



13 April 2018

COAG Energy Council Secretariat
GPO Box 787
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By email: energycouncil@environment.gov.au

Dear Secretariat

COAG ENERGY COUNCIL SENIOR COMMITTEE OF OFFICIALS (SCO) - CONSULTATION ON BINDING RATE OF RETURN AMENDMENTS

SA Power Networks, Australian Gas Infrastructure Group, CitiPower, United Energy and Powercor (the Businesses) are pleased to provide this joint submission on the National Electricity Law and National Gas Law Amendment Package - Creating a binding rate of return instrument. The Businesses support the submissions provided by Energy Networks Australia and the Australian Pipelines and Gas Association to the COAG Energy Council SCO on the amendment package, including the amendments proposed to the draft legislation.

Our owners have invested in our Businesses on the basis of now well tested regulatory approaches to the rate of return and an overall stable regulatory environment. Our continued ability to access efficient funding from investors rests upon stability and certainty in the regulatory process with good governance arrangements, including around the process for setting and changing rules.

The proposal to provide the regulator with limited guidance on key matters such as the rate of return represents a material increase in uncertainty to networks, investors and our customers. The Businesses consider that the proposed changes have gone too far and support a re-calibration of the proposed framework to ensure appropriate, balanced protections are in place that are more aligned with the long term interests of our customers.

In addition to the matters raised in the Energy Networks Australia and Australian Pipelines and Gas Association submissions, the Businesses would like to raise three issues for consideration by the COAG Energy Council SCO.

The first issue relates to the transitional arrangements to apply to the making of the first binding guideline, in particular in Western Australia. The draft Bill published in March 2018 includes specific transitional arrangements which will apply to the first binding guideline to be made by the AER. The COAG Energy Council SCO Bulletin notes that different transitional arrangements will apply to the ERA's first rate of return instrument, in particular it will be exempt from the requirement to consult with a consumer reference group, it will not be required to consult stakeholders before publishing a draft instrument or to have the draft reviewed by an independent panel. The Bulletin contemplates that these specific arrangements will be adopted separately under the *National Gas Access (WA) Act*

2009 (WA) or by changes to the draft Bill. However, there are no specific transitional arrangements applicable to the ERA included in the current version of the draft Bill.

The ERA is currently undertaking a review of its rate of return guideline. In November 2017 the ERA indicated that it would publish a draft guideline in the first half of 2018, followed by a period of consultation and an updated rate of return guideline in the second half of 2018.¹ We understand that the final version of the Bill to give effect to the binding guideline is not expected to be enacted until December 2018. It is difficult for stakeholders to participate in a review of a guideline when the legislative framework for the making of it has not been finalised.

The SCO Bulletin acknowledges that the policy represented by the draft Bill has not yet been endorsed by the Energy Council. The Businesses assume then that it may (and should) be subject to change, and encourages amendments to be made for the reasons set out in the Energy Networks Australia submission. However, this timing means that the guideline reviews currently underway will take place concurrently or ahead of the enactment of the draft Bill.

This is challenging, particularly in Western Australia which is subject to a shorter timeframe. We believe that the transitional arrangements should be reconsidered and include, for example, a requirement for the ERA to have their draft guideline reviewed by an independent review panel, with the same provisos outlined below. This review would likely occur at a similar time to the AER independent review, and as such, there is sufficient time for it to occur. This would more likely lead to a guideline that is capable of being accepted by stakeholders.

The second issue relates specifically to the independent panel process envisaged in the draft Bill. The current provisions require the panel to provide a report which must include the panel's assessment of the evidence and reasons supporting (or not) the draft binding guideline.² However, the Businesses submit that the independent panel process will be more valuable and lead to a more transparent and robust binding guideline that is capable of being accepted by stakeholders if the following additional steps were required:

1. If the independent panel does not consider that the guideline will or is likely to contribute to the national electricity/national gas objectives to the greatest degree, the independent panel should state how it would amend the guideline in order to meet that test (or the relevant experts would, if the report is not by consensus).
2. The regulator should be required to amend the guideline to address any recommendations in the independent panel report, unless it has clear reason to believe that the independent panel's recommendations do not best meet the NGO/NEO to the greatest degree, and then the regulator should explain why its approach does so.

These represent important steps in the process which will ensure that the independent panel report is fully considered and addressed and that the final guideline meets the overarching objectives to the greatest extent possible. Procedural protections such as these are particularly important in a framework where greater discretion about the content and process for making a binding guideline is contemplated.

¹ ERA-Notice Review of the Rate of Return Guidelines for Gas Transmission and Distribution Networks, 27 November 2017

² Proposed new section 18P(4) of the NEL/30K(4) of the NGL

In relation to process more generally, the Businesses support the approach being taken by the AER in the current guideline review. It is in the interests of all stakeholders for there to be certainty about the process for future reviews and we support the addition of provisions which provide greater guidance in this regard.

Finally, the legislative reforms propose to remove the guidance provided by the existing rate of return rules, as well as remove the AEMC's role in making such rules. With regard to the first point, Energy Networks Australia have proposed a sensible position whereby certain key parts of the rules are retained to provide moderate but sufficient guidance to stakeholders when setting the rate of return.

With regard to governance, we note that Australia's energy market governance has benefited from a relatively stable policy environment, a clear delineation of the functions and powers of policy maker, rule maker, and economic regulator and importantly, accountable and transparent regulatory decision making. The AEMC rule making process in the Law is an important part of the overall regulatory framework, providing the ability for any stakeholder to take an active role in the development of energy rules and for those Rules to be made by an independent body following a robust consultation process. The Businesses see no reason why this should change, particularly in relation to a matter as important as the rate of return.

The Businesses submit that the Rules should continue to contain the key guidance provided by the existing rate of return rules as per the Energy Networks Australia submission and that the AEMC's rule making power should be maintained. In order to achieve this, we would suggest:

1. Sections 10 and 20 of the draft Bill, which specifically exclude rate of return as a subject matter about which the AEMC may make rules, be removed.
2. The key features of the existing Rules around rate of return remain in place, with perhaps some simplification as proposed in Attachment 1 to the Energy Networks Australia submission.

If you have any queries regarding this submission, please contact Nick Wills-Johnson on either 08 9223 4902 or nick.wills-johnson@agig.com.au in the first instance to arrange a convenient time to discuss.

Yours sincerely



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