

1 September 2022

Ms Anna Collyer

Chair

Australian Energy Market Commission

PO Box A2449

Sydney South NSW 1235

Electronic Submission – ERC0325

Draft Rule Determination – Material Change in Network Infrastructure Project Costs

Dear Ms Collyer,

Energy Networks Australia (ENA) welcomes the opportunity to provide a submission to the Australian Energy Market Commission's (AEMC's) Draft Determination – Material Change in Network Infrastructure Project Costs.

ENA is the national industry body representing Australia's electricity transmission and distribution and gas distribution networks. Our members provide more than 16 million electricity and gas connections to almost every home and business across Australia.

Transmission is an important enabler of the transition to a low emissions economy. It is important that the regulatory arrangements continue to provide strong protections for consumers that ensure that the right projects are delivered and that the cost of the investment is prudent and efficient whilst at the same time facilitating timely investment. The rapid pace of the energy transition and the acceleration in the optimal timing identified by AEMO for new, major transmission projects necessitates flexible and practical regulatory arrangements to facilitate timely investments.

The draft Rule strikes an appropriate balance between increased transparency and timeliness of investment

ENA broadly supports the AEMC's more preferable draft Rule, as a practical and fit-for-purpose approach that will address the concerns raised by consumers and support the overall objective of timely and efficient transmission investment. ENA also supports the AEMC's proposed transitional provisions, which ensure that the new Rules will only apply on a prospective basis, for projects that have yet to publish a Project Assessment Draft Report (PADR) or Draft Project Assessment Report (DPAR). This is particularly important so as not to affect the project timelines and certainty for investors in relation to projects that have already passed this stage of the regulatory process. ENA notes that the existing Material Change in Circumstance (MCC) provisions will continue to apply to these projects.

The draft Rule increases transparency for consumers in identifying factors that may lead to re-evaluation of whether an investment option for a major project remains appropriate, following completion of the relevant Regulatory Investment Test (RIT).

ENA agrees that this is more fit-for-purpose than a deterministic approach, such as the fixed cost thresholds for re-applying the RIT in the original Rule change proposal. The factors that may affect the identification of the preferred option can be highly specific to a particular RIT and can include matters affecting both costs and benefits.

ENA also agrees that it is appropriate to retain the Network Service Provider (NSP) as the party who identifies whether a MCC has occurred, as the NSP will have the most up-to-date and relevant information. Including and consulting on 're-opening triggers' as part of the RIT process for large projects will improve visibility of the circumstances in which consumers (and the Australian Energy Regulator (AER)) should expect the NSPs to notify the AER that these triggers have occurred, and so will improve the operation and enforcement of the existing MCC provisions.

The requirement for NSPs to consult on these re-opening triggers at the PADR/ DPAR stage provides a meaningful avenue for stakeholders to provide input into the triggers, with the NSPs then setting out how this feedback has been taken into account as part of the final RIT report. ENA notes that NSPs include a detailed and specific discussion of how the issues raised in stakeholder submissions have been taken into account as part of the final RIT reports, in line with the NER requirements:¹

'The project assessment conclusions report must set out [...] a summary of, and the RIT-T proponent's response to, submissions received, if any, from interested parties [...].'

Recent examples of how TNSPs' PACRs have covered points raised in submission include Transgrid's HumeLink PACR and the joint Transgrid/Powerlink PACR for Expanding Queensland-NSW transfer capacity.² The AER has explicitly considered whether these NER requirements have been met in the PACR as part of its assessment of whether triggers for a contingent project application have been met.³

Further, allowing the NSP to identify the proposed course of action if a re-opening trigger does occur allows the action to be tailored to the circumstances, and avoids delays to investment from having to re-do the RIT in full where an alternative action may be more appropriate.

The more preferable draft Rule builds on Transmission NSPs' (TNSPs) existing practices in their RIT-T documents (in particular inclusion of sensitivity and boundary tests for key variables) and Contingent Project Applications (CPAs) (in confirming that the preferred option has not changed since the RIT-T application). The draft Rule codifies this practice and so will facilitate greater transparency for consumers in relation to what may constitute an MCC.

¹ NER 5.16A.4(j)(2) (applying to actionable ISP projects). Equivalent provisions apply in NER 5.16.4(v) for non-actionable ISP projects and NER 5.17.4 (r)(1)(ii) for distribution projects.

² Transgrid HumeLink [PACR](#) section 4 and Appendix D; Transgrid/Powerlink [PACR](#) for Expanding Queensland-NSW transfer capacity (Section 3, Appendices E and F).

³ See AER Determination, HumeLink Early Works contingent project, August 2022, p. 6-8.

ENA supports the additional obligations on re-opening triggers only applying to major projects

ENA supports the distinction drawn in the draft Rule between the obligations applying to all RIT projects, and those applying to ‘major projects’ over \$100m. It is appropriate that there is a greater degree of scrutiny and obligations around major projects, as these projects will have the most significant impact on consumers. Whilst recognising that the \$100m threshold is ultimately an arbitrary cut-off point, ENA considers it appropriate as it will capture both ISP projects and also major augmentation or replex projects, the majority of which can be expected to go through a CPA. ENA agrees that the cost threshold should be subject to the AER’s cost thresholds review.

ENA notes that for projects below this threshold, the NSP’s business as usual engagement processes could be enhanced to provide improved transparency to consumers around investments.

Re-opening triggers will provide greater transparency to consumers

As noted above, including ‘re-opening triggers’ as part of the RIT process for large projects will improve visibility and so improve the operation and enforcement of the MCC provisions.

ENA is supportive of the AER developing guidance on re-opening triggers, and agrees with the AEMC that this guidance should be principles-based rather than prescriptive and should also include examples.

ENA notes that there could be a small minority of projects for which there is no realistic re-opening trigger and suggests that the Rules should not preclude this outcome (noting that the NSP would still need to consult on there not being a realistic re-opening trigger as part of the RIT process). This would include, for example, where specific network investment is required in order to comply with an externally imposed obligation.

ENA supports a timeframe being placed on the AER to make its decision on the appropriate course of action, if a re-opening trigger occurs, and to have regard to the cost and delays associated with the proposed action. ENA suggests that the Rule also requires the AER to consider the costs and delays associated with its proposed action (if this differs from the NSPs).⁴ ENA considers 40 days to be consistent with the objective of facilitating timely investment.

ENA suggests that the AER Guidelines should include the material the AER expects to be provided with to make its decision, to avoid a need to ‘stop the clock’ and request additional information.

ENA supports the proposed six month exclusion period for re-examining whether there has been a MCC, as a practical way of avoiding continual analysis, consistent with facilitating timely investment.

Reporting through the Contingent Project Application process will provide further transparency

The draft Rule includes a new requirement for NSPs to include in their CPA confirmation and supporting analysis as to whether or not there has been an MCC.⁵ Where there has been an MCC, the NSP is required

⁴ This could be added to the factors the AER must have regard to in the Draft rule 5.16.4

⁵ Draft Rule 6A.8.2(b)(9) and (10) (and equivalents).

to provide further information to confirm whether it notified the AER (in accordance with the Rules) and what action (if any) the NSP took as a result.

In practice NSPs currently already include material to demonstrate that there has not been an MCC as part of their CPAs. Formalising the inclusion of this material as proposed in the draft Rule is consistent with the AEMC's intent that NSPs keep the MCC provisions 'front of mind' following the completion of the RIT-T.

The draft Rule does not provide a role for the AER in deciding that it is satisfied with the NSP's assessment that there has or has not been a MCC as part of the CPA process. On reflection, ENA considers this appropriate and understands it is in-line with the AEMC's intent. The ENA agrees with the AEMC's concerns around the potential for delay to major projects from introducing provisions that could re-open consideration of the RIT-T assessment at this late stage (ie, similar to the earlier clause 5.16.6 provisions that were actively removed from the Rules).

ENA considers that the draft Rule strikes an appropriate balance between ensuring appropriate accountability by the NSPs, providing greater transparency to consumers and not unduly delaying project delivery.

Some aspects of the Draft Rule may benefit from further consideration

Some aspects of the Rule drafting may benefit from further consideration, to ensure the Rule change is effective in providing customers with greater confidence in the operation of the MCC provisions.

In particular:

- » The proposed drafting does not automatically require a NSP to notify the AER if a re-opening trigger has occurred, as the proposed clause 5.16.4(z3) (and equivalents) does not equate a material change in circumstance with the occurrence of a re-opening trigger. ENA suggests that the intent of the draft Rule would be furthered if NSPs are required to notify the AER if a re-opening trigger occurs and propose a course of action.
- » Clause 5.16.4(z3)(5) (and equivalents) require RIT proponents to take actions specified by the AER within any timeframe specified. To ensure the AER has regard to any issues the NSP might face in taking the required actions, ENA suggests the final Rule refer to the 'reasonable timeframe' specified by the AER. The AER could also provide guidance on what factors it would take into account when determining the timeframe for actions to be taken.
- » The draft Rule does not include a requirement for the AER to publish any of: the notification by an NSP of an MCC and the NSP's proposed course of action; the AER's decision on the course of action; and any statement from the NSP that it has complied with the AER's decision. Publication of these notices/documents on these elements of the process would provide greater transparency to consumers around the operation of the MCC provisions, and ENA encourages the AEMC to consider reflecting this in the final Rule. NSPs would also be able to publish materials and engage with consumers and stakeholders on an MCC, outside of any formal Rules requirement.
- » The draft Rule does not impose any obligation on the AER to consult in making its decision, or explicitly provide it with the ability to request additional information from stakeholders other than the NSP (eg, draft Rule 5.16.4(z5)(2) and equivalents). ENA suggests that the AER could be provided with the discretion to consult where it considered that would assist it in making its decision and would not unduly delay the project. This would be similar to the discretion provided under the cost

pass through provisions – NER 6A.7.3(i). This would provide flexibility for the AER to consult where it considers it necessary or desirable, and where consultation would not unduly delay the project.

Ensuring transparency in relation to the operation of the MCC provisions, and the AER's role in considering and deciding on the proposed course of action, would provide greater assurance to consumers that the implications of an MCC are being proactively considered by both the NSP and the AER. This transparency is an effective substitute to extending the scope of any dispute provisions to also include the AER's determination on the appropriate course of action if there is an MCC.

ENA considers that introducing dispute arrangements as part of the MCC provisions is not necessary and would risk introducing a potential source of project delays. ENA notes that there is an analogy with the *Improving NER Consultation Procedures Rule Change*. In that final determination (p. 20), the AEMC concluded that requiring consulting parties to publish reasons on why they choose not to switch from expedited to standard consultation would incentivise effective and transparent consultation. The AEMC preferred this approach to other accountability mechanisms, such as a dispute resolution procedure proposed by the EUAA and Shell Energy.

The MCC provisions relating to re-opening triggers should also apply to AEMO

ENA suggests the AEMC re-consider whether AEMO (in its role as transmission planner in Victoria) should also be subject to the need to identify re-opening triggers in the PADR and PACR. ENA notes that under the draft Rule AEMO does continue to be subject to the broader MCC provisions.

ENA does not agree that the requirement for AEMO to undertake its functions with regard to the National Electricity Objective (NEO) provides a fundamental distinction between AEMO and the NSPs. NSPs are required to comply with the NER, which are developed to meet the NEO. The RIT Guidelines also state the AER's view that fulfilling the purpose of the RIT-T/RIT-D contributes to achieving the NEO.

ENA considers that having AEMO identify re-opening triggers as part of the RIT-T and to also actively demonstrate that there has not been a MCC once the cost of the tender outcome is known is materially the same as requiring NSPs to demonstrate this as part of their CPA, when they will also have completed the tender process to determine actual project costs. In both cases, the tender outcomes could be agreed on a conditional basis, subject to completion of the final regulatory step (ie, provision of information confirming that there has not been a MCC), to ensure the 'right' project is proceeding.

The AEMC notes AEMO has updated PACRs previously based on a change in circumstances,⁶ and suggests it is therefore unnecessary to apply the MCC provisions to transmission augmentations in Victoria for which AEMO is the RIT-T proponent. The fact that AEMO has updated PACRs is a valid point to make, but does not necessarily mean different obligations should apply to AEMO and other TNSPs going forward.

⁶ The Regional Victoria Thermal Capacity RIT-T, where a PACR was issued in October 2013 and then updated in June 2014 following further analysis by AEMO of proposals received from non-network proponents. ENA notes that the first PACR flagged that there would be further analysis of these proposals (which related to a later stage of the proposed investment), rather than the update to the PACR being triggered by an unexpected MCC (or change in costs).

Development of additional AER guidance

ENA supports the AEMC clarifying matters relating to cost estimation that can be covered in the AER's RIT Guidelines. ENA recognises there has been substantial consumer concerns around the accuracy of cost estimates adopted in the RITs, and the cost increases in subsequent CPAs.

The development of clear guidance on the treatment of contingencies in cost forecasts will help to align approaches and understanding on the appropriate treatment of risks. ENA suggests the Rules require the AER to consider advice from AEMO in developing any guidance in relation to the adoption of particular cost estimation classification system(s), due to AEMO's practical experience in this area.

ENA does not support the proposed change in the draft Rule to allow the AER to identify parts of its RIT Guidelines as binding. The RIT-T and RIT-D instruments themselves are binding on NSPs and the purpose of the RIT Guidelines is to provide guidance to NSPs on how they can meet the requirements set out in the instruments. The energy transition highlights the need for the Rules and associated Guidelines to remain flexible so that they can be applied to different situations as necessary. Introducing 'binding' elements of the RIT Guidelines would run directly counter to this,⁷ and could constrain the AER's ability to oversee the RITs as the transition progresses.

ENA understands that the proposed change is intended to only be confined to those areas of the guidelines that relate to the matters addressed in the draft Rule (ie, cost estimation and the specification of re-opening triggers). However ENA notes that the current draft Rule does not reflect this limitation and would enable the AER to identify any areas of the Guidelines as binding (which goes beyond the scope of the matters being considered in this Rule change).

In relation to complying with AER guidance on cost estimation, NSPs would need to follow any additional guidance provided by the AER (unless they can provide a rationale for varying) to have confidence that the RIT would not be disputed. In relation to sensitivities and boundary tests, the AEMC observes that this is already standard practice and so a change to 'binding' guidance is unnecessary.

ENA welcomes the constructive ongoing engagement with the AEMC and would welcome further engagement if the AEMC is considering making substantial changes to the current proposed draft Rule. ENA would also be happy to assist the AEMC with any further rule change revisions if this were beneficial.

Should you have any queries on this response please feel free to contact Verity Watson, vwatson@energynetworks.com.au.

Yours sincerely,



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⁷ The rationale for making elements of the AER's Cost Benefit Analysis (CBA) Guidelines binding does not apply to the RIT Guidelines. The Rules that allow the AER to identify guidance in the CBA Guidelines as binding arose from the development of the actionable ISP framework, which applies to a broader set of activities and interactions undertaken across both AEMO and the TNSPs.