perthenergy

25 January 2019

Rule Change Panel
Attn: Stephen Eliot, Executive Officer
C/o Economic Regulation Authority
PO Box 8469
PERTH BC WA 6849

Request for further information on the rule change proposal: ERA access to market information and SRMC investigation process (RC_2018_05)

Dear Mr Eliot,

This letter is provided in response to your email sent on 3 January 2019 to Perth Energy, Alinta Energy and Synergy requesting further information in relation to our submission on the rule change proposal: ERA access to market information and SRMC investigation process (RC_2018_05). We would like to clarify our position on the Economic Regulation Authority's (ERA) rule change proposal and provide additional context for you to consider during the course of your deliberations on the rule change.

Perth Energy supports the ERA's proposal to correct the administrative oversight to allow it to require the Australian Energy Market Operator (AEMO) to provide it with information to perform its functions, and undertake a single investigation, rather than two, in relation to a potential breach of short run marginal cost rules. This is an appropriate amendment and will enable the ERA to operate more effectively within the bounds of its functions and responsibilities.

However, Perth Energy does not support the ERA's proposed amendments to information provisions; more specifically its amendments that in combination will allow the ERA access to "any information considered necessary" for use under any of its functions.

As you correctly pointed out in your email, Perth Energy and other participants consider that such widespread and seemingly unfettered access to information could result in the potential misuse of information for the purpose of compliance monitoring and enforcement. The risk associated with this is discussed further below.

However, we feel the more pertinent point that the Rule Change Panel must consider before making a determination on the ERA's proposed rule change is that the ERA has not identified any deficiencies with the current data access processes, nor any gaps in information provided by the Market Surveillance Data Catalogue (MSDC).

The provision of confidential information that has the potential to disadvantage parties is an extremely sensitive topic, whether in the energy sector or any other industry. Therefore, we consider it imperative that the need for information disclosure and the application of that data (and the intent of the requestor) must be clearly and transparently expressed before access to that information is provided. This degree of rigour and transparency is an important safeguard of market integrity and is a reasonable expectation among owners of sensitive information.

The current provisions for information access already provide this safeguard. As highlighted in your email, the ERA can access any information over and above that provided under the MSDC as part of a formal process, including for the purposes of market monitoring and compliance. However, the rigour of such formal processes provides market participants the opportunity to highlight potential sensitivities and work with the ERA to ensure the integrity and competitiveness of the market is not compromised.

This is the heart of our objection to the ERA's rule change. While we ultimately do not object to the provision of information for compliance purposes, we believe that sufficient scrutiny should be placed on information requests and usage, and that therefore the onus should be on the ERA to justify and validate its requests, rather than requiring market participants to accommodate all requests, however frivolous.

We therefore request the Rule Change Panel carefully considers the implications of providing open access of information to a third party, and whether *the concern with the existing Market Rules that is to be addressed by the proposed rule change*[1] has been fully explained and justified.

Further, in your email you note Rule Change Panel Support had follow-up meetings with Alinta Energy and Synergy. This same opportunity was not afforded to Perth Energy. As a consequence, it is difficult for us to target this further submission as you have requested, except to the extent you raised specific questions in your email. As such, we have reiterated and expanded upon key matters from our first submission, and addressed your specific questions in the following sections of this letter.

The ERA has not identified a problem that needs to be resolved

As required by the WEM Rules, the ERA presented an early version of the proposed changes to the Market Advisory Committee (MAC). At that meeting, MAC members raised concerns with the proposed amendments specifically related to its proposed ability to request and receive any information considered necessary.

The MSDC provided for under clause 2.16.1 of the WEM Rules, gives the ERA access to information about the operation of the real-time market. The MSDC includes the following items:

- the number of Market Generators and Market Customers in the market;
- the number of participants in each Reserve Capacity Auction;
- clearing prices in each Reserve Capacity Auction and Short Term Energy Market (STEM) Auction;
- Load Following Ancillary Services (LFAS) Submissions;
- all Reserve Capacity Auction offers;
- all bilateral quantities scheduled;
- all STEM Offers and STEM Bids, including both quantity and price terms;
- Balancing Submissions, including associated Balancing Price-Quantity Pairs and Ramp Rate Limits;
- all Fuel Declarations;
- all Availability Declarations;
- all Ancillary Service Declarations;
- any substantial variations in STEM Offer and STEM Bid prices or quantities relative to recent past behaviour;

[1] As required in section 1 of the RCP's rule change proposal form.

- any evidence that a Market Customer has significantly over-stated its consumption as indicated by its Net Contract Position with a regularity that cannot be explained by a reasonable allowance for forecast uncertainty or the impact of Loss Factors;
- any information as to whether a Facility was not able to comply with a Dispatch Instruction from the AEMO and the reasons for that non-compliance;
- any substantial variations in Balancing Prices, Non-Balancing Facility Dispatch Instruction Payments or Balancing Quantities relative to recent past behaviour;
- the capacity available through Balancing from Balancing Facilities, Dispatchable Loads and Demand Side Programmes;
- the frequency and nature of Dispatch Instructions and Operating Instructions to Market Participants;
- the number and frequency of outages of Scheduled Generators and Non-Scheduled Generators, and Market Participants' compliance with the outage scheduling process;
- the performance of Market Participants with Reserve Capacity Obligations in meeting their obligations;
- details of Ancillary Service Contracts that it enters into as System Management;
- all LFAS Prices;
- the number of Rule Change Proposals received, and details of Rule Change Proposals that the Rule Change Panel has decided not to progress; and
- such other items of information as AEMO considers relevant to the functions of the IMO, Rule Change Panel, the AEMO and the ERA under clause 2.16.

We agree that in order for the ERA to effectively monitor Market Participants' compliance with the WEM Rules under section 2.13 of the WEM Rules, it needs access to market information. However, we consider MSDC provides the majority of the information that is likely to be required to perform the ERA's compliance and investigation functions. The ERA has not identified any information gaps that exist in the MSDC.

Importantly, clause 2.16.14 of the WEM Rules, precludes the ERA from using the information received as part of the MSDC to undertake any function other than monitoring the effectiveness of the market, including for the purposes of compliance monitoring and investigations. This affords important protection to parties disclosing information and to the integrity of the market itself. We suggest any rule change that has the effect of removing this protection, or rendering clause 2.16.14 redundant, brings unnecessary risk and potential for grievances.

In its discussions with the MAC, the ERA noted it has two options:

1. Amend section 2.13 (monitoring compliance) to provide a head of power for the ERA to obtain market data from the AEMO for this purpose.
2. Amend clause 2.16 (monitoring the effectiveness of the market) to provide for the use of the data in the MSDC for any of its functions under the WEM Rules.

MAC members (including AEMO) noted their preference for the list of information required to be provided to be limited to the information included in the MSDC, with other information provided on

request. However, the ERA instead proposed a broad head of power to require AEMO to provide any information the ERA considers relevant.

In your email, you highlight that "the ERA has confirmed that they are only proposing under RC_2018_05 to get access to information required under the Market Rules". This statement of the ERA's intent, however, is not sufficient to address the risks posed by the open access that a legislative instrument such as the WEM Rules provides.

We therefore suggests the proposed amending rules are modified by the Rule Change Panel to clarify this in the WEM Rules, explicitly defining "market information" and requiring any information requested to fulfil the ERA's extraneous functions, such as "anything else that the ERA determines to be conducive or incidental to the performance of its functions" to be formally requested by the ERA.

We recommend the following:

- The Rule Change Panel requests the ERA defines the problem it is trying to address with the proposed amendments, including a specific list of information the ERA considers it requires and does not currently have the power to obtain under the WEM Rules or ERA Act.
- The Rule Change Panel further amends the proposed amending rules to provide a head of power for the ERA to request specific market information from AEMO for the purposes of compliance monitoring and investigations, through the existing market surveillance arrangements.

Confidential information should not be used for any purpose

The ERA's proposed amendments result in the ongoing provision of confidential information for ERA to perform any of its functions under the WEM Rules. The ERA's functions include anything else the ERA determines to be conducive or incidental to the performance of its functions. Perth Energy is concerned that this could lead to the misuse of confidential information.

The ERA suggests its proposed amendments are reasonable and within the scope of its compliance functions, comparing the current information provisions in the WEM to those more relaxed arrangements that applied to the former IMO, and continue to exist in the Gas Services Information (GSI) Rules. We highlight that the compliance and enforcement arrangements that relate to the publication of information on the gas bulletin board and in the long-term gas forecast are not comparable to those the ERA is required to perform. The ERA's compliance and enforcement functions in the WEM are more akin to those performed by the Australian Tax Office, or the Australian Energy Regulator with respect to the nature of the legislative obligations and potential financial impact. We therefore suggest the Rule Change Panel turns to these compliance regimes to inform its decision on the ERA's rule change proposal.

We consider confidential information should only be used for the purpose for which it was provided. For example, the use of individual, commercially sensitive gas contracts obtained by AEMO through the certification process should not be used to inform more general market outcomes such as energy price limits or a facility's short run marginal cost. Commercial arrangements are more complex than a single piece of information, and often require the combination of a number of different pieces of information.

As the market operator, Perth Energy considers AEMO is best placed to undertake any data manipulation and/or analysis in relation to the WEM. AEMO understands, and has access to all operational market information, and if provided with the necessary information about the matter at hand, would be able to most effectively and efficiently provide the most relevant and correct information to the ERA.

However, we highlight that market participants themselves may be in the best position to provide information for the purposes of compliance and investigations. Using the same gas price example, a participant may have entered into a new contract since the annual certification process was run, and therefore AEMO's information may not be the most up-to-date. We therefore consider it is also appropriate for stakeholders to participate in the process to ensure that all relevant information is considered, and appropriate outcomes are arrived at.

We suggest that if the ERA is able to demonstrate that the current information provisions are insufficient for it to perform its functions, the Rule Change Panel should commence a process to list each piece of market information captured under the WEM Rules, and consult with stakeholders on the appropriate use, of that information. The process should also detail the method for the provision and retention of that information for the purposes of operations, review, compliance and enforcement activities. We highlight a similar process is currently underway by the Rule Change Panel in relation to the rule change proposal: managing market information.

Market participant obligations in relation to third-party access to confidential information

In your email you highlight that the ERA has confidentiality requirements under its establishing legislation/regulations and under the WEM Rules. Perth Energy acknowledges this, and appreciates this protects our information from being shared further. However, the ERA's protections do not extend to market participants.

In the course of running an energy generation or retail business, a participant has access to a significant amount of third-party confidential information. Where this is provided to AEMO in relation to a specific request, a participant must meet its contractual obligations including for example, Perth Energy is required to seek permission to provide AEMO with proprietary information about its generation facility for certification each year. If this information was readily available for the ERA to use for any purpose, Perth Energy would be in breach of its confidentiality obligations.

We suggest the Rule Change Panel consults with stakeholders more broadly in relation to the impact of the proposed amendments for the ERA to access and use confidential information for any purpose.

Examples of confidential information that should not be provided as a matter of course to the ERA

In your email you requested additional examples of information provided to AEMO that would not be appropriate for the ERA to use without consultation with the information provider, together with the potential adverse outcomes of the provision of that information without consultation.

Perth Energy provides the following, non-exhaustive list:

- Fuel contract information provided as part of the annual certification process. This is likely to be a subset of contracts and may not be the most up-to-date information about fuel costs at any point in time and therefore would be misleading and an inaccurate representation of Perth

Energy's costs. It can therefore not be used to inform compliance and investigation matters including most importantly a facility's SRMC.

- Technical information regarding a facility's design. This is proprietary information and must be specifically requested annually from our supplier to be provided as part of the certification process. The matter of course provision of this information to the ERA would result in Perth Energy breaching its confidentiality clauses and result in significant liabilities for Perth Energy, for which it cannot be compensated by the ERA. It can therefore not be provided to the ERA without a formal request, including the purpose for which the information will be used.
- Information provided to AEMO in relation to Prudential reviews – [redacted]. This information cannot and should not be passed over to the ERA under any circumstances. If the ERA wishes to obtain information regarding Perth Energy's hedge position and cost thereof, they could lodge a Section 51 notice in order to obtain that data.

Boundaries between market monitoring and investigations

In its rule change proposal, the ERA asserts that, prior to the transfer of compliance functions to the ERA, there was allowance for the free flow of all information between the compliance/enforcement and market operation arms of the Independent Market Operator (IMO). However, this was not the case. If this was the case, the MSDC would not be required.

We consider the ERA's proposed amendments to be provided with unrestricted access to any information it considers necessary is likely to increase the duplication of the already blurred responsibility between AEMO in its capacity to monitor, and the ERA in its capacity to observe and enforce compliance with the WEM Rules.

The continued separation between market monitoring – undertaken by AEMO – and compliance enforcement – undertaken by the ERA – should be retained through continued use of the MSDC for the ERA to access market information, with any additional information required to be requested formally from AEMO.

Conflict of interest between the ERA and RCP

When the State Government re-allocated the functions and responsible parties as part of the former Electricity Market Review, one of the issues it intended to address was the conflict of interest that was perceived to exist with the rule-making, and compliance and enforcement functions both within the same organisation.

At a recent MAC meeting it was highlighted that the Rule Change Panel Support and ERA staff were working together on the development and assessment of rule change proposals. We do not believe such close collaboration is appropriate without stringent ringfencing arrangements in place.

Using ERA staff on Rule Change Panel activities is contrary to the intention of the Government's reforms, which sought to separate the WEM rule-making and approval functions, and brings the independence of the Rule Change Panel into question. The prioritisation of the ERA's proposed rule change over other previously submitted rule changes that would be more beneficial to the market, magnifies this concern.

We presume ERA staff are being asked to work on Rule Change Panel activities due to resourcing constraints. We therefore suggest that to remove any inference of impropriety, the ERA and the Rule Change Panel discusses any resourcing shortfalls with the MAC and agrees a more appropriate strategy to address workload issues.

Thank you for the opportunity to provide clarification in relation to our submission on the ERA's rule change proposal. If you would like to discuss any of the information provided or recommendations made in this letter, please do not hesitate to contact me.

Yours sincerely

[redacted]

Elizabeth Aitken

General Manager Operations