

APIA Submission
on
amendments to the electricity and gas rule-change process
February 2007

The Australian Pipeline Industry Association (APIA) welcomes the opportunity to make a submission to the Standing Committee of Officials (SCO) of the Ministerial Council on Energy (MCE) in regard to the proposed amendments to the electricity and gas rule-change process, as set out in the SCO's January 2007 consultation paper.¹

The primary focus of this submission is APIA's response to the proposed amendments to the AEMC's rule-change process, which are outlined in section 1. While APIA is not seeking to provide detailed comments at this time on the other issues raised in this consultation paper, namely the proposed amendments to the National Electricity Law and National Electricity Rules, some general comments are provided in section 2 of this submission.

1. Amendments to the Rule-change process

APIA supports a robust and fair rule-change process that serves to facilitate improved outcomes for energy markets. To achieve this, there must be reasonable access to this process for participants, both in terms of proposing a rule change and commenting on proposed changes. This requires that there should not be any unnecessary barriers to participating in the rule-change process. Additionally, the AEMC should be required to give proper consideration to all proposals.

In particular, APIA considers that it is important that market participants are able to initiate rule-change proposals. This is an essential element of a fair process given that participants are the most affected parties. Clearly, participants are well-informed with regard to issues of market operation and are, therefore, in a strong position to provide proposals that may improve market outcomes.

APIA generally supports measures designed to achieve a more efficient and streamlined rule-change process, however, it is critical that the overall integrity of the process is not undermined. APIA therefore offers the following comments on the changes proposed by the SCO.

¹ Standing Committee of Officials of the Ministerial Council on Energy, Electricity amendments and further amendments to the electricity and gas rule-change process, January 2007.

Additional minimum content for rule change requests

SCO is proposing to place a significantly greater onus on the applicant to provide information in support of its application as part of the minimum content for rule-change applications. This includes “an explanation of expected benefits and costs of the proposed rule change and potential impacts on those likely to be affected”. In some cases, where the benefits will primarily fall on the proponent, there is a requirement for a detailed analysis of the impact of the change.

APIA is concerned that the requirement to explain expected benefits and costs is ambiguous and is in addition to the requirement to explain how the proposed Rule will contribute to the NEL Objective. In particular, it is not clear whether the intention is to require the proponent to prepare a full quantitative cost-benefit analysis of the proposed change or whether it is intended simply that the proponent make a *prima facie* case that the benefits exceed the costs.

APIA is strongly of the view that a requirement for the proponent to prepare a fully detailed and enumerated cost-benefit analysis would be inappropriate as it would potentially be an onerous and costly exercise. This is particularly so given the lack of clarity as to what the AEMC would regard as acceptable in meeting this requirement. As it is a minimum content requirement for an application to proceed, proponents could be forced to invest significant resources in developing a full quantitative cost-benefit analysis in order to ensure its application is considered. As presently drafted, it would appear that the AEMC has a wide discretion in determining the type of analysis to be provided and industry, therefore, has very little certainty as to what would be required.

Furthermore, it is the proper role of the AEMC to undertake this type of analysis, and it is one which the AEMC is best placed to undertake given its overall picture of the market.

To provide greater certainty with regard to this matter, the legislation should clearly state that the proponent is not required to undertake a full quantitative cost-benefit analysis in order to satisfy the AEMC’s minimum threshold. If the SCO is unwilling to include this clarification, APIA contends that this requirement to explain costs and benefits should be removed altogether with the explanation of how the National Electricity Objective will be achieved through the Rule being sufficient for the purpose.

Fast-track process

A fast track consultation process may, in certain circumstances, assist in streamlining the rule-change process. However, it is essential that any fast-tracking arrangements do not undermine procedural fairness. In this regard, it will be important for the AEMC to ensure that the body undertaking the consultation (eg. NEMMCO, gas

market operator) is conducting an open and fair process that specifically addresses the issue being considered for a rule-change. Also, to ensure participants are aware of the status and potential implications of the consultation process being undertaken by another body, the AEMC needs to be absolutely clear that it is being undertaken for the purposes of a rule-change. It may also be appropriate for stakeholders to have the opportunity to query the AEMC's decision not to undertake a separate process.

APIA does not support regulators, such as the AER, being able to initiate or conduct rule-change processes as this is a confusion of the roles of policy/rule making and rule application/enforcement. The AER should not be able to review the rules it is responsible for applying.

Higher gate-keeper role

Several of the proposals in the SCO paper, such as the higher gate-keeping role, appear designed to give the AEMC greater discretion to reject or not consider rule change proposals. These measures include an ability to reject a rule-change proposal where: information requests have not been responded to within 2 months; there are no clear or material benefits apparent; and where the issue has recently been considered.

APIA believes that the AEMC should have the power to reject proposals that are trivial or vexatious. The 'no clear or material benefits' test will help to achieve this. Nevertheless, the greater discretion given to the AEMC to reject rule-change proposals needs to be limited in some way to ensure that legitimate and reasonable proposals are properly considered, and that the AEMC is not seen to prejudge the merits of an issue.

In terms of the information provision requirement, it may be that the information requested is complicated and difficult to compile, or potentially costly. The AEMC should not be able to reject a rule-change proposal on these grounds where the proponent has a reasonable explanation for being unable to meet that timeframe. More broadly, it would be appropriate to include safeguards to ensure information requests are reasonable, having regard to the expected benefits of obtaining the information. Such safeguards are particularly important where failure to comply with an information request within a specified time frame is a basis for rejecting a proposal.

The AEMC's discretion to reject proposals could also be constrained by a requirement that the AEMC must consider a rule change that is supported by six market participants. This mechanism will serve to ensure that the issue raised is substantive and has broad support.

In regard to the AEMC's discretion to reject proposals where the issue has been considered in the last 12 months, APIA considers that the legislation should provide that, if a Rule change has been clearly demonstrated to have failed, changing it within this timeframe should not be ruled out.

For transparency, APIA also considers that government-initiated changes should proceed through the rule-change process. This will allow for the proper involvement of market participants and users on issues related to the management of the market.

Consolidation of proposals

APIA generally supports giving the AEMC enhanced ability to consolidate rule-change applications as a means of streamlining the process. However, this is subject to ensuring that participants have adequate opportunity to comment on all elements of a consolidated proposal. Further, APIA supports the requirement that, where the AEMC has proposed a new solution that has not previously been raised in the consultation process, it must re-open consultation on that issue to ensure stakeholders have an opportunity to make submissions.

Application fee

APIA strongly opposes the proposal to impose an application fee. The SCO consultation paper indicates that the purpose of the fee is not intended as a form of cost recovery as the AEMC is subject to separate funding arrangements, but rather it is intended to ensure proponents are committed to the changes they request.

APIA believes that the best and most appropriate way to address the issue of trivial or vexatious applications is to ensure the gate-keeping powers are adequate for this purpose. An application fee is unlikely to be effective in deterring applications that are not serious. Different proponents will have differing capacity and willingness to pay. As such, this measure could in fact deter legitimate proposals from proceeding and may not deter others which might be trivial or vexatious. Given this, the level of the proposed fee itself would appear to be arbitrary. In addition, the fee could preclude worthwhile smaller reforms which would improve the operation of the market from occurring.

Moreover, the policy objectives of the fees seem unclear and not fully considered; in particular:

- the costs appear to be designed to be a disincentive to submitting rule changes that are “inappropriate”, however the fees change the incentives for proponents because they skew the incentives towards proposals that benefit the proponent rather than the market as a whole, and
- since a rule change can only be accepted if it promotes the NEL objective then it is difficult to see any policy basis for imposing a cost on an application for a rule change that is going to deliver the policy benefits required.

APIA considers the application fee is unnecessary, particularly in view of the other proposed changes to the gate-keeping powers and is potentially counterproductive to the goal of the rule-change process.

2. Other amendments to the NEL

APIA has not sought to provide detailed comments on the proposed amendments to the NEL. However, there are a number of matters in the NEL which parallel those in the NGL. These include the following matters, and APIA refers the SCO to its submission on the NGL for its position in relation to these matters:

- the appropriate balance between the Law and the Rules. (In this regard APIA is of the view that the balance in the NEL/NER is much more appropriate than in the NGL/NGR, reflecting the governance and institutional arrangements in the AEMA);
- use of regulations;
- information gathering;
- merits review; and
- fit for purpose.

However, APIA would like to comment on two particular aspects of the NEL. Firstly, APIA notes the changes to the guideline-making power which strengthens the ability of the AER to, in effect, make rules, through the ability to create new regulatory obligations. This is clearly an inappropriate confusion of the rule-making and rule-enforcement functions, further weakening the institutional and governance arrangements in which the AEMC's role is to make the rules and the AER's role is to apply them.

Secondly, in respect of the information gathering powers, APIA stated in its NGL submission that the powers in respect of information gathering instruments should be governed by a requirement on the AER to consider costs and benefits and that there be Rules which govern the application of the Regulatory Information Instruments by the AER. APIA suggests that the better alternative for these provisions (with the appropriate constraints as described in APIA's NGL submission)² is to move this powers relating to information gathering to the Rules and for the AEMC to be required to apply a cost-benefit test in making the Rules.

² APIA, Submission to MCE, Exposure draft of the National Gas Law, December 2006, p. 21-34