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Contact Officer: Warwick Anderson  
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7 June 2016

John Pierce  
Chairman  
Australian Energy Market Commission  
PO Box A2449  
SYDNEY SOUTH NSW 1235

By email

Dear Mr Pierce

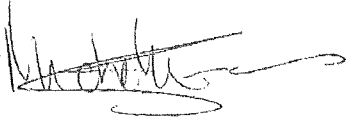
**Request for changes to the National Electricity Rules and the National Gas Rules**

Please find attached the Australian Energy Regulator's (AER) rule change proposal relating to the review process of the rate of the return guidelines (the Guideline). The AER requests that the timeframe to review the Guideline be extended from three to five years for the first review after the initial development of the guideline. Specifically, regarding the review of the current Guideline (published on 17 December 2013), the AER requests that the date for completing the review be extended from 17 December 2016 to 17 December 2018. The AER will endeavour to complete the review prior to 17 December 2018 depending on the scope of issues and resources.

This rule change proposal has been prepared in accordance with section 92 of the NEL (298 of the NGL), and includes the text of the AER's proposed rule amendment. The AER proposes that the attached rule change proposal be treated as non-controversial in nature and expedited under section 96 of the NEL (304 of the NGL). The rule change proposal included in Attachment A to this letter has been considered by the Energy Networks Association (ENA), Australian Pipeline and Gas Association, and the Public Interest Advocacy Centre (PIAC) and these entities support the proposal. Letters of support from the ENA and the PIAC are also attached.

Should you have any questions or queries regarding the attached proposal, please contact Warwick Anderson on 02 6243 1240.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michelle Groves', with a long horizontal flourish extending to the right.

Michelle Groves  
Chief Executive Officer

**Attachments**

Attachment A: Rule change proposal

Attachment B: Letter of support from the Energy Networks Association

Attachment C: Letter of support from the Public Interest Advocacy Centre

# **ATTACHMENT A**

## **National Electricity Rules and National Gas Rules**

### **REQUEST FOR A RULE CHANGE**

Relating to

#### **EXTENSION OF THE TIME FOR THE AER TO CARRY OUT A REVIEW OF THE RATE OF RETURN GUIDELINES**

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**Proposal to change clauses 6.5.2(p)(1) and 6A.6.2(p)(1) of the National Electricity Rules and rule 87(16)(a) of the National Gas Rules.**

**A Name and address of person making the request**

Australian Energy Regulator  
Level 35  
360 Elizabeth Street  
MELBOURNE VIC 3000

**B Description of proposed rule**

This rule change proposal seeks an amendment to clauses 6.5.2(p)(1) and 6A.6.2(p)(1) (Rate of return guidelines) of the National Electricity Rules and rule 87(16)(a) (Rate of return guidelines) of the National Gas Rules.

The National Electricity Rules and the National Gas Rules (collectively the Rules) require the AER to review the Rate of Return Guidelines (the Guideline) every three years. As the AER published the current Guideline on 17 December 2013, it needs to be reviewed by 17 December 2016. However, key elements of the current Guideline are still in contention before the Australian Competition Tribunal (the Tribunal) and Federal Court of Australia (the FCA) where an outcome is unlikely before 17 December 2016.<sup>1</sup>

**B1 Request for expedited process**

The AER proposes that this rule change proposal be treated in accordance with sections 96 of the NEL (304 of the NGL) of the non-controversial provision. The AER considers that the proposed rule change is unlikely to have a significant effect on the energy market. The two year extension sought will not materially affect the regulation of gas and electricity network businesses as the current Guideline will remain in force. While some businesses may be affected by the outcome of the Guideline review under the proposed timeframe extension, these businesses, industry and consumer groups support the proposed rule change.

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<sup>1</sup> The AER implemented the current Guideline in its recent NSW, ACT and SA determination decisions, which were appealed. Ausgrid, Endeavour Energy, Essential Energy (Networks NSW), ActewAGL and the Public Interest Advocacy centre (PIAC); Jemena Gas Networks (JGN); and South Australian Power Networks (SA Power Networks) appealed the AER's decision on 17 July 2015, 30 July 2015 and 19 November 2015, respectively. The Tribunal handed down its decision on NNSW, ActewAGL, JGN and PIAC on 26 February 2016. The AER appealed the Tribunal's decision on 24 March 2016. The AER's and SA Power Networks' appeals are underway.

Letters of support from the Energy Networks Association and the Public Interest and Advocacy Centre are provided with this rule change request. In discussions with the AER, the Australian Gas and Pipeline Association also indicated its support to amend the Rules to defer the review of the Guideline by two years using the expedited non-controversial rule change process.

## **C Statement of Issue**

### *1. Current Rules*

The Rules require the AER to review the Guideline at intervals not exceeding three years:<sup>2</sup>

*The AER must, in accordance with the distribution consultation procedures, review the Rate of Return Guidelines:*

- (1) at intervals not exceeding three years, with the first interval starting from the date that the first Rate of Return Guidelines are published under these Rules;*

### *2. The problem*

Key elements<sup>3</sup> of the current Guideline are in dispute and are being considered by the Tribunal and the FCA. The outcome of these legal processes is unlikely to be known before 17 December 2016 and may not be known within the next 12 months. The outcome of these legal processes may cause a change in the AER's approach to setting the allowed rate of return and hence trigger a review of the Guideline. It would not be prudent to conduct a Guideline review by December 2016, when fundamental issues about the appropriate application of the legislative framework are likely to be unresolved by that time, and if an amended Guideline would be superseded shortly after. Further, important stakeholders whose views would be sought in any Guideline review would be preoccupied with the Tribunal and FCA processes, compromising the consultation component that is essential in any Guideline review. The AER considers there is no value in commencing a Guideline review before the Tribunal and FCA processes are settled.

### *3. Proposed solution*

The AER requests that the timeframe for reviewing the current Guideline be extended by two years, to 17 December 2018. This will allow for a more efficient review of the Guideline that can incorporate the outcomes of the Tribunal and FCA processes. It will allow time for the Tribunal and FCA processes to conclude and for the AER to carry out a subsequent Guideline review. The proposed rule change maintains the approach in the current version of the Rules of providing a maximum interval between reviews of the Guideline, with discretion for the AER to undertake a review of the Guidelines earlier than 17 December 2018.

### *4. How the proposed solution will contribute to the achievement of the National Electricity and Gas Objectives*

The National Electricity Objective is to:

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<sup>2</sup> Clauses 6.5.2(p)(1) and 6A.6.2(p)(1) (Rate of return guidelines) of the National Electricity Rules and rule 87(16)(a) (Rate of return guidelines) of the National Gas Rules.

<sup>3</sup> Return on debt and the value of imputation credits (which is not part of the rate of return but with which the rate of return must be consistent).

*...promote efficient investment in, and efficient operation and use of, electricity (gas) services for the long term interests of consumers of electricity (gas) with respect to:*

- a) price, quality, safety, reliability and security of supply of electricity (gas); and*
- b) the reliability, safety and security of the national electricity system.<sup>4</sup>*

The National Gas Objective is to:

*... promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.*

Given that, in the AER's view, the proposed rule change is uncontroversial in nature, it is not expected to have a significant effect. In the AER's view, the proposed rule change will provide clarity to the AER (and stakeholders) in respect of the timing of a Guideline review and scope for the Guideline review to consider the outcomes of the Tribunal and FCA processes. Predictability of outcomes in the rate of return issues is likely to materially benefit the long term interest of consumers.

5. *Benefits and costs and potential impact on those likely to be affected by the rule change*

The significant benefit of the proposed rule change is that it will provide certainty by allowing the Tribunal and FCA processes to run their course and for the outcomes of these processes to be fully considered in the Guideline review. It will allow stakeholders engaged in the Tribunal and FCA processes to more effectively engage in the Guideline review, contributing to greater robustness in the review outcomes. It will also reduce the cost and regulatory burden associated with conducting a Guideline review by 17 December 2016 that may be superseded shortly after.

The proposed rule change will result in impacts from moving the timing of the review, that is, from moving the latest completion of the review from December 2016 to December 2018. These impacts can be grouped into two types:

- Impacts on regulated businesses' preparing regulatory proposals<sup>5</sup> to be submitted to the AER during the Guideline review or shortly after.
  - Regulated businesses are required to identify departures from the Guideline in their regulatory proposals.<sup>6</sup>
  - The proposed rule change will result in regulatory proposals submitted between 17 December 2016 and 17 December 2018 being required to identify departures from the current Guideline, rather than a reviewed (and potentially amended) Guideline.
- Impacts on the relevant material to be considered by the AER in making a regulatory determination.

<sup>4</sup> Section 88(1) of the NEL. This also applies to the National Gas Objective (NGO), section 23 of the NGL.

<sup>5</sup> Revenue proposals for electricity transmission network service providers, regulatory proposals for electricity distribution network service providers, and access arrangement proposals for gas pipeline operators.

<sup>6</sup> Cll. S.6.1.3(9) and S.6A.1.3(4A) of the NER, and r. 72(1)(g) of the NGR.

- In the AER's view, the Guideline is likely to outline relevant estimation methods, financial models, market data, or other evidence that the AER is required under the Rules to consider when making a regulatory determination.<sup>7</sup> The AER must also publish reasons for any departure (in a regulatory determination) from the Guideline.<sup>8</sup>
- The proposed rule change will result in the current Guideline, rather than a reviewed (and potentially amended) Guideline, applying in regulatory determinations concluded between 17 December 2016 and 17 December 2018.

In the AER's view, these timing changes, at an overall level, do not have a material impact. Conducting a Guideline review at any point in time is likely to impact on one or more of the AER's regulatory determination processes.<sup>9</sup> A calendar of regulatory determination processes likely to occur between 2016 and 2019 is included at Appendix A.2. We do not consider that the proposed rule change, at an overall level, exacerbates these impacts relative to the current Rules.

We also note that the rule change proposal maintains the approach of providing a maximum interval between reviews of the Guideline. As such, we will endeavour to complete the Guideline review earlier than December 2018.<sup>10</sup> Further, the rule change proposal maintains the current available flexibility to depart from the Guideline in a regulatory proposal or determination (if doing so would contribute to the achievement of the allowed rate of return objective). In addition, to assist in mitigating any impacts, we will endeavour to:

- Develop a structure and schedule for our review of the Guidelines that considers the regulatory determination / access arrangement processes that may be running concurrently.
- Provide reasonable opportunity for all stakeholders to comment on developments in the review of the Guidelines and how they may impact the regulatory determination / access arrangement processes that may be running concurrently.
- Minimise duplication of effort for both the AER and stakeholders
- In the final decision for our review of the Guidelines, clearly set out all amendments to the Guidelines and the reasons for the amendments. This should assist regulated businesses in identifying departures from any amended Guidelines in their proposals / access arrangements.

<sup>7</sup> Cll. 6.5.2(e)(1) and 6A.6.2(e)(1) of the NER, and r. 87(5)(a) of the NGR.

<sup>8</sup> Cll. 6.2.8(c) and 6A.2.3(c) of the NER, and r. 87(18) of the NGR.

<sup>9</sup> Noting that in undertaking a Guideline review the AER must comply with the distribution and transmission consultation procedures set out in the Rules.

<sup>10</sup> The timing of the Guideline review will likely depend on the required scope of the review, which may not be fully known until the Tribunal and FCA processes are completed.

## APPENDIX A.1 – PROPOSED AMENDMENTS

### RULE CHANGE REQUEST – EXTENSION OF TIME TO COMPLETE THE INITIAL REVIEW OF THE RATE OF RETURN GUIDELINES

#### TEXT OF PROPOSED AMENDMENTS

Clause 6.5.2(p)(1) of the National Electricity Rules to be amended to read:

- (1) at intervals not exceeding five years for the first interval and three years for all subsequent intervals, with the first interval starting from the date that the first *Rate of Return Guidelines* are *published* under these *Rules*; and

Clause 6A.6.2(p)(1)) of the National Electricity Rules to be amended to read:

- (1) at intervals not exceeding five years for the first interval and three years for all subsequent intervals, with the first interval starting from the date that the first *Rate of Return Guidelines* are *published* under these *Rules*; and

Rule 87(16)(a) of the National Gas Rules to be amended to read:

- (a) at intervals not exceeding five years for the first interval and three years for all subsequent intervals, with the first interval starting from the date that the first *rate of return guidelines* are published under these *Rules*; and

## 2019

1

\* Indicative dates only  
Note: The Government of Western Australia (WA) has announced its intention to transfer the responsibility for regulating Western Power's electricity networks from the ERA to the AER as well as its intention to transfer regulatory functions for WA's four natural gas pipelines from the ERA to the AER. The timeframes reflected in this calendar are indicative only and have not been endorsed by Ministers (at the Commonwealth or State level) or COAG.

.....	Current regulatory control/access arrangement period (remaining years)
.....	Upcoming regulatory control/access arrangement period
.....	Framework and approach process
.....	Regulatory determination process

**Framework and approach**

N(T)	Service provider notifies AER on need for framework & approach stage
N(A)	AER consults on need for framework & approach for component not triggered by service provider
N	AER issues notice on need for framework & approach stage
PP	Position paper on framework & approach
FA	Final framework and approach paper released by the AER
DA	Distribution network service provider notifies AER on the value of dual function assets

**Regulatory / revenue / access arrangement proposal**

FM	Service notifies the AER of its proposed methodology for forecasting expenditures
RP	Regulatory proposal due end of month
IP	AER publish issues paper on regulatory proposal
PF	AER hold public forum on issues paper and regulatory proposal
SUB	Submissions close on regulatory proposal & issues paper

**Draft decision**

DD	Draft determination released by the AER
PC	Predetermination conference on draft determination

**Final decision**

RRP	Revised regulatory proposal due
SUB	Submission on draft determination and revised proposal close
CSUB	Cross- submissions close
FD	Final determination released by the AER





25 May 2016

Mr Warwick Anderson  
General Manager, Network Regulation  
Australian Energy Regulator  
23 Marcus Clarke Street Canberra 2601

Via email: [Warwick.Anderson@aer.gov.au](mailto:Warwick.Anderson@aer.gov.au)

## **Request for changes to the National Electricity Rules and the National Gas Rules – Deferral of Rate of Return Guideline**

Dear Mr Anderson

I am writing to you following recent discussions between ENA and the AER on the proposed AER rule change application relating to the deferral of the next Rate of Return Guideline review. The ENA greatly appreciates the collaborative engagement which the AER has undertaken in its consideration and preparation of its rule change application.

The purpose of this letter is to indicate the support of the Energy Networks Association and its members for the sensible proposal to amend the National Electricity and Gas Rules to defer the requirement for completion of a review of the Rate of Return guideline for up to two years.

The ENA supports the proposed deferral through the mechanism of an expedited rule change process as this would recognise that significant elements of the guidelines are currently being considered in merits and judicial review proceedings, and the outcomes of these may not be known within the next 12 months.

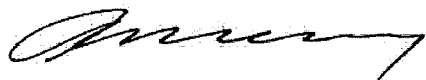
Proceeding with a rate of return guideline review in these circumstances risks duplication, additional costs and wasted resources given the potential for the outcomes of these proceedings to have implications for broader rate of return estimation processes. ENA considers these impacts would be contrary to the National Electricity and Gas Objectives and the long-term interests of consumers in promoting clear efficient investment signals.

Moreover, a deferral of the guideline timeline would provide other tangible benefits. For example, it would provide the best opportunity, following any resolution of review proceedings, for AER, energy consumer groups and network service providers to explore potential collaborative opportunities. Such engagement could focus future reviews on key priority issues, and identifying common ground, thereby further improving the efficiency and effectiveness of the guideline review process.

ENA further supports the expediting of this rule change application consistent with s.96 of the *National Electricity Law* and its equivalent provision in the *National Gas Law*. Approval of this rule change under the expedited process would provide timely clarity for all stakeholders on the review timing, prior to the expending of significant resources from any party ahead of the currently scheduled review.

Should you wish to discuss any of these issues further, please feel free to contact either myself (02 6272 1555) or Garth Crawford, Executive Director, Economic Regulation on 02 6272 1507.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'John Bradley', with a stylized, cursive script.

John Bradley  
**Chief Executive Officer**

6 May 2016



Mr Warwick Anderson  
General Manager – Network Financing and Reporting  
Australian Energy Regulator

By email: [warwick.anderson@aer.gov.au](mailto:warwick.anderson@aer.gov.au)

Dear Mr Anderson

**AER proposal for changes to the National Electricity Rules and National Gas Rules regarding the review process of the Rate of Return Guideline**

The Public Interest Advocacy Centre (PIAC) thanks the Australian Energy Regulator (AER) for the opportunity to provide comment on the AER's draft rule change proposal relating to the review requirement of the Rate of Return Guideline (the Guideline). The proposal covers both the National Electricity Rules and National Gas Rules.

PIAC understands that the AER is proposing to extend the timeframe for the completion of the next review of the Guideline from three to five years, which would effectively defer the required completion date from 17 December 2016 to 17 December 2018. The extension of time would apply to the next review only. We understand that the AER is making this proposal in light of the ongoing appeals process, including an impending judicial review, in relation to the AER's revenue determinations for the NSW distribution networks. The Australian Competition Tribunal's recent decision, which remitted the issue of debt and gamma to the AER, and the AER's application for judicial review of that decision, means that these two issues are still in contention. They are also key elements of the Guideline.

PIAC supports the AER's approach of reviewing the Guideline after the rate of return issues have been further clarified in the relevant appeals processes. We agree with the AER that there would be no value in commencing a review of the Guideline until the disputed issues are settled. This is a practical approach that ensures the next Guideline provides relevant and up-to-date guidance for stakeholders. We understand that the AER will look to the timetable of the next revenue determination resets and on that basis make best endeavours to ensure the timing of the review minimises any potential disruption.

PIAC agrees with the AER that the rule change proposal is unlikely significantly to impact on the energy market, and is unlikely materially to affect the regulation of gas and electricity network businesses as the current Guideline will remain in force. PIAC therefore agrees that this proposal should be treated as non-controversial and be expedited in accordance with section 96 of the *National Electricity Law* and section 304 of the *National Gas Law*.

Level 5, 175 Liverpool St  
Sydney NSW 2000  
Phone: 61 2 8898 6500  
Fax: 61 2 8898 6555  
[www.piac.asn.au](http://www.piac.asn.au)  
ABN: 77 002 773 524

If you require any further information, please do not hesitate to contact me.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Edward Santow', with a stylized, cursive script.

**Edward Santow**

**Chief Executive Officer**

Public Interest Advocacy Centre

Direct phone: +61 2 8898 6508

E-mail: [esantow@piac.asn.au](mailto:esantow@piac.asn.au)