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COAG Energy Council Secretariat
Department of the Environment and Energy
GPO Box 787
CANBERRA ACT 2601

Via email: energycouncil@environment.gov.au

Dear Senior Committee of Officials,

Feedback on proposed binding rate of return instrument amendments

Thank you for the opportunity to comment on the COAG Energy Council's proposed amendments to the National Electricity Law ("NEL") and National Gas Law that introduce a binding rate of return instrument.

The proposed amendments are a significant departure from the current rule framework that applies to the rate of return and the value of imputation credits, established by the Australian Energy Market Commission ("AEMC"). We have concerns with key aspects of these changes and support the Energy Network Australia's ("ENA's") submission on them.

We also have specific concerns with when the proposed binding rate of return instrument will first apply to Power and Water. Our letter focuses on these concerns and strongly urges the COAG Energy Council to incorporate transitional provisions for networks like ours that are in the middle of regulatory determination processes – in our case, the first under the NEL.

Our background

Power and Water owns and operates the smallest electricity network in the country. We are transitioning from jurisdictional regulation to the national framework, which is a significant change for our business, our people and our customers. Economic regulation has recently transitioned from the Northern Territory's ("NT's") Utilities Commission to the Australian Energy Regulator ("AER"), and other functions are following suit over the coming 18 months.

We are currently working with the AER on our first regulatory determination (to be) made under the NEL, and spent much of last year consulting with our customers and other stakeholders on our plans – and potential prices – for the 2019 to 2024 regulatory period. These prices and this engagement was done on the basis that the 2013 rate of return guideline will apply to us under the AEMC's 2016 decision on the rate of return guideline¹.

In making that decision, the AEMC explained (page 22) why it included transitional provisions that meant that the 2013 guideline would apply to Power and Water, rather than the 2018 guideline, as follows:

¹ AEMC, Rule Determination, National Electricity Amendment (Rate of Return Guidelines Review) Rule 2016, 13 October 2016.

The Commission considers that the extension of the review deadline to December 2018 creates uncertainty and places constraints on the ability for six service providers [including Power and Water] to appropriately consider information from a new guideline. Additionally, the Commission considers that there is limited flexibility, in this instance, for the AER to develop, consult and publish a revised Guideline, and also allow a sufficient amount of time for service providers to adequately consider it, given the uncertainty of when the FCA [Federal Court of Australia] decisions and related processes will finalise. On this basis there is sufficient cause to warrant the creation of transitional provisions to provide additional clarity, in advance, regarding the 2018 regulatory process for affected service providers.

We supported this decision because it gave certainty to us, our customers and other stakeholders at a time when we and the NT were transitioning to a new rule and wider regulatory framework.

Our concerns

Our key concern is that without appropriate transitional provisions in place for Power and Water, our business, our customers and other stakeholders will face an unacceptable level of regulatory uncertainty. Abandoning the existing transitional provisions will put the 2019 to 2024 regulatory determination process at risk of failure and undermine our genuine engagement with our customers and other stakeholders over the last 12 months.

In short, our concerns are that without such provisions the proposed changes would:

- **Unfairly apply retrospectively.** The proposed changes would retrospectively alter the rules that applied when we made our regulatory proposal to the AER in January 2018, which mandated that the 2013 rate of return guideline would apply to the 2019–24 regulatory determination.

Such late changes would add significant regulatory uncertainty, especially because we are not likely to know the outcome of the 2018 rate of return guideline (or instrument) until the end of this year.

- **Reverse the AEMC's rule determination on transition.** Moreover, the proposed changes would reverse the final rule determination made by the AEMC on the transitional provisions applying to the 2018 rate of return guideline – a determination broadly supported by the AER, customer groups and network businesses.

In its determination, the AEMC included transitional provisions to provide additional regulatory certainty to affected service providers including Power and Water. Removing these provisions would negatively impact regulatory certainty and add risk by undermining the past – broadly supported – decision of the rule making body.

- **Undermine our existing consultation on the rate of return, the value of imputation credits, and prices for the 2019–24 regulatory period.** We have been actively consulting with our customers and stakeholders over the past 12 months on the basis that the 2013 guideline would apply to the 2019–24 regulatory determination made by the AER. This has involved us explaining what that guideline says and what it likely means for our prices over the 2019–24 regulatory period.

Any significant change to how the rate of return or the value of imputation credits was set would

severely undermine this consultation, harming the goodwill that we have sought to develop through it at a time when we are trying to build trust with our customers and stakeholders.

- **Provide us with insufficient time to consult with our customers and stakeholders on the impact of the instrument on 2019–24 prices.** The outcomes of the 2018 guideline (or instrument) will not be known until December 2018. This timing means that we will be unable to meaningfully integrate those outcomes into our consultation on our revised regulatory proposal, which is due to the AER in December 2018.
- **Provide us with insufficient time to prepare a compliant revised regulatory proposal.** Moreover, the timing means that we would have insufficient time to prepare a compliant revised regulatory proposal that incorporates the outcomes of the 2018 guideline (or instrument). Forcing us to submit a non-compliant proposal would be a significant unintended consequence of the proposed changes.
- **Provide insufficient time for us to consult with the Northern Territory Government regarding derogations to the NEL prior to the final determination.** Given the unique circumstances of Power and Water being partway through adopting the NER, the application of a binding guideline may not be appropriate in the transition phase. The proposed December 2018 timing would not allow sufficient time for Power and Water to propose transitional arrangements to the Northern Territory Government to consider for potential derogations and pass these through the appropriate governance processes.

Our recommendation

If the amendments are retained, we strongly urge the COAG Energy Council to include transitional provisions similar to those adopted by the AEMC that (currently) apply to the 2018 guideline.

These provisions will ensure that our business, our customers and other stakeholders are not unfairly impacted by the changes at a time when there are already significant changes occurring to energy regulation in the NT.

If you have any questions regarding our feedback in this letter, please do not hesitate to contact Jodi Triggs, Senior Executive Manager Network Regulation and Commercial at Jodi.Triggs@powerwater.com.au or on 08 8985 8456.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael', followed by a large, stylized flourish that extends to the right.

Michael Thomson

Chief Executive

13 April 2018