AUSTRALIAN COMPETITION TRIBUNAL

Applications by Public Interest Advocacy Centre Ltd and Endeavour Energy [2016] ACompT 2

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| Citation: | Applications by Public Interest Advocacy Centre Ltd and Endeavour Energy [2016] ACompT 2 |
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| Review from: | Australian Energy Regulator |
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| Applicants: | **PUBLIC INTEREST ADVOCACY CENTRE LTD and ENDEAVOUR ENERGY** |
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| File number: | ACT 2 of 2015;  ACT 6 of 2015 |
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| Tribunal: | **MANSFIELD J, PRESIDENT**  **MR R DAVEY, MEMBER**  **DR D ABRAHAM, MEMBER** |
| Interveners in  ACT 2 of 2015  ACT 6 of 2015: | AusNet Services (Distribution) Pty Ltd  AusNet Services (Transmission) Ltd  Australian Gas Networks Ltd  Citipower Pty Ltd  Powercor Australia Ltd  SA Power Networks  United Energy Distribution Pty Ltd  Ergon Energy Corporation Ltd  Minister for Resources, Energy and Northern Australia |
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| Interveners in  ACT 2 of 2015: | Endeavour |
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| Interveners in  ACT 6 of 2015: | Public Interest Advocacy Centre Ltd |
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| Date of Determination: | 26 February 2016 |
|  |  |
| Dates of hearing: | 21-25 September 2015; 28-30 September 2015;  1-2 October 2015, 6-9 October 2015 |
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| Place: | Darwin (via video link to Sydney, Melbourne, Brisbane and Adelaide) |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 6 of 2015 |

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| RE:  BY: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ENDEAVOUR ENERGY PURSUANT TO RULE 6.11.1 OF CHAPTER 6 OF THE NATIONAL ELECTRICITY RULES  ENDEAVOUR ENERGY  Applicant |

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| TRIBUNAL: | MANSFIELD j, president  MR r davey, member  DR d abraham, member |
| DATE OF DETERMINATIOn: | 26 FEBRUARY 2016 |
| WHERE MADE: | DARWIN (VIA VIDEO LINK TO SYDNEY, MELBOURNE, BRISBANE AND ADELAIDE) |

THE TRIBUNAL DETERMINES THAT:

1. Pursuant to s 71P(2)(c) of the *National Electricity Law*, the *Final Decision Endeavour Energy distribution determination 2015-16 to 2018-19*, April 2015, including attachments (the Final Decision) is set aside and remitted to the Australian Energy Regulator (AER) to make the decision again in accordance with the following directions:
   * + 1. the AER is to make the constituent decision on opex under r 6.12.1(4) of the *National Electricity Rules* in accordance with these reasons for decision including assessing whether the forecast opex proposed by the applicant reasonably reflects each of the operating expenditure criteria in r 6.5.6(c) of the *National Electricity Rules* including using a broader range of modelling, and benchmarking against Australian businesses, and including a “bottom up” review of Endeavour’s forecast operating expenditure;
       2. the AER is to make the constituent decision on a return on debt in relation to the introduction of the trailing average approach in accordance with these reasons for decision;
       3. the AER is to make the constituent decision on estimated cost of corporate income tax (gamma) in accordance with these reasons for decision, including by reference to an estimated cost of corporate income tax based on a gamma of 0.25; and
       4. the AER is to consider, and to the extent to which it considers appropriate to vary the Final Decision in such other respects as the AER considers appropriate having regard to s 16(1)(d) of the *National Electricity Law* in the light of such variations as are made to the Final Decision by reason of (a)-(c) hereof.

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |  |
|  | ACT 2 of 2015 |

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| RE:  by: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ENDEAVOUR ENERGY, PURSUANT TO CLAUSE 6.11.1 OF CHAPTER 6 OF THE NATIONAL ELECTRICITY RULES  PUBLIC INTEREST ADVOCACY CENTRE LTD  Applicant |
|  | ACT 6 of 2015 |
| RE:  BY: | APPLICATION UNDER SECTION 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF DISTRIBUTION DETERMINATION MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO ENDEAVOUR ENERGY PURSUANT TO RULE 6.11.1 OF CHAPTER 6 OF THE NATIONAL ELECTRICITY RULES  ENDEAVOUR ENERGY  Applicant |

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| TRIBUNAL: | MANSFIELD J, PRESIDENT  MR R DAVEY, MEMBER  DR D ABRAHAM, MEMBER |
| DATE: | 26 FEBRUARY 2016 |
| PLACE: | DARWIN (VIA VIDEO LINK TO SYDNEY AND MELBOURNE) |

**REASONS FOR DETERMINATION**

# BACKGROUND

1. On 30 April 2015, the Australian Energy Regulator (AER) delivered its Final Decision for the Endeavour Energy (Endeavour) distribution determination for the period 2015-16 to 2018-19 pursuant to r 6.11.1 of Ch 6 of the *National Electricity Rules* (NER).
2. Endeavour is a distribution network service provider (DNSP) and is owned by the State of New South Wales (NSW). It is one of three state owned NSW DNSPs which were granted leave to apply for review of the AER’s decisions made on 30 April 2015. They are Ausgrid (ACT 4 of 2015), Endeavour (ACT 6 of 2015) and Essential Energy (Essential) (ACT 7 of 2015). They collectively form Networks NSW and are incorporated under the *Energy Services Corporations Act 1995* (NSW).
3. The relevant regulatory control period is 2014-19. In the case of the Networks NSW DNSPs, it included a transitionary period in 2014-15. A placeholder revenue allowance was set by the AER on 16 April 2014 to apply from 1 July 2014 to 30 June 2015. The relevant Final Decisions, including the Endeavour Final Decision, were delivered after Endeavour submitted a Regulatory Proposal on 31 May 2014 and the AER had published Draft Decisions on that and the other Regulatory Proposals on 27 November 2014, and Endeavour had submitted a Revised Regulatory Proposal on 20 January 2015.
4. On 21 May 2015, Endeavour applied for leave to review the AER’s Final Decision in relation to Endeavour under s 71 B of the *National Electricity Law* (NEL), as scheduled in the *National Electricity (South Australia) Act 1996* (SA). The NEL is given jurisdictional effect through the *National Electricity (New South Wales) Act 1997* (NSW).
5. On 21 May 2015, the Public Interest Advocacy Centre Ltd (PIAC) also filed an application for leave to apply to review the AER’s Final Decision in relation to Endeavour under s 71B of the NEL. PIAC also filed applications for leave to apply for review with respect to the AER’s Final Decisions with respect to Ausgrid (ACT 1 of 2015) and Essential (ACT 3 of 2015).
6. The Tribunal granted leave to Endeavour to apply for review, and it also granted leave to PIAC to do so under s 71B of the NEL on 17 July 2015. Endeavour and PIAC were also each granted leave to intervene in each other’s applications. The Tribunal also granted leave to intervene in each of those matters to AusNet Services (Distribution) Pty Ltd, AusNet Services (Transmission) Ltd, Australian Gas Networks Ltd, CitiPower Pty Ltd, Powercor Australia Ltd, SA Power Networks and United Energy Distribution Pty Ltd (Vic/SA Interveners), Ergon Energy Corporation Ltd (Ergon) and the Commonwealth Minister for Industry and Science (now the Minister for Resources, Energy and Northern Australia).
7. The hearing of each of the applications by Networks NSW and PIAC took place together. In addition, ActewAGL Distribution (ActewAGL) applied, and was granted leave, to review a decision of the AER made under the NEL (ACT 5 of 2015) on the same date as the Networks NSW Final Decisions. Later Jemena Gas Networks (NSW) Ltd (JGN) applied, and was granted leave, to review a further decision of the AER made on 3 June 2015 under the *National Gas Law* (NGL) (ACT 8 of 2015).
8. Each of the eight applications was heard together because a number of the issues arising in relation to them were common to issues with other applications. There are, of course, some issues particular to one or more of the applicants, and in some respects the issues or arguments relating to particular issues differed slightly.

# THE GROUNDS OF REVIEW

1. Endeavour’s grounds of review related to a number of the building blocks prescribed by r 6.4.3 of the NER as components of the Final Decision. It claimed that the AER had erred in significant respects in arriving at the Final Decision fixing the revenue allowed for the regulatory control period in respect of:
2. operating expenditure (opex);
3. Efficiency Benefit Sharing Scheme (EBSS);
4. rate of return on equity;
5. rate of return on debt;
6. estimated cost of corporate income tax (gamma); and
7. consequential issues, including form of control mechanism (X factor).

They mirrored the grounds of review of Ausgrid, save for Ausgrid having an additional issue concerning its metering costs.

1. PIAC’s grounds of review related to Endeavour in the same terms as they related to Ausgrid and Essential. PIAC largely sought to restore the Draft Decisions of the AER. Its grounds concerned the building blocks of:
2. opex, by having the benchmark efficiency target fixed at 0.86, being the weighted average of the upper quartile of the efficiency scores of the comparators used by the AER, and removing certain of the operating environment factors (OEF) adjustments made by the AER in each Final Decision;
3. return on equity, to vary the equity beta to 0.5 rather than that used by the AER in each Final Decision; and
4. return on debt, to commence the transitional methodology adopted by the AER to move to the trailing average approach for estimating the return on debt to the earlier (transitional) year 2014-15.

In other respects, it supported each of the AER’s Final Decisions concerning Networks NSW.

1. The Vic/SA Interveners broadly speaking supported the position taken by Networks NSW generally, as did Ergon. Ergon made a separate contention with respect to the transitional consequences of the Final Decisions (relating to all the network service providers) as a result of the 2012 Rule Amendments and the 2013 Legislative Amendments.
2. The Tribunal has decided that it is not necessary, for the purposes of this or the other applications, to address Ergon’s contention. It may seek to raise it, depending on the Final Decision of the AER in relation to Ergon itself.

# THE PIAC-AUSGRID DECISION

1. The Tribunal has, at the same time as this decision is published, published its decision on the applications by PIAC relating to the AER’s Ausgrid Final Decision, and Ausgrid to review that Final Decision: *Applications by Public Interest Advocacy Centre Ltd* *and* *Ausgrid* [2016] ACompT 1 (the *PIAC-Ausgrid Decision*).
2. This decision deals only with the applications by PIAC and Endeavour to review the AER Final Decision concerning Endeavour. It is intended to be read in conjunction with the decision of the Tribunal in the *PIAC-Ausgrid Decision*. That decision serves as the “lead” decision on the Tribunal’s general considerations, on the significance of matters of common concern, and its consideration of aspects of particular topics that do not need to be repeated in full in the decisions of the Tribunal concerning the other applications. The definitions used in the *PIAC-Ausgrid Decision* are adopted for the purposes of this decision.
3. As noted, in the *PIAC-Ausgrid Decision*, the Tribunal conducted public consultation in relation to the matters raised in each of the eight applications on 6 and 7 August 2015. It then heard the applications concurrently over the period from 21 September 2015 to 9 October 2015.
4. Due to the substantial commonality of issues raised, it was common ground that it would be appropriate for the applicants to prepare common written submissions in relation to those issues or topics which it had substantially in common with other applicants. On this basis, and pursuant to the Tribunal’s directions of 5 August 2015:
   1. the Network Applicants prepared common written submissions on the issues of return on equity and the value of imputation credits;
   2. Networks NSW and ActewAGL prepared common written submission on return on debt; and
   3. Networks NSW prepared common written submissions on framework, opex, X-factor, EBSS, the application of s 71O of the NEL and what constitutes a materially preferable NEO decision.
5. The applicants were to some extent also represented during the hearing by common counsel in respect of those issues or topics which it had in common with the other applicants. Relevantly, common counsel appeared on behalf of each of the Network Applicants in relation to return on equity and gamma, on behalf of Networks NSW and ActewAGL in respect of return on debt, and on behalf of each of Network NSW in relation to framework, opex, X-factor, EBSS, s 71O of the NEL and what constitutes a materially preferable NEO decision. In addition, during the course of the hearing the Network Applicants and the interveners adopted the submissions of other parties where it was appropriate to do so.
6. That recitation is sufficient to indicate why it is, in relation to these two applications, unnecessary to do much more than to note any significant differences between the circumstances of Ausgrid and Endeavour, any significant differences in the way in which the AER approached its task in relation to its determination of its Final Decisions concerning Ausgrid and Endeavour (the Tribunal has not discerned any), and any significant points to be made concerning the Tribunal’s reasoning with respect to the topics addressed in the *PIAC-Ausgrid Decision* by reason of the particular circumstances of Endeavour.

# THE AER’S FINAL DECISION RELATING TO ENDEAVOUR

1. The effect of the AER’s Final Decision for Endeavour was to disallow some $1.17 billion (that is a reduction of about 17 percent) of the revenue for standard control services sought in its Revised Regulatory Proposal over the 2014-19 regulatory period. That sum is made up of a reduction in claimed revenue for opex of $264m; a reduction of $744m in revenue relating to the claimed return on capital (equity and debt) over the period, made up of a $461m reduction in revenue for the claimed return on equity, and a $283m reduction in claimed revenue for the return on debt; a reduction of $100m in claimed revenue for the carryover of the EBSS; and a reduction of $60m in claimed revenue for the value of imputation credits (gamma). The figures in this part of the reasons are presented by Networks NSW, some of which did not specify whether they are nominal or real figures.
2. The Tribunal notes that those reductions followed the revenue allowance in the placeholder determination for 2014-15, where the claimed revenue was $949.5m, but the allowance from the AER was $858.6m, that is an additional $91m reduction in claimed revenue in 2014-15 and reflected of course after the 2015-19 regulatory period.

# CONSIDERATION

1. The Tribunal proposes to follow the same sequence of principal headings as appears in the *PIAC-Ausgrid Decision*. In addition, given the degree of commonality of issues, the following very largely incorporates reasons by reference to what the Tribunal has said in the *PIAC-Ausgrid Decision*, with respect to the regulatory framework and the grounds raised in relation to this decision. There is very little that requires further detailed discussion, notwithstanding that there are some differences between Endeavour and Ausgrid both in their operating environment, and in their respective submissions to the AER, and of course in the AER’s reasons for their respective Final Decisions. The Tribunal has, of course, considered those differences.
2. It does not consider that it is necessary to expand upon them or to discuss them separately in any particular detail. It has done so where it considers it desirable.
3. Accordingly, the reasons for this decision are hereafter relatively brief.

## (a) Operating Expenditure

1. The AER’s Final Decision with respect to opex found that Endeavour was not materially inefficient. However, it did not provide an allowance claimed by Endeavour for labour and vegetation management costs that would be incurred in the 2014-19 regulatory control period. It raised grounds of review in this respect, which also corresponded with the opposing grounds raised by PIAC in relation to Endeavour’s claimed allowance for labour and vegetation management.
2. The Tribunal’s reasons with respect to opex, including matters specific to Endeavour and PIAC, can be found in the Ausgrid-PIAC Decision.
3. In short, the common contentions of Networks NSW regarding the opex allowance in each of the Networks NSW applications relating to the selection and use of data, the model construction and use of the EI model, and the reflection of the OEFs have been made out.
4. In the case of Endeavour, however, the AER’s starting point despite those matters was that its opex was not materially inefficient on the basis of the EI model. Nonetheless, it adjusted downwards its forecast opex by $240.7m (in $2013-14) in respect of what it identified as increased vegetation management expenditure (VM Expenditure) and by $17.3m (in $2013-14) in respect of redundancy costs (the Redundancy Expenditure).
5. The AER rejected the proposed VM Expenditure because the proposed additional expenditure was to enable Endeavour to meet increased contract prices from outsourced providers in response to Endeavour targeting further improvements to achieve conformance with the minimum risk standards it must meet regarding the clearance distance between mains and vegetation for all of its network area.
6. The AER considered it did not have “persuasive evidence” that Endeavour’s historical opex was too low to achieve the opex objectives, and without such evidence, it did not consider such increased contract costs to be a reason to increase the opex forecast, given that Endeavour’s regulatory obligations were unchanged.
7. Consequently, while Endeavour was not found to be materially inefficient, its decision was “marginal” and would not have been the same had Endeavour’s base year opex included additional expenditure consistent with the VM Expenditure proposed. The AER also considered that further evidence would be required to substantiate the VM Expenditure, and that it would be inconsistent with the application of the EBSS to include the VM Expenditure in the opex forecast.
8. The AER rejected the proposed Redundancy Expenditure because it considered that this was only needed because Endeavour was not currently operating as efficiently as it could. In this respect, it relied upon a report by Deloitte Access Economics (Deloitte) dated 28 April 2015 (the 2015 Deloitte Labour Report) concerning labour and workforce management issues affecting Networks NSW.
9. It is a consequence of the grounds of review established in relation to the EI model (as recorded in the *PIAC-Ausgrid Decision*) in a less direct way than is the case with Ausgrid and Essential, but which nevertheless affect the AER’s Endeavour Final Decision, that the same grounds of review with respect to Endeavour are made out.
10. That step is further explained in relation to Endeavour in the *PIAC-Ausgrid Decision*. In that decision, the OEF adjustments made by the AER, including in relation to Endeavour are also the subject of detailed consideration by the Tribunal.
11. The AER in the Endeavour Final Decision, as noted, accepted that the opex claimed by Endeavour in its Revised Regulatory Proposal – apart from the VM Expenditure and the Redundancy Expenditure – was not materially inefficient. Endeavour in its closing submissions proposes a reconsideration of its opex, starting therefore with the allowed opex of $1,218m. It then seeks to have revisited only those two disputed elements.
12. The Tribunal makes more general orders than it might otherwise because it does not know what might be the consequences of the AER’s assessment of the efficiency of the claimed opex when it has undertaken the modelling and benchmarking which the Tribunal canvassed in the *PIAC-Ausgrid Decision*. Depending on the outcome of that, the AER may adhere to that starting point or revisit it. It should, in any event, be given the opportunity to consider that, and to revisit the VM Expenditure and Redundancy Expenditure claimed in the more general context of the opex expenditure claimed.
13. It is desirable to add some further observations about the VM Expenditure.
14. The VM Expenditure was required, according to Endeavour’s Revised Regulatory Proposal, to enable Endeavour to be compliant with applicable standards for vegetation management in NSW, and so (it says) to ensure the safety and reliability of the supply of electricity and the distribution system. Consequently, in its contention, the VM Expenditure was directed at meeting the operating expenditure objectives, specifically those in rr 6.5.6(a)(2), (3) and (4) of the NER.
15. Reference was made to the Industry Safety Steering Committee 3 Standard – Guidelines for Managing Vegetation Near Powerlines (ISSC 3) specifying minimum clearances to be maintained between electricity assets and vegetation based on the operating voltage and construction type of the electricity assets, and regrowth allowances which an operator may maintain to allow for regrowth between trimming cycles.
16. Endeavour accepted that its compliance was not complete. It attributed that to some contractors trimming vegetation only to the minimum clearances and not making any allowance for regrowth. As a result, minimum clearances were not being maintained following regrowth, leading to a need for more frequent trimming cycles. It provided material showing it had withheld payments under contracts due to non-compliance with the required contractual standards, including a substantial withheld payment of $2.8m in the 2011-12 year.
17. In 2011-12 (for two geographical areas) and in 2012-13 (for the remaining 11 geographical areas in its service area), Endeavour went to market and re-tendered, requiring trimming to the minimum clearance plus regrowth allowance in accordance with ISSC 3. The market priced the additional costs required to adequately meet compliance standards, with significant increased costs. Compliance with ISSC 3 rose to a much higher level by 2013-14 as a result.
18. This increase in price to contractors was the major reason for the inclusion of the VM Expenditure in Endeavour’s forecast opex for the 2014-19 regulatory control period.
19. The AER treated the proposed VM Expenditure as a “step change” so that it would only accept the VM Expenditure if it was a change resulting from a capex/opex trade-off, or a change resulting from a new regulatory obligation. It is argued that that was in error, because its task was to consider whether Endeavour’s forecast opex, including the VM Expenditure, reasonably reflected the opex criteria: r 6.5.6(3) of the NER.
20. The AER made no finding that ISSC 3 is an unreasonable standard to adopt. It is an industry standard which Endeavour has been required by the NSW Department of Water and Energy to incorporate into plans it must maintain under the *Electricity Supply (Safety and Network Management) Regulation 2014* (NSW). By disallowing the VM Expenditure, it is argued that the AER disallowed Endeavour the expenditure it requires to comply with the standard providing for best practice vegetation clearance, and which has been incorporated into documents with which it is required to comply under regulatory provisions. That is said not to be an approach consistent with the opex objectives, the RPP or the NEO itself.
21. It is not necessary to explore those assertions fully.
22. It is sufficient to note that the AER’s rejection of the VM Expenditure is infected by the same errors which affect its benchmarking exercise and the EI model in particular. That is because the AER expressly relied upon the fact that its benchmarking exercise had found Endeavour to be not materially inefficient, but only marginally so, such that any additional expenditure could not be added without jeopardising the finding of efficiency, and because the AER relied upon its benchmarking exercise to support the proposition that comparator networks operate safe and reliable networks. Those aspects are dealt with in the *PIAC-Ausgrid Decision*.
23. The rejection of the Redundancy Expenditure is a matter which is common to Networks NSW, and is dealt with in the *PIAC-Ausgrid Decision*.
24. The Tribunal has not specifically addressed the asserted error of discretion on the part of the AER that it wrongly rejected Endeavour’s proposed VM Expenditure and Redundancy Expenditure on the basis that they did not arise because of a change resulting from a capex/opex trade-off or a change resulting from a new regulatory obligation (those being the criteria set out in the AER’s Expenditure Forecast Assessment Guideline which, Networks NSW asserted, have no basis in the NEL or the NER). Nor has the Tribunal specifically accepted or rejected Endeavour’s contention that the AER wrongly rejected the proposed VM Expenditure when Endeavour was not given a reasonable opportunity, or any opportunity, to make submissions in relation to that topic.
25. The further review by the AER which the Tribunal proposes to direct should be conducted so that the AER is not constrained by its formal rulings on those matters, particularly having regard to s 16(1)(d) of the NEL.
26. For the reasons given in the *PIAC-Ausgrid Decision*, the Tribunal in the circumstances did not need finally to determine the correctness of PIAC’s contentions.

## (b) Control Mechanism (X factor)

1. This issues is confined to the Networks NSW DNSPs. It is not a matter upon which PIAC made submissions, either as an applicant or an intervener. Nor did any other intervener address submissions in relation to it.
2. The written and oral submissions on the application of revenue smoothing (involving the use of an X factor) were prepared jointly in each of the applications for review by Ausgrid, Essential and Endeavour. The Tribunal’s reasons on the X factor are set out in the *PIAC-Ausgrid Decision*. It is not necessary to repeat them here.
3. As a consequence of the Tribunal’s decision with respect to opex, the ground of review for the application of the control mechanism has largely fallen away. When the AER revisits and re-determines the opex allowances, it will then have to apply the X factor. It will do so at a time, and in relation to revenues streams, which will require it to make a fresh decision on the X factor.

## (c) EBSS

1. The Tribunal’s reasons with respect to the EBSS can be found within the *PIAC-Ausgrid Decision*. The consideration of the grounds of review with respect to the EBSS has been substantially confined as a consequence of the Tribunal’s decision with respect to opex. It is common ground that the treatment of the EBSS by the AER is related to the opex allowance.
2. In the case of Essential, the consequence of the opex allowance was in part to lead the AER to exclude Essential from a significant penalty or liability which it had incurred in the previous regulatory period.
3. The Tribunal considers that, because of the interrelationship between the EBSS and the allowance for opex, the AER may wish to revisit that approach. Indeed, the Networks NSW proposed orders include the proposition that that liability should be carried forward to the current regulatory period (of course on its assumption that in other respects the opex allowance should be revisited to allow for VM Expenditure and Redundancy Expenditure).

## (d) Return on Equity

1. The AER’s Final Decisions for Networks NSW are said to compromise two components of the building block “return on capital” under Ch 6 of the NER: the return on equity and the return on debt. The written and oral submissions of the parties separated the two issues, despite their interrelatedness in forming a critical feature of the building block for return on capital. It was appropriate to proceed that way in view of the complexity and individual features of the contentions before the Tribunal with respect to equity and debt.
2. The grounds of review with respect to the rate of return on equity for Endeavour are common to all the Networks NSW submissions and PIAC’s submissions also apply to Networks NSW as a group.
3. Networks NSW unsuccessfully sought to make out grounds of review in relation to the AER’s reasons for its quantification of the allowance for return on equity. PIAC supported the AER’s contentions in that regard, and successfully so.
4. In addition, PIAC argued that the allowance for return on equity for each of Networks NSW should be reduced because the AER should have adopted an estimate of equity beta of 0.5. The Tribunal did not conclude that that ground of review is made out.
5. The reasons of the Tribunal in the *PIAC-Ausgrid Decision* for that conclusion equally apply to Endeavour. It is not necessary to repeat them.
6. The Tribunal has rejected the contentions by Networks NSW seeking to disturb the AER Final Decisions on the rate of return on equity in the *PIAC-Ausgrid Decision*. Those reasons apply equally to Ausgrid and to Endeavour (and to Essential). The consequence is that no grounds of review are made out in relation to the Final Decisions concerning the return on equity.
7. Separately, in the *PIAC-Ausgrid Decision*, the Tribunal has also explained why it does not consider that PIAC has made out its grounds of review in relation to the return on equity.
8. The Tribunal does not need to repeat those reasons.

## (e) Return on Debt

1. As stated above, the grounds of review with respect to the rate of return on capital for Endeavour, and specifically the return on debt, are common to Networks NSW. PIAC’s grounds of review on this topic also apply to Networks NSW generally.
2. As explained in the *PIAC-Ausgrid Decision*, the competing contentions of Networks NSW and PIAC were directed to the way in which the introduction of the trailing average approach to determining the appropriate return on debt should be transitioned.
3. Their respective positions could not have been further apart.
4. The Tribunal was satisfied that Networks NSW had established grounds of review in relation to each of them about the transition methodology adopted by the AER, largely by reason of its adoption of a standard regulated benchmark efficient entity.
5. PIAC’s contention was again premised on the AER’s approach being broadly correct. It then contended that the transition methodology should have been applied commencing a year earlier than that adopted by the AER. Because the premise was not maintained by the Tribunal, it did not need to fully consider PIAC’s contention.
6. The reasons for those conclusions are set out in the *PIAC-Ausgrid Decision*. There were no particular elements, peculiar to Endeavour, which require separate consideration.
7. The reasons for the decision on the return on debt for Networks NSW addressed in the *PIAC-Ausgrid Decision* are therefore equally applicable to this application. The contentions on behalf of Networks NSW, as discussed in the *PIAC-Ausgrid Decision*, mean that Endeavour succeeds on its grounds of review on this topic. That result also means that PIAC’s contentions about the timing for the commencement of the transition methodology of the trailing average for estimating return on debt do not arise.
8. Again, the Tribunal refers to, and adopts, its reasons in the *PIAC-Ausgrid* Decision without repeating them.

## (f) The Value of Imputation Credits (Gamma)

1. The Tribunal’s reasons with respect to gamma for Endeavour are applicable to each of Networks NSW, as the submissions were common. Consequently, the Tribunal’s reasons and conclusion in the *PIAC-Ausgrid Decision* apply equally to this application. That means that Endeavour has made out grounds of review with respect to this topic.

## (g) What determination should be made?

1. The Tribunal’s consideration of how the constituent components of the AER’s Final Decisions interrelate with each other, taking into account the RPP under s 71P(2b) of the NEL are addressed as issues common to Networks NSW in the *PIAC-Ausgrid Decision*.
2. So too are the Tribunal’s reasons with respect to whether its decision would, or would be likely to, result in a materially preferable NEO decision under s 71P(2a) of the NEL. Consequently, for Endeavour, for the reasons set out in the *PIAC-Ausgrid Decision*, the Tribunal is satisfied that it should set aside the AER Final Decision with respect to Endeavour in relation to those topics where a ground of review has been made out, or where there is an interrelationship between one or more of those topics and another topic addressed in the Endeavour Final Decision of the AER. For the reasons there discussed, that re-opens to the AER, to the extent to which it considers appropriate, the other elements or amounts allowed for the other building blocks in its Final Decision concerning Endeavour.

# DETERMINATION

1. For those reasons, the Tribunal has decided to make its determination in much the same terms as are made in the Ausgrid application for review, and in the PIAC application for review of the AER’s Ausgrid Final Decision. That means the AER Final Decision is set aside and the matter remitted to the AER for reconsideration in accordance with the Tribunal’s reasons in the *PIAC-Ausgrid Decision* and as adopted for this decision.
2. The AER’s reconsideration in relation to opex will involve, at least in part, a “bottom up” analysis of the VM Expenditure and a review of its approach to the Redundancy Expenditure. The extent to which the determination “opens up” the more general opex allowance for the AER is a matter for the AER to determine. Indeed, for the reasons given in the PIAC-*Ausgrid Decision*, the Tribunal’s determination on the Endeavour application enables the AER to revisit such of the other topics it addressed in the Endeavour Final Decision as it considers appropriate to give effect to s 16(1)(c) and (d) of the NEL. For the same reasons, the Tribunal makes no determination in the PIAC application concerning the Endeavour Final Decision by the AER.

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| I certify that the preceding seventy-six (76) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice Mansfield, Mr R Davey and Dr D Abraham. |

Associate:

Dated: 26 February 2016