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AEMO East Coast Gas System procedures and guidelines

Attention: Manager Gas Reform Implementation

The ACCC welcomes the opportunity to provide feedback on AEMO's draft East Coast Gas System procedures and guidelines, which will form part of the broader package of reforms that Energy Ministers agreed to implement in 2022 to allow AEMO to:

- monitor the reliability and adequacy of supply in the east coast gas market
- communicate any threats it identifies to the market
- issue directions and/or trade in natural gas services if necessary to maintain and improve the reliability or adequacy of supply.

The ACCC understands that as part of this package of reforms, the National Gas Rules (NGR) have been amended to allow AEMO to convene gas supply adequacy and reliability (GSAR) conferences with industry for 1 or more of the following purposes:

- to assess whether or not there is an actual or potential threat, including the likelihood of a threat occurring
- to signal the need for an industry response to an actual or potential threat
- to obtain information on the nature and extent of an actual or potential threat.

We also understand that the NGR require AEMO to invite the ACCC to any GSAR conferences that it decides to convene and to consult with the ACCC and AER on any procedures or guidelines pertaining to these conferences.

It is with this in mind that we have reviewed the GSAR conference related provisions in the draft procedures and guidelines. Before setting out the issues that we have identified, we note that nothing stated or not stated in this submission should be taken as ACCC approval or endorsement of the draft procedures or guidelines.

Issues identified with the draft procedures and guidelines

It would appear from the ACCC's review of the draft procedures and guidelines that AEMO has taken a number of steps to try and minimise the risks associated with bringing industry together in what has the potential to be highly anti-competitive conduct. The ACCC has nonetheless identified two areas of concern with the draft procedures and guidelines, which relate to:

- the potential disclosure of information by market participants that could have an anti-competitive impact

- the potential for conferences carried out for the purposes of assessing whether there is a reliability or supply adequacy threat to result in a sub-set of market participants having greater knowledge about an emerging threat than other participants.

Potential disclosure of information that could have an anti-competitive impact

The draft guidelines currently require relevant entities that are invited to attend GSAR conferences to arrange for their representatives to be briefed on competition law risk and be provided AEMO's competition law meeting protocol (which we understand is published on its website) before attending the conference. The draft guidelines also note the potential for conference participants to indicate that information is confidential and to engage directly with AEMO outside the GSAR conferences if they wish to convey this information to AEMO.

While there are these safeguards in place, there is still a risk that participants may be required to share market sensitive information through the GSAR conferences. For example:

- Clause 3.5(d) of the draft guidelines states that AEMO may invite production, storage and pipeline operators to these conferences and ask them to provide information on:

  (a) production and storage facility current deliveries, available capacity and the capability to provide additional gas by location

  (b) pipeline deliverability, nominations and any additional and unused capacity.

  The ACCC is concerned that some of these operators may be direct competitors and that the type of information that they are asked to report could be used to facilitate coordinated conduct between market participants.

- Clause 3.6.3(c) of the draft procedures refers to relevant entities having to review and validate information on their gas outlook provided to AEMO, but it is unclear from the drafting whether relevant entities would be expected to:

  (a) discuss their gas outlook in the industry wide conference, or

  (b) just state that the information they have provided AEMO is still correct, or if it is not that they will provide AEMO updated information bilaterally, which would not give rise to this concern.

  If market participants are required to do the former, then it could result in the sharing of market sensitive information with direct competitors, which as noted above could facilitate coordinated conduct between market participants.

While it would be open to market participants in both of these two cases to indicate the information is confidential and provide it bilaterally to AEMO, we think there would be value in:

(a) The procedures and guidelines being amended to make it clear that market sensitive information that could have an anti-competitive impact should not be disclosed in the GSAR conferences. Rather, it should only be disclosed to AEMO on a bilateral basis.

(b) Adopting a similar safeguard to that employed in the conditional authorisation that AEMO was granted in November 2022,[1] which is to require a competition lawyer to attend each GSAR Conference. To the extent that there are any grey areas on the sensitivity of information, the competition lawyer could advise parties prior to them sharing it.

Potential for a sub-set of market participants to have greater access to information

The second concern we have relates to the potential for AEMO to conduct GSAR conferences with a sub-set of industry participants and not to make the information available to the rest of the market in a timely manner.

[1] ACCC, Determination: Application for authorisation lodged by AEMO in respect of coordination and information sharing for the purpose of ensuring reliable operation of energy systems, November 2022. see here

For example, clause 3.5(d) of the guidelines refers to AEMO potentially conducting conferences with specific relevant entities or classes of relevant entities (such as production, pipeline and/or storage facility operators) to ascertain whether there is a reliability or supply adequacy threat.

While we can see the merit in this type of assessment conference, we are concerned that it could result in some market participants having information not otherwise available to the rest of the market, which could confer an unfair competitive advantage on these attendees and may also result in some form of 'insider trading'.

Similar concerns were raised in our original submission on these reforms and we noted it could potentially be addressed by requiring information on potential threats to be published and made available to all market participants, including any information discussed at the conferences. While the amendments to the NGR appear to provide for this to occur, clause 3.6.4 of the draft procedures appears to provide AEMO up to 20 business to publish this information.

We are concerned that 20 business days would not provide the transparency that is required to address the risks set out above. We would therefore suggest that this be amended to require the information to be published as soon as practicable after the conference and no later than 1 business day after the conference. To meet this timeframe, a short minute could be published that briefly describes the nature of the potential risk or threat and any potential solutions that were identified in the meeting.

Conclusion

As we noted in our original submission on these reforms, there is always a risk with industry based conferences that they could result in arrangements being put in place that have unintended consequences and/or facilitate coordinated conduct between market participants. Entering into such arrangements without authorisation can risk breaching the restrictive trade practices provisions in Part IV of the *Competition and Consumer Act 2010* (CCA) if they amount to cartel conduct, or have the purpose, effect or likely effect of substantially lessening competition.

In this regard it is worth noting that market participant responses to the original reform process suggest that there is a risk that if authorisation is not obtained, they may not participate in the conferences in the manner intended because of the perceived risk of breaching the CCA. They may not, for example, be willing to speak at the conferences, or if they do speak, they may greatly restrict what they say. This could limit the effectiveness of the GSAR conferences and mean the objectives in conducting these conferences (i.e. to assess whether there is an actual or potential threat and to obtain information on the nature and extent of that threat) are not met.

To the extent parties are concerned that conduct may risk breaching the CCA, this risk can be eliminated by obtaining authorisation. Authorisation can be granted where parties satisfy the ACCC that the public benefits likely to result from the conduct outweigh any detriments.

If you would like to discuss this submission any further, please contact Wallace Stark on (02) 6243 1325 or Wallace.Stark@accc.gov.au.

Yours sincerely

Anna Brakey
Commissioner
Australian Competition and Consumer Commission