Under the current Code change process any interested party (which requires some standing) can propose a rule change. Extending the right to initiate a rule change to disinterested parties or parties whose interest if exposed is not a bona fide interest opens the rule change process to too frequent or frivolous applications or even to abuses of process. AGL considers that the criteria for suggesting a Rule change should be limited to interested parties. If necessary, the definition of interested parties should be broadened to specifically include the MCE and jurisdictions or to parties who can demonstrate they have a relevant interest in the energy industry or the specific Rule change.

### ***AEMC can refuse a Code change or reword a change at its discretion***

AGL is concerned that the AEMC is given a wide power to reject a Code change. While it can be argued that the AEMC is unlikely to reject a beneficial change, we would prefer that the process contains a provision, much like the current process, that if there is multi party support that a change be considered, the AEMC is bound to commence the process. This ensures that the AEMC cannot stop a widely supported change.

The AEMC also has the power to reword a change. While the rewording has to be consistent with the intent of the original change, subtle changes can have significant ramifications. AGL would suggest that the approval of the proposer be required if a change were to be reworded.

### ***AEMC can apply a shorter or longer process at its discretion***

The AEMC has the ability to put in a fast process, with limited consultation, for administrative changes or to correct errors. This has always been the case and is supported. The fast process can also, however, be applied where no opposition is expected. While this seems a good idea and could shorten the process, the AEMC has a broad the right to reject objections to the faster process. The AEMC can also extend the defined timeframes at its discretion. This is, of course, necessary for complex changes but there needs to be limits on this discretion.

AGL considers that market participants and interested parties must have recourse to ensure that the Code change process is appropriately and expeditiously carried out. This should be, or be equivalent to, common law administrative review where the process and the legality of decisions but not the merits are reviewable. Such review should also enable participants to require action by the AEMC as would be possible under common law administrative review.

### ***Obligations to publish proposed rule changes***

AGL considers that the AEMC should be obligated to publish details of proposed rule changes it rejects so there is a fully transparent process. Currently, the proposed process requires the AEMC to “provide written reasons to a party” which implies that a party would first have to seek written reasons. The process should provide for automatic publication of rejected proposals.

### ***Transitional Arrangements***

AGL believes it is important that Code changes during the transitional period are not delayed so that the market continues to develop. This is particularly important in the B2B area where the changes are the culmination of years of industry work and consultation. Energy businesses are already spending considerable resources on systems and process. Therefore it is critical that the work undertaken to date is not lost or delayed.

### **Summary**

AGL supports the Rule change process and the adoption of Market Rules defined by the National Electricity Law rather than retention of the existing Code. We believe, however, that some aspects need to be clarified or altered to make the process robust. These concerns relate to who can propose changes, how changes are assessed and limits to the discretion of the AEMC in management of the process.



If you have any questions regarding the above matters, please contact Alex Cruickshank, Manager NEM Development, on (03) 9201 7694 or by email to [acruicks@agl.com.au](mailto:acruicks@agl.com.au).

Yours sincerely

Dr Robert Wiles  
General Manager Regulation and Policy

