



**RULE**

Australian Energy Market Commission

## **RULE DETERMINATION**

# **NATIONAL ELECTRICITY AMENDMENT (MATERIAL CHANGE IN NETWORK INFRASTRUCTURE PROJECT COSTS) RULE**

### **PROPONENT**

ERM Power, Energy Users Association of Australia (EUAA), Major Energy Users Inc., AGL, Delta Electricity

27 OCTOBER 2022

**Rule determination**

Material change in network infrastructure project costs  
27 October 2022

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## ABOUT THE AEMC

The AEMC reports to the Energy Ministers' Meeting (formerly the Council of Australian Governments Energy Council). We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the Energy Ministers' Meeting.

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## VALE DAVID HEADBERRY

The AEMC wishes to acknowledge the passing of David Headberry on 12 November 2021. David was a representative for the Major Energy Users Inc, who are one of the joint proponents of this rule change.

Though David passed away prior to the publication of the draft determination he was a significant and active contributor to this rule change. His work leaves a lasting legacy in energy policy and reform.

## SUMMARY

- 1 The Australian Energy Market Commission (AEMC or Commission) has made a final rule to amend the National Electricity Rules (NER) in relation to the 'material change in circumstances' (MCC) provisions for the Regulatory Investment Test (RIT).<sup>1</sup> Under the current MCC provisions, the RIT must be reapplied where, in the reasonable opinion of the RIT proponent, there has subsequently been a material change in circumstances which means that the preferred option identified through the RIT is no longer the preferred option.
- 2 The Commission's final determination is to make a more preferable final rule that seeks to add clarity to the process for determining whether a material change in circumstances has occurred by requiring certain RIT proponents to develop reopening triggers which, if met, would require the RIT proponent to consider if and how to reconsider the extent to which the previously identified preferred option is likely to remain the most net beneficial option in light of the changed circumstances.
- 3 The final rule additionally seeks to improve cost estimate accuracy by clarifying the rules governing the guidelines for RITs in order to support strengthened guidelines for cost estimate development.
- 4 The final rule has been made in response to a rule change request submitted by the Energy Users Association of Australia (EUAA), Delta Electricity, Major Energy Users Inc, ERM Power Limited (now Shell Energy Operations) and AGL Energy (the proponents). The rule change request sought to improve stakeholder confidence in the RIT process by amending the NER to require a RIT proponent to reapply the RIT process if, following completion of the RIT, project costs were to increase by more than a fixed percentage, unless an exemption was granted by the Australian Energy Regulator (AER).

### Features of the final rule

- 5 The key features of the final rule are that it:
  - requires all RIT proponents to consider whether there has been a material change in circumstances for the project subsequent to the completion of the RIT
  - requires RIT proponents (other than the Australian Energy Market Operator where it is the sole RIT proponent) of projects with an estimated cost of greater than \$100 million to develop reopening triggers which would clearly indicate whether there was subsequently a material change in circumstances
  - requires RIT proponents, if they consider there has been a material change in circumstances (which would include the activating of a reopening trigger), to notify the AER and propose a course of action (backed by supporting analysis) to reconsider the extent to which the preferred option previously identified through the RIT is likely to remain the most net beneficial option in light of the changed circumstances

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<sup>1</sup> References in this document to the Regulatory Investment Test should be taken as referring to both the Regulatory Investment Test for Transmission (RIT-T) and the Regulatory Investment Test for Distribution (RIT-D).

- requires the AER to approve or reject and modify the RIT proponent's proposed course of action
- requires proponents of contingent projects, at the time of submitting the contingent project application (CPA), to provide a separate statement to the AER confirming whether or not there has been a material change in circumstances, including supporting analysis, and (if relevant) confirming that the AER was notified of any material change in circumstances and outlining the course of action that was undertaken
- clarifies the rules governing the AER guidelines for RITs to support strengthened guidelines for cost estimate development.

6 The more preferable final rule is different to the proponents' rule change request in that it requires certain RIT proponents to develop reopening triggers to determine whether or not the preferred option remains the most net beneficial option. This is instead of introducing a standing reapplication requirement that would be triggered by project costs increasing by more than a particular percentage. Further, the final rule allows RIT proponents, if they consider that a material change in circumstances has occurred, to propose the course of action that should follow, as opposed to the default course of action involving reapplication of the RIT.

7 The final rule largely reflects the draft rule, with some refinements made in light of stakeholder feedback on the draft rule. The most significant change in the final rule is requiring proponents of contingent projects to provide to the AER and publish a statement confirming whether or not there has been an MCC separate to the CPA, rather than providing this information as part of the CPA. This change more clearly reflects the role performed by the AER when it consults on CPAs. Other changes include requiring the RIT proponent to provide supporting analysis and to consider certain factors when proposing a course of action (including an associated timeframe), and requiring the AER to publish the notification from a RIT proponent of a material change in circumstances and its proposed course of action together with the AER's decision on the course of action (including the timeframe).

## Benefits of the final rule

8 Having regard to the issues raised in the rule change request, the Commission is satisfied that the more preferable final rule is likely to better contribute to the achievement of the National Electricity Objective (NEO), particularly with respect to the efficient investment in electricity services for the long-term interests of consumers of electricity. The final rule:

- **Promotes efficient outcomes for consumers by balancing the timely and economic delivery of network projects** by providing that reapplication of the RIT is a last resort. The requirement for proponents of major projects to propose the course of action that should follow if a material change in circumstances has occurred will allow RIT proponents to propose more appropriate, more timely and less costly courses of action than full reapplication of the RIT (which is currently the default course of action under the current MCC provisions and would have been required under the proposed rule where specified financial thresholds were met). Similar to its role under the current MCC

provisions, the AER will be able to test this proposed course of action to promote the efficient delivery of network projects.

- **Promotes economic efficiency** by providing RIT proponents with guidance on what is a 'material change in circumstances', to inform decision-making as to when the RIT should be reapplied or further analysis undertaken. The reopening triggers developed by RIT proponents will provide greater certainty as to the circumstances under which the preferred option may no longer be the most net beneficial option, and, in some cases, may indicate what the preferred option would be given the changed circumstances. This should help address stakeholder concerns about the transparency of the operation of the current MCC provisions, and how enforceable they are in practice. Guidance provided by the AER in the RIT application and Cost Benefit Analysis (CBA) guidelines will help RIT proponents develop these reopening triggers.
- **Minimises practical implementation and compliance costs** as it is already common practice for RIT proponents to conduct sensitivity testing and outline boundary values for key input assumptions at which the preferred option changes. Although the final rule may lead to additional work being undertaken by RIT proponents and the AER for projects where an MCC eventuates, given that the existing arrangements have not been effective or well-used, the Commission has endeavoured to minimise any associated costs as far as possible and considers that the final rule strikes an appropriate balance between administrative costs and timeliness on the one hand, and the risks associated with the progression of projects that are no longer the most net beneficial option on the other.
- **Provides flexibility and facilitates decarbonisation** through the way it balances the timely and economic delivery of network projects, which is likely to be consistent with the substantial investment in, and build of, transmission infrastructure associated with the decarbonisation of the energy market.

## Implementation and transition

- 9 The commencement date for the final rule is **9 October 2023**. Under transitional arrangements (which take immediate effect), the AER is required to update and publish the RIT-T and RIT-D application guidelines and CBA guidelines prior to the commencement date.
- 10 The new rule requirements relating to reopening triggers would not apply to projects for which a Project Assessment Draft Report (PADR) or Draft Project Assessment Report (DPAAR) had already been published by the commencement date. In consultation on the draft determination, stakeholders submitted a range of responses to this position, which the Commission has considered carefully.
- 11 While promoting value for money in very substantial investments is of clear importance for consumers, the Commission considers that the interests of consumers will also be served by promoting the timely delivery of required network infrastructure. Consumers will benefit through lower electricity prices and better system security and reliability outcomes, as thermal generation retires and is replaced with decentralised variable renewable energy and firming capacity. The recent 2022 *Electricity Statement of Opportunities* highlighted the urgency in progressing currently uncommitted transmission developments, including major

projects identified in the Integrated System Plan, in order to address reliability challenges and support the energy transition.<sup>2</sup>

- 12 On balance, the Commission considers that the potential costs to consumers associated with extended project timelines resulting from the need for RIT proponents to revise their draft RITs to develop and then finalise reopening triggers would likely outweigh any potential avoided costs to consumers from the substitution of a project by another that became more net beneficial as a result of a material change in circumstances.

### Interaction with the Transmission planning and investment review

- 13 The Material change in network infrastructure project costs rule change has been undertaken concurrently with the AEMC *Transmission planning and investment review* (the Review). The Review seeks to determine whether the regulatory framework is sufficiently flexible to support the timely and efficient delivery of major transmission projects under the current step-change growth required to transition to net zero, while ensuring these investments are in the long-term interests of consumers.
- 14 There are some issues being explored in the Review, particularly under Stage 3, which will complement the rule change. Stage 3 of the Review is examining several areas in the framework where the regulatory treatment of major projects can be simplified, made more timely, and provide more certainty. Whether there is the potential to make changes to the current assessment of costs and benefits of major investments through the economic assessment is a key area of focus under Stage 3. Accordingly, the RIT-T and CPA process and associated guidelines will be examined further in the Review. When considering possible alternatives to the economic assessment process, the Review will be cognisant of the changes made in this final determination.

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<sup>2</sup> AEMO, *2022 Electricity Statement of Opportunities*, August 2022, p. 5.

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# 1 FINAL RULE DETERMINATION

This chapter sets out the Commission's final determination with a summary of reasons.

Specifically, the chapter includes:

- a description of the final rule and summaries of the differences between the final rule and the proposed rule and between the final rule and the draft rule
- the rule making test for changes to the NER
- the assessment framework used for considering the rule change request
- the Commission's consideration of the more preferable final rule against the national electricity objective and a summary of the Commission's reasons.

The Commission's considerations of the key aspects of the proposed rule are described in chapters 2 to 5, which also provide additional details supporting the Commission's final determination.

Further information on the legal requirements for making this final rule determination is set out in appendix B.

## 1.1 The Commission's final rule determination is a more preferable final rule

### 1.1.1 Description of the final rule

The Commission has determined to make a more preferable final rule. The final rule made by the Commission is published with the final rule determination. The key features of the final rule are that it:

- requires all RIT proponents to consider whether there has been a material change in circumstances for the project subsequent to the completion of the RIT
- requires RIT proponents (other than AEMO where it is the sole RIT proponent) of projects with an estimated cost of greater than \$100 million to develop reopening triggers which would clearly indicate whether there was subsequently a material change in circumstances
- requires RIT proponents, if they consider there has been a material change in circumstances (which would include the activating of a reopening trigger), to notify the AER and propose a course of action (backed by supporting analysis) and an associated timeframe, to reconsider the extent to which the preferred option previously identified through the RIT is likely to remain the most net beneficial option in light of the changed circumstances
- requires the AER to approve or reject and modify the RIT proponent's proposed course of action
- requires proponents of contingent projects, at the time of submitting the CPA, to provide a separate statement confirming whether or not there has been a material change in circumstances, including supporting analysis and (if relevant) confirming that the AER was notified and outlining the course of action that was undertaken

- clarifies the rules governing the AER guidelines for RITs to support strengthened guidelines for cost estimate development.

The Commission has also made recommendations in this final determination for the AER to consider how the guidelines governing RITs should be strengthened to promote the development of more robust cost estimates.

### 1.1.2

#### **There are differences between the final rule and the proposed rule**

The more preferable final rule differs from the proposed rule requested by the proponents. The major differences are that the final rule:

- requires certain RIT proponents to develop reopening triggers that can be used to identify circumstances in which the preferred option may no longer be the most net beneficial option and that may be used in some cases to indicate what the preferred option would be given the changed circumstances, instead of implementing a predetermined reapplication trigger of project costs increasing by a particular percentage
- allows RIT proponents, if they consider that a material change in circumstances has occurred (such as a reopening trigger being triggered), to propose a course of action, as opposed to the default course of action involving reapplication of the RIT
- requires all RIT proponents to consider whether there has been a change to the identified need and additionally require proponents of projects with an estimated cost greater than \$100 million to develop reopening triggers, this is instead of requiring proponents to reapply the RIT and for the AER to waive this requirement if project costs are less than \$150 million and \$50 million for transmission and distribution projects respectively
- clarifies the rules governing the guidelines for RITs in order to support strengthened guidelines for cost estimate development (in relation to cost estimate classification systems and any role for contingency allowances), instead of requiring cost estimates for the final RIT report to be based on a particular cost estimate class
- does not include a transitional rule to require ElectraNet to re-assess PEC by updating the PACR, since the new requirements of the draft rule relating to reopening triggers would not apply to projects for which a PADR or DPAR had already been published by the commencement date.

### 1.1.3

#### **The are some differences between the final rule and the draft rule to address issues raised by stakeholders**

The final rule differs from the draft rule, with some refinements being made to the rule to address issues raised by stakeholders through submissions to the draft rule. These changes:

- require the AER to publish the notification from a RIT proponent of a material change in circumstances and its proposed course of action together with the AER's decision on the course of action
- require the RIT proponent to propose a timeframe associated with the proposed course of action
- require the RIT proponent to provide supporting analysis to justify its proposed course of action to the AER

- require RIT proponents, when proposing a course of action, to consider whether a reapplication of the RIT is justified in the circumstances, the costs and delay that may result from the proposed course of action and the costs and delay that may result from the reapplication of the RIT to the RIT project
- require the AER, when determining whether or not to approve the RIT proponent's course of action (including the timeframe), to take into account whether the RIT proponent has considered whether a reapplication of the RIT is justified in the circumstances, the costs and delay that may result from the proposed course of action and the costs and delay that may result from the reapplication of the RIT to the RIT project
- require that the course of action pursued by a RIT proponent must include, at a minimum, publishing a statement identifying whether the preferred option remains the preferred option or if it is no longer the preferred option, identifying the new preferred option, as well as any supporting information necessary to demonstrate the preferred option is the most net beneficial option
- require proponents of contingent projects, at the time of submitting the CPA, to provide a separate statement confirming whether or not there has been a material change in circumstances, providing supporting analysis and (if relevant) confirming that the AER was notified and outlining the course of action that was undertaken (as opposed to submitting this information in the CPA, as in the draft rule)
- require the RIT proponent to publish the statement confirming whether or not there has been a material change in circumstances at the same time, or as soon as reasonably practicable after, submitting a CPA.

## 1.2

### Rule making test

#### 1.2.1

##### Achieving the NEO

Under the NEL the Commission may only make a rule if it is satisfied that the rule will, or is likely to, contribute to the achievement of the national electricity objective (NEO).<sup>3</sup> This is the decision making framework that the Commission must apply.

The NEO is:<sup>4</sup>

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.

#### 1.2.2

##### Making a more preferable rule

Under s. 91A of the NEL, the Commission may make a rule that is different (including materially different) to a proposed rule (a more preferable rule) if it is satisfied that, having

<sup>3</sup> Section 88 of the NEL.

<sup>4</sup> Section 7 of the NEL.

regard to the issue or issues raised in the rule change request, the more preferable rule will or is likely to better contribute to the achievement of the NEO.

In this instance, the Commission has made a more preferable rule. The Commission considers that the changes made to the rule will better contribute to the achievement of the NEO. The reasons are summarised below in section 1.4 and detailed further in chapters 2 to 5.

### 1.2.3 Rulemaking in the Northern Territory

The NER, as amended from time to time, apply in the Northern Territory, subject to modifications set out in regulations made under the Northern Territory legislation adopting the NEL.<sup>5</sup> Under those regulations, only certain parts of the NER have been adopted in the Northern Territory.<sup>6</sup>

As the more preferable final rule relates to parts of the NER that apply in the Northern Territory, the Commission is required to assess whether to make a uniform or differential rule under Northern Territory legislation.

To the extent that the final rule relates to:

- parts of the NER that currently do not apply in the Northern Territory, the Commission has not assessed the rule against the additional elements required by the Northern Territory legislation; and
- parts of the NER that apply in the Northern Territory, the Commission has assessed the final rule against additional elements required by the Northern Territory legislation.<sup>7</sup>

The Commission has determined to make a uniform rule (rather than a differential rule) as it does not consider that a differential rule will, or is likely to, better contribute to the achievement of the NEO than a uniform rule.

See appendix B for further information.

## 1.3 An assessment framework was used to assess the rule change request and develop the final rule

In assessing the rule change request against the NEO, the Commission has considered the following principles:

- **Outcomes for consumers:** Assesses whether the regulatory arrangements promote and adequately balance the timely and efficient delivery of network projects.
- **Economic efficiency:** Assesses whether the solution promotes efficient investment in, and use of, electricity services in the long-term interests of consumers with regard to:

<sup>5</sup> These regulations under the NT Act are the *National Electricity (Northern Territory) (National Uniform Legislation) (Modifications) Regulations 2016*.

<sup>6</sup> The version of the NER that applies in the Northern Territory is available on the AEMC website.

<sup>7</sup> From 1 July 2016, the NER, as amended from time to time, apply in the NT, subject to derogations set out in regulations made under the NT legislation adopting the NEL. Under those regulations, only certain parts of the NER have been adopted in the NT. See the AEMC website for the NER that applies in the NT.

- *Efficient risk allocation:* allocating risk (and costs) to parties best placed to manage them and who have the incentives to do so will support efficient decision making
- *Effective price signals/incentives:* effective incentives are needed to support service providers in making efficient and timely investment decisions
- *Information provision/transparency:* service providers require clear and adequate information to inform decision making in an evolving market
- *clear, consistent, predictable rules:* a stable regulatory environment creates confidence in the market and will encourage investment and innovation through the transition and beyond.

Evaluates whether the solution provides service providers with a reasonable opportunity to recover at least their efficient costs.

- **Implementation:** Considers the complexity of implementing a solution, i.e. whether it will require law and rule changes or other jurisdictional legislative changes. Assesses the costs of implementing a solution (practical implementation and compliance costs). Evaluates the timing of costs and benefits.
- **Flexibility:** Assesses whether the solution is consistent with the long-term direction of energy market reform. Evaluates whether the solution is flexible enough to accommodate uncertainty regarding unknown technological, policy, and other changes that may eventuate.
- **Decarbonisation:** Considers whether market arrangements will enable the decarbonisation of the energy market.

## 1.4 The Commission is satisfied the more preferable final rule is likely to better contribute to the NEO for a number of reasons

Having regard to the issues raised in the rule change request and during consultation, the Commission is satisfied that the more preferable final rule is likely to better contribute to the achievement of the NEO than the proposed rule.<sup>8</sup>

### **Efficient outcomes for consumers will be promoted**

The Commission considers that the more preferable final rule would promote efficient outcomes for consumers by balancing the timely and economic delivery of network projects by providing that reapplication of the RIT is a last resort.

The requirement for proponents of major projects to propose the course of action that should follow if a material change in circumstances has occurred (for example, where a reopening trigger has been triggered) will allow RIT proponents to propose more appropriate, more timely and less costly courses of action than full reapplication of the RIT (which is currently the default course of action under the current MCC provisions). Similar to its role under the current MCC provisions, the AER will be able to test this proposed course of action to promote the efficient delivery of network projects.

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<sup>8</sup> Further detail on the Commission's reasons for making the more preferable final rule can be found in chapters 2 to 5.

Similarly, under the proposed rule, RIT proponents would have been required to reapply the RIT in full where specified financial thresholds were met. The more preferable final rule provides flexibility to allow a course of action appropriate to the circumstances to be developed, such that unnecessary delays can be avoided and additional costs incurred only where there are likely to be commensurate benefits.

### **Economic efficiency will be achieved through guidance on and transparency around what constitutes a material change in circumstances**

The more preferable final rule will provide RIT proponents with guidance on what is a 'material change in circumstances', to inform decision-making as to when the RIT should be reapplied or further analysis undertaken.

The reopening triggers developed by RIT proponents for major projects will provide greater certainty as to the circumstances under which the preferred option may no longer be the most net beneficial option, and, in some cases, would indicate what the preferred option would be given the changed circumstances. This should help address stakeholder concerns about the transparency of the operation of the current MCC provisions, and how enforceable they are in practice. Guidance provided by the AER in the RIT application and Cost Benefit Analysis (CBA) guidelines will help RIT proponents develop these reopening triggers.

As compared to the proposed rule, the reopening triggers have the potential to cover a greater range of changes in circumstances, as opposed to being limited to changes in project costs.

### **Practical implementation and compliance costs will be minimised**

The obligation to consult on and finalise reopening triggers will impose new requirements on RIT proponents for projects with an estimated cost in excess of \$100 million. However, it is already common practice for RIT proponents to conduct sensitivity testing and outline boundary values for key input assumptions at which the preferred option would change. The more preferable final rule largely formalises existing practice and, by using the existing RIT PADR/DPAR consultation process, minimises practical implementation and compliance costs for RIT proponents.

While the final rule provides more flexibility as compared to the current MCC provisions (under which the default course of action is full reapplication of the RIT), the Commission acknowledges that, in practice, the final rule may lead to additional work being undertaken by RIT proponents and the AER for projects where a material change in circumstances does eventuate, given that the existing arrangements have not been effective or well-used. The Commission has endeavoured to minimise any associated costs as far as possible and considers that the final rule strikes an appropriate balance between administrative costs and timeliness on the one hand, and the risks associated with the progression of projects that are no longer the most net beneficial option on the other.

The Commission further notes that the AER's role under the more preferable final rule is in substance similar to its role under the current arrangements, and minimises additional regulatory burden on the AER.

### **The rule enables a flexible approach and is consistent with the long-term direction of energy market reform and decarbonisation**

Because the assessment of the rule change request has been conducted concurrently with the Transmission Planning Investment Review, the Commission has been able consider it in light of potential longer-term changes to the frameworks governing network investment. The Commission has concluded that the more preferable final rule is consistent with the implementation of policy initiatives likely to eventuate from the Review.

The Commission further considers that the balance struck by the more preferable final rule in terms of the timely and economic delivery of network projects is likely to be consistent with the substantial investment in, and build of, transmission infrastructure associated with the decarbonisation of the energy market.



## 2 REOPENING TRIGGERS TO PROVIDE TRANSPARENCY AROUND WHAT WOULD BE A MATERIAL CHANGE

This chapter explains why the Commission has made its final determination and the accompanying more preferable final rule to require certain RIT proponents to develop reopening triggers. It outlines the problem identified in the rule change request and how the final rule will address it. It also discusses stakeholder feedback and presents the Commission's analysis and conclusions.

### 2.1 The proponents considered the current material change in circumstances provisions were not effective

There are concerns from some stakeholders, including the rule change proponents, that the current MCC provisions are not effective. The Commission is not aware of any instance in which a RIT proponent has reapplied the RIT in response to a material change in circumstances, nor any determination by the AER to waive the requirement to reapply the RIT.<sup>9</sup> That the relevant provisions have not been used raised a threshold question as to whether the current approach is fit for purpose.

The requirement to reapply the RIT is triggered under the current provisions if the project proponent forms the view that circumstances have changed to the point where the preferred option is no longer the preferred option. It is reasonable to assume that a proponent would be reluctant to form this opinion and trigger the reapplication requirement because doing so may involve repeating a lengthy and resource-intensive process. This has important implications for the robustness of this part of the regulatory framework.

While the AER could waive the requirement to repeat the whole RIT or require only part of the process to be repeated, the default position in the NER is that the proponent 'must reapply the regulatory investment test'.<sup>10</sup> A RIT proponent will have no certainty as to how the AER will respond to a request for a determination to waive part or all of the reapplication requirement.

If a proponent does not consider that circumstances have materially changed, there is no recourse available if stakeholders have a different view.<sup>11</sup> The dispute resolution provisions that relate to the RIT are only available for a 30-day period following publication of the PACR or the Final Project Assessment Report (FPAR, for distribution projects) and only apply to matters in the RIT. They do not deal with matters relating to the CPA (for example, if the costs outlined in the CPA are significantly higher than those in the RIT).<sup>12</sup>

9 AEMC, *Consultation Paper: Transmission Planning and Investment Review*, 19 August 2021, p. 50.

10 AEMC, *Consultation Paper: Transmission Planning and Investment Review*, 19 August 2021, p. 56.

11 This is different to the situation where a statutory authority forms a view with which stakeholders disagree. In such cases, the authority's decision may be open to challenge on the ground that it is manifestly unreasonable, or through a dispute resolution process.

12 See clause 5.16B(c) of the NER.

As outlined below in appendix C.4, the proponents proposed a deterministic cost increase reapplication trigger, where if project costs increased by a certain percentage, the proponent would be required to reapply the RIT, unless otherwise determined by the AER. The proponents were of the view that the NSP should not be the one to decide if there has been an MCC. Their deterministic proposed rule would provide mechanistic triggers to determine if there had been an MCC, and then allow the AER (in line with the current rules) to decide whether reapplication of the RIT is required.

The consultation paper raised the possibility of an alternative decision rules approach, referred to hereafter as the 'reopening trigger approach'.<sup>13</sup> This approach was suggested as an alternative to adopting a 'one size fits all' cost increase reapplication trigger. It would instead involve requiring proponents to include in their PACR or FPAR bespoke 'decision rules'.

Such rules could enable RIT proponents to test, once market costs are revealed, whether the preferred option remains preferred, or whether another credible option should be re-examined. For example, the PACR could specify that, if the cost of the preferred option were to increase by X% (following market testing) and/or the cost of the second option reduce by Y% (e.g. based on producer price indexes or market data), then the outcome of the RIT should be revisited.

## 2.2 The draft determination required certain RIT proponents to develop reopening triggers

The Commission's draft determination was to:

- require certain RIT proponents to develop reopening triggers to help them determine whether a preferred option in a RIT may no longer be the most net beneficial option
- require these RIT proponents to outline these reopening triggers in the PADR/DPAR (as is applicable) for consultation
- require these RIT proponents to consider whether any reopening triggers have been triggered
- require the AER to update the RIT application and CBA guidelines to provide guidance to RIT proponents in relation to developing reopening triggers.

The Commission's reasons for its draft determination in relation to reopening triggers are summarised below.

### 2.2.1 Transparency and enforceability of the current MCC provisions was likely not fit for purpose

In the draft determination, the Commission concluded that the current MCC provisions are unlikely to be fit-for-purpose because a 'material change in circumstances' is not clearly

<sup>13</sup> The Commission has denoted what was previously referred to as 'decision rules' in the consultation paper as 'reopening triggers' to differentiate this approach from the decision rules AEMO uses for the Integrated System Plan (ISP). See AEMC, *Consultation Paper: Transmission Planning and Investment Review*, 19 August 2021, p. 53.

defined and they confer discretion on the RIT proponent to form a view as to any MCC without any guidance.<sup>14</sup>

As highlighted by stakeholders in submissions to the consultation paper,<sup>15</sup> there are other mechanisms that may help address the impacts of cost impacts, the form of the CPA process and the 'feedback loop'.<sup>16</sup> While these mechanisms are important safeguards, they do not fully address the specific issue that the current MCC provisions seek to address – ensuring that the preferred option identified through the RIT process remains the most net beneficial option after a material change in circumstances. Consequently, the Commission concluded that there is a need to revise the current MCC provisions.

## 2.2.2

### Reopening trigger approach is preferable to deterministic cost increase reapplication trigger approach

The Commission considered that the reopening trigger approach would be a preferable way of addressing the concerns surrounding the operation and enforceability of the current MCC provisions, as compared to a deterministic cost increase reapplication trigger approach. Under the approach in the draft rule, both costs and benefits can be considered, and reopening triggers can be tailored to the project in question and be sufficiently flexible to accommodate any uncertainty surrounding the nature of future projects.-

Reopening triggers would be developed by RIT proponents to help determine whether there has been a material change in circumstances.<sup>17</sup> These reopening triggers would be outlined in the PADR/DPAR and consulted on as part of the RIT process. This would promote transparency surrounding how RIT proponents determine whether there has been a material change in circumstances.

In the draft determination, the Commission discussed the potential for using mechanistic 'decision rules', that is where a given change in circumstances would automatically lead to a pre-defined alternative option now becoming the preferred option. While such rules might be appropriate and useful in some situations, the Commission noted that, in other cases, reopening triggers might need to be broader than these types of automatic decision rules.

The draft determination included a number of examples of reopening triggers, including both those where a pre-defined alternative option would now automatically become the preferred option and those where the activation of the reopening trigger would necessitate further analysis to understand if the preferred option has changed.<sup>18</sup>

<sup>14</sup> Australian Energy Market Commission, *Material change in network infrastructure project costs*, Draft determination, p. 16.

<sup>15</sup> Consultation paper submissions: AER, p. 8; CEC, p. 5; ENA, p. 27.

<sup>16</sup> The 'feedback loop' refers to the mechanism in place under clause 5.16A.5 whereby, in order to be eligible to submit a contingent project application for an actionable ISP project, the RIT-T proponent must obtain confirmation from AEMO that the cost of the preferred option does not change the status of that actionable ISP project as part of the ISP's optimal development path.

<sup>17</sup> Australian Energy Market Commission, *Material change in network infrastructure project costs*, Draft determination, p. 17.

<sup>18</sup> Australian Energy Market Commission, *Material change in network infrastructure project costs*, Draft determination, p. 17.

### 2.2.3

#### Existing guidelines should provide guidance on reopening triggers

The Commission also considered that guidance should be provided to RIT proponents through existing AER guidelines (i.e. the RIT-T and RIT-D application and CBA guidelines)<sup>19</sup> to help them identify and develop reopening triggers.<sup>20</sup> However, the Commission considered that such guidance should not be extensive or prescriptive, to enable RIT proponents to develop reopening triggers appropriate to each project. It should be limited to outlining the purpose for which reopening triggers should be developed, listing examples of reopening triggers, and ensuring they comprise identifiable and measurable circumstances and are clear.

This guidance should be provided in existing guidelines to minimise the complexity to proponents in preparing their RITs, and for stakeholders navigating the guidelines, and any associated administrative burden on the AER.

## 2.3

### Stakeholder views

#### 2.3.1

##### Most stakeholder agreed that transparency and enforceability of the current MCC provisions could be improved

Most stakeholders agreed that there are issues with the operation and enforceability of the current MCC provisions.<sup>21</sup> The proponents and PIAC both suggested that improvements in transparency and governance are required, while the AER also supported the provision of additional transparency in the MCC process.<sup>22</sup> ENA broadly supported the more preferable draft rule as a practical and fit-for-purpose approach that will address the concerns raised by consumers and support the overall objective of timely and efficient transmission investment.<sup>23</sup>

AEMO diverged from broad stakeholder support on this issue, submitting that revising the MCC provisions is unnecessary.<sup>24</sup> AEMO suggested that RIT proponents often test the impact of an MCC and publish results to demonstrate that the preferred option remains preferred, despite not being required to under the current provisions. In AEMO's view, if a RIT proponent fails to do this, the AER would be able to challenge compliance with the MCC provisions via its compliance and enforcement role, or a stakeholder could approach the AER to raise compliance concerns which the AER may pursue if it considers there is merit. AEMO submitted that introducing additional MCC obligations may reduce investment certainty, risks additional costs for and delay the delivery of network projects, and would impose an unnecessary administrative burden.

19 See clauses 5.16.2 (RIT-T application guidelines), 5.17.2 (RIT-D application guidelines) and 5.22.5 (Cost Benefit Analysis Guidelines) of the NER.

20 Australian Energy Market Commission, *Material change in network infrastructure project costs*, Draft determination, p. 18.

21 Submissions to draft determination: AER, p. 1; CEIG, p. 2; ENA, p. 1; EnergyAustralia, p. 1; PIAC, p. 1; Proponents, pp. 1-2.

22 Submissions to draft determination: AER, p. 1; PIAC, p. 1; Proponents, pp. 1-2.

23 ENA, submission to draft report, p. 1.

24 AEMO, submission to draft determination, p. 4.

### 2.3.2 **Most stakeholders supported reopening triggers being developed**

Most stakeholders supported the Commission's draft position that reopening triggers should be developed for particular projects to help determine whether there has been an MCC.<sup>25</sup> ENA highlighted that this approach would allow for consideration of matters affecting both costs and benefits and, according to EnergyAustralia, the reopening trigger approach would provide flexibility for RIT proponents.<sup>26</sup> CEIG submitted that this approach would reduce unnecessary re-prosecution of cost assessments and "allow NSPs to adapt a project appropriately to changing circumstances".<sup>27</sup>

The proponents and PIAC were supportive of reopening triggers but considered that the governance of the selection and operation of reopening triggers could be improved, including engagement to reset the PADR triggers at the PACR stage and beyond.<sup>28</sup> According to the proponents, this is because reopening triggers "will be significantly less relevant at the PACR or certainly at the CPA stage given the significant capex cost increases we are seeing at each successive stage".<sup>29</sup>

Snowy Hydro agreed with earlier feedback from AEMO that decision rules could be difficult to develop for large projects, where a multitude of factors could influence whether the preferred option is no longer preferred.<sup>30</sup> According to Snowy Hydro, the "costs of imposing decision rules on actionable projects such as HumeLink and VNI West outweigh the benefits". These costs include investment uncertainty, project delays, higher construction costs and increased risk of blackouts.

### 2.3.3 **Existing guidelines should provide guidance on reopening triggers**

Only ENA commented on the Commission's position on requiring the AER to develop guidance on reopening triggers, which it supported.<sup>31</sup> It agreed that the guidance should be principles-based and include examples

## 2.4 **Analysis**

### 2.4.1 **Improvements to transparency and enforceability will be made in the final rule**

The more preferable final rule maintains the same approach as the more preferable draft rule, as set out in the draft determination. In particular, the Commission continues to consider that the current MCC provisions are unlikely to be fit-for-purpose because:

- A 'material change in circumstances' is not clearly defined. The rules only provide two examples, which are arguably the most extreme forms of an MCC (a change in key assumptions used in identifying the identified need or the credible options assessed in the PACR/FPAR).

25 Submissions to draft determination: CEIG, p. 4; EnergyAustralia, p. 1; ENA, pp. 2-3; Proponents, p. 2; PIAC, p. 1.

26 Submissions to draft determination: EnergyAustralia, p. 1; ENA, p. 2.

27 CEIG, submission to draft report, p. 4.

28 Submissions to draft determination: PIAC, p. 2; Proponents, pp. 3, 6.

29 Proponents, submission to draft determination, p. 6.

30 Snowy Hydro, submission to draft determination, p. 3.

31 ENA, submission to draft report, pp. 2-3.

- The MCC provisions confer discretion on the RIT proponent to form a view as to any MCC, without any guidance. Further, it is unclear whether the proponent can be required to turn its mind to whether the preferred option is still preferred at any particular point in time after publication of the PACR/FPAR.

The Commission's view is aligned with the majority of stakeholder feedback on this matter, with most submissions either explicitly agreeing that the current MCC provisions are not fit-for-purpose or raising issues with their operation and enforceability.<sup>32</sup>

The Commission continues to consider that neither the CPA process nor the feedback loop fully address the specific issue that the current MCC provisions seek to address – providing a check that the preferred option identified through the RIT process remains the preferred option after a material change in circumstances.<sup>33</sup>

Consequently, the Commission considers that there is a need to revise the current provisions. While, in some cases, RIT proponents may have previously tested the impact of an MCC and published results to demonstrate that the preferred option remains preferred, the Commission considers that from a transparency perspective (and to improve stakeholder confidence in the process), it is beneficial to clarify the RIT proponents' obligations under the MCC provisions.

Further, as is discussed below, under the new MCC provisions RIT proponents would be required to develop reopening triggers. The use of reopening triggers would improve transparency and enforceability by providing objective thresholds that will be used to monitor and determine whether there has been an MCC.

#### 2.4.2 Reopening trigger approach is preferable

The majority of stakeholders supported the Commission's view that the reopening trigger approach would be preferable to a deterministic cost increase reapplication trigger approach, with submissions highlighting that this approach would allow for consideration of matters affecting both costs and benefits, and would provide flexibility for RIT proponents.<sup>34</sup>

Consequently, the Commission has determined to include in the more preferable final rule the development of reopening triggers by certain RIT proponents to help determine when there has been material change in circumstances.

The reopening triggers would be outlined in the PADR/DPAR and consulted on as part of the RIT process, promoting transparency surrounding how proponents determine whether there has been a material change in circumstances. As stakeholders would be able to comment on draft reopening triggers before they are finalised in the PACR/FPAR, RIT proponents would be encouraged to develop robust reopening triggers, ultimately promoting better outcomes for consumers.

<sup>32</sup> Submissions to draft determination: AER, p. 1; CEIG, p. 2; ENA, p. 1; EnergyAustralia, p. 1; PIAC, p. 1; Proponents, pp. 1-2.

<sup>33</sup> The feedback loop, for example, confirms that any increase in costs does not change the project's status as being on the optimal development path identified by AEMO. The CPA process involves estimating project costs for the preferred option (once it has been selected) more accurately in order to calculate how much revenue needs to be recovered from consumers.

<sup>34</sup> Submissions to draft determination: EnergyAustralia, p. 1; ENA, p. 2.

The Commission notes an issue raised by some stakeholders that setting the reopening triggers at the PADR/DPAR stage would not be effective, since the preferred option could change between the PADR/DPAR stage and PACR/FPAR stage.<sup>35</sup> The process would be for the RIT proponent to propose and consult on reopening triggers at the PADR/DPAR stage and finalise these at the PACR/FPAR stage. Consequently, the finalised reopening triggers could reflect any change to the project between the PADR/DPAR stage and PACR/FPAR stage.

There is currently no consultation process for the final RIT report, and adding such an additional step risks adding time to the RIT process with the benefit of additional consultation unclear. The objective of the reopening triggers is to help the RIT proponent determine whether there has been an MCC between the final RIT report and the CPA. This implies that the reopening triggers should be fixed by the final RIT report stage and should account for any change in the preferred options between the draft and final RIT report.

Consistent with stakeholder feedback, reopening triggers could, if necessary, be broader than the type of mechanistic 'decision rules' developed by AEMO for stage actionable ISP projects. While decision rules could be used where appropriate, reopening triggers could also be used to identify changes to variables that would warrant revisiting whether the preferred option remains net beneficial (as opposed to indicating that a specific option is now the preferred option). Multiple triggers could apply to a single project, with the number of triggers likely to reflect the complexity of the project and the prevailing circumstances.

The Commission notes that the reopening trigger approach reflects threshold analyses that are already commonly undertaken in a RIT. For example, under the AER's CBA guidelines for actionable ISP projects, proponents are given the discretion to illustrate 'boundary values' for important input assumptions at which the preferred option changes.<sup>36</sup> The Commission also notes that sensitivities were considered in the RITs for the HumeLink, Eyre Peninsula, and Project EnergyConnect projects, as well as for several non-ISP reliability projects.<sup>37</sup>

Consequently, requiring NSPs to develop reopening triggers that, in large part, reflect these existing analyses would be unlikely to add additional costs for or delay the delivery of network projects, nor impose an unnecessary administrative burden. Effectively, these reopening triggers would reflect the analysis that many RIT proponents are already conducting and promote increased transparency surrounding this process.

### 2.4.3

#### Existing guidelines should provide guidance on reopening triggers

Consistent with the draft rule, the more preferable final rule modifies the requirements on existing AER guidelines (i.e. the RIT-T and RIT-D application and CBA guidelines) to provide

<sup>35</sup> Submissions to draft determination: PIAC, p. 2; Proponents, pp. 3, 6.

<sup>36</sup> AER, *Cost benefit analysis guidelines: Guidelines to make the Integrated System Plan actionable*, August 2020, p. 33.

<sup>37</sup> ENA, RIT-T Economic Assessment Handbook for non-ISP RIT-Ts (26 October 2020), p. 58; TransGrid, Reinforcing the NSW Southern Shared Network to increase transfer capacity to demand centres (HumeLink): Project Assessment Draft Report (10 January 2020), pp. 31, 49; TransGrid, Reinforcing the NSW Southern Shared Network to increase transfer capacity to demand centres (HumeLink): Project Assessment Conclusions Report (20 July 2021), pp. 34, 54; ElectraNet, Eyre Peninsula Electricity Supply Options: Project Assessment Conclusions Report (18 October 2018), p. 66; Project Energy Connect, Project Assessment Conclusions Report (13 February 2019), p. 107; TransGrid, Maintaining Reliable Supply to the North West Slopes Area: RIT-T Project Assessment Draft Report (18 February 2022), pp. 39, 52; TransGrid, Maintaining Reliable Supply to the Bathurst, Orange and Parkes Areas: RIT-T Project Assessment Draft Report (18 February 2022), pp. 39, 51.

guidance to help RIT proponents identify and develop reopening triggers. The only stakeholder commenting on this matter was supportive of this approach.<sup>38</sup>

## 2.5 Conclusions

The Commission's final determination (subject to the further considerations outlined in chapters 3 and 4 below) is to:

- require certain RIT proponents to develop reopening triggers to help them determine whether the preferred option may no longer be the most net beneficial option
- require these RIT proponents to outline these reopening triggers in the PADR/DPAR (as is applicable) for consultation
- require these RIT proponents to consider whether any reopening triggers have been triggered
- require the AER to update the RIT application and CBA guidelines to provide guidance to RIT proponents in relation to developing reopening triggers.

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<sup>38</sup> ENA, submission to draft report, pp. 2-3.



## 3 CONSEQUENCES OF A MATERIAL CHANGE IN CIRCUMSTANCES SHOULD NOT DEFAULT TO RIT REAPPLICATION

This chapter explains why the Commission has made its final determination and the accompanying more preferable final rule around the consequences that should follow if the RIT proponent considers there has been a material change in circumstances. It outlines the steps that should be undertaken if there has been a material change, discusses stakeholder feedback, and presents the Commission's analysis and conclusions.

### 3.1 The default outcome under the MCC provisions requires reconsideration

The consequences that should follow if the RIT proponent considers that a material change in circumstances has occurred (such as where a reopening trigger has been triggered) now need to be considered.

The current MCC provisions require that the proponent must, in the event of an MCC, reapply the RIT unless otherwise determined by the AER. The proponent has no certainty as to whether the AER will waive the requirement to reapply the RIT, either in part or in full.

A related issue is who should be responsible for determining the consequences that should flow if there has been an MCC. While the proponent will be most familiar with the project's costs and benefits and thus may be best placed to identify if the ranking of the preferred option has changed, it may naturally be reluctant to reapply the RIT or could be seen to have a conflict of interest. The AER is impartial and focused on consumer protection. As such, the AER may be considered the more objective judge of whether reapplication of the RIT, in some form, is warranted.

The proponents' proposed rule required the RIT proponent to reapply the RIT if there has been a particular percentage increase in project costs, unless otherwise determined by the AER. RIT proponents would be required to publish revised total project cost forecasts. The AER would have 30 days after publication of the revised project cost to determine whether reapplication of the RIT is not required.

The potential alternative to the rule change request outlined in the consultation paper (and subsequently in the draft determination) involved the proponent providing updated analysis to the AER (if a reopening trigger has been triggered). Requiring publication of such modelling (both high level findings and underpinning data) would help restore confidence in the RIT process. Engagement with stakeholders could also occur at this time. This would allow interested stakeholders, potentially including proponents of other credible options, to engage with the NSP and the AER and ensure that the process is appropriately robust and the RIT's conclusion sound.

## 3.2 The draft determination required RIT proponents to notify the AER if there was an MCC and propose a course of action

The Commission's draft determination was to:

- require RIT proponents, if they determine that a material change in circumstances has occurred (which, for certain RIT proponents, may include that a reopening trigger has been triggered), to inform the AER and propose an appropriate course of action
- permit the AER to request further information/analysis from the RIT proponent, and/or require the RIT proponent to pursue an alternative course of action
- require the AER to decide whether the RIT proponent should follow an alternative course of action within 40 days of notification of the proposed course of action
- exempt RIT proponents from considering whether a material change in circumstances has occurred (including whether a reopening trigger has been triggered) within six months of the completion of the analysis (i.e. initial RIT or subsequent rerun of the analysis).

The Commission's reasons for its draft determination in relation to the consequences of an MCC are summarised below.

### 3.2.1 **In the first instance, the RIT proponent should decide whether the RIT should be reapplied (as a last resort)**

The Commission concluded that the RIT proponent is best placed to determine whether a RIT should be reapplied. This is because the RIT proponent will have the most up-to-date and accurate information on costs, benefits and customer expectations.

The Commission considered that the AER should have a role (similar to its role under the current MCC provisions), in relation to what particular consequence should flow if the proponent identifies an MCC. This is because different courses of action are likely to be appropriate depending on the nature of the change in circumstances. The Commission concluded that the AER should be able to test the RIT proponent's proposed course of action. The Commission noted that under the mechanism set out in the draft rule, the AER would not have a role in testing the merits of a RIT proponent's view as to whether an MCC has occurred.

Under the draft rule, if the RIT proponent determines that a material change in circumstances has occurred (such as where a reopening trigger has been triggered), it would be required to inform the AER, and propose the appropriate course of action. The AER should be permitted to request further information/analysis from the RIT proponent, and as a last resort require the full RIT to be reapplied.

### 3.2.2 **Guidance for the AER on whether additional analysis is required, or in the extreme case, whether the RIT should be reapplied should be included in the NER**

The Commission considered that guidance should be included in the rules to help the AER determine whether the RIT should be reapplied in full or in part, similar to that provided in the current MCC provisions. The Commission noted that the current MCC provisions prescribe the factors that the AER must have regard to when making a determination that the RIT

proponent need not reapply the RIT.<sup>39</sup> Under the revised MCC provisions, the Commission concluded that the AER should be required to consider similar factors, in addition to the costs likely to be incurred and delay that would result from reapplying the RIT in full or in part.

### **3.2.3 A time limit should be placed on the AER to decide whether the RIT proponent should follow a course of action different to that proposed**

The Commission considered that a time limit is required in order to reduce any potential impacts of project delays. Time limits similar to those used in the AER's process for addressing disputes in relation to the application of RITs could be applied.<sup>40</sup> The draft rule provided that, if it rejects the RIT proponent's proposed course of action, the AER has 40 days to determine the appropriate course of action for the RIT proponent to follow.

### **3.2.4 Limits to re-running analysis should be introduced to mitigate the risk of 'analysis paralysis'**

The Commission considered that the risk of the RIT proponent experiencing 'analysis paralysis' – that is, a continual need to rerun analysis which prevents the progression of a project – should be mitigated. The draft rule consequently limited the requirement to consider whether a material change in circumstances has occurred (including whether any reopening triggers have been triggered) to after six months of the completion of the analysis (i.e. initial RIT or subsequent rerun of the analysis).

## **3.3 Stakeholder views**

### **3.3.1 There were mixed views on whether the RIT proponent should decide whether the RIT should be reapplied in the first instance (as a last resort)**

AEMO, ENA and the AER agreed that the RIT proponent is best placed to determine whether an MCC has occurred.<sup>41</sup> However, the proponents submitted that, maintaining the RIT proponent as the decision maker on whether there has been an MCC is contrary to good governance principles.<sup>42</sup> They suggested that, under the draft rule, the RIT proponent would control the selection and application of triggers, the CBA model and the level of engagement with consumers on the CBA model. Consequently, the proponents, together with PIAC, submitted that there should be a positive obligation to report to the AER that there has not been an MCC, accompanied by detailed analysis and a statutory declaration (akin to revenue determination requirements).<sup>43</sup>

ENA considered that the proposed drafting would not automatically require a NSP to notify the AER if a reopening trigger has occurred. Rather the obligation would only be enlivened if the change in circumstances meant that the previously preferred option was no longer the preferred option. ENA suggested that the intent of the draft rule would be furthered if NSPs

<sup>39</sup> Clause 5.16.4(z3), 5.16A.4(n) and 5.17.4(t) of the NER.

<sup>40</sup> See clauses 5.16B(d) and 5.17.5(d) of the NER.

<sup>41</sup> Submissions to draft determination: AEMO, p. 3; ENA, p. 2; AER, p. 1.

<sup>42</sup> Proponents, submission to draft determination, pp. 9-10.

<sup>43</sup> Submissions to draft determination: PIAC, p. 2; Proponents, p. 3.

were always required to notify the AER if a reopening trigger occurs and propose a course of action.<sup>44</sup>

Regarding the consequences that should flow if the RIT proponent considers there has been an MCC, most stakeholders agreed with the draft position requiring RIT proponents to inform the AER and propose a course of action (which can be rejected and modified by the AER).<sup>45</sup> The AER broadly supported this draft position, but requested clarification in the drafting, since it considered that the draft rule could be misinterpreted as requiring the AER to engage in a form of merits review which is not the intention.<sup>46</sup> According to the AER, the NSP should be required to consult on the proposed course of action, and the AER would then review the process the NSP followed in reaching a decision on that course of action.

The proponents and ENA suggested that the AER should be required to publish the proponent's notification, the decision and information regarding compliance with the AER's decision.<sup>47</sup> According to ENA, "[p]ublication of these notices/documents on these elements of the process would provide greater transparency to consumers around the operation of the MCC provisions", and allow NSPs to engage with consumers and stakeholders on an MCC (without any formal rules requirement to do so).<sup>48</sup>

ENA also submitted that the AER guidelines should include the material the AER expects to be provided with to make its decision on the proposed course of action, to avoid a need to 'stop the clock' and request additional information.<sup>49</sup> ENA further suggested that, to ensure the AER has regard to any issues the NSP might face in taking the required actions, the final Rule should require the AER to specify a timeframe that is 'reasonable'.<sup>50</sup>

In addition, the proponents suggested that the AER should be required to consult on its determination following a RIT proponent's notification of an MCC.<sup>51</sup> ENA submitted that the AER could at least have the discretion to consult on its decision, where it considered it would assist in decision-making and not unduly delay the project.<sup>52</sup>

### 3.3.2

#### **Guidance for the AER on whether additional analysis is required, or in the extreme case, whether the RIT should be reapplied**

EnergyAustralia agreed that the AER should be required to consider the costs and delay that may result from any reapplication of the RIT or other actions proposed by the RIT proponent, since consumer interests are served by not prolonging regulatory approvals.<sup>53</sup> The AER suggested that the requirement for considering the factors outlined in the draft rule should be instead placed on the RIT proponent.<sup>54</sup> The AER would then review the information

44 ENA, submission to draft determination, p. 4.

45 Submissions to draft determination: ENA, p. 2; CEIG, p. 4; PIAC, p. 2; AER, p. 1; Proponents, p. 2.

46 AER, submission to draft determination, p. 3.

47 Submissions to draft determination: Proponents, p. 13; ENA, p. 4.

48 ENA, submission to draft determination, p. 4.

49 ENA, submission to draft determination, p. 3.

50 ENA, submission to draft determination, p. 4.

51 Proponents, submission to draft determination, p. 13.

52 ENA, submission to draft determination, p. 4.

53 EnergyAustralia, submission to draft determination, p. 1.

provided by the RIT proponent to confirm it had regard to these factors in reaching its decision on the proposed course of action.

### **3.3.3 Time limit on the AER to decide whether the RIT proponent should follow a course of action different to that proposed was supported**

ENA considered the proposed 40 day time limit to be consistent with the objective of facilitating the timely investment of network infrastructure.<sup>55</sup>

### **3.3.4 Mitigating the risk of 'analysis paralysis' was largely supported**

AEMO broadly agreed that the regulatory framework should avoid 'analysis paralysis' and unnecessarily delaying the development of efficient network investments.<sup>56</sup> ENA supported the proposed six month exclusion period for examining whether there has been an MCC, as a practical way of avoiding continual analysis, consistent with facilitating timely investment.<sup>57</sup> The AER supported the intent of the draft position on the exemption window, but submitted that provision should be made to account for changes that are significant enough to constitute an MCC despite falling within the exemption window.<sup>58</sup> The AER also queried the appropriateness of a seemingly arbitrary six month window.

## **3.4 Analysis**

### **3.4.1 In the first instance, the RIT proponent should decide whether the RIT should be reapplied (as a last resort)**

The Commission continues to consider that the RIT proponent is best placed to determine whether the preferred option remains the most net beneficial option, and to understand any costs and delays that might be associated with reapplying a RIT. There was broad stakeholder support for the position that the RIT proponent would be best placed to determine whether an MCC has occurred.<sup>59</sup>

Some stakeholders submitted that, under the draft rule, RIT proponents would have no incentive to report an MCC. In their view, the governance framework could be strengthened by requiring RIT proponents to report to the AER that there had not been an MCC, accompanied by detailed analysis and a statutory declaration.<sup>60</sup>

The Commission notes that, under the draft rule, RIT proponents would generally be required to confirm as to whether or not there had been an MCC, concurrently with the CPA process (this is discussed further in section 4.2.2). The Commission considers that this aspect of the rule would act as a check on the RIT proponent, requiring it to consider whether or not there has been an MCC and, from this assessment, provide a defensible conclusion.

54 AER, submission to draft determination, p. 3.

55 ENA, submission to draft determination, p. 3.

56 AEMO, submission to draft determination, p. 4.

57 ENA, submission to draft determination, p. 3.

58 AER, submission to draft determination, p. 4.

59 Submissions to draft determination: AEMO, p. 3; ENA, p. 2; AER, p. 1.

60 Submissions to draft determination: PIAC, p. 2; Proponents, p. 3.

Most stakeholders supported the draft position requiring RIT proponents to inform the AER and propose a course of action if there has been an MCC (which could be rejected and modified by the AER).<sup>61</sup> The Commission agrees with a number of suggestions provided by stakeholders to improve the drafting of the rule.

Firstly, the Commission has clarified in the final rule that the RIT proponent would be required to notify the AER whenever a reopening trigger is triggered, and not only when the change in circumstances means that the previously preferred option is no longer the preferred option (as in the draft rule). The intent is that a change in circumstances that has the potential to lead to a change in preferred option is identified and then a course of action determined. It is unlikely that the RIT proponent would know whether the preferred option remains preferred or not until further analysis forming part of an approved course of action is undertaken. Consequential changes have been made elsewhere such that this logic applies to all forms of MCC.

The Commission has also determined that the AER should be required to publish notification from a RIT proponent of an MCC and the RIT proponent's proposed course of action, and the AER's decision on the course of action. The Commission considers this amendment to the draft rule is a simple way to promote transparency surrounding the new MCC process, without adding more time and cost to the RIT process.

As part of this process, under the final rule, the RIT proponent would be required to notify the AER of the timeframes within which it proposes to complete the course of action. The AER would decide whether to approve or reject and modify the proposed timeframe as part of its determination on the course of action. Where the AER rejects the proposed timeframe, it would need to specify a reasonable timeframe for the completion of the course of action.

The Commission further considers it would be beneficial to require RIT proponents, when proposing a course of action to the AER (including the associated timeframes), to provide supporting analysis to avoid the need for the AER to request further information. This would streamline the process of determining an appropriate course of action.

No additional consultation (as compared to the draft rule), either by the RIT proponent during the process of formulating its proposed course of action or by the AER in determining whether to approve or to reject and modify the proposed course of action, is required under the final rule. The Commission anticipates that, in many cases, the proposed course of action would itself involve consultation – the RIT proponent consulting on updated analysis used to determine the most net beneficial credible option, for example. Consequently, any additional consultation would likely be superfluous and have the potential of introducing undue delay into the process.

The Commission considers that requiring the RIT proponent to consider if reapplication of the RIT is justified, the costs and delay that may result from the proposed course of action and the costs and delay that may result from the reapplication of the RIT when proposing the course of action to be taken would assist with ensuring that the course of action ultimately undertaken is fit-for-purpose. The AER would then review that these considerations have in

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61 Submissions to draft determination: ENA, p. 2; CEIG, p. 4; PIAC, p. 2; AER, p. 1; Proponents, p. 2.

fact been taken into account by the RIT proponent in determining the course of action. This is discussed further below.

### **3.4.2 Guidance should be provided in the rules on what factors should be considered when determining a course of action if there has been an MCC**

The Commission agrees with the AER that the AER's role in making a determination on a proposed course of action should be clarified. This has been achieved in the final rule by requiring the RIT proponent to consider, in formulating a proposed course of action, the factors that were to be considered by the AER in approving or rejecting and modifying a course of action in the draft rule, i.e. under the final rule, the AER would then be required to conduct a process check on the RIT proponent's proposed course of action when making its determination.

The Commission considers that requiring the RIT proponent to consider these factors would put the onus on the RIT proponent to explain to the AER why the proposed course of action is appropriate and thereby provide useful guidance to the RIT proponent. It would also clarify the AER's role in the process as conducting a procedural check on whether the RIT proponent has considered the specified factors in formulating the proposed course of action.

### **3.4.3 40-day time limit on the AER to decide whether the RIT proponent should follow a course of action that is different to that proposed**

The Commission has determined to maintain in the final rule its draft position that the AER should be required to make its determination on the course of action that should be taken by the RIT proponent within 40 days. The only stakeholder commenting on this aspect of the draft rule was supportive of this requirement.<sup>62</sup>

The Commission has amended one related aspect of the draft rule. In the draft rule, where the AER requested additional information or analysis from the RIT proponent, the period of time for making a determination on a proposed course of action would have been extended by the time it takes the RIT proponent to provide the additional information or analysis, provided that:

- the request was made at least seven days prior to the expiry of the period of time for making a determination; and
- the additional information or analysis was provided within 14 days of receipt of the request.

In the final rule, the limitation on the additional time to a maximum period of 14 days has been removed. This means that the period of time for making a determination on a proposed course of action is now extended by the period of time taken by the RIT proponent to provide the additional information or analysis.

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<sup>62</sup> ENA, submission to draft determination, p. 3.

### 3.4.4

#### Mitigating the risk of 'analysis paralysis' with an exemption window

The provision in the draft rule limited the requirement to consider whether a material change in circumstances has occurred to after six months of the completion of the relevant analysis (i.e. initial RIT or subsequent rerun of the analysis). The need for an exemption window attracted support from stakeholders through submissions.<sup>63</sup>

While supporting the intent of the exemption window, the AER suggested that provision should be made to account for changes that are significant enough to constitute an MCC despite falling within the exemption window and queried the appropriateness of a seemingly arbitrary six-month window.<sup>64</sup>

The Commission acknowledges the concern that some significant changes in circumstances may fall within the exemption window but considers that the risk of such significant changes occurring within this timeframe is low. Implementing an exemption mechanism to this exemption window would also unduly complicate the new MCC framework.

Regarding concerns about the length of the exemption window (six months) being arbitrary, the Commission considers that any chosen length will be to some extent arbitrary. The Commission considered that an exemption window of six months would represent a realistic target for many projects and may act to incentivise RIT proponents to accelerate the lodging of CPAs in some cases (which would support the timely delivery of required network infrastructure). Further, this exemption window would be unlikely to apply to the most significant projects with lengthy timeframes needed for CPA preparation, meaning that, for these projects (which will have the largest potential impact on consumers), any MCC will need to be considered by RIT proponents after publication of the final RIT report.

## 3.5

### Conclusions and the Commission's final determination on consequences from an MCC

The Commission's final determination (subject to the further considerations outlined in chapter 4) is to:

- require RIT proponents, if they determine that an MCC has occurred (which, for certain RIT proponents, may include that a reopening trigger has been triggered), to inform the AER and propose an appropriate course of action (including an associated timeframe) backed by supporting analysis
- require that the course of action pursued by the RIT proponent must include, at a minimum publishing:
  - a statement identifying whether the preferred option remains the preferred option, as well as any supporting information necessary to demonstrate that the preferred option identified remains the preferred option, or,

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<sup>63</sup> Submissions to the draft determination: AEMO, p. 4; AER, p. 4; ENA, p. 3.

<sup>64</sup> AER, submission to draft determination, p. 4.



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- if no longer the preferred option, a statement identifying the new preferred option, as well as any supporting information necessary to demonstrate the preferred option is the most net beneficial option
- permit the AER to request further information/analysis from the RIT proponent, and/or require the RIT proponent to pursue an alternative course of action
- require the AER to approve or reject any actions (and/or associated timeframes) or decide whether the RIT proponent should follow an alternative course of action (including an associated reasonable timeframe) within 40 days of notification of the proposed course of action (subject to requests for further information/analysis from the RIT proponent)
- require the AER to publish the RIT proponent's notice of a material change in circumstances and the AER's determination on the proposed course of action
- exempt RIT proponents from considering whether a material change in circumstances has occurred (including whether a reopening trigger has been triggered) within six months of the completion of the analysis (i.e. initial RIT or subsequent rerun of the analysis).

## 4 RIT PROJECTS WITH A VALUE OVER \$100 MILLION SUBJECT TO NEW REQUIREMENTS TO DEVELOP REOPENING TRIGGERS

This chapter explains why the Commission has made its final determination and the accompanying more preferable final rule on which RIT projects should be subject to the new requirements to develop reopening triggers. It outlines when reopening triggers are required, discusses stakeholder feedback, and presents the Commission's analysis and conclusions.

### 4.1 Determining which projects should be subject to strengthened MCC provisions

In the rule change request, the proponents suggested that the proposed changes should apply to all transmission and distribution projects which require a RIT, but that the AER should have the discretion to waive the application of the provisions for smaller projects (greater than \$150 million and greater than \$50 million for transmission and distribution projects respectively).<sup>65</sup> The proponents stated that the focus of their proposed rule change was on larger projects that go through the RIT process.

The proponents submitted that it may be appropriate for these value thresholds to be indexed to preserve their real value.<sup>66</sup> Further, the proponents submitted that it was not their intention to require the AER to undertake a review of every project given the associated administrative costs.

In relation to whether the proposed rule change should apply to both contingent and non-contingent projects, the proponents submitted that major non-contingent projects should be captured since the risk to consumers of a 'capex blowout' for contingent projects is equally applicable to non-contingent projects.<sup>67</sup>

As outlined in the consultation paper, in considering what projects should be captured by the proposed rule change, it is relevant to weigh up the potential impact on consumers of projects being delivered that may not be the most net beneficial option against the administrative cost and potential delay associated with revisiting the preferred option.<sup>68</sup>

It may be more appropriate to focus attention on major projects since the potential impact on consumers of a large project being delivered that is no longer the most net beneficial option after an MCC could be significant and would be more likely to outweigh any costs or delay associated with revisiting the preferred option.

Any decision as to which projects should be covered by revised MCC provisions would need to have regard for the number of projects that would be expected to meet various

65 ERM et al., *Rule change request*, p. 10.

66 Proponents, submission to the consultation paper, p. 11.

67 Proponents, submission to the consultation paper, p. 14.

68 AEMC, *Consultation Paper: Transmission Planning and Investment Review*, 19 August 2021, p. 52.

thresholds, and the potential impact on consumers of projects of various sizes not being captured by the MCC provisions.

## 4.2 The draft determination required all RIT proponents to consider whether there was a material change with certain RIT proponents required to develop reopening triggers

The Commission's draft determination was to:

- require RIT proponents (other than AEMO) of projects with an estimated cost greater than \$100 million to develop reopening triggers (as discussed in Chapter 2)
- require proponents of contingent projects to state in their contingent project application (CPA) whether or not there has been a material change in circumstances, provide supporting analysis and (if relevant) confirm that the AER was notified and outline the course of action that was undertaken
- exempt projects for which a PADR or DPAR had already been published by the commencement date of the rule from the requirements of the new MCC provisions.

The Commission's reasons for its draft determination in relation to the RIT projects subject to the new requirements to develop reopening triggers are summarised below.

### 4.2.1 Reopening triggers should only be developed for projects above \$100 million

The Commission concluded that all RIT proponents (for both transmission and distribution projects) should be required to broadly consider whether there has been an MCC, including a change to the identified need. Changes to the identified need would be of fundamental importance but would also be relatively easy to monitor (as compared to a change in the credible options, for example).

Only RIT proponents of projects above a value threshold of \$100 million should be required to additionally develop reopening triggers. These would focus on covering changes to the key assumptions used in identifying the credible options assessed in the final RIT report, and ranking these options. Because monitoring changes to the credible options and ranking of these would be more difficult and administratively burdensome than monitoring a change to the identified need, the Commission considered that only proponents of major projects should be required to develop reopening triggers.

The Commission also determined that the \$100 million value threshold should be subject to the AER's cost threshold review under clause 5.15.3 of the NER which requires the AER to conduct a review of the various cost thresholds used for RIT-Ts and RIT-Ds.

### 4.2.2 The draft position was to confirm whether or not there had been an MCC through the CPA process

The Commission's draft determination was that the new MCC provisions should apply to both contingent and non-contingent projects but noted that they would likely work most effectively for RIT projects that subsequently become contingent projects. This is because,

for contingent projects, the submission of the CPA is a clear event at which time consideration can be given to whether a reopening trigger has been triggered.

Proponents of contingent projects would be required to state in the relevant CPA whether or not there has been a material change in circumstances, provide supporting analysis and (if relevant) confirm that the AER was notified and outline the course of action that was pursued if one or more reopening triggers had been triggered. Similarly, proponents of contingent projects below the \$100m threshold would need to state in the CPA whether or not there had been a material change in circumstances (including a change to the identified need), with supporting analysis, and the course of action taken if so.

#### **4.2.3 Reopening triggers would not be required in Victoria under the draft rule**

The Commission noted in the draft rule that AEMO, which is the RIT-T proponent for most transmission augmentations in Victoria, has different incentives to other NSPs. Under s. 49 of the NEL, AEMO must carry out its statutory functions having regard to the NEO, and therefore must exercise its function as RIT-T proponent in a way that promotes efficient investment in network infrastructure for the long-term interests of consumers.

The draft rule exempted AEMO as RIT proponent, from the need to develop reopening triggers and include these in the PADR. Because the contingent project process does not apply to transmission augmentations in Victoria, AEMO would also not be subject to the requirement to report on any material changes in circumstances through the CPA.

#### **4.2.4 The draft transition provisions excluded projects for which a PADR or DPAR had already been published**

The Commission determined that the new requirements relating to reopening triggers should not apply to projects for which a PADR or DPAR had already been published by the commencement date of the rule. This would avoid any need for these projects to go back to the PADR/DAPR stage to identify and consult on reopening triggers, and ensure that additional time and costs are not added to the process.

### **4.3 Stakeholder views**

#### **4.3.1 The majority of stakeholders supported reopening triggers only being developed for projects above \$100 million**

The proponents, PIAC, Snowy Hydro, ENA, PIAC and EnergyAustralia agreed with the draft position that only RIT proponents of projects above \$100 million should be required to develop reopening triggers.<sup>69</sup> ENA suggested that, while the \$100 million threshold is ultimately an arbitrary cut-off point, it is appropriate as it will capture both ISP projects and also major augmentation or repex projects, the majority of which can be expected to go through a CPA.<sup>70</sup>

<sup>69</sup> Submissions to draft determination: EnergyAustralia, p. 1; ENA, p. 3; Snowy Hydro, p. 3; Proponents, p. 5; PIAC, p. 1.

<sup>70</sup> ENA, submission to draft determination, p. 3.

The AER expressed concerns about the practicality of applying the same mechanism for all projects and recommended considering whether different approaches could be tailored depending on the nature of the project (e.g. actionable ISP project or not).<sup>71</sup> Further, ENA suggested that there may be a small number of projects for which no realistic reopening trigger can be formulated (e.g. projects required by law).<sup>72</sup>

ENA agreed that the \$100 million value threshold should be subject to the AER's cost threshold review.<sup>73</sup>

#### 4.3.2

#### **Reporting through the CPA process was supported by some stakeholders with the AER expressing concerns around duplication of assessment**

In relation to the Commission's draft position on leveraging the CPA process, the proponents, PIAC and ENA supported requiring NSPs to provide confirmation regarding their MCC assessment as part of their CPAs.<sup>74</sup> According to ENA, in practice NSPs currently already include material to demonstrate that there has not been an MCC as part of their CPAs. It considered that formalising the inclusion of this material as proposed in the draft rule is consistent with the AEMC's intent that NSPs keep the MCC provisions 'front of mind' following the completion of the RIT. ENA agreed that the AER should not have a role in deciding whether it is satisfied with the NSP's MCC assessment as part of the CPA process, highlighting the potential for delay if the RIT was reassessed at this late stage in the process.

In contrast, the AER suggested that linking the MCC process to the contingent project process would risk duplication in assessment and creating unnecessary certainty for the NSP.<sup>75</sup> This is because the AER considers that, if the NSP's analysis and supporting evidence is resubmitted with the NSP's CPA, it would be consulted on again as part of the AER's assessment of that application. This risks the issues underpinning the NSP's MCC assessment being litigated a second time. The AER suggested that the NSP should instead be required to consult on its assessment of whether an MCC has occurred before submitting the CPA.<sup>76</sup>

AEMO considered that leveraging the CPA process is unnecessary since the actionable ISP framework already provides an opportunity for the AER to address an MCC before a CPA is considered.<sup>77</sup> Further, according to AEMO, the need to confirm compliance with the MCC provisions should be based on the individual circumstances of the particular RIT and the nature of any changes since the publication of the draft RIT report.<sup>78</sup>

The proponents and PIAC submitted that (to the extent that the current dispute procedures do not allow stakeholders to raise a dispute on NSPs' report of no MCC), stakeholders should

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71 AER, submission to draft determination, p. 2.

72 ENA, submission to draft determination, p. 3.

73 ENA, submission to draft determination, p. 3.

74 Submissions to draft determination: ENA, p. 4; PIAC, p. 2; Proponents, p. 2.

75 AER, submission to draft determination, p. 4.

76 AER, submission to draft determination, p. 3.

77 AEMO, submission to draft determination, p. 5.

78 AEMO, submission to draft determination, p. 6.

be able to dispute a RIT proponent's conclusion that there has not been an MCC within 30 days of the PACR/CPA submission.<sup>79</sup>

#### **4.3.3 Some stakeholders considered the MCC provisions should apply in Victoria**

AEMO supported the draft position to exempt AEMO from the requirement to develop reopening triggers for RIT-Ts in Victoria.<sup>80</sup> It agreed with the position that AEMO is not subject to the same incentives as other TNSPs. In contrast, the proponents, EnergyAustralia, and ENA disagreed, submitting that the MCC provisions should apply equally to AEMO.<sup>81</sup> In their view, the draft determination provided an insufficient justification for differentiating AEMO from other RIT proponents.

#### **4.3.4 There were mixed views on the transitional provisions**

CEIG, ENA and Snowy Hydro supported the transitional provisions.<sup>82</sup> They considered that it is important to progress the delivery of investments that have already been approved, and not increase uncertainty for investors and delay project timelines.

In contrast, the proponents and PIAC submitted that reopening triggers should be set at the PACR/early works stage, rather than at the PADR stage, to improve transparency and robustness. One impact of this change would be to ensure that the operation of the rule extends to projects submitting CPAs before 2030, as the proponents suggested that most projects likely to submit CPAs prior to that time which would otherwise be required to develop reopening triggers have already passed the PADR stage.<sup>83</sup> According to these stakeholders, the interests of consumers would be best served by the proposed rule being implemented as soon as practicable, and they considered that doing so need not compromise the timely delivery of network infrastructure since engagement on reopening triggers for projects undertaking early works could be done in parallel with other parts of the early works.

Similarly, EnergyAustralia suggested the inclusion of explicit obligations for projects that have already passed the PADR stage. According to EnergyAustralia, including more rather than fewer large actionable ISP projects within the scope of the rule change would help minimise negative impacts on social licence, avoid delays and improve investment uncertainty.<sup>84</sup>

## **4.4 Analysis**

### **4.4.1 Reopening triggers should only be developed for projects above \$100 million**

The Commission has determined to maintain in the final rule its draft position to require only RIT proponents of projects above \$100 million to develop reopening triggers. This was generally supported by stakeholders in submissions to the draft determination and is also

79 Submissions to draft determination: Proponents, p. 3; PIAC, p. 2.

80 AEMO, submission to draft determination, p. 9.

81 Submissions to draft determination: ENA, p. 5; Proponents, p. 13; EnergyAustralia, p. 2.

82 Submissions to draft determination: CEIG, p. 5; ENA, p. 1; Snowy Hydro, p. 1.

83 Submissions to draft determination: Proponents, p. 2; PIAC, pp. 1-2.

84 EnergyAustralia, submission to draft determination, p. 2.

broadly consistent with the views of attendees at a roundtable hosted by the AEMC on 16 February 2022.<sup>85</sup>

As acknowledged in the draft determination, any value threshold imposed will be to some extent arbitrary, but \$100 million will strike an appropriate balance between capturing the majority of major contingent projects (i.e. actionable ISP projects) which could have the most significant impacts on consumers and the additional administrative costs involved. The Commission notes that no alternative threshold values were proposed by stakeholders in response to the draft determination.

The Commission considers that tailoring the threshold according to the nature of the project (e.g. actionable ISP project or not) is unnecessary. As noted above, the threshold has been set to target the projects which are likely to have the most significant impacts on consumers, while lower value projects would remain subject to the broader MCC provisions. Further, imposing different thresholds for different project types would add unnecessary complexity to the new framework.

The Commission does not consider it necessary for allowance to be made to exempt certain projects that are above the threshold from the requirement to develop reopening triggers. The Commission considers it unlikely that, for a project exceeding \$100 million in value, there would be no factors that might impact on the decision to proceed. One potential example put forward in submissions was where a specific network investment is required to comply with an externally imposed obligation.<sup>86</sup> In that case, a relevant reopening trigger would be any change to the externally imposed obligation.

The Commission continues to consider that it would be appropriate for the \$100 million value threshold to be subject to the AER's regular cost threshold review. Given the scope of the cost thresholds that are currently subject to this review, there would seem to be no reason for excluding the new threshold from this review. This will allow the AER to consider whether the threshold remains appropriate over time and will not add any time to the process since the AER must already review the existing cost threshold. The only stakeholder to comment on this matter in submissions to the draft determination was supportive.<sup>87</sup>

#### 4.4.2

#### **Reporting on whether or not there has been an MCC should be undertaken at the same time as the CPA**

The Commission has made a final determination to amend the provisions in the draft rule related to reporting through the CPA process. Under the draft rule, the relevant NSP would be required to state in its CPA whether or not there has been a material change in circumstances, provide supporting analysis and (if relevant) confirm that the AER was notified and outline the course of action that was undertaken. The AER would then consult on all the matters contained in the CPA as usual.

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<sup>85</sup> For further information, see: draft determination, section 5.2.1.

<sup>86</sup> ENA, submission to draft determination, p. 3.

<sup>87</sup> ENA, submission to draft determination, p. 3.

The AER would not have been required to make a determination regarding the NSP's assessment as to whether or not there has been an MCC under the draft rule as the Commission did not intend for there to be any duplication of analysis and consultation by requiring the NSP to provide confirmation and supporting analysis in the CPA as to whether or not there has been an MCC.

Nevertheless, the AER expressed concerns that, if the analysis and supporting evidence relating to an earlier MCC is resubmitted with the NSP's CPA, it would need to be consulted on again as part of the application. In the AER's view, this would risk the issues underpinning the NSP's MCC assessment being relitigated resulting in the AER potentially being required to seek further information in response to stakeholders, resulting in delays to the process.<sup>88</sup>

The AER suggested that a potential solution would be to require the NSP to consider whether an MCC has occurred and notify the AER of the outcome, including where it has determined that no change has occurred and no action is needed, before the NSP finalises and submits its CPA. Alternatively, if a sequential process would introduce an unacceptable risk of project delay, the rules should make clear that the AER's involvement in the MCC process is separate from its assessment of the CPA.<sup>89</sup>

The Commission considers that the AER's concerns are addressed in the final rule by requiring the RIT proponent to provide a statement, that is separate to the CPA, at the same time the CPA is submitted. The statement would contain confirmation whether or not there had been a material change in circumstances and any supporting analysis, and would outline the actions (if any) that had been taken if there had been a material change in circumstances. The RIT proponent would be required to publish the statement at the same time as, or as soon as reasonably practicable after, submitting it to the AER.

As part of its assessment of the CPA, the AER would check that the statement had been completed and submitted. This approach would mitigate the risk of re-litigating MCC decisions where an MCC has previously been determined and acted upon through the AER's consultation on the CPA.

The Commission has concluded that these arrangements would be preferable to a sequential process. Such a process would involve additional complexity – for example, the rules would need to specify the maximum length of time prior to the submission of the CPA in which the RIT proponent's MCC assessment could be undertaken. There would be a risk that an MCC could occur in the period between the MCC assessment and the submission of the CPA.

The Commission considers that the option contained in the final rule would continue to promote stakeholder confidence in the new MCC framework, while formalising the nature of the process check to be undertaken by the AER and avoiding adding time or any significant complexity to the process.

Finally, the Commission noted the views of stakeholders who suggested that stakeholders should be able to dispute a RIT proponent's conclusion that there has been no material

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<sup>88</sup> AER, submission to draft determination, p. 4.

<sup>89</sup> AER, submission to draft determination, p. 4.



change, within 30 days of PACR publication or contingent project application submission.<sup>90</sup> The Commission notes that the existing RIT dispute processes set out in rule 5.16B (for transmission) and clause 5.17.5 (for distribution) would allow a relevant party to dispute the reopening triggers decided upon in the PACR/FPAR in the event where that relevant party's submissions during the PADR/DPAR consultation phase have not been considered as required by the NER. The Commission is of the view that existing dispute mechanisms are sufficient and as such has decided not to add a dispute resolution mechanism to the reporting undertaken by NSPs at the time of the CPA in order to avoid adding further time and complexity to the process.

#### 4.4.3

##### **AEMO as a RIT proponent will be required to consider whether there has been an MCC but will not be required to develop reopening triggers for Victorian projects**

The Commission has determined to maintain in the final rule its draft position that AEMO should be exempted as RIT proponent from the need to develop reopening triggers and include these in the PADR. The Commission notes that a number of stakeholder submissions to the draft determination advocated applying the new MCC provisions to AEMO in full. However, as highlighted in the draft determination, AEMO has different incentives to other NSPs and must carry out its statutory functions having regard to the NEO.

It is also the case that the contingent project process does not apply in Victoria. Instead, AEMO tenders for transmission augmentations that meet certain criteria, and this can often involve AEMO running an Invitation to Tender process prior to the relevant PACR. This would mean both that AEMO will have better cost information before the PACR stage and also that it would be difficult to design a process for AEMO to submit a final MCC assessment equivalent to that for other NSPs at the time of the CPA.

Under the final rule, AEMO would still be required to consider broadly whether there has been an MCC, including a change in the identified need. This aligns relatively closely with the current MCC provisions which apply to AEMO.<sup>91</sup>

Finally, the Commission has clarified in the final rule that the exemption from developing reopening triggers only applies where AEMO is the sole RIT-T proponent. This means that, for any interconnector projects where AEMO and another TNSP are joint proponents, reopening triggers must be developed.

#### 4.4.4

##### **Transitional rules will not require reopening triggers to be developed for projects which have already published a PADR/DPAR**

After careful consideration, the Commission has decided to maintain its draft position that the new MCC provisions should not apply to projects for which a draft RIT report had already been published by the commencement date. Stakeholders submitted a range of views in response to this position with some, including the proponents, suggesting that the interests

<sup>90</sup> Submissions to draft determination: Proponents, p. 3; PIAC, p. 2.

<sup>91</sup> Submissions to draft determination: ENA, p. 5; Proponents, p. 13; EnergyAustralia, p. 2.

of consumers would be best served if reopening triggers were developed for a number of projects that have already passed the PADR stage.<sup>92</sup>

While promoting value for money in very substantial investments is of clear importance for consumers, the Commission considers that the interests of consumers will also be served by promoting the timely delivery of required network infrastructure. Consumers will benefit through lower electricity prices and better system security and reliability outcomes, as thermal generation retires and is replaced with decentralised variable renewable energy and firming capacity. The recent 2022 *Electricity Statement of Opportunities* (ESOO) highlights that:<sup>93</sup>

*"Anticipated generation, storage and transmission developments, including ISP actionable transmission developments, need to progress urgently to committed status to address reliability challenges and support the energy transition underway.*

The Commission notes recent modelling which suggests that, on average NEM-wide, residential customers would pay a total of approximately \$330 more in electricity bills over a 15-year period if actionable and future ISP transmission projects are delayed by a year.<sup>94</sup> While the Commission is not suggesting that applying the new MCC provisions to projects for which a draft RIT report had already been published by the commencement date would need to delay those projects by as much as a year, this does illustrate the scale of the costs that could be incurred by consumers in the event of delays.

On balance, the Commission considers that the potential costs to consumers associated with extended project timelines resulting from the need for RIT proponents to revise their draft RITs to develop and then finalise reopening triggers would likely outweigh any potential avoided costs to consumers from the substitution of a project by another that became more net beneficial as a result of a material change in circumstances.

## 4.5 Conclusions and the Commission's decision on what types of projects reopening triggers must be developed for

The Commission's final determination is to:

- require RIT proponents (other than AEMO where it is the sole RIT proponent) of projects with an estimated cost greater than \$100 million to develop reopening triggers (as discussed in Chapter 2)
- require proponents of contingent projects, at the time of submitting the CPA, to provide a separate statement to the AER confirming whether or not there has been a material change in circumstances, including supporting analysis and (if relevant) confirming that the AER was notified and outlining the course of action that was undertaken

<sup>92</sup> Submissions to draft determination: Proponents, p. 2; EnergyAustralia, p. 2; PIAC, pp. 1-2.

<sup>93</sup> AEMO, *2022 Electricity Statement of Opportunities*, August 2022, p. 5.

<sup>94</sup> Endgame Economics, *Modelling Electricity Bill Impact of Transmission Project Delays*, A Report for NEXA Advisory, 7 June 2022, pp. 10-11.

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- require the RIT proponent to publish the statement confirming whether or not there has been a material change in circumstances, at the time of or as soon as practicable after providing to the AER
- exempt projects for which a PADR or DPAR had already been published by the commencement date of the rule from the requirements of the new MCC provisions.

## 5 STRENGTHENED GUIDELINES FOR RITS TO PROVIDE MORE ROBUST COST ESTIMATES

This chapter explains why the Commission has made its final determination and the accompanying more preferable final rule on strengthening guidelines for RITs to provide more robust cost estimates. It outlines the improvements which will assist cost estimate accuracy, discusses stakeholder feedback, and presents the Commission's analysis and conclusions.

### 5.1 Cost estimate accuracy robustness should be improved

In addition to their primary proposal in relation to the MCC provisions, the proponents suggested that the RIT-T and RIT-D application guidelines should be strengthened to encourage proponents to develop robust RITs. In their view, this would ultimately reduce the likelihood that reapplication of the RIT would be needed under the current MCC provisions.

The proponents' rule change request proposed that the AER guidelines be amended to require RIT proponents to develop more rigorous cost estimates for the final RIT report. These cost estimates should be based on a class 2 AACE estimate (i.e. a detailed feasibility study). The AACE international cost estimate classification system provides guidelines for applying general principles of estimate classification to project cost estimates (i.e. cost estimates that are used to evaluate, approve and/or fund projects).

There is a question for the Commission as to whether there is a need to change the rules governing the AER guidelines that apply to RITs, in order to promote the strengthening of these guidelines and supplement the changes proposed for the MCC provisions.

### 5.2 Draft determination clarified the rules governing RIT and CBA guidelines to assist in improving cost estimate accuracy

The Commission's draft determination was to:

- clarify, in the rules governing the RIT-T and RIT-D application guidelines and the CBA guidelines, that the AER can provide guidance in relation to any acceptable cost estimate classification systems that should be used for the RIT, and any role for contingency allowances
- allow the AER to specify which parts of the RIT-T and RIT-D application guidelines are binding on proponents.

The Commission also recommended the AER further consider how the guidelines governing RITs could be strengthened to promote the development of more robust cost estimates.

#### 5.2.1 The draft recommended changes to the guidelines and rules covering the guidelines to improve cost estimate accuracy

The Commission's draft determination was that the rules that govern the RIT application and CBA guidelines should be amended to clarify that the AER can provide guidance to RIT

proponents on using a particular class of cost estimates from a particular system. In the draft determination, the Commission recommended that the AER consider amending these guidelines to provide clarity in relation to cost estimate classification systems and cost estimate accuracy levels, and consider whether these should be binding on RIT proponents.

The Commission also decided that the rules should be clarified to give the AER the option to update the guidelines to provide guidance on the role of contingency allowances. The Commission recommended that the AER consider amending the RIT application and CBA guidelines to clarify the role of contingency allowances.

The Commission noted that the AER currently encourages RIT proponents to conduct sensitivity analyses and illustrate the boundary values for input assumptions at which the preferred option would change. Sensitivity testing and boundary values are routinely included in RIT assessments, with the boundary tests flagging the changes in costs or benefits that would impact option rankings.<sup>95</sup> Accordingly, the Commission did not consider that any clarification in the rules governing the guidelines is required in this regard. However, the Commission recommended that the AER consider amending the RIT application and CBA guidelines to *require* RIT proponents to conduct sensitivity analyses and illustrate boundary values for input assumptions at which the preferred option would change.

### 5.2.2 **The Commission's draft position was that the AER should specify which parts of the guidelines are binding**

The Commission determined that the AER should have the ability to specify which parts of the RIT-T and RIT-D guidelines are binding on RIT proponents, in the same way it does for the CBA guidelines. This would address the concern raised by the rule change proponents that the guidelines are not binding on RIT proponents.

### 5.2.3 **Implementation and transition requirements provided for the rule commencing 12 months after the publication of the final rule**

The Commission's draft determination was that the rule should commence operation 12 months after publication of the final rule, and that the AER be required to update and publish the RIT application guidelines and CBA guidelines prior to the commencement date, under transitional arrangements.

## 5.3 **Stakeholder views**

### 5.3.1 **Stakeholders largely supported recommended changes to the guidelines and rules covering the guidelines to improve cost estimate accuracy**

The proponents, ENA, the AER and the CEIG supported the draft position clarifying the rules governing the AER guidelines for RITs to support strengthened guidelines for cost estimate

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<sup>95</sup> See for example: Transgrid *Maintaining Reliable Supply to the Bathurst, Orange and Parkes areas PADR* February 2022, section 7.5 (includes discussion of boundary tests for capex and discount rate assumptions), [https://www.transgrid.com.au/media/n4zlwcks/transgrid-padr\\_maintaining-reliable-supply-to-bathurst-orange-and-parkes-areas.pdf](https://www.transgrid.com.au/media/n4zlwcks/transgrid-padr_maintaining-reliable-supply-to-bathurst-orange-and-parkes-areas.pdf); Transgrid *HumeLink PACR*, section 6, section 8.4 (including boundary test conducted for the increase in Option 3C costs that would result in Option 2C becoming the preferred option – p. 56), <https://www.transgrid.com.au/media/txancvmx/transgrid-humelink-pacr.pdf>.

development.<sup>96</sup> The AER and CEIG, for example, agreed with the focus on improving transparency, reducing uncertainty and enabling investors to compare cost changes across different process stages and projects.<sup>97</sup>

Some stakeholders proposed further changes. ENA suggested that the rules should require the AER to consider advice from AEMO in developing any guidance in relation to the adoption of particular cost estimation classification systems.<sup>98</sup> The proponents and PIAC submitted that the AER needs to amend the Guidance Note Regulation of actionable ISP projects to ensure the changes carry through to the CPA stage.<sup>99</sup>

### **5.3.2 There were mixed views on the AER specifying which parts of the guidelines are binding**

The proponents supported the draft position that the AER should have the ability to specify which parts of the RIT-T and RIT-D guidelines are binding on RIT proponents. Although AEMO agreed that cost estimate accuracy and consistency is most appropriately addressed within AER guidelines, it supported less reliance on binding obligations within the guidelines and more meaningful engagement on their consistent application.<sup>100</sup> ENA was unsupportive of the draft position on allowing the AER to identify binding parts of the guidelines.<sup>101</sup> It submitted that this would constrain the flexibility of the process, and is beyond the scope of the rule change.

### **5.3.3 The proponents and PIAC suggested the implementation date should be brought forward**

The proponents and PIAC submitted that the AER review of the guidelines could be completed within nine months of publication of the final determination.<sup>102</sup> The proponents suggested that it took the AER nine months to develop the 'Guidelines to make the ISP actionable', which involved making two completely new guidelines.<sup>103</sup>

## **5.4 Analysis**

### **5.4.1 Changes to be made to the guidelines and rules to improve cost estimate accuracy**

The Commission has determined to maintain in the final rule its draft position to clarify the rules governing the AER guidelines for RITs to support strengthened guidelines for cost estimate development. This position was broadly supported by stakeholders in submissions to the draft determination.<sup>104</sup>

96 Submissions to draft determination: Proponents, p. 14; ENA, p. 6; AER, p. 1; CEIG, p. 4.

97 Submissions to draft determination: AER, p. 1; CEIG, p. 4.

98 ENA, submission to draft determination, p. 6.

99 Submissions to draft determination: PIAC, p. 2; Proponents, p. 3.

100 AEMO, submission to draft determination, p. 7.

101 ENA, submission to draft determination, p. 6.

102 Submissions to draft determination: PIAC, p. 2; Proponents, p. 3.

103 Proponents, submission to draft determination, pp. 15-16.

104 Submissions to draft determination: Proponents, p. 14; ENA, p. 6; AER, p. 1; CEIG, p. 4.

The Commission considers that the rules do not need to specifically require the AER to consider advice from AEMO in developing any guidance in relation to the adoption of particular cost estimation classification systems as suggested by ENA in its submission.<sup>105</sup> This is because the AER is required to comply with the *Transmission consultation procedures* and the *Rules consultation procedures* when amending the RIT application and CBA guidelines respectively. This would require the AER to consult on any amendments and consider any submissions when making a final decision, including any submission made by AEMO.

Regarding the *Guidance note for the regulation of actionable ISP projects*, raised by the proponents and PIAC in their submissions,<sup>106</sup> the Commission notes that in section 2.2 of that guidance note, the AER encourages TNSPs, in engaging with stakeholders as they prepare their CPAs, to indicate the level of accuracy, or uncertainty in the forecast costs for the project and notes that the AACE cost estimate classification provides a useful and consistent framework.<sup>107</sup> As set out in the draft determination, the AER could consider whether it would be appropriate to strengthen requirements on TNSPs to use AACE cost estimates. The Commission does not consider any rules changes are required to facilitate this, noting that the AER developed the Guidance note without being required to do so under the rules.

#### **5.4.2 The AER should specify which parts of the guidelines are binding**

Consistent with the draft determination, the Commission has determined that the AER should be allowed to specify which parts of the RIT-T and RIT-D application guidelines are binding on RIT proponents (as it is permitted to do so for the CBA guidelines). This would promote stakeholder confidence in the RIT process.

The Commission notes that s. 34(3)(g) of the NEL gives the AER the ability to make a guideline binding and, the Commission considers that this aspect of the final rule is within the scope of the rule change as there is a cogent link between the rule change request and the final rule. This is because the proponents in their rule change request sought an amendment to the AER guidelines to require RIT proponents to develop more rigorous cost estimates for the final RIT report. Further, prescribing which parts of the guidelines the AER can make binding could introduce risks and practical difficulties, for instance with respect to future rule changes.

#### **5.4.3 The rules should commence operation on 9 October 2023 which is roughly 12 months after the final rule**

The Commission has determined that the rule should commence operation on 9 October 2023. The AER will be required to update and publish the RIT application guidelines and CBA guidelines prior to the commencement date, under transitional arrangements which take effect on 27 October 2022. This implementation period is broadly consistent with the 12 months provided for in the draft determination.

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<sup>105</sup> ENA, submission to draft determination, p. 6.

<sup>106</sup> Submissions to draft determination: PIAC, p. 2; Proponents, p. 3.

<sup>107</sup> See: AER, *Guidance note for the regulation of actionable ISP projects*, March 2021, p. 7.

The Commission notes that the proponents and PIAC submitted that the AER review of the guidelines could be completed within nine months of publication of the final determination, as opposed to 12 months.<sup>108</sup> However, in that time, the AER will be required to update the RIT-D application guidelines (under the distribution consultation procedures), the RIT-T application guidelines (under the transmission consultation procedures) and the CBA guidelines (under the rules consultation procedures).

The rules consultation procedures have recently been amended by the *Improving consultation procedures in the rules* rule, and the amendment of the CBA guidelines by the AER will be one of the first applications of this new process. The typical maximum duration for a standard consultation process under the new rules will be 28 weeks, although this may be extended if it involves issues that are complex or difficult, or where there is a material change in circumstances.<sup>109</sup>

Finally, 9 October 2023 is already the commencement date for both Schedule 1 of the National Electricity Amendment (*Fast frequency response market ancillary service*) Rule 2021 No. 8 and Schedule 1 of the National Electricity Amendment (*Enhancing information on generator availability in MT PASA*) Rule 2022 No. 7. Combining the commencement dates will minimise administrative costs for the AEMC and for participants.

## 5.5 Conclusions and Commission's final policy position on improving cost estimate accuracy

The Commission has made a final determination to:

- clarify, in the rules governing the RIT-T and RIT-D application guidelines and the CBA guidelines, that the AER can provide guidance in relation to any acceptable cost estimate classification systems that should be used for the RIT, and any role for contingency allowances
- allow the AER to specify which parts of the RIT-T and RIT-D application guidelines are binding on proponents.

The Commission also recommended the AER further consider how the guidelines governing RITs could be strengthened to promote the development of more robust cost estimates.

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<sup>108</sup> Submissions to draft determination: PIAC, p. 2; Proponents, p. 3.

<sup>109</sup> AEMC, *Improving consultation procedures in the rules*, Rule determination, 4 August 2022, p. 9.



## ABBREVIATIONS

AACE	Association for the Advancement of Cost Engineering
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
CBA	Cost Benefit Analysis
CPA	Contingent Project Application
Commission	See AEMC
DPAR	Draft Project Assessment Report
EUAA	Energy Users Association of Australia
FPAR	Final Project Assessment Report
ISP	Integrated System Plan
MCC	Material change in circumstances
MCE	Ministerial Council on Energy
MEU	Major Energy Users
NEL	National Electricity Law
NEO	National electricity objective
NERL	National Energy Retail Law
NERO	National energy retail objective
NGL	National Gas Law
NGO	National gas objective
NSP	Network Service Provider
PACR	Project Assessment Conclusions Report
PADR	Project Assessment Draft Report
PEC	Project Energy Connect
PSCR	Project Specification Consultation Report
RIT	Regulatory Investment Test
RIT-D	Regulatory Investment Test for Distribution
RIT-T	Regulatory Investment Test for Transmission

## A SUMMARY OF OTHER ISSUES RAISED IN SUBMISSIONS

This appendix sets out the issues raised in the second round of consultation on this rule change request and the AEMC’s response to each issue. [If an issue raised in a submission has been discussed in the main body of this document, it has not been included in this table.]

**Table A. 1: Summary of other issues raised in submissions**

STAKEHOLDER	ISSUE	AEMC RESPONSE
AEMO	<p>AEMO submitted that RIT proponents should be required to publish:</p> <ul style="list-style-type: none"> <li>• breakdowns for all transmission cost estimates used in the ISP (including preparatory activities), RIT-T and CPA; and</li> <li>• project estimates for RIT-Ts and CPAs using AEMO’s Transmission Cost Database to enable stakeholders to understand differences between TNSP estimates and NEM-wide average values.</li> </ul>	<p>The Commission determined that this issue is outside the scope of the rule change and is more appropriately dealt with by the TIPR.</p>

## B LEGAL REQUIREMENTS UNDER THE NEL

This appendix sets out the relevant legal requirements under the NEL for the AEMC to make this final rule determination.

### B.1 Final rule determination

In accordance with ss. 102 and 102A of the NEL, the Commission has made this final rule determination in relation to the rule proposed by the proponents.

The Commission's summary of reasons for making this final rule determination are set out in section 1.4.

A copy of the more preferable final rule is attached to and published with this final rule determination. Its key features are described in chapter 1.

### B.2 More preferable rule

Under section 91A of the NEL, the Commission may make a rule that is different (including materially different) to a proposed rule (a more preferable rule) if it is satisfied that, having regard to the issue or issues raised in the rule change request, the more preferable rule will or is likely to better contribute to the achievement of the NEO. In this instance, the Commission has made a more preferable final rule. The Commission's reasons for making a more preferable rule are summarised in chapter 1.

### B.3 Power to make the rule

The Commission is satisfied that the more preferable final rule falls within the subject matter about which the Commission may make rules. The more preferable final rule falls within s. 34(1)(b) of the NEL, which permits the Commission to make Rules for or with respect to any matter or thing contemplated by the NEL, or which is necessary or expedient for the purposes of the NEL. The Commission considers the electricity Rule is necessary and expedient for the purposes of the NEL.

Further, the more preferable final rule falls within the matters set out in Schedule 1 to the NEL as it relates to Items 17, 19, 26A and 26C because the more preferable final rules relates to the:

- principles to be applied, and procedures to be followed, by the AER in exercising or performing an AER economic regulatory function or power relating to the making of determinations to amend transmission and distribution determinations for contingent projects; and
- economic framework, mechanisms or methodologies to be applied by the AER for the purposes of making determinations to amend transmission and distribution determinations for contingent projects.

## B.4 Commission's considerations

In assessing the rule change request the Commission considered:

- its powers under the NEL to make the rule
- the rule change request
- submissions received during first and second rounds of consultation
- views expressed at the AEMC cost estimate accuracy roundtable held on 16 February 2022
- views expressed at the AEMC public forum held regarding the draft determination for this rule change on the 25 August 2022
- the Commission's analysis as to the ways in which the proposed rule will or is likely to, contribute to the NEO.

There is no relevant Ministerial Council on Energy (MCE) statement of policy principles for this rule change request.<sup>110</sup>

The Commission may only make a rule that has effect with respect to an adoptive jurisdiction if satisfied that the proposed rule is compatible with the proper performance of Australian Energy Market Operator (AEMO)'s declared network functions.<sup>111</sup> The more preferable final rule is compatible with AEMO's declared network functions because it would not affect those functions.

## B.5 Application to the Northern Territory

Under the Northern Territory legislation adopting the NEL, the Commission may make a differential rule if, having regard to any relevant MCE statement of policy principles, a different rule will, or is likely to, better contribute to the achievement of the NEO than a uniform rule.

A differential rule is a rule that:

- varies in its term as between:
  - the national electricity system, and
  - one or more, or all, of the local electricity systems, or
- does not have effect with respect to one or more of those systems

but is not a jurisdictional derogation, participant derogation or rule that has effect with respect to an adoptive jurisdiction for the purpose of section 91(8) of the NEL.

The Commission's final determination in relation to making a uniform or differential rule is set out in chapter 1.

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<sup>110</sup> Under s. 33 of the NEL the AEMC must have regard to any relevant MCE statement of policy principles in making a rule. The MCE is referenced in the AEMC's governing legislation and is a legally enduring body comprising the Federal, State and Territory Ministers responsible for energy. On 1 July 2011, the MCE was amalgamated with the Ministerial Council on Mineral and Petroleum Resources. The amalgamated council became the COAG Energy Council, and is now the Energy Ministers' Meeting.

<sup>111</sup> Section 91(8) of the NEL.

## B.6 Civil penalties

The Commission cannot create new civil penalty provisions. However, it may recommend to the Energy Ministers' Meeting that new or existing provisions of the NER be classified as civil penalty provisions.

The draft rule does not amend any clauses that are currently classified as civil penalty provisions under the NEL or National Electricity (South Australia) Regulations. The Commission does not propose to recommend to the Energy Ministers' Meeting that any of the proposed amendments made by the draft rule be classified as civil penalty provisions.

## B.7 Conduct provisions

The Commission cannot create new conduct provisions. However, it may recommend to the COAG Energy Council that new or existing provisions of the NER be classified as conduct provisions.

The final rule does not amend any rules that are currently classified as conduct provisions under the NEL or National Electricity (South Australia) Regulations. The Commission does not propose to recommend to the Energy Ministers' Meeting that any of the proposed amendments made by the draft rule be classified as conduct provisions.

## C MATERIAL CHANGE IN NETWORK INFRASTRUCTURE PROJECT COSTS RULE CHANGE REQUEST

### C.1 Rule change request

On 20 January 2021, the Energy Users Association of Australia (EUAA), Delta Electricity, Major Energy Users Inc (MEU), ERM Power Limited (now Shell Energy Operations) and AGL Energy (the proponents) made a request to the Australian Energy Market Commission (AEMC or Commission) to make a rule change relating to material changes in network infrastructure project costs (rule change request). The rule change request seeks to restore confidence in the Regulatory Investment Test (RIT) process by ensuring that the RIT is reapplied when a significant increase in network project costs occurs after completion of the RIT, unless otherwise determined by the Australian Energy Regulator (AER).

This appendix outlines:

- the current arrangements for the application and reapplication of the RIT
- the rationale for the rule change request
- the solution proposed in the rule change request
- the rule making process.

### C.2 Current arrangements for the application and reapplication of the RIT

#### C.2.1 Purpose of the RIT - identify the preferred option to meet an identified need

The RIT is a cost benefit analysis (CBA). The purpose of the RIT is to identify network investments that maximise the present value of net economic benefits in the market. Before investing in a significant transmission or distribution project to meet an identified need on the network, a proponent must consider all credible options (including potential non-network solutions) to meet that need, before selecting the option that maximises the net economic benefit across the market. This promotes efficient investment in the long-term interests of consumers.

In this final determination, the RIT is used to describe multiple sets of arrangements that are used for both transmission and distribution projects, in the form of the Regulatory Investment Test for Transmission (RIT-T) and Regulatory Investment Test for Distribution (RIT-D). A RIT-T proponent or RIT-D proponent is required to apply the RIT-T or RIT-D (as applicable) to any project which has the purpose of meeting an identified need.

There are a number of exceptions to the requirement to complete a RIT, including where the estimated capital cost of the most expensive option to address the identified need which is technically and economically feasible is less than \$7 million for transmission projects or \$6

million for distribution projects,<sup>112</sup> where the project is to address an urgent or unforeseen network issue, involves maintenance work that is not intended to augment the network, or is needed to address inadequate levels of inertia or system strength (and there is less than 18 months in which to complete the work).<sup>113</sup>

### C.2.2 The RIT process comprises three key stages

The process to be followed by RIT proponents is set out in Chapter 5 of the NER, with RIT proponents firstly being required to publish a specification report – the Project Specification Consultation Report (PSCR) for transmission projects, and a non-network options report for distribution projects. This report outlines, among other things, a description of the identified need and all credible options that address this need.

This initial report is consulted on, and submissions are taken into account when developing the draft RIT report – the Project Assessment Draft Report (PADR) for transmission projects, and the Draft Project Assessment Report (DPAR) for distribution projects.<sup>114</sup> This report outlines, among other things, each credible option assessed and the proposed preferred option.<sup>115</sup>

The draft RIT report is consulted on by stakeholders, after which the RIT proponent must publish a final RIT report – the Project Assessment Conclusions Report (PACR) for transmission and the Final Project Assessment Report (FPAR) for distribution. This final report must outline any submissions received in relation to the draft RIT report.

### C.2.3 Need to reapply the RIT if there has been a material change in circumstances

If a RIT proponent has published a final RIT report and still wishes to undertake the project, the NER requires that the proponent - unless otherwise determined by the AER - must reapply the RIT to the project if 'there has been a material change in circumstances which, in the reasonable opinion of the RIT-T [or D] proponent means that the preferred option in the project assessment conclusions report [or final project assessment report] is no longer the preferred option.'<sup>116</sup> These provisions are hereafter referred to as the 'material change in circumstances (MCC) provisions'.

The MCC provisions give examples of what may constitute a material change in circumstances. They may include, but are not limited to, a change to the key assumptions used in identifying the need described in the final RIT report, or the credible options

112 See clause 5.16.3(a)(2) of the NER for RIT-Ts and clause 5.17.3(a)(2) for RIT-Ds. While both provisions refer to \$5 million, this value is subject to variation in accordance with a cost threshold determination. Under the AER's most recent cost threshold determination (which took effect on 1 January 2022), the value of this threshold is now set at \$7 million and \$6 million for transmission and distribution projects respectively. See: AER, *Final Determination - Cost thresholds determination*, November 2021.

113 Clause 5.16.3(a) and clause 5.17.3(a) of the NER.

114 This stage is not required for projects that have been identified as being 'actionable' under the Integrated System Plan.

115 The RIT proponent is not required to publish a PADR or DPAR (as is applicable) if, among other things, the estimated capital cost of the proposed preferred option is less than \$46 million and \$12 million respectively: clauses 5.16.4(z1), 5.16A.4(m), 5.17.4(n)(2) of the NER; AER, *Final Determination - Cost thresholds determination*, November 2021.

116 Clauses 5.16.4(z3), 5.16A.4(n) and 5.17.4(t) of the NER. The PACR is the final report in the RIT-T while the final project assessment report (FPAR) is the final report in the RIT-D. The AER has discretion to determine that the RIT does not have to be reapplied when there has been a material change in circumstances.

assessed in the final report.<sup>117</sup> The MCC provisions (with respect to distribution projects) were introduced in 2012,<sup>118</sup> and were extended to transmission projects in 2017.<sup>119</sup>

#### **C.2.4 Many significant RIT projects also go through the contingent project process**

Many of the most significant projects assessed under the RIT subsequently undergo additional assessment through the contingent project process, and it is helpful to understand the two different processes.

As set out in rules 6.6A and 6A.8 of the NER, the contingent project mechanism can be used for large discrete projects where there is uncertainty as to whether or not they will be required during a Network Service Provider's (NSP's) upcoming regulatory control period.

Contingent projects are not included in the NSP's ex-ante revenue allowance. However, the definition of the contingent projects and their accompanying trigger events form part of the NSP's revenue determination. A trigger event is commonly the successful completion of a RIT.

The AER must determine that a project is a contingent project if it is satisfied that, among other things, the proposed capital expenditure for the project is not provided for in the forecast capital expenditure for the relevant regulatory control period and the capital expenditure exceeds either \$30 million or five per cent of the value of the maximum allowed revenue for the relevant NSP.

Since the introduction of the Integrated System Plan (ISP), contingent projects also include actionable ISP transmission projects for which (among other things):

- a PACR has been published
- the RIT-T proponent has received confirmation from the Australian Energy Market Operator (AEMO) that the preferred option addresses the relevant identified need specified in the ISP, and the cost of the preferred option does not change the status of the actionable ISP project as part of the optimal development path
- the cost of the preferred option set out in the CPA does not exceed AEMO's cost assessment.<sup>120</sup>

Where the trigger event for an actionable ISP project or other contingent project has occurred, the relevant NSP will apply to the AER to amend its revenue determination. The AER will publish the NSP's Contingent Project Application (CPA) and invite submissions from stakeholders on the application. The AER will then determine, among other things, the total capital expenditure that is reasonably required to undertake the project.

Importantly, the AER's assessment is intended to determine the expenditure reasonably required for the purpose of undertaking the contingent project. It does not revisit the

<sup>117</sup> See clauses 5.16.4(z4), 5.16A.4(o) and 5.17.4(u) of the NER.

<sup>118</sup> AEMC, *Rule Determination: National Electricity Amendment (Distribution Network Planning and Expansion Framework) Rule 2012*, 1 October 2012.

<sup>119</sup> AEMC, *Rule Determination: National Electricity Amendment (Replacement expenditure planning arrangements) Rule 2017*, 18 July 2017.

<sup>120</sup> Clause 5.16A.5 of the NER.



analysis used to determine whether the project would be the most net beneficial option that would usually have been previously undertaken through a RIT.

### C.3 The rationale for the rule change request was to improve the material change in cost provisions in the NER

In the rule change request, the proponents noted that AEMO's 2020 Final ISP Report highlighted that each major transmission project identified in the Draft ISP had incurred at least a 30 per cent increase in cost from initial estimates and suggested that the potential for further cost increases existed as these projects were to move through their respective RIT processes.<sup>121</sup>

In the view of the proponents, the issue of rising costs for transmission projects was further highlighted by the increase in costs of Project Energy Connect (PEC) and the Eyre Peninsula upgrade that occurred between completion of the RIT-T and the application for funding. In the case of the Eyre Peninsula upgrade, costs increased by 21 per cent and, in the case of PEC, costs increased by approximately 60 per cent.<sup>122</sup>

However, despite this increase in costs for PEC, the RIT-T proponent did not consider that there had been a material change in circumstances under the NER that may have required the reapplication of the RIT-T. The rule change proponents noted that the decision as to what is a 'material change' rests solely with the project proponent, not the AER.

In the view of the proponents, these cases where material increases in project costs have occurred following application of the RIT-T raise questions as to whether the current Rules remain fit for purpose and whether they are able to meet the challenges created by the expected transition in the NEM and the associated development of a large number of significant scale and cost transmission projects.<sup>123</sup>

According to the rule change proponents, "allowing capital costs to significantly increase after the application of the RIT is a poor outcome from a governance perspective and negatively impacts consumer and stakeholder confidence that the RIT framework is achieving its stated purpose".<sup>124</sup>

### C.4 The solution proposed in the rule change request focused on a mechanistic change in cost threshold

The rule change request proposed that, unless otherwise determined by the AER, RIT-T proponents would be required to reapply the RIT-T if there had been a material change in costs following completion of the RIT-T. Under this change, which would apply for both actionable ISP projects and non-ISP projects, a material change in costs would be defined as:

- 15 per cent or more for projects costing less than \$500 million in total

121 ERM et al., *Rule change request*, p. 4.

122 ERM et al., *Rule change request*, p. 4.

123 ERM et al., *Rule change request*, p. 4.

124 ERM et al., *Rule change request*, p. 2.

- 10 per cent or more for projects costing more than \$500 million in total.<sup>125</sup>

Similar changes were proposed for distribution projects, in that a RIT-D proponent would be required to reapply the RIT-D if there had been a material change in costs following completion of the RIT-D. However, for distribution projects, a material change in costs would be defined as:

- 15 per cent or more for projects costing less than \$200 million in total
- 10 per cent or more for projects costing more than \$200 million in total.

Under the proposed approach, if a material cost increase were to occur, a proponent would need to reapply the RIT, or apply to the AER to waive the reapplication requirement, regardless of whether the ranking of the preferred option had changed. The AER would have 30 business days, following publication of the revised capital expenditure cost to make and publish a determination exempting a RIT proponent from the requirement to reapply the RIT.

Under the proposed rule, the AER would have the discretion to waive the requirement to reapply the RIT, including where projects are below the threshold of:

- \$150 million for transmission network projects and
- \$50 million for distribution network projects.<sup>126</sup>

The rule change proponents also requested a transitional rule requiring ElectraNet to reassess PEC by updating the PACR.<sup>127</sup>

The rule change request contained a further requirement that cost estimates for final RIT reports should be based on a class 2 estimate from the AACE international cost estimate classification (i.e. a detailed feasibility study). The rule change proponents considered that this would help mitigate the risk that RITs would subsequently have to be reopened under the proposed material change definition.<sup>128</sup>

## C.5 The standard rule making process was followed for this rule change

On 19 August 2021, the Commission published a notice advising of its commencement of the rule making process and consultation in respect of the rule change request.<sup>129</sup> This rule change was considered concurrently with the Transmission Planning and Investment Review, given its focus on issues central to the transmission planning and investment process. A consultation paper was published collectively for both the rule change and the Review. Submissions closed on 30 September 2021.

The Commission considered all the issues raised in the 28 submissions received as part of the first round of consultation and published a draft determination and draft rule on 7 July 2022.

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<sup>125</sup> ERM et al., *Rule change request*, p. 5.

<sup>126</sup> The wording of the rule change request refers to the requirement to reapply the RIT being “automatic” when higher cost projects (those exceeding the thresholds listed here) are subject to material cost increases. However, the drafting appended to the rule change request retains the existing discretion conferred on the AER whereby a proponent is required to reapply the RIT in the event of a material change in circumstances, “unless otherwise determined by the AER”. Thus, under the proposed drafting, the requirement to reapply the RIT would not be “automatic”, since it could still be waived by the AER (regardless of project size).

<sup>127</sup> ERM et al., *Rule change request*, p. 10.

<sup>128</sup> ERM et al., *Rule change request*, p. 9.

<sup>129</sup> This notice was published under s. 95 of the *National Electricity Law (NEL)*.

Submissions from stakeholders were invited on the draft determination and draft rule, with these due by 1 September 2022.

The Commission received eight submissions in response to the draft determination, and it has made its final determination and final rule following consideration of the issues raised in these submissions and by interested stakeholders at a public forum held on 25 August 2022. Issues raised in submissions are discussed and responded to throughout this final determination, including in appendix A