



5 October 2012

Mr Trevor Johnston
Project Leader
Australian Energy Markets Commission
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Sydney South NSW 1235

By email to: trevor.johnston@aemc.gov.au

Dear Trevor

Submission to AEMC Consultation Paper on Rule Change GRC0012 - *Reference and Rebateable Services*

The Financial Investor Group (FIG) welcomes the opportunity to comment on the Commission's Consultation Paper regarding the definitions of Reference Services and Rebateable Services in the National Gas Rules.

FIG is an affiliation of the major investors in Australian energy network assets. FIG members have interests in well over \$30 billion of Australian energy network assets, most of which are regulated. This is a substantial proportion of Australia's privately owned energy network assets, and about 40% of those subject to economic regulation. FIG's members compete for the ownership of infrastructure, including regulated energy network assets, and for investors' funds that are, or may be, seeking exposure to the asset class.

As you know, investors strongly prefer a stable, predictable regulatory framework in which regulators are accountable for their decisions. Investor confidence is an essential pre-requisite for efficient investment, which is the stated objective of the legislation. As a guiding principle therefore, FIG supports an open, transparent and predictable Rule Change process following the procedures specified in the National Electricity Rules and the National Gas Rules. FIG considers that these procedures are intended to promote investor confidence in the regulatory framework to which the Rules apply.

The following submission therefore does not address the substantive matters addressed in this Rule change, but rather the process followed in progressing this Rule Change. In particular FIG is most concerned that the Consultation Paper introduces scope for the proposed Rule to apply retrospectively to Access Arrangement review processes already in train. FIG considers that retrospective Rule making has significant scope to undermine investor confidence in regulated assets in Australia.

If you have any questions in relation to the attached submission, please feel free to contact me directly on 0414 775 089.

Yours sincerely

David Bartholomew
Chief Executive Officer
DUET Group

The Financial Investor Group

Submission to AEMC Consultation Paper on Reference Services and Rebateable Services

The Financial Investors Group (FIG) is pleased to take the opportunity to respond to the AEMC's Consultation Paper, *National Gas Amendment (Reference service and rebateable service definitions) Rule 2012* dated 13 September 2012.

Summary

This submission does not address the substantive matters of the Rule change relating to the definitions of Reference and Rebateable Services in the National Gas Rules.

Rather, FIG considers the processes utilised by the AEMC as embodied in the Consultation Paper and is concerned that the process adopted by the AEMC for the making of the proposed rule includes concerning elements, and has not been undertaken in accordance with the requirements in the National Gas Law (NGL).

In summary FIG considers that, to avoid perceptions of retrospective Rule-making, the AEMC should publish a full draft of the rule it proposes to make (including relevant transitional provisions) in the form of a draft Rule determination, and then follow the processes in the NGL with respect to the making of a draft Rule determination.

FIG is extremely concerned by the AEMC's foreshadowing of the making of transitional provisions which would purport to provide for the operation and application of the final Rule determination to access arrangement reviews already in progress.

FIG is concerned that the AEMC's approach may offend clause 43(1) of Schedule 2 of the NGL, which precludes the operation of an amended Rule to an access arrangement review which was begun under the previous provisions. In the case of the access arrangement review for the Victorian gas businesses, the process has not only "begun", but has passed the draft decision stage.

Application to a review process that has already begun

As the AEMC is aware, the Victorian gas businesses are in the middle of an access arrangement review process for the period of 1 January 2013 – 31 December 2017. In April 2012, these businesses submitted proposed revisions to their access arrangements to the AER for review. In September 2012, the AER released its draft decisions on these proposals, setting out alternative revisions to the access arrangements that would be acceptable to the AER. The draft decisions require the Victorian gas businesses to submit revised access arrangement proposals to the AER by 9 November 2012.

The Victorian gas businesses' proposals, including service definitions, revenue modelling and proposed tariffs, are all based on the current National Gas Rules (NGR) in place at the time of filing the proposed revisions. The AER's draft decisions on the proposed access arrangement revisions are also based on the current NGR.

The service providers' original proposal and the AER's draft decisions are key steps in the access arrangement review process. The documents establish the scope for further amendments by either the service provider or the AER. In accordance with the NGR, the amendments which may be made by the service provider after the draft decision stage are largely limited to those necessary to address matters raised in the draft decision. Similarly, any amendments which may be made by the AER are to be formulated with regard to the service provider's proposal and the AER's reasons for refusing to approve that proposal. It is clear from the structure of the NGR that the access arrangement review is intended to be an iterative process which commences with, and is clearly framed by, the service provider's original proposal.

FIG submits it is implicit in the NGR that a consistent set of rules are to apply throughout the access arrangement review process; that the Rules should be “frozen” at the time the service provider lodges its application for revisions to its access arrangement. If not, amendments to an access arrangement proposal could not be limited in the way it is envisaged, creating an unacceptable risk of regulatory uncertainty.

FIG therefore considers that it is inappropriate for any change in the rules governing the preparation of access arrangement proposals to apply to review process which have already “begun”. FIG is concerned that such a change would violate clause 43(1) of Schedule 2 of the NGL, a clause in which FIG has historically taken comfort in its provision of Rule stability.

Process for making the proposed Rule

FIG is concerned the AEMC has not followed a transparent procedure in relation to this Rule change proposal.

In the Draft Rule Determination, the AEMC considered that the Rule change as proposed by the AER would not be in the long term interests of consumers, noting in particular the increased risk to new investment. The AEMC concluded:

The Commission considers that the proposed rule may lead to an increased risk to investment which would not be conducive to efficient investment in natural gas services and would not be in the long term interests of consumers. This is because there is potential to change the risk/reward relationship in existing bilateral contracts if the proposed change to the rebateable service definition is accepted.

By way of its Consultation Paper dated 13 September 2012, the AEMC announced a fundamental reversal of its position regarding the rule change from that stated in its Draft Rule Determination.

FIG is most concerned that such a fundamental reversal of position could occur, given that the AEMC has not reconciled this new approach with its earlier draft Determination that the proposed Rule change would not be in the long term interests of consumers.

FIG’s view is that as there is such a significant variation to the more preferable rule contained in the Draft Rule Determination, the Consultation Paper should effectively replace the Draft Rule Determination. FIG strongly considers that this would more closely align to the processes in section 308 of the NGL as a matter of good practice, and to ensure consistency and predictability for stakeholders.

Given the potentially significant implications of any Rule change, FIG considers that it is critical that the AEMC clearly articulate what Rule it intends to make (including transitional provisions) and provide for adequate consultation. This is particularly important in circumstances where the Rule may purport to affect an access arrangement review process which is already well progressed.

In the absence of a draft of the Rule which the AEMC intends to make and given the very short period provided for consultation on the AEMC’s proposal, FIG has been unable to definitively identify precisely what impact the proposed Rule change may have on the access arrangement review process currently in play. However to the extent there are such impacts, we note that this may mean that any final rule may be in conflict with clause 43(1) of Schedule 2 to the National Gas Law.

Incomplete proposed rule

FIG notes the AEMC has sought submissions on possible transitional provisions that would deal with the operation and application of the final rule to access arrangement reviews already in progress.

FIG further notes that transitional arrangements were not identified in the draft Rule Determination and that neither the AER nor the AEMC have provided any proposed drafting for the transitional

provisions in the Consultation Paper. Consequently, in FIG's view, the Consultation Paper does not contain a complete proposed rule change as required by section 308 of the NGL.

FIG considers that a rule dealing with transitional issues is of the same character and importance as any other rule the AEMC is entitled to make. Transitional provisions have substantive operation, and it is erroneous to regard them as ancillary or of inferior importance to the making of any other rule. FIG considers That, to satisfy the requirements of NGL section 308, the AEMC is required to publish a complete draft of the rule that it proposes to make, including any transitional provisions.

In light of the above issues, FIG considers that the AEMC should take steps to address what appears to be a defective process in relation to the proposed Rule change. The process could potentially be cured by the AEMC making, and publishing notice of, a complete draft Rules determination in respect of any proposed more preferable Rule. The processes then set out in the National Gas Law in respect of consultation would then apply to the draft determination.

In summary, FIG submits:

- that the AEMC should give careful consideration to whether any rule it intends to make may purport to operate in a retrospective manner; and
- that the AEMC should also allow for adequate consultation on any proposed rule (including transitionals), in order to ensure that any final rule does not operate retrospectively.

The FIG would welcome the opportunity to discuss these matters further at the Commission's convenience.