



6 February 2009

Manager, MCE Secretariat
Department of Resources, Energy, and Tourism
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Via email to MCE@ret.gov.au

Dear Sir/Madam

Australian Energy Market Operator Exposure Drafts: Amendments to the National Electricity Law and National Electricity Rules

The Australian Pipeline Industry Association (APIA) welcomes the opportunity to respond to the AEMO Exposure Draft Explanatory Material and the amendments to the National Gas Law (NGL) and National Gas Rules (NGR).

APIA's comments are focussed on the information gathering powers of AEMO and the subsequent treatment of that information. We also have comments concerning the Gas Statement of Opportunities (GSOO) and some of the wording of the relevant NGL and NGR amendments.

APIA questions the position put forward by the AEMO Implementation Steering Committee (ISC) in its response to submissions to its Statement of Proposed Approach for AEMO. In response to issue 45 "If a Rule or Procedure conflicts with existing contractual rights and obligations the latter must prevail", the ISC has put forward the position that "The Rules and Procedures will have the force of law and will therefore generally prevail over provisions in contracts".

APIA considers that, in the case where AEMO makes a new procedure that conflicts with existing contracts, such a procedure should not override commercial contracts. Such a statutory action would normally be avoided by Government. This issue is discussed further in APIA's submission.

As the ISC's timeframes are tight, APIA would welcome the opportunity to directly discuss with the ISC any of the issues raised in this submission. We look forward to continuing our constructive dialogue on this important matter.

Yours sincerely

CHERYL CARTWRIGHT
Chief Executive



APIA submission to the AEMO Exposure Drafts of amendments to the NGL and NGR

Introduction

The *National Gas (Australian Energy Market Operator) Amendment Bill 2009* and the *National Gas (Australian Energy Market Operator) Amendment Rules 2009* set out the amendments necessary to ensure that the Australian Energy Market Operator (AEMO) has the powers necessary to perform its functions.

This submission will address APIA's concerns relating to the information gathering powers of AEMO, its subsequent treatment of that information and the Gas Statement of Opportunities (GSOO).

1. Information Gathering Powers

Inconsistency in the application of MINs and MIOs between NEL and NGL

APIA notes that the relevant functions for which AEMO can issue a Market Information Notice (MIN) or Market Information Order (MIO) under the NEL c53(2) does not include the Electricity Statement of Opportunities (SOO). APIA does not consider it necessary to extend the use of a MIN or MIO to AEMO's function of preparing the SOO. Indeed, the SOO has been successfully published for 10 years without the use of MINs and/or MIOs and the existing provisions in the NER are adequate.

APIA is concerned that, aside from the declared system functions AEMO will be exercising in Victoria, the only use of a MIN or MIO under the amended NGL will be to enable AEMO to gather information relevant to the GSOO. While gas and electricity have different characteristics, there is no clear reason for this particular discrepancy. The AEMO Implementation Steering Committee (ISC) should provide explain why they would recommend imposing a broad ranging information gathering power (through MINs and MIOs) on the gas sector for a function that does not apply for the same function in the electricity sector).

APIA considers that the GSOO will result in better outcomes if it is prepared in a non-coercive manner. Consequently the statutory powers of a MIN and MIO to AEMO to complete this function would be unnecessary. In particular, it should be noted that the Gas Market Leaders Group has agreed in principle to providing the information necessary for the 2009 GSOO to AEMO prior to the amendments to the NGL coming into effect. i.e. prior to AEMO having the power to issue a MIN or MIO. This, along with the experience of NEMMCO in preparing the SOO, demonstrates the provision of the necessary information for the GSOO does not need to be coerced from industry on an annual basis. As the information is being provided without

MINs and MIOs, there appears to be no rationale that supports extending such regulation.

The information that can be requested for GSOO purposes is set out in the NGR. APIA submits that this information mainly comprises information already submitted (in a slightly different form) to the Gas Bulletin Board or publicly announced information in the case of new projects and expansion of existing facilities. It is not necessary to institute a broad ranging power in the proposed market information instruments to gather such information and APIA seeks an explanation as to what purpose this extended information gathering power is intended.

In the case of gas markets, MINs and MIOs should be specifically crafted for AEMO's declared system functions and should not remain open to being used for any other purposes. To do otherwise is to create an inconsistent information gathering framework for AEMO's electricity SOO and GSOO planning functions with no clear reason for such a difference.

Exemption from MINs and MIOs regarding the GSOO

APIA understands that the AEMO ISC is considering limiting the use of MINs and MIOs for GSOO purposes to those classes of market participant required to provide information to the Gas Bulletin Board (BB) under NGL s223. APIA supports this limitation, and suggests that participants exempt from providing information to the BB should be exempt from providing information to the GSOO. The criteria for exemption are set out in NGR s149-151, and essentially limit exemptions to very small facilities or facilities outside of the main production and demand zones. The GSOO is intended to provide supply and demand information aggregated to the same zones as defined for the BB and it is APIA's view that facilities warranting an exemption from the BB are not significant to the GSOO.

Such facilities currently do not have established systems to provide BB information and establishing systems to meet GSOO requirements would impose significant expenditure demands on small facilities. The GSOO is a supply and demand forecast mechanism and, as such, is likely to contain a degree of inaccuracy. The supply and demand information to be reported by the assets currently exempt from BB reporting is likely to be within the GSOO forecasting error.

As AEMO will be managing both the BB and the GSOO, it should not be necessary for those participants and/or facilities with an exemption from the BB to reapply for an exemption to the GSOO.

Alternative to use of MINs and MIOs for the GSOO

Discussions with the ISC have indicated the ISC is open to restricting the use of MINs and MIOs to an option of last resort for AEMO.

Rule 135KC of the NGR states that the GSOO must be published annually by 31 December. As an alternative to the use of MINs and MIOs, an additional rule could be created requiring market participants identified as having to provide information to AEMO for the purposes of the GSOO (as per s223 of the NGL) should provide the necessary information in the agreed format by 30 September each year, another appropriate date. Should a participant fail to provide such information, AEMO could issue a MIN to non-compliant participants.

In this way, AEMO would be using MINs when it is considered reasonably necessary, if a market participant did not provide the mandated information by the due date.

This is consistent with rules governing the SOO and the BB, except that the nature of the information provided for these functions requires market participants to provide information as they become aware of it, rather than on a specific date.

Ability to question the issue of a MIO and/or MIO

While the proposed MIO and MIN regime provides for consultation with notice recipients, AEMO has complete discretion in its consideration of the submissions. Under the proposed regime, AEMO drafts the notice, consults on it and makes the final decision as to the notice's breadth and application before implementation. As the drafter and implementer of the notice, AEMO should be required to introduce the requisite checks and balances in order to appropriately consider submissions and concerns that arise from the consultation process. Clearly, some level of separation between drafting and implementation of the notice is desirable.

The proposed regime does not provide grounds on which the issuing of a MIO or MIN can be questioned by the recipient. In the case of similar documents, such as subpoenas, recipients can seek to prevent document production on a number of grounds, including oppression, relevance and, in certain circumstances, confidentiality.

While the regime provides that submissions can be put as to whether AEMO should serve the MIN or MIO, the regime does not specify on what grounds recipients will be able to challenge the MIN or MIO. APIA believes that, at a minimum, recipients should be able to challenge MINs and MIOs on the same basis as a subpoena.

Information to be requested in a MIN and/or MIO

The potential scope of the MINs and MIOs is broad and can cover anything "AEMO considers reasonably necessary" (NGL s91F(1)) in the exercise of a relevant function. There should be clearly defined rules and criteria controlling the use of AEMO's discretion in issuing MINs and MIOs.

While the NGR sets out the information AEMO must publish in the GSOO in s135KB, APIA considers that, given the use of the term "reasonably necessary" in NGL s91F(1), the use of a MIN and MIOs in relation to the GSOO should be defined as, and hence limited to, that information which it must publish, as set out in s135KB. However, the issue of the potential scope of MINs and MIOs remains for those MINs and MIOs issued in relation to AEMO's declared system functions.

APIA accepts that, from time to time, the AEMO may wish to acquire new and/or different information in relation to compiling the GSOO, but AEMO should not be empowered to demand this as yet unspecified information from industry.

2. Use of Information

s91FD allows AEMO to use any information it obtains, regardless of method, for any purpose connected with its statutory functions. The information AEMO will be

collecting for GSOO purposes is to be published in aggregate form, and it is inappropriate for AEMO to use it in any other form, or to share it in any other form.

APIA considers information obtained by AEMO through the use of a market information instrument in pursuit of a declared system function should expressly be limited for uses relating to the declared system. If such a limit is not in place for the Victorian jurisdiction there is a real risk that participants' confidential information could be, perhaps inadvertently, misused or mishandled.

3. Treatment of Confidential Information

Certain documents provided in response to MINs and MIOs may be confidential to more than one party (eg. commercial contracts) or may not be confidential to the MIN recipient but confidential to a third party. In such cases, APIA seeks clarification as to how the duty to protect the information will work under the regime. If the MIN recipient provides information but does not do so "in confidence" under s91(1)(a), there is a question as to whether the third party is protected, or can seek protection. APIA believes that third parties should be allowed to seek protection.

Further to the issue above, s91GB allows AEMO to disclose protected information with consent. APIA also seeks clarification as to whether AEMO will require the consent of all parties to a confidential agreement or only the provider of the document prior to its disclosure. APIA believes that the consent of all parties to a confidential agreement should be obtained prior to disclosure.

The disclosure of protected information to any of the regulators and persons listed in s91GC(2) is authorised without limitation as to purpose. While s91GC(3) limits use of that information, APIA believes confidential information should not be provided without additional protection. The persons noted in s91GC(2) should not be given the protected information without first demonstrating that they reasonably require the information to carry out their regulatory functions.

In addition, s91GC(3) should be more focussed and directed so that it can appropriately apply to each of the persons noted in sub section(2). In particular, while the reference to "functions" and "powers" is appropriate when considering a regulator, it has less application when applied to "staff or consultant". The functions or powers of a consultant, for example, may have broad application. As such, the clause may not have a substantive effect in limiting the use of the protected information. APIA believes the section is unclear and needs to be re-drafted.

While AEMO can impose conditions when disclosing protected information to regulators, there should be a requirement that the persons noted in s91GC(2) be subject to confidentiality obligations. As currently drafted, confidential information could be made available to a regulator or a regulator's consultant, and then could be disclosed generally. The obligations of confidentiality must be preserved.

s91GH(1) gives AEMO the discretion to disclose protected information once it has formed a view as to the balance of detriment and public benefit. Although the section provides for consultation with the information provider, s91GH(2)(a)(i) contemplates that AEMO would already have formed a view about detriment and

public benefit prior to going to consultation. APIA seeks assurance that AEMO will not form any view prior to consultation. To form a view prior to consultation would be to do so with only partial information. If AEMO is permitted to form a view prior to consultation there would be a question regarding the 'open mindedness' with which AEMO will consider submissions which conflict with its predetermined view. The process, as currently outlined, has the appearance of "discussion" rather than "consultation".

The proposed regime does not provide for merits review of AEMO decisions. Given that the only review mechanism is judicial review, the regime should provide for a more defined framework and criteria around which AEMO can exercise its various discretions. This would improve accountability in the exercise of those discretions. Increased accountability will increase the quality of AEMO decision making.

4. Changes to Gas Market Rules and Procedures - Impact on existing Access Arrangement and Contracts

The amended NGL, s74(3)(fa), confers "power on AEMO to make, amend or revoke Procedures governing the operation of wholesale gas markets and retail gas markets".

APIA considers that this amendment should be tempered by making provision in the NGL for AEMO to have appropriate regard for existing Access Arrangements (AA) and contracts. If AEMO is to propose a rule change or procedure that is inconsistent with existing AAs or contracts, it should at least be required to justify and demonstrate how the proposed Procedure provides superior outcomes for the operation of a network or pipeline compared with existing practice.

While procedure changes cannot impact on an AA until it is due for review, in circumstances where a procedure change will result in a material alteration to an AA in due course, AEMO should be mandated to provide justification of such proposed procedure changes.

In the case of existing contracts, the ISC, in its response to submissions to the Statement of Proposed Approach issued in December 2009, has identified, "The Rules and Provisions will have the force of law and will therefore generally prevail over provisions in contracts". This position effectively provides AEMO with statutory power to override contracts. It is typical and sensible for new laws to avoid altering existing contracts, as this would expose the Government to the risk of having to provide, on 'just terms', compensation under s51 (xxxi) of the Constitution. Under normal circumstances, Government policy avoids intervention in commercial arrangements in order to avoid compensation issues.

There are various ways in which new laws can accommodate existing contracts. There is the frequently used provision that a new law will not override existing contracts, but will affect all new contracts written after a specific date. Existing contracts are effectively 'grandfathered'. Such an approach should be used by AEMO when making rule and procedure changes.