

25 November 2021

Australian Energy Market Commission
GPO Box 2603
Sydney NSW 2000

Electronic submission

National Electricity Amendment (Extension of time and reduction of scope of the 2022 Reliability Standard and Settings Review) Rule 2021

Snowy Hydro Limited welcomes the opportunity to comment on matters raised in the Consultation paper from the Australian Energy Market Commission (the Commission) on the National Electricity Amendment (Extension of time and reduction of scope of the 2022 Reliability Standard and Settings Review) Rule 2021 ("Rule Change Request").

Snowy Hydro opposes the Rule Change Request, in particular the Energy Security Board's proposal to 'align' its capacity mechanism design work with the reliability settings assessment. Our objections are as follows:

1. It would prejudice industry stakeholders as compared to the status quo, given the narrow membership of the ESB. The ESB has no industry representation and therefore industry would lose its right to participate as a constituent member of the body assessing and recommending reliability settings. This is particularly concerning given the nature of the panel's work. As discussed in our previous submission¹, the NEM is an energy-only market. Reliability is underpinned by scarcity rents supporting investment in new peaking capacity, and the reliability settings are therefore a critical influence on reliability outcomes in the NEM. Industry should not be deprived of its decision-making power in this process (ie. the power to assess and make recommendations) - the Reliability Panel's work is too important. The ESB cannot cure this defect by promising to take account of stakeholder views in the review; anything less than membership of the body performing the review would represent a serious degradation of rights currently enjoyed by stakeholders.
2. The Rule Change Request is inconsistent with the expressed intention of the legislature, which conferred decision making authority on the Reliability Panel in recognition of the benefits associated with its representative nature.² Membership of the Reliability panel includes, among others, representatives of retailers, generators, networks and end users, whereas the ESB is composed solely of market bodies. Snowy Hydro questions the propriety of rule changes which are inconsistent with the relevant legislative intent.
3. The Rule Change Request would establish an improper process. A key element of procedural fairness is the rule against bias. This requires that the decision-maker is not interested in the matter to be decided, nor that there be an appearance that the decision-maker brings to the matter a prejudiced mind.³ It also includes the

¹ Snowy Hydro, submission to *National Electricity Amendment (Extension of time and reduction of scope of the 2022 Reliability Standard and Settings Review) Rule 2021*, 10 November 2021.

² See: Second reader, SA Parliament, *National Electricity (South Australia) (New National Electricity Law) Bill 2005* (Page 1453 of the Legislative Assembly Hansard.)

³ *Ebner v The Official Trustee in Bankruptcy* (2000) 76 ALR 644 at 662

principle that no one ought to be a judge in his or her own cause (*nemo debet esse iudex in propria sua causa*). Yet the Rule Change Proposal risks creating this very situation. The ESB is on the record⁴ as recommending the adoption of a decentralised capacity mechanism (the Physical Retailer Reliability Obligation, or PRRO) and has previously stated that spot market price caps would be reduced under such a mechanism.⁵ This suggests that the ESB may not come to the matter with an open mind, being pre-disposed to reducing the Market Price Cap (MPC) in order to accommodate its preferred policy outcome. To the extent that the PRRO involves changes to the reliability settings, the ESB would be critiquing its own recommendations..

4. It is difficult to adequately assess the Rule Change Request because no detail is provided as to the governance framework under which the review would take place, and to what extent the relevant provisions of the National Electricity Rules regulating the Reliability Panel would carry-over to the ESB. These provisions impose obligations and constraints on the panel which constitute important protections for stakeholders. For example, clause 8.8.2(d)(2) empowers the AEMC to remove any member of the Reliability Panel at any time if that person fails to discharge the obligations of that office imposed by the Rules. Would the AEMC enjoy a corresponding right with respect to the ESB? It is not clear from the consultation paper. These details should be provided as part of the consultation in order to allow for a proper assessment of the Rule Change Request. In any event, any reduction or loosening of these obligations would prejudice stakeholders and diminish confidence in the review.
5. The ESB's characterisation of its proposal as a one-off 'transitional arrangement' is misleading, and irrelevant. The forthcoming reliability review is the most important since the creation of the NEM, as there is a significant possibility that the ESB would recommend - consistent with its market design work - that the MPC should be reduced as part of a decentralised capacity mechanism. A PRRO or similar mechanism combined with a reduced MPC would together amount to a radical reform to the NEM's structure as an energy-only market, anchoring a new set of reliability settings within the NEM framework which would endure for years to come. In any case, the Commission must assess the Rule Change Request on its merits, and the fact that the ESB is seeking only to supplant the Reliability Panel's assessment authority for a single review does not in any way lend support to (or mitigate the downsides of) the proposal.
6. The rationale underpinning the Rule Change Request is flawed. The ESB's principal justification for the proposal is to 'align' the assessment of the reliability settings with its Post 2025 work. However, the fact and timing of the ESB's market design work only reinforces the need to maintain the current process, with the review being carried out by an independent body (the Reliability Panel) rather than effectively being brought 'in-house', in a way which allows the ESB to make an assessment which supports its own, previously-announced policy recommendations. Another way of looking at this Rule Change Request is that it would provide the ESB a means to facilitate its preferred reform (ie. PRRO). Taking control of the reliability settings assessment would allow the ESB to avoid the risk

⁴ ESB, Post-2025 Market Design Final advice to Energy Ministers, Part A, 27 July 2021, p19.

⁵ ESB, Post 2025 Market Design Consultation Paper, September 2020, p41



that the Reliability Panel would reach a different or unfavourable conclusion, which does not align with the ESB's position. The Rule Change Request also contradicts the ESB's previous support for the Reliability Panel retaining responsibility for the 2021 review (including reviewing reliability settings).⁶

In any case, to the extent that inter-dependencies exist between a design of a capacity mechanism and the optimal reliability settings required for the market, they should be dealt with through the Reliability Panel's 'normal' review process. The fact that the ESB has been assigned the Post 2025 market design work does not provide any basis for it to arrogate to itself the legislated function of the Reliability Panel. Snowy Hydro understands that the decision of the National Cabinet was for the ESB to progress detailed design work on a mechanism that specifically values capacity in the NEM.⁷ The ESB's ability to progress such work is not in any way dependent on it supplanting the responsibilities of the Reliability Panel. Indeed, there is nothing to suggest that the Reliability Panel cannot make an assessment of the appropriate level of reliability settings following the ESB's market design work. The status quo would represent a superior process for dealing with these issues, as it would avoid the defects inherent in the Rule Change Proposal, particularly relating to apprehension of bias.

Timing

- **Reliability Settings**

The Rule Change Request would create new problems, given that it would reduce the notice period for any changes to the reliability settings by approximately 6 months. This poses downside risks for market participants, given that over-the-counter derivatives frequently span a period of multiple years and the negotiation and execution of those contracts may occur a year or more in advance of commencement. Investment decisions for new assets can take place over a number of years before a financial investment decision is made.

Snowy Hydro opposes the Rule Change Request, but to the extent it causes any delay to the review of the reliability settings, there should be a corresponding adjustment to the date from which the settings take effect.

- **Reliability Standard**

Snowy Hydro agrees it would be appropriate to extend the time frame of the Panel's review of the reliability standard and final report from 30 April 2022 to 30 June 2022 to take account of the ESB's post 2025 recommendations and final advice in its review.

Assessment Framework

The AEMC's proposed assessment framework for the Rule Change Request includes: promoting transparency and flexibility; minimising uncertainty and market changes; and

⁶ ESB, Post 2025 Market Design Consultation Paper, 2020, p25

⁷ *Summary of the final reform package and corresponding Energy Security Board recommendations*, available at <https://www.energy.gov.au/sites/default/files/2021-10/Summary%20of%20the%20final%20reform%20package%20and%20corresponding%20Energy%20Security%20Board%20recommendations.pdf>



reducing regulatory and administrative burden. While those are legitimate considerations, the AEMC must also consider matters of due process, governance under the existing regulatory framework, fairness for stakeholders and how such matters impact public confidence in the work assigned to the Reliability Panel. Each of those matters bear on investment in the NEM and therefore resource adequacy, which are important factors in determining whether the Rule Change Request contributes to the NEO.

About Snowy Hydro

Snowy Hydro Limited is a producer, supplier, trader and retailer of energy in the National Electricity Market ('NEM') and a leading provider of risk management financial hedge contracts. We are an integrated energy company with more than 5,500 megawatts (MW) of generating capacity. We are one of Australia's largest renewable generators, the third largest generator by capacity and the fourth largest retailer in the NEM through our award-winning retail energy companies - Red Energy and Lumo Energy.

Yours sincerely,



Leigh Creswell

Snowy Hydro Limited

