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8 March 2022

Mr Paul Verschuer
Executive General Manager
AEMO Services Ltd
Email: paul.verschuer@aemo.com.au

Dear Mr Verschuer

Re: Tender Rules with respect to long-term energy supply agreements

Thank you for consulting with the Australian Energy Regulator (AER) on your tender rules with respect to long-term energy supply agreements (LTES agreements) as required under section 47(6) of the *Electricity Infrastructure Investment Act 2020 (NSW)* (EII Act). We also appreciate the extensive consultation and interaction with NSW Department of Energy and Consumer Trustee staff.

Our comments relate to the version of the tender rules provided to us for consultation on 25 January 2022. We welcome your response or further discussion on any of our comments below. We intend publishing this letter and the tender rules provided to us together with any feedback from the Consumer Trustee. We consider that this provides appropriate transparency for interested parties in executing the legislative obligation to consult with us.

The EII Act and supporting regulations do not define 'consult' or specify a process or timing to be followed by the Consumer Trustee and AER to satisfy section 47(6). In reviewing the tender rules, we have:

- a. Checked that the tender rules cover the items in sections 47(5)(a)-(e) of the EII Act.
- b. Considered whether the tender rules will likely facilitate competitive outcomes for LTES agreements in the long-term financial interests of NSW electricity customers.

We note that the tender rules submitted to us relate to competitive tendering for LTES agreements only. We understand that the Consumer Trustee will consult with us on an updated set of tender rules once the design of the access rights regime is complete.

With respect to the version of the tender rules provided, we observe that the document:

- is comprehensive and provides a good level of detail to the market.
- clearly lays out the legislated requirements. We note that the Consumer Trustee is required to consider a range of matters other than price in assessing and recommending LTES agreements.
- notes that the Consumer Trustee is to gazette tender rules before running a competitive tender.
- includes all key design elements and the detail on each element with reference to the legislation and the regulations.

Further, we note that the Consumer Trustee Board will be advised by an independent probity advisor. NSW Department of Energy staff advised AER staff that the probity advisor will have unfettered access to the competitive tender materials. We also understand that probity guidelines are being developed and these will be published along with the probity advisor's contact details.

In reviewing the tender rules, we note that the EII Act requires the Consumer Trustee to consider a range of matters other than price alone in assessing and recommending LTES Agreements. However, we consider that the importance of price in protecting the long-term financial interests of NSW electricity customers should remain a driving factor.

Further, we note some specific items that may benefit from further consideration by the Consumer Trustee before finalising its tender rules for LTES agreements. These items follow.

Non-price assessment (section 2.4)

The Consumer Trustee will assess and determine which non-price proposals will be shortlisted. At the Consumer Trustee's discretion, parties with expert knowledge such as AEMO and EnergyCo NSW may be invited to provide advice on the non-price assessment of proposals.

We consider that protecting the independence of the Consumer Trustee is critical. To this end, we suggest that conflicts of interest (real or perceived) be managed according to best practice for each evaluation step. We also suggest that the Consumer Trustee's probity advisor have similar independence requirements.

Questions on price proposals (section 2.5)

Shortlisted proposals will be invited to submit a price proposal. The proponents can submit questions regarding their proposals to the Consumer Trustee, which may choose to make questions and clarifications available to all proponents without releasing commercially sensitive or confidential information.

We note that a process for communicating with the market during the non-price request for proposal is not identified. We suggest that it is preferable that all questions from the market and the answers are provided to all interested parties on the Consumer Trustee's website. Questions identified as commercial in confidence may not be provided to all potential proponents, with a preference towards disclosure of additional information to all to provide a level playing field.

Financial value of LTES agreements is to be the Consumer Trustee's primary consideration

The tender rules note that the Consumer Trustee has a clear duty to act in the long-term interests of NSW electricity customers.

In the context of assessing the bids, the evaluation criteria remain high level and the critical element of the tender process will be to assess the financial value for NSW customers and to understand the deliverability and commercial viability of a project.

To this end, we expect that further development of the tender rules, guidelines and the evaluation process will evolve.

At the completion of a tender round, should the Consumer Trustee Board be unable to recommend a suitable proponent for an LTES agreement, an additional step the Consumer Trustee Board may consider incorporating is conducting analysis into the process undertaken, and the tender bids received. By doing this the Consumer Trustee Board may become attuned to issues of concern to participants and be able to factor them into future tender assessments.

Eligibility and merit criteria

The tender rules describe eligibility and merit criteria, and these seem clear and appropriate to the procurement process. It also provides examples of the documents that will be sought to allow evaluation against the criteria.

Section 2.7 of the tender rules provides a catch all for the Consumer Trustee to request further information to conduct its assessment of eligibility and merit criteria, so the following comments should be considered in that context.

A proponent's participation in a tender process will require projects to meet the eligibility criteria (tables 4 and 5 of attachment A). Some suggestions for your consideration are provided below:

- Eligibility criteria 2 limits eligibility to generation projects 30 MW or greater and must not have previously been awarded an LTES agreement – should a similar constraint be applied to long-duration storage and firming projects?
- Eligibility criteria 3 wording around 'registered capacity that can be dispatched for at least eight hours' may be overly restrictive. For example, would a project that is 2000 MW that can operate for 4 hours be rejected when it could operate at 1000MW for 8 hours?
- Eligibility criteria 3 does not apply to firming – should duration requirements be considered for firming projects?
- References to Demand Response appear in documentation around eligibility but it remains unclear where the Consumer Trustee is thinking it will participate under this part of the scheme (presumably firming).
- Merit criteria 1 does not explicitly seek independent resource assessments.
- Merit criteria 3 – 5 are the elements that are critical to support an assessment of the deliverability and commercial viability of a project. We query whether further consideration should be given to an explicit request for financial models that would support an assessment of the commercial viability of the project?
- Prior to the Consumer Trustee Board considering and recommending a final selection of proponents and projects to the Scheme Financial Vehicle a portfolio assessment of the cumulative impacts of the proposals will be conducted. Some of the wording in table 3 appears to imply that the portfolio assessment process will only apply to the interaction of the aggregated shortlisted projects. Can you please confirm if this is the case or

whether the portfolio assessment process is much wider in scope and will consider existing LTES agreements as well as the broader impact on customers?

- There is reference in 2.10 of the tender rules that implies that the Scheme Financial Vehicle has limited discretion to not enter LTES agreements recommended by the Consumer Trustee Board. Its unclear what this limited discretion is. We suggest clarifying words would be helpful.

Outstanding merit

Generation projects located outside a declared REZ must demonstrate 'outstanding merit' and we understand that a definition of 'outstanding merit' will be in regulations. As the tender rules may also apply to tenders for long-duration storage and firming, the document may benefit from clearer wording in section 2.6 that this only applies to generation projects as defined in s 48(3) with reference to s 43(1)(a).

Frequency of consultation with AER on tender rules – s47(1)

Section 47(1) of the EII Act states that 'The consumer trustee must conduct a competitive tender for LTES agreements unless the regulator otherwise authorises generally or in a particular case'.

No documents provided to date are clear on when the Consumer Trustee would seek authorisation from the AER to not run a competitive tender for LTES agreements.

Consumer Trustee staff have indicated to AER staff that it might be instances where there are an insufficient number of proponents particularly for firming. We would appreciate clarification on this element and suggest the Consumer Trustee consider whether to include wording in the tender rules to clarify for participants.

We appreciate the opportunity to provide the above comments. Should you wish to discuss any of the matters raised, please contact Kami Kaur, A/g General Manager NSW REZ at kami.kaur@aer.gov.au or 02 9230 9163.

Yours sincerely



Clare Savage
Chair
Australian Energy Regulator