AUSTRALIAN COMPETITION TRIBUNAL

Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy [2015] ACompT 2

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| Citation: | Applications by Public Interest Advocacy Centre Ltd, Ausgrid, Endeavour Energy and Essential Energy [2015] ACompT 2 |
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| Review from: | Australian Energy Regulator |
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| File number: | ACT 1 of 2015ACT 2 of 2015ACT 3 of 2015ACT 4 of 2015ACT 6 of 2015ACT 7 of 2015 |
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| Tribunal: | MANSFIELD J, presidentMR R DAVEY, member**DR D ABRAHAM, member** |
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| Date of decision: | 17 July 2015 |
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| Catchwords: | **CONSUMER LAW** – application for leave to review regulatory determination of Australian Energy Regulator – consideration of criteria for leave in s 71E of *National Electricity Law* – consideration of whether serious issue or issues to be heard and determined – consideration of whether asserted grounds of review, if made out, would, or would be likely to, result in a materially preferable NEO (National Electricity Objective) decision – consideration of adequacy of identification of grounds of review in s 71C of *National Electricity Law* as specified in application  |
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| Legislation: | *Energy Services Corporations Act 1995* (NSW)*National Electricity (South Australia) Act 1996* (SA)*Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA)*Competition and Consumer Act 2010* (Cth)*Administrative Decisions (Judicial Review) Act 1975* (Cth) |
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| Cases cited: | *Application by Energy Australia* [2009] ACompT 8*WA Gas Networks (No 3)* [2012] ACompT 12 *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33*Application by ActewAGL Distribution* [2010] ACompT 4 *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 *Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)* [2010] AComptT 9*Application by Energex Limited (Gamma) No 5* [2011] ACompT 9 |
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| Category: | Catchwords |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL | ACT 1 of 2015ACT 2 of 2015ACT 3 of 2015ACT 4 of 2015ACT 6 of 2015ACT 7 of 2015 |

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| RE: | APPLICATIONS UNDER S 71B OF THE NATIONAL ELECTRICITY LAW FOR A REVIEW OF DISTRIBUTION DETERMINATIONS MADE BY THE AUSTRALIAN ENERGY REGULATOR IN RELATION TO AUSGRID, ENDEAVOUR ENERGY AND ESSENTIAL ENERGY UNDER CL 6.11.1 OF THE NATIONAL ELECTRICITY RULES |
| BY: | **PUBLIC INTEREST ADVOCACY CENTRE LTD (ACT 1, 2 and 3 of 2015)****AUSGRID (ACT 4 of 2015)****ENDEAVOUR ENERGY (ACT 6 of 2015)****ESSENTIAL ENERGY (ACT 7 of 2015)** |

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| TRIBUNAL: | MANSFIELD J, presidentMR R DAVEY, memberDR D ABRAHAM, member |
| DATE OF DIRECTIONS: | 17 JULY 2015 |
| WHERE MADE: | ADELAIDE (HEARD IN SYDNEy) |

THE TRIBUNAL DIRECTS THAT:

1. Leave is given to:

(1) Public Interest Advocacy Centre Ltd in ACT 1 of 2015;

(2) Public Interest Advocacy Centre Ltd in ACT 2 of 2015;

(3) Public Interest Advocacy Centre Ltd in ACT 3 of 2015;

(4) Ausgrid in ACT 4 of 2015;

(5) Endeavour Energy in ACT 6 of 2015;

(6) Essential Energy in ACT 7 of 2015;

with respect to their designated grounds of review to apply for review of the decisions of the Australian Energy Regulator published on 30 April 2015 referred to in their respective applications.

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| TRIBUNAL: | MANSFIELD J, presidentMR R DAVEY, memberDR D ABRAHAM, member |
| DATE: | 17 JULY 2015 |
| PLACE: | ADELAIDE (HEARD IN SYDNEY) |

**REASONS FOR DECISION**

# INTRODUCTION

1 On 30 April 2015, the Australian Energy Regulator (AER) made a distribution determination under cl 6.11.1 of Ch 6 of the *National Electricity Rules* (NER) in relation to each of the following distribution network service providers (DNSPs): ActewAGL Distribution (ActewAGL), Ausgrid, Endeavour Energy (Endeavour) and Essential Energy (Essential). Each of Ausgrid, Endeavour and Essential are New South Wales State owned corporations incorporated under the *Energy Services Corporations Act 1995* (NSW) and were referred to collectively in the course of the hearing as Networks NSW.

2 On 21 May 2015, ActewAGL, Ausgrid, Endeavour and Essential applied separately to the Tribunal for leave to review the AER’s respective determinations.

3 Public Interest Advocacy Centre Ltd (PIAC), which participated in the processes leading to the AER’s respective determinations, also applied for leave to review each of the AER’s determinations relating to Networks NSW.

4 These applications were brought under s 71B of the *National Electricity Law* (NEL) as scheduled in the *National Electricity (South Australia) Act* *1996* (SA).

5 They (together with the application of ActewAGL Distribution: ACT 5 of 2015) are the first applications to the Australian Competition Tribunal (the Tribunal) under the revised Limited Merits Review processes of the Tribunal following the amendments to the NEL effected by the *Statutes Amendment (National Electricity and Gas Laws – Limited Merits Review) Act 2013* (SA) (the 2013 Amendments), and following significant amendments to the NER.

6 The background to those amendments helpfully is set out in the written submissions of the several applicants, in particular those of PIAC and the AER. It is not necessary to refer to them in detail. The Tribunal is not to be taken to have endorsed the commentary upon that background in those submissions; its role is to give effect to those legislative and regulatory provisions according to their terms and having regard to the context in which they came about. All the submissions agreed that the effect of the amendments to the NEL and the NER give rise to a significantly changed regime for the making of regulatory decisions by the AER and for their review by the Tribunal.

7 The Tribunal, as it proposes to give leave to each of the applicants to apply for review of the AER decisions which affect them, will of course have to give more detailed consideration to that background and the construction and application of the NEL and the NER, as so amended, in its final determination. At this point, its focus is upon whether it is satisfied that the conditions for the grant of leave to apply under s 71E of the NEL are met. (From time to time, these reasons use the terms “satisfy”, “satisfied” or “satisfaction”, as an alternative to the statutory expression in s 71E that “it appears to the Tribunal”; it is used only as a shorthand way of conveying that statutory requirement in s 71E. In using this shorthand, the Tribunal is mindful that the requirement in s 71E “it appears to the Tribunal” is to be contrasted with, and distinguished from, the requirement in s 71P(2a)(c) and (d) that it be “satisfied” when, having granted leave, it makes a determination in respect of an application.)

8 For present purposes, it is accepted that each of the distribution determinations that the AER made on 30 April 2015 is a “reviewable regulatory decision” within the meaning of that term in s 71A of the NEL. It is also accepted that each of the applicants, including PIAC, has the status under s 71B of the NEL to make its respective application.

9 It is accepted that each of the seven applications was made within the time prescribed by s 71D of the NEL.

10 Section 71E of the NEL provides:

**Tribunal must not grant leave unless serious issue to be heard and determined etc**

Subject to this Subdivision, the Tribunal must not grant leave to apply under section 71B(1) unless it appears to the Tribunal –

(a) that there is a serious issue to be heard and determined as to whether a ground for review set out in section 71C(1) exists; and

(b) that the applicant has established a *prima facie* case that a determination made by the Tribunal varying the reviewable regulatory decision, or setting aside the reviewable regulatory decision and a fresh decision being made by the AER following remission of the matter to the AER by the Tribunal, on the basis of 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable NEO decision.

11 Each of the seven applications for leave to apply for review has been heard together. As is customary, at a first procedural hearing directions were given which set in place a timetable firstly for the Tribunal to determine whether to grant leave to apply for review under s 71E of the NEL and, if leave were given, for the hearing and determination of the applications for review.

12 These reasons for decision address the question whether leave to apply for review under s 71E should be given to each of the applicants.

# GENERAL OBSERVATIONS

13 The Tribunal has had the benefit of detailed written and oral submissions in support of each of the applications, and from the AER. It is not routine for the Tribunal to entertain oral submissions at the point of considering whether it should grant leave to review under s 71E, but it has done so in each of these instances with the concurrence of each of the parties to the seven applications and with the concurrence of the AER, having regard to the new statutory provisions relating to review by the 2013 Amendments.

14 The Tribunal notes that, whilst the AER has opposed the grant of leave in respect of each of the seven applications for the reasons set out in its detailed written submissions and in its oral submissions, there is no issue that the threshold specified in s 71F is met, and ss 71G and 71H, providing particular circumstances in which leave to apply might be refused, have not been enlivened.

## (a) Section 71E(b)

15 It is not necessary at this point to refer in detail to the full suite of amendments effected by the 2013 Amendments. They concern both the circumstances in which leave to apply for review may be given, and to the nature of any substantial review to be conducted by the Tribunal in the event that it gives leave to apply for review. For present purposes, the most significant change is that an applicant for leave to apply for review must satisfy the Tribunal that there is a prima facie case that a determination made by the Tribunal in relation to a reviewable regulatory decision, even if one or more grounds of review is made out, either separately or collectively would, or would be likely to, result in a “materially preferable NEO [National Electricity Objective] decision”. As was pointed out in submissions, s 71P also contains a similarly expressed requirement or condition before the Tribunal can make a determination which either remits the AER decision to the AER for further consideration or which varies the AER decision. It is clear that the term “materially preferable NEO decision” is used consistently in each section and is as defined in s 71P(2a)(c) and (2b).

16 The submissions of the AER drew attention, in particular, to s 71P(2b)(d) which provides:

(d) the following matters must not, in themselves, determine the question about whether a materially preferable NEO decision exists:

(i) the establishment of a ground for review under section 71C(1);

(ii) consequences for, or impacts on, the average annual regulated revenue of a regulated network service provider;

(iii) that the amount that is specified in or derived from the reviewable regulatory decision exceeds the amount specified in s 71F(2).

17 It pointed out that subs (i) and subs (iii), provide that the establishment of a ground of review does not itself give rise to a materially preferable NEO decision, and that the threshold imposed by s 71F(2) does not indicate that where an established ground of review would result in a revised decision in an amount exceeding the threshold there is thereby a materially preferably preferable NEO decision. Its submissions at this point did not focus on subs (ii).

18 The Tribunal, of course, accepts that it must apply the definition of a materially preferable NEO decision when considering the criterion for the grant of leave under s 71E(b). However, at this point, there are two important points to note.

19 The first, obviously, is that it must appear to the Tribunal at this point that there is a prima facie case that a ground or grounds of review (which the Tribunal must also consider to give rise to a serious issue or issues to be heard and determined) may result in a determination “on the basis of 1 or more grounds” of review, either separately or collectively, which would, or would be likely to, result in a materially preferable NEO decision. Consequently, the test to be applied does not require the same degree of satisfaction as that specified in s 71P. The second is that the satisfaction required may exist on the basis of one or more of the (accepted) grounds of review giving rise to that prima facie appearance to, or level of satisfaction to, the Tribunal. That is because, at this point, it would be very difficult, and certainly not efficient, to assess the inter-relationship between grounds of review in any comprehensive way.

20 A clear illustration of that point appears from the competing applications of Networks NSW on the one hand and PIAC on the other. They each complain of the same three decisions of the AER concerning its assessment of operating expenditure (opex) and of the return on debt. Networks NSW say the AER’s decision on those two building blocks is far too low. PIAC says they are far too high. Those competing submissions did have two common points. First, that adherence to the prescribed requirements of the NEL and the NER is prima facie likely to result in a materially preferable NEO decision, and second that the economic consequences of the adjustments to the AER decision for which each contended were not simply a very substantial sum, but a sum which (either way) would detrimentally affect in a material way the long term interests of consumers. Each submission, therefore, supported an approach of the Tribunal that the potential amount of any variation to the AER regulatory decision if a particular ground of review succeeded would, or would be likely to, result in a materially preferable NEO decision, not simply by reference to the threshold in s 71F(2).

21 Section 7 of the NEL provides:

The objective of this Law is to promote efficient investment in, and efficient operation and use of, electricity services for the long term interests of consumers of electricity with respect to –

(a) price, quality, safety, reliability and security of supply of electricity; and

(b) the reliability, safety and security of the national electricity system.

22 In the case of the PIAC contentions, the focus was on price. If (as PIAC asserted) the other elements in s 7(a) and (b) were adequately satisfied by the amount of the proposed regulatory decision as set out in the AER’s Draft Decision, then it is prima facie the case that the lesser price which would follow from either or both of PIAC’s grounds of review succeeding would, or would be likely to, be in the long term interests of consumers of electricity. It is, or it is arguably, not in their long term interests that the price should be more than that reasonably required under the NEL and the NER to otherwise satisfy the NEO.

23 As the Tribunal considered that, as PIAC put its case, it was prima facie the case that the AER’s Draft Decision may have been the more correct one, it follows that it appears to the Tribunal that in relation to PIAC’s applications (if s 71E(a) is satisfied) the condition of the grant of leave to apply in s 71E(b) is met.

24 In the case of Networks NSW’s applications, the focus was on the elements of quality, safety, reliability and security of supply of electricity. They argued that, on the material before the Tribunal, it should appear to the Tribunal that, unless altered in a very material way, then prima facie the AER Decision would expose consumers to vulnerability in respect of those elements of the factors in the NEO recognised as part of the long term interests of consumers.

25 It is equally the case that it does appear at present to the Tribunal that, the Networks NSW grounds of review (which it considers give rise to serious issues to be heard and determined, relevantly in the present context in relation to opex and return on debt as they are the same matters as PIAC has ventilated) prima facie would, or would be likely to, result in a materially preferable NEO decision if either or both of those matters are shown to give rise to a ground of review because, without adjustment to the AER Decision, the long term interests of consumers would, or would be likely to be, adversely affected by a less safe or reliable or secure supply of electricity.

26 How that assessment might ultimately be made is not a question to be decided at this point. It was not suggested that the Tribunal, at present, is in a position to finally measure, and balance, the consequences of one or more of the grounds of review of either PIAC or Networks NSW being made out. Nor was it suggested, at this point, that the Tribunal could in any definitive way balance the respective contentions on those issues, or the actual consequences of one or more of the grounds of review being made out, to the long term interests of consumers, or the inter-relationship between the successful grounds of review and the other elements or components of the reviewable regulatory decision: see s 71P(2b). As the AER said in its submission, that exercise is critically to be exercised at the end of the review process.

27 Consequently, while it must now appear to the Tribunal that the element in s 71E(b) exists before leave to apply for review is given, in respect of the grounds of review concerning opex and the rate of return (on both equity and debt) raised by both PIAC and by Networks NSW, the Tribunal has the level of prima facie satisfaction required.

28 The Tribunal has applied the statutory prescription in s 71E(b). It has not found it useful in this matter to explore the difference, if any, between the concepts of a “serious issue to be heard and determined” in s 71E(a) and of a “*prima facie* case” in s 71E(b). It has simply applied the test prescribed in each subclause of s 71E.

29 It records that it accepts in general the series of propositions in the AER submission that “mere error” or error “without more” or “non-material errors” will not of themselves lead to the Tribunal being satisfied about the test in s 71E(b). It also accepts that it is not, at this point, required or permitted to consider whether the AER’s decision finally is the materially preferable NEO decision. At this point, it is to be satisfied about whether a ground or grounds of review give rise to a serious issue to be heard and determined, and if so then to be satisfied that prima facie a case exists that varying the relevant AER decision or setting it aside for the making of a fresh decision by the AER on one or more of those serious issues would, or would be likely to, result in a materially preferable NEO decision.

30 It is self-evident that the views the Tribunal holds in relation to those grounds of review do not represent the likely outcome of the reviews for which leave to apply has been given. The Tribunal will have to address those grounds of review in the light of all the review related material. Much of the AER’s submission on the question of leave to apply indicates the significant obstacles confronting each of PIAC and Networks NSW to making out their grounds of review, and persuading the Tribunal that the orders which they each seek on the review will result in a materially preferable NEO decision.

31 The several grounds of review of PIAC and Networks NSW are addressed below to explain briefly why the Tribunal, in relation to them, is satisfied that they give rise to serious issues to be heard and determined. In the case of the other matters the subject of proposed grounds of review of Networks NSW (which are not common with the PIAC applications), the issue required to be addressed under s 71E(b) is also addressed.

32 Of course, even though the Tribunal at this point is satisfied in terms of s 71E(b), it does not follow that in fact it will be satisfied ultimately of the parallel requirement in s 71P(2a)(c) as explained in s 71P(2b)(d) of the NEL even if one or other of those grounds of review (or in the case of Networks NSW, their other grounds of review) is or are made out.

## (b) Section 71E(a)

33 The available grounds of review to which s 71E(a) refers are, of course, those specified in s 71C(1). They are:

(a) the AER made an error of fact in its findings of fact, and that error of fact was material to the making of the decision;

(b) the AER made more than 1 error of fact in its findings of facts, and that those errors of fact, in combination, were material to the making of the decision;

(c) the exercise of the AER’s discretion was incorrect, having regard to all the circumstances;

(d) the AER’s decision was unreasonable, having regard to all the circumstances.

34 There are two further matters to be addressed at a general level before considering the individual grounds of review.

35 The first concerns whether the several applications of PIAC and Networks NSW properly identify one or more of the grounds of review under s 71C(1). The AER made forceful submissions critical of the several applications, and urging that leave to apply for review should be very confined by refusing leave to apply for review as expressed in numerous grounds (or paragraphs) of the applications. That was accompanied by a detailed schedule of paragraphs where, it was submitted, leave should not be granted.

36 The Tribunal has considered those detailed submissions. The complaint is that the paragraphs of the application are too general, and do not properly specify the ground or grounds of review relied upon, or (variously) do not properly detail the alleged ground of review, or (variously) where a ground of review is asserted do not then assert facts or matters which can support that ground of review.

37 It is convenient to select one application and one part of it to address those concerns.

38 The Ausgrid application is divided by subheadings: Introduction; Effect of Final Decision; Application for leave and application for review of a distribution Determination; and Grounds for Review. It is only the section under the heading Grounds for Review which is the subject of criticism.

39 The section Grounds for Review is then subdivided into 11 parts, dealing with opex and errors; cost of corporate income tax (gamma) and errors; allowed rate of return (income and debt) and errors; efficiency benefit sharing scheme (EBSS) and errors; metering costs and errors; and, finally, errors in the control mechanism for standard controls services (X factor).

40 The opex section is taken for detailed analysis. The recital of the AER determination on opex, and its process in reaching that view is described (paras 33-40). No exception is taken to that. The lengthy section (paras 41-61) dealing with the asserted errors is what attracted the AER’s criticism.

41 Paragraph 41 asserts an error or error of fact, or alternatively an incorrect exercise of discretion or an unreasonable decision in concluding that Ausgrid’s forecast opex was inefficient or reflected inefficient costs, either generally or to the extent identified by the AER.

42 Paragraph 42 makes the same general assertions in relation to the AER’s “reliance on benchmarking models and the AER’s ad hoc post modelling adjustments”.

43 There are then the same general assertions in relation to:

(1) the AER’s methodology, as being inconsistent with the NER r 6.5.6 and r 6.12.1 in five specified ways: para 43;

(2) the benchmarking model the AER used (referred to in the Networks NSW submissions as the EI Model) not being fit for the purpose of determining an efficient level of opex – particulars are given in subparas (a)-(c), and it is said further errors in the use of the EI Model are provided later: para 44;

(3) the weight given to the AER benchmarking without regard to Ausgrid’s actual opex in the 2009-2014 regulatory period and its forecast opex, contrary (it is said) to r 6.5.6 of the NEL: para 45;

(4) the assessment of the efficient costs of maintaining the quality, reliability, security and safety of Ausgrid’s distribution system without having regard to its actual network, contrary (it is said) to r 6.5.6(a)(3) and (4) of the NEL; para 46; and

(5) the failure to have regard to Ausgrid’s regulatory obligations, including to comply with its relevant enterprise bargaining agreements and performance and safety requirements: para 47.

44 The next series of paragraphs assert that the AER failed to consider certain factors:

(1) the impact of its revised allowance for opex on Ausgrid’s ability to engage in proper maintenance and operation of its network, and its lack of ability to transition to a smaller workforce, so that there was an incorrect exercise of discretion or there was an unreasonable decision: para 48; and

(2) the NEO under s 7 of the NEL, and the need to give an appropriate signal for investment: s 7A(3) and (6) of the NEL, with particulars given of each: para 49.

45 The next two paragraphs again assert the three general assertions of error in that the AER:

(1) adopted a methodology for forecasting opex which (it is said) is not consistent with the EBBS, and with the service target performance incentive scheme (STPIS) and r 6.5.6(e)(i) of the NER: para 50; and

(2) failed to consider factors endogenous to Ausgrid and its capacity to fulfil cl (a) of s 7 of the NEL: para 51.

46 The next paragraph, para 52 (which runs for some 14 pages), contains the detailed list of errors in relation to the EI Model:

(a) the character of the Australian data;

(b) the character of the overseas data;

(c) the lack of comparability of the sourced data;

(d) the failure to account in the model for key variables;

(e) the failure to account in the model for the geographic spread of Ausgrid’s and others network assets;

(f) the assumption of constancy of relationship between the four identified cost drivers used;

(g) the model’s use of average efficiency over the 2006-2013 period, rather than current efficiency;

(h) the sensitivity of the modelling to the judgment of the modeller about the inputs; and

(i) the use of particular partial performance indicators to corroborate the model’s outputs.

47 Under the heading “Other errors”, there are several paragraphs with the same general assertions of the categories of error allowed by s 71C in relation to:

(1) the way the AER applied the efficiency score from the EI Model as modified for operating environment factors (OEFs) for the operating environment (OEF Adjustments) to determine the opening opex for its forecast, with detailed particulars: para 53;

(2) the failure to place any weight on Ausgrid’s opex for the previous regulatory period, again with detailed particulars: para 54;

(3) the numbers of staff and the labour costs of Ausgrid: para 55;

(4) the conclusion about Ausgrid’s efficient staff numbers and labour costs, having regard to the “regulatory obligation or requirement” under the NER upon Ausgrid and the status of its Enterprise Bargaining Agreements, again with detailed particulars: para 56; and

(5) the way the AER made the OEF Adjustments, again with detailed particulars: para 57; and

(6) the AER’s opex forecasts being insufficient for Ausgrid to satisfy the specific requirements of s 7(a) of the NEO (except as to price), with detailed particulars: para 59.

48 Paragraph 58 asserts that, even if the AER was correct that the Ausgrid opex forecast did not reflect efficient costs, it incorrectly exercised its discretion, or made an unreasonable decision, by failing to allow a transition period for Ausgrid to reduce its opex to the AER forecast levels, with additional particulars.

49 Paragraph 60 asserts that the magnitude of the reduction required by the AER’s opex determination is, in all the circumstances, unreasonable.

50 Finally, para 61 in essence asserts reviewable errors in the terms of s 71C of the NEL.

51 One thing is apparent. The facts and conclusions asserted by Ausgrid are clear. The Tribunal will have no difficulty in identifying whether Ausgrid is, in its submissions, transgressing into areas of inquiry which it has not raised in its application. The general, or conclusionary allegations, in paras 41 and 60 and in 61, will not provide an opportunity for Ausgrid to depart from the case of which it has given notice. Senior counsel for Ausgrid (and Networks NSW) acknowledged that.

52 So, the concern of the AER must be the adequacy of the characterisation of the grounds of review in relation to the errors alleged.

53 The following observations are made in the context that this concern of the AER was expressed in its detailed form by a memo filed the day before the hearing and so where the applicants for leave to apply for review had a relatively short opportunity to address the AER’s concerns. That is not to be taken as a criticism. It is the nature of applications such as these that they must proceed quickly. But it means that, on this aspect, the Tribunal has not had the benefit of full argument or the opportunity for mature consideration. There are certain matters which inform the approach the Tribunal should take to those concerns.

54 Section 44ZZR(2)(e) of the *Competition and Consumer Act 2010* (Cth) provides for the making of regulations under that Act to govern the practice and procedure of the Tribunal in its consideration of matters arising under the NEL. Regulation 28M, read with reg 7B(2) of the *Competition and Consumer Regulations 2010* (Cth) provides, as might be expected, that the Tribunal is not bound by technicalities, legal forms or rules of evidence, and to act as speedily as a proper consideration of merits review applications allows in the circumstances.

55 It is also appropriate to note that the line between the several available grounds of review is not necessarily always clear cut. Sometimes, it will be a clear line, and sometimes it will not. Moreover, there is no prescription in s 71C that, in particular facts and circumstances, there can be only one ground of review made out: see eg *Application by Energy Australia* [2009] ACompT 8 at [70].

56 The Tribunal’s attention was drawn to authorities identifying when a material error of fact or facts may be made out. As was emphasised in *WA Gas Networks (No 3)* [2012] ACompT 12 at [22], it is not sufficient to demonstrate such an error merely because the Tribunal might have preferred to have made a different finding of fact, but if material factual error is established, then a ground of review may be shown to exist. In that event, that factual error may also lead to the decision of the AER being determined as unreasonable in all the circumstances.

57 There is also no clear line between factual error, opinion, and discretionary judgment; one may feed into the other. The AER drew to the Tribunal’s attention the discussion of that issue in *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2006) 152 FCR 33 (*ACCC v ACT*) at [171] and in *Application by ActewAGL Distribution* [2010] ACompT 4 (*ActewAGL*) at [32]. The present application by Ausgrid may provide an example. Ausgrid criticises the data input into the EI Model (including the overseas data), and into the use of the EI Model itself. It says the AER took the view that the data obtained was accurate (clearly factual matters) and that it was both relevant and appropriate data to use for the purpose of determining opex allowance. Is its appropriateness a fact, or an opinion, or the exercise of a discretion to proceed on that basis? Its relevance may be a matter of opinion, but could not that opinion be a complex fact? Its appropriateness may be a complex fact, based upon a sub-set of facts about the character of the overseas providers and the circumstances in which they operate. It may be an opinion based upon those primary facts. Is the decision of the AER to use the EI Model based upon the fact that it is an appropriate model to use for the purpose? Or is that an opinion? Is it the exercise of a discretion to use that model rather than other models (noting the AER says it did use other models as well), and if so what are the sort of factors which in the circumstances might be said to lead to the view (if the Tribunal reached the view) that the exercise of that discretion was wrong? Would they not include (within the review related material) factual material either of a simple or complex character? Of course, the above is merely hypothetical at present. And factual error is not demonstrated by the legitimate making of choices between permitted methodologies, by the weight legitimately given to competing factual data or to competing regulatory decisions, or by legitimately formed and maintained opinion: see eg *ACCC v ACT*; *ActewAGL* at [30]-[33] and *Application by DBNGP (WA) Transmission Pty Ltd (No 3)* [2012] ACompT 14 at [326].

58 The Tribunal in this matter, having been satisfied that the respective applicants have clearly identified (and therefore been confined to) the particular facts and matters upon which they say that the AER fell into reviewable error, does not at this point consider it appropriate to disallow the challenged paragraphs of the application either in part or in relation to the expression of the specified grounds of review to which they are said to give rise. It does not presently consider that the way the grounds of review have been identified gives rise to unfairness in the conduct of the reviews. That is not to preclude the AER (or an intervenor) from seeking from the Tribunal a direction that further specificity of a particular ground or grounds of review should be given if it is apparent that it is necessary to do so to secure a fair hearing. As the Tribunal has noted, the ruling in this matter also is not intended to preclude the AER from raising similar concerns if the occasion arises.

59 The other matter is to note that the parties have made submissions as to what may constitute each of the grounds of review. There was a slight difference of emphasis between the submissions of Networks NSW and PIAC on the one hand and the AER on the other. It is not necessary to advert in detail to that difference. The debate was as to the circumstances in which reviewable error under s 71C will be made out, and the extent to which it approximates the test for judicial intervention under the *Administrative Decisions (Judicial Review) Act 1975* (Cth). In the course of considering the respective applications, now that leave to apply for review is to be given, these questions may require more careful consideration.

60 From those general observations, the Tribunal turns to consider whether it appears to the Tribunal that, in respect of each of the grounds of review of each application, the two criteria in s 71E(a) and (b) of the NEL are met.

61 For that purpose, where there are overlapping issues in two or more applications, they will be considered together. As the submissions focused on issues, it is also convenient to address the criteria separately on an issues basis.

# THE ISSUES

## PIAC/ Networks NSW – Operating Expenditure

62 In its determination of the appropriate opex allowance, the AER was required to accept the forecast opex of Networks NSW provided that the AER was satisfied that forecast opex reasonably reflects the opex criteria set out in r 6.5.6(c) of the NER. As the AER was not satisfied that the forecast opex reflected these criteria, the AER was required to provide an estimate of its opex and to set out the applicants’ reasons for doing so: r 6.12.1(4) of the NEL.

63 The AER relied on a benchmarking model developed in a report prepared by its consultant, Economic Insights (EI), technically referred to as a Cobb-Douglas Stochastic Frontier Analysis Operating Expenditure Cost Function Model and, as observed, called the EI Model in the Networks NSW submissions. Relevantly, the variables in this model which determine opex are: customer numbers, circuit length (not circuit route), ratcheted maximum demand and share of underground cables. The AER relied on this benchmarking method as a starting point to assess the efficient amount of opex for each of Networks NSW, and then modified this amount to take into account the average opex efficiency of what the AER considered to be the most efficient service providers (‘the efficiency frontier’) and other OEFs.

64 The submissions of Networks NSW raise three broad areas of deficiency in the AER's decision about its opex allowance: the benchmarking methodology by which the AER determined the opex allowance; the presumptive limitation of considerations relevant to determining whether the forecast Networks NSW opex reasonably reflects the efficient costs of an objectively prudent provider to exogenous considerations; and the AER’s compliance with the NER.

65 The submissions of Networks NSW are that the AER erred in its use of the benchmarking model and the data input used in the model. They say that the data input used in the model is primarily inappropriate because there was insufficient Australian data available for proper modelling. That seems to have been accepted by the AER. Consequently, only 19% of the data relied upon was from Australian companies; the majority of the data relied upon was sourced from companies operating in Ontario and New Zealand which (they said) face vastly different operating conditions (such as the geographic area covered and climate) and market conditions (such as number of consumers). In addition, they submit that the model is inappropriate because it fails to take account of key variables (such as the physical environment within which the network operates), it is highly sensitive to change, it establishes a false frontier by using average over time and it does not control for critical operating differences across the companies. Further, they submit that, there is evidence that the type of model relied upon produces arbitrary outcomes and that other analysis does not corroborate the conclusion.

66 Consequently, they submit that the AER's benchmarking methodology has such serious technical deficiencies that it had no value as a means of assessing their efficient costs, and ought not to have played any part in the AER's decisions pursuant to rr 6.5.6(c) and 6.12.1(4) of the NER.

67 They also submitted that the AER had made a number of errors in the modifications it made to the opex allowance based on the benchmarking model. In particular, the AER erred in law by presumptively limiting the OEFs to exogenous considerations beyond the control of Networks NSW and failing to consider the consequences of previous business decisions which impact upon their ability to deliver safe and reliable supplies of electricity. They also submitted that the AER’s decision to adjust the opex allowance based on a calculation of the ‘efficiency frontier’ using the lowest of the efficiency scores in the top quartile of possible scores was arbitrary.

68 Finally, they submit that the methodology by which the AER approached its task of making decisions about their opex allowance was inconsistent with the methodology prescribed by rr 6.5.6(c) and 6.12.1(4) of the NER, and was therefore contrary to law. This is because the AER did not ‘start’ with their forecast opex, but that it constructed its own forecast which was lower than the forecasts of Networks NSW, and not being satisfied that there was an explanation for the difference, the AER rejected their forecasts and adopted its own as the appropriate allowance. They point out that the final determination of the AER represents a significant reduction from the opex that they consider is required to meet the opex objectives in r 6.5.6 of the NER

69 The AER responded to these submissions in some detail. As this is an application for leave to apply for review which is being granted, it is not necessary to outline these submissions in detail. It should however be noted that the AER’s responsive submissions are apparently potent and substantial.

70 For reasons which are set out in a little more detail in the *Application by ActewAGL Distribution* [2015] ACompT 3, it appears to the Tribunal that there is a serious issue to be heard and determined whether the errors asserted by Networks NSW are made out, and leave should be given to apply to review the AER regulatory decision on the specified grounds. For the same reasons as expressed in that decision, it also appears to the Tribunal that Networks NSW have established a prima facie case that a determination made by the Tribunal on the basis of 1 or more grounds raised in the application, either separately or collectively, would, or would be likely to, result in a materially preferable NEO decision.

71 The PIAC application complains of the opex allowance from a different perspective. It starts with the Draft Decision of the AER (incorporating the outcome of the EI Model and its inputs) and complains about the adjustments made to the opex allowance following the Draft Decision. It says the “softening factors” are “arbitrary, unprincipled and illogical”. To that extent, but from a different perspective, the criticisms of AER’s adjustments to the Draft Decision are shared with Networks NSW.

72 PIAC’s concerns focus initially on the AER lowering the benchmark comparison point by 11%, by adopting the fifth most efficient network as identified by the output of the EI Model, and secondly on the operating environment factors as adjusted or allowed for by the AER. It has given detailed particulars of those concerns. Again, the AER’s submissions provide an apparently cogent response to those contentions, but it is not the role of the Tribunal at present to determine if they are correct.

73 The Tribunal is satisfied that the PIAC application, in respect of the opex allowance, gives rise to serious issues to be heard and determined. It will apparently support the validity of the EI Model’s inputs and processes. So, too, does the AER. From that point, its concerns about the AER’s adjustments after its Draft Decision, whilst in kind equate to those of Networks NSW (which the Tribunal has decided satisfy s 71C(a)) result in a very different outcome if they are correct. Those errors are described in terms of errors of fact; the incorrect exercise of discretion; and the making of a decision which is, in all the circumstances, unreasonable. As the Tribunal has said, that series of alternative categorisation of errors is understandable. The ultimately correct characterisation of any error (if reviewable error is made out), will have to be clearly identified by the Tribunal before any final decision.

74 In the light of the general observations above, and the amounts of opex allowance which are said by PIAC to have been erroneously allowed, the Tribunal recognises that the price element in s 7(a) of the NEO will be materially affected if the grounds of review are made out. In the Tribunal’s present assessment, it appears to the Tribunal that adjustment would, or would be likely to, result in a materially preferable NEO decision. Of course, the balancing of factors relevant to that question is a matter to be undertaken by the Tribunal at a later point.

## PIAC/ Networks NSW – Rate of Return on Equity

75 The return on equity forms part of the calculation of a rate of return. The rate of return objective was introduced into r 6.5.2 of the NER.

76 Networks NSW proposed a 10.15% return on equity. The AER Final Decision producing a 7.1% return on equity.

77 Amendments to the NER in late 2012 removed the requirement for the AER to determine the return on equity using a single model, like the Sharpe-Lintner Capital Asset Pricing Model (SL CAPM). Instead, the AER was able to have regard to a range of estimation methods, financial methods, market data and other evidence in making a decision on the return on equity.

78 Networks NSW proposed four models to be used in calculating the return on equity: the SL CAPM, the Fama French Three Factor Model (Fama French Model), the Black Capital Asset Pricing Model (Black CAPM) and the Dividend Growth Model (DGM).

79 The AER did not approve of the proposed methodologies or proposed figures by Networks NSW. The AER decided to use the SL CAPM as its ‘foundation model’ for measuring the return on equity. Networks NSW (and ActewAGL) claim that this wrongly confines its consideration to the previous version of the NER.

80 The issues raised by Networks NSW (and by ActewAGL) concern the following aspects of the AER’s decision on the rate of return on equity:

(1) giving sole or most weight to the output of the SL CAPM in determining the return on equity where the SL CAPM had known deficiencies and there were relevant models which were designed to overcome those deficiencies but no weight to the evidence about the prevailing return from three other models and for the output of the SL CAPM;

(2) the non-compliance with r 6.5.2(e) of the NER in considering the relevance of other models;

(3) concluding that a Capital Asset Pricing Model with a fixed or relatively inflexible Market Risk Premium (MRP) would provide predictability and certainty;

(4) the determination of the MRP;

(5) concluding that the DGM, Black CAPM or Fama French Models were not suitable for use in calculating the return on equity

(6) concluding that any difficulties with the SL CAPM would be overcome by using the theory of the Black CAPM to choose an equity beta from the top of the AER’s equity beta range;

(7) failing to have proper regard to the application of the DGM in supplementing the volatile impacts on the output of the AER’s application of the SL CAPM;

(8) concluding that its method for determining the return on equity is consistent with its estimate for the value of imputation credits, whereas the AER did not properly adjust its estimate to account for the value of imputation credits;

(9) concluding that ‘cross checks’ confirm that the AER had the correct return on equity estimate;

(10) determining the return on equity for the transitional regulatory control period in 2014-15, using a 20 business day averaging period from 9 February to 30 June 2014, which would have given a higher, and inappropriate, rate; and

(11) reaching a decision that does not produce a return that is commensurate with the efficient financing costs of a benchmark efficient entity with a similar degree of risk.

81 At this point, the Tribunal is not required to determine if it is satisfied that those issues, or some of them, are correct and if so whether the potential orders the Tribunal might make as a result would lead to a materially preferable NEO decision: s 71P(2a)(c). Its function is to decide whether it appears the criteria for leave to apply for review are met under s 71E(a) and (b).

82 Whilst the thorough and helpful submissions of the AER indicate potent reasons why those contentions might not ultimately succeed, it appears to the Tribunal with the benefit of the written and oral submissions that the material presently referred to does mean that the criteria are met. As in other instances, it is in the circumstances desirable that the Tribunal should not go into a detailed analysis of the respective contentions or the material referred to. It would be unhelpful and perhaps even misleading, particularly where it is clear that the full range of relevant review related material has not been addressed. The Tribunal has discussed above its present approach to the criterion in s 71E(b).

83 It appears to the Tribunal that there are serious issues to be heard and determined as to whether a ground for review exists by reason of those issues and that Networks NSW have established a prima facie case that a determination made by the Tribunal varying or setting aside the reviewable regulatory decision with a fresh decision to be made by the AER on the basis of one or more s 71C(a)-(d) grounds, either separately or collectively, would, or would be likely to, result in a materially preferable NEO decision.

## Rate of return on debt

84 The AER was required to give effect to the NER as relevantly altered by the *National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012 No 9*, including the introduction of the rate of return objective: r 6.5.2. That objective informs the rate of return for both debt and equity.

85 The AER introduced, uncontentiously, a new methodology to determine the rate of return on debt: the trailing average approach. The issue of concern is how that approach was to be adopted.

86 In their regulatory proposal Networks NSW proposed its immediate application, which for 2014-15 would mean a return on debt of 7.98%. The AER introduced a transitional use of the trailing average approach over 10 years (with 10% weighting each year), so that the return on debt for 2014-15 was 6.51%, and then adjusted annually.

87 Networks NSW submit that the AER approach involved a series of errors falling within the grounds of review in s 71C(1), because it:

(1) used as the relevant benchmark efficient entity a regulated efficient entity, rather than an unregulated efficient entity;

(2) misapplied the concept of a regulated efficient entity in its assessment, in particular that it thereby required transitioning rather than direct application; that it used the prevailing 2014 rate for the future, rather than periodically re-setting it; and because the trailing average approach did not require the transitioning imposed by the AER;

(3) did not reflect the fact that Networks NSW had debt facilities comprising a staggered portfolio of fixed rate debt;

(4) concluded the debt management strategies of Networks NSW were not inefficient;

(5) failed to have regard to the way Networks NSW had managed its debt facilities in the past having regard to the life of its assets;

(6) concluded the transitioning of the trailing average approach did not represent the efficient financing costs or debt management practices of a benchmark efficient entity;

(7) did not take into account that there were other characteristics of a benchmark efficient entity;

(8) concluded there was no “windfall” gain to Networks NSW by the immediate introduction of the trailing average approach and that reference to any earlier windfall gain could not inform the current AER decision;

(9) inappropriately selected a simple average of broad BBB rated debt data series published by the Reserve Bank and Bloomberg; and

(10) departed from its Rate of Return Guideline.

88 PIAC also complains of the AER’s transitional introduction of the rate of return on debt, but from a different perspective. It says the transition should have commenced from 2015/16 rather than 2014/15 to comply, or to better comply with r 6.5.2 of the NER, especially where the “on the day” rates at the time of and leading up to the date of its decision were declining. On its analysis, the consequential allowances over the regulatory period would be very much less than the effect of the AER’s decision.

89 The AER’s responsive submissions, as observed elsewhere, provide an apparently potent response to both those sets of complaints.

90 However, with the benefit of the submissions, it appears to the Tribunal that they each give rise to serious issues to be heard and determined, albeit with dramatically different outcomes, as to whether the ground or grounds of review specified in relation to them exist: s 71E(a). It also appears to the Tribunal, for the reasons discussed generally above, that prima facie those grounds of review (if made out) or some one or more of them would, or would be likely to, result in a materially preferable NEO decision.

## Networks NSW – Value of imputation credits (gamma)

91 The AER’s decision regarding the value of imputation credits (referred to as gamma) relates to the tax liability of investors and estimating the value of those imputation credits.

92 Rule 6.5.3 of the NER states that the calculation of corporate income tax of a distribution network service provider (DNSP) must follow a particular formula. Imputation credits provide a benefit to some investors by reducing their personal tax liabilities. The value of imputation credits (gamma) is deducted from the amount which the business otherwise requires to provide an appropriate return to an investor after meeting costs. This is done to avoid overstating the appropriate revenue and to ensure an appropriate return for investors.

93 The AER, Networks NSW (and ActewAGL) agreed on gamma being the distribution rate for imputation credits multiplied by the value of the distributed imputation credits. The disagreement surrounds the parameters to calculate the value of the imputation credits.

94 Networks NSW (and ActewAGL) proposed an amount for gamma and a distribution rate. This was based on the market value of distributed imputation credits, as indicated by a dividend drop-off methodology in what is known as the SFG Dividend Drop-Off Study (the SFG Study) adopted by the Tribunal following its decision in *Application by Energex Limited (Distribution Ratio (Gamma) (No 3)* [2010] ACompT 9 – see *Application by Energex Limited (Gamma) No 5* [2011] ACompT 9.

95 The AER did not accept the proposed gamma by Networks NSW (or ActewAGL) and adopted a gamma of 0.4. The distribution rate was between 0.7 and 0.8. The AER gave reasons for its decision, as outlined in the applications and submissions.

96 The complaints made by Networks NSW (and ActewAGL) are based on the following processes and considerations by the AER:

(1) concluding that the value of imputation credits was 0.4;

(2) misconstruing and misapplying of r 6.5.3 of the NER to mean that “value of imputation credits” means utilisation;

(3) determining that theta should reflect the before personal tax and before personal costs value of imputation credits to investors;

(4) adopting a construction and approach to theta that caused the AER to give weight to measures that could only be a theoretical upper bound for theta, with no proper weight given to measurement of market value (SFG Study);

(5) considering that the equity ownership approach provided direct evidence as to theta and erred in giving any, or the greatest, weight to such measurement;

(6) incorrectly estimating the domestic equity ownership;

(7) failing to take into account the 45 day rule or other reasons why a taxpayer may not utilise the imputation credits;

(8) giving weight to tax statistics over market value produced by the SFG Study, and concluding that the redemption rates evidenced by tax statistics are greater than the value to investors of those same imputation credits;

(9) concluding that market value studies provided limited information as to the value of theta, whereas the market value studies do in fact do that;

(10) concluding that the output of a market value study would have to be adjusted to capture the utilisation rate of the imputation credits, rather than the value of those credits to investors;

(11) failing to recognise that the estimate of market value produced by the SFG Study was reasonable having regard to the estimate of the imputation credit redemption rate from tax statistics;

(12) erring in the regard given to the distribution rate for listed equity, as it is unlikely to be representative of a benchmark efficient entity;

(13) concluding that market value studies can be subject to limitations and produce a range of results, justifying giving no weight to the SFG Study, as well as seeking to discredit the study by making observations relevant to previous dividend drop-off studies;

(14) concluding that market value studies indicate a range for theta between particular values by giving undue weight to the result of the earlier dividend drop-off studies known to have methodological issues, and without consideration to what the outcome of the SFG Study was;

(15) adopting a distribution weight in a particular range while giving undue weight to evidence for the distribution of a small group of listed companies, with little to no regard for what it would be across all companies; and

(16) adopting a value for theta in a particular range without giving sufficient regard to the market value of imputation credits and giving undue weight to domestic equity ownership and imputation credit rates, as reflected in tax statistics.

97 It is evident that there is considerable overlap between those matters, and perhaps through an abundance of caution a degree of repetition. It is also evident from the AER’s responsive submission that there is much to be said against each of those propositions and to support the correctness of the AER decision. However, having regard to the detailed written and oral submissions, it appears to the Tribunal that the matters of concern to Networks NSW (and to ActewAGL) do give rise to a serious issue to be heard and determined whether the allowance for gamma in the AER decision on the grounds specified in the respective applications is correct. Also, in the light of its earlier observations about the criterion for leave in s 71E(b), it appears to the Tribunal the issue of gamma in that criterion is also met.

98 Accordingly, it appears to the Tribunal that there is a serious issue to be heard and determined as to whether a ground for review exists in relation to the allowance made for gamma and that Networks NSW (and ActewAGL) have established a prima facie case that a determination made by the Tribunal varying or setting aside the reviewable regulatory decision with a fresh decision to be made by the AER on the basis of one or more s 71C(a)-(d) grounds, either separately or collectively, would, or would be likely to result in a materially preferable NEO decision.

## Networks NSW – Efficiency Benefit Sharing Scheme (EBSS) Carryover

99 The EBSS is a regulatory incentive scheme designed for DNSPs to spend less than what is forecast for opex by the AER for the regulatory control period. It ultimately creates an incentive for efficiency.

100 The AER published the relevant EBSS in February 2008, providing for the calculation of any carryover amounts to be applied to the building block revenue in the next regulatory control period commencing on 1 July 2014.

101 The DNSPs were able to propose cost categories that should be excluded from the scheme, including those uncontrollable by the AER. In the previous regulatory control period, these were debt-raising costs, self-insurance costs, insurance costs, superannuation costs relating to defined benefit and retirement schemes, non-network alternative costs and changes in capitalisation policy. The expenditure for all operating expenditure categories were then quantified in the 2009-14 determination.

102 Version 2 of the EBSS was released by the AER in November 2013 outlining what would be accrued during the next regulatory control period. The AER Final Decision stated that changes in provisions for employee entitlements would be excluded from the calculation of the carryover as a building block revenue item for 2014-19. The decision was also made that no carryover would apply for 2020-2024.

103 Networks NSW claim that the decision will distort incentives and have consequences for safety, security and reliability of supply.

104 This issue is a short one. Networks NSW says the AER was erroneous because it concluded that changes in employment provisions were not actual costs incurred in delivering network services for the purposes of the EBSS.

105 Again, it is proper to record that at this point the Tribunal is addressing only the criteria for leave in s 71E, and that there are substantial and substantive responses of the AER on the issue which will require careful consideration again at a later point. At present, it is sufficient to say that, in the light of the written and oral submissions and the material referred to, the Tribunal is satisfied that those criteria are met.

106 Accordingly, the Tribunal records that it appears that there is a serious issue to be heard and determined as to whether these grounds for review exist in relation to EBSS, and that Networks NSW has established a prima facie case that a determination made by the Tribunal varying or setting aside the reviewable regulatory decision with a fresh decision to be made by the AER on the basis of one or more s 71C(a)-(d) grounds, either separately or collectively, would, or would be likely to result in a materially preferable NEO decision.

## Ausgrid – Metering costs

107 This issue is specific to Ausgrid only.

108 Under previous regulatory regimes, Type 5 and 6 meters were classified as standard control services. The AER made the decision to change them to alternative control services, which has the effect of removing Type 5 and 6 meters from the larger building block proposal subject to a revenue cap, to a more discrete metering building block subject to a price cap control mechanism.

109 In its final decision, the AER approved the caps on metering charges based on capital costs, opex and tax. Ausgrid submitted a forecast metering opex amount that was rejected by the AER, with a lesser amount determined.

110 The AER had a different forecast from Ausgrid because it used an average of metering opex from 2008-09 to 2012-13. This is compared to Ausgrid’s proposal which used 2012-13 as the base year for metering opex.

111 Ausgrid claims that the reason metering costs are higher in 2012-13 and more reflective of ongoing metering operating expenditure is because of the greater uptake of Type 5 meters which are more expensive to read, operate and maintain than Type 6 meters.

112 The AER took the view that adopting a single year for metering operating expenditure would give Ausgrid an incentive to load expenditure into one year.

113 In response, Ausgrid now says in its application that the AER erred by:

(1) stating that Type 5 meters are not more expensive to maintain than Type 6 meters;

(2) deciding it was inappropriate to use a single year because that would incentivise loading expenditure into the one year; and

(3) making an unreasonable decision because of evidence before the AER that Ausgrid was likely to incur substantially greater metering opex over the regulatory control period than was taken into account by the AER when making the metering costs decision.

114 As in previous instances, it appears to the Tribunal that there is a serious issue to be heard and determined as to whether a ground for review exists on this topic and as expressed in Ausgrid’s application. It also appears to the Tribunal that Ausgrid has established a prima facie case that a determination made by the Tribunal varying or setting aside the reviewable regulatory decision with a fresh decision to be made by the AER on the basis of one or more s 71C(a)-(d) grounds, either separately or collectively, would, or would be likely to result in a materially preferable NEO decision.

## Networks NSW

## Control mechanism and X factors

115 The AER determined X factors for the smoothing of revenues over the five year regulatory control period for distribution in relation to (all of the Networks NSW businesses) and transmission (in the case of Ausgrid) services for 2015-16, a lesser percentage for 2016-17 and reducing it further to a consistent rate for the final two years of the regulatory period.

116 The application of X factors is primarily for the purposes of smoothing revenue across the regulatory control period.

117 Networks NSW claim that the decision resulted in the full difference between previous and upcoming revenues being experienced by Ausgrid, Essential Energy and Endeavour Energy in the first year of the regulatory control period. Networks NSW claim that that approach enhances price instability with a larger price reduction at the beginning of the control period, which is not in the long-term interests of consumers. It also claims that it reduces revenue consistently below the annual revenue requirement and that a more gradual reduction in revenues would provide better price stability for customers and allow the businesses time to adjust to significant revenue reductions.

118 Of course, the Tribunal is unable to comment on the final merits of that view, or the countervailing view of the AER in its decision and in its submissions.

119 However, it appears to the Tribunal that there is a serious issue to be heard and determined as to whether a ground for review exists in relation to this topic, again with the comment that as expressed in the several applications the precautionary step appears to have been taken to cover the range of grounds of review in s 71C. The general observations of the Tribunal acknowledge the difficulty of providing in a different way for all possible permutations and combinations. The factual and legal issues are clearly expressed. In addition, it appears to the Tribunal for the reasons already given that Networks NSW has established a prima facie case that a determination made by the Tribunal varying or setting aside the reviewable regulatory decision with a fresh decision to be made by the AER on the basis of one or more s 71C(a)-(d) grounds, either separately or collectively, would, or would be likely to, result in a materially preferable NEO decision.

# CONCLUSION

120 For the reasons given, the Tribunal gives leave to each of Ausgrid, Endeavour and Essential, and to PIAC, to apply for review of the decisions of the AER which directly affect each of them as specified in their respective applications, and on the grounds and in respect of each of the matters referred to in their respective applications.

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| I certify that the preceding one hundred and twenty (120) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield, Mr R Davey and Dr D Abraham. |

Associate:

Dated: 17 July 2015