

## Energy & Resources Law Update

7 September 2011

### Rebidding in the NEM – good faith clarified

#### In brief

- In *Australian Energy Regulator v Stanwell Corporation Limited [2011]* FCA 991 the Federal Court has dismissed The Australian Energy Regulator (AER)'s application and ordered the AER to pay the respondent's costs.
- The decision is the first judicial consideration of the obligation on a generator to make dispatch offers or rebids under the National Electricity Rules (NER) in "good faith" in accordance with clause 3.8.22A of the NER.
- The decision has clarified when it can be said that a dispatch offer or a rebid is made in good faith. It will provide greater certainty for traders in the National Electricity Market.

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The long awaited decision, *Australian Energy Regulator v Stanwell Corporation Limited [2011]* FCA 991, has been handed down by Justice Dowsett of the Federal Court on 30 August 2011, almost 15 months after the completion of the hearing. The Australian Energy Regulator (AER)'s application was dismissed and the AER was ordered to pay the respondent's costs.

The decision is the first judicial consideration of the obligation on a generator to make dispatch offers or rebids under the National Electricity Rules (NER) in "good faith" in accordance with clause 3.8.22A of the NER. The maximum civil penalty for a breach of clause 3.8.22A of the NER is \$1 million.

The decision has clarified when it can be said that a dispatch offer or a rebid is made in good faith. It will provide greater certainty for traders in the National Electricity Market (NEM).

#### Background

The case concerned a series of rebids made by Stanwell Corporation Limited (Stanwell) made on 22 and 23 February 2008 under the NER. The AER alleged that Stanwell breached clause 3.8.22A of the NER.

The judgement sets out in great detail the rebidding undertaken by Stanwell and the effect (and in some cases its lack of effect) on the Dispatch Price (being the price for the five minute Dispatch Interval).

In summary, the rebids were made in circumstances where Stanwell was (or was close to) being the price setter for the spot price in the Queensland Region of the NEM at the time of the rebids. Stanwell's rebids sought to move small amounts of dispatch volume (within a range of 100 - 200 MW) from lower price bands to higher price bands in certain Dispatch Intervals. Following some of the rebids:

- the Dispatch Price did not change or only changed by a few dollars. In that situation, Stanwell made further rebids; and
- the Dispatch Price changed significantly from prices less than \$100 to prices greater than \$9000.

The rebids that the AER sought to impugn were those made by Stanwell that had a limited impact on the Dispatch Price and were followed by further rebids which then resulted in a significant increase in the Dispatch Price.

### Relevant provisions of the NER

Clause 3.8.22A of the NER provides:

- (a) *Scheduled Generators and Market Participants* must make *dispatch offers, dispatch bids and rebids* in good faith.
- (b) In clause 3.8.22A(a) a *dispatch offer, dispatch bid or rebid* is taken to be made in good faith if, at the time of making such an offer, bid or *rebid*, a *Scheduled Generator or Market Participant* has a genuine intention to honour that offer, bid or *rebid*, if the material conditions and circumstances upon which the offer, bid or *rebid* were based remain unchanged until the relevant *dispatch interval*.
- (c) A *Scheduled Generator or Market Participant* may be taken to have contravened clause 3.8.22A(a) notwithstanding that, after all the evidence has been considered, the intention of the *Scheduled Generator or Market Participant* is ascertainable only by inference from the conduct of the *Scheduled Generator or Market Participant*, or of any other person, or from relevant circumstances.

The key elements are:

- rebids are required to be made in good faith;
- good faith is taken to exist where the market participant had a genuine intention to honour the bid if the material conditions and circumstances of the bid remained unchanged until the relevant dispatch interval; and
- a market participant could be said to have contravened the good faith requirement even where its intention regarding the bid was ascertainable only by inference from its conduct, or from relevant circumstances.

### The AER's case

On 22 and 23 February 2008, Stanwell's traders made a number of rebids. The AER asserted that a number of these did not occur in good faith, because they were made with the intention that should the Dispatch Price not rise sufficiently as a result of the rebid, Stanwell would make a further rebid. This was said to be inconsistent with the good faith requirement as there was not the requisite intention to honour the initial rebid absent any change in material conditions or circumstances. The AER argued that subsequent rebids made in this manner constituted an absence of good faith. As an alternative, the AER submitted that there was, in effect, no material change in the conditions and circumstances under which the rebids were made, thus constituting an absence of good faith.

### Stanwell's position

In respect of the good faith requirement, Stanwell submitted that a bid would be in good faith if it represented what Stanwell's trader was prepared to dispatch at the time the rebid was made. That is, Stanwell's trader did not, at the time of making the rebid, have an intention of displacing it with another rebid. The Court accepted this view.

## Good faith requirement – findings

Justice Dowsett found that Stanwell's traders responsible for making each of the rebids in question had not exercised any particular incompetence either in the performance of their duties or in their understanding of the market. His Honour found that their focus was on the mechanical aspects of assimilating information and responding to it, and that their overarching purpose was to maximise Stanwell's revenue by maximising the volume of energy dispatched and the price obtained for it. This was, in his Honour's view, the manner in which the market was intended to operate.

In determining whether a rebid has occurred in good faith, Justice Dowsett took the view that the market must be considered as a whole. It was necessary for the AER to demonstrate, on the balance of probabilities, that the relevant trader did not have a genuine intention to honour the bid at the time at which he made it.

Justice Dowsett took the view that a change in the Dispatch Price could itself constitute a change in the conditions or material circumstances on which a rebid was made. The change in distribution of dispatch volume and the absence of an effect on the Dispatch Price were said to be changes in conditions or circumstances in respect of the market, with the result that the AER was not able to prove a lack of good faith.

## Practical implications

For the purposes of clause 8.3.22A, "good faith" has been given a broad interpretation.

In the context of rebidding it is critical for traders to demonstrate that they had a genuine intention to honour the rebid at the time it was made. In doing so it is appropriate for traders to consider the circumstances of the market as a whole including the impact of their rebids.

Further rebidding following a rebid which does not give rise to an expected response in Dispatch Price does not necessarily lead to a conclusion that the initial rebid has not been made in good faith.

*We acknowledge the assistance of lawyer Caitlin McMorrow with this article.*

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