

Australian Energy Market Commission

RULE DETERMINATION

National Electricity Amendment (WACC Reviews: Extension of Time) Rule 2009

Rule Proponent

Australian Energy Regulator

26 March 2009

A handwritten signature in black ink, appearing to read "John Tamblin", is written over a light blue circular watermark.

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For and on behalf of the Australian Energy Market Commission

RULE CHANGE

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About the AEMC

The Council of Australian Governments, through its Ministerial Council on Energy, established the Australian Energy Market Commission (AEMC) in July 2005 to be the Rule maker for national energy markets. The AEMC is currently responsible for Rules and policy advice covering the National Electricity Market. It is a statutory authority. Our key responsibilities are to consider Rule change proposals, conduct energy market reviews and provide policy advice to the Ministerial Council as requested, or on AEMC initiative.

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Abbreviations

AEMC	Australian Energy Market Commission
AER	Australian Energy Regulator
Commission	see AEMC
DNSP	Distribution Network Service Provider
MCE	Ministerial Council on Energy
NEL	National Electricity Law
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
NEO	National Electricity Objective
Rules	National Electricity Rules
TNSP	Transmission Network Service Provider
WACC	Weighted Average Cost of Capital

1 The AER's Rule change proposal

1.1 AER's Rule change proposal

On 16 February 2009, the Australian Energy Market Commission (Commission) received a Rule change proposal from the Australian Energy Regulator (AER) (Rule Change Proposal).¹ The AER is seeking to amend clauses 6A.6.2(g), 6A.6.4(c) and 6.5.4(b) of the National Electricity Rules (Rules) to extend the timeframe for the completion of its review of the Weighted Average Cost of Capital (WACC) parameters for electricity transmission and distribution network service providers (WACC Review), from 31 March 2009 to 1 May 2009. The AER also requested that its Rule change proposal be treated as non-controversial in nature and expedited under section 96 of the National Electricity Law (NEL).

1.2 Problem to be addressed by the Rule change

Under the Rules, the AER is currently required to complete its first WACC Review for electricity transmission and distribution businesses by 31 March 2009.²

The AER's WACC Review will determine the WACC values, methods and credit rating levels to be applied by the AER in making a transmission network service provider's (TNSP) revenue determination under Chapter 6A of the Rules and a distribution network service provider's (DNSP) building block determination under Chapter 6 of the Rules.³ TNSPs and DNSPs will then use the AER determined WACC values, methods and credit rating level to prepare their revenue/regulatory proposals for submission to the AER. Under the Rules, TNSPs are required to adopt the WACC parameters determined by the AER in their revenue proposals.⁴ However, DNSPs are able to request that the AER apply different WACC parameters to those determined in the AER's WACC Review by providing persuasive evidence in their regulatory proposals which justifies a departure.⁵

The AER states that it is seeking to extend the timeframe for its completion of its first WACC Review for the following reasons:

- The AER requests further time is required to consider the large volume of submissions received on the AER's Explanatory Statement on its WACC Review and the complex issues raised in these submissions. The AER suggests that the

¹ AER, 2009, *WACC Reviews: Extension of Time Rule change proposal*, 16 February, p. 3.

² On 26 June 2008, the AEMC made a Rule to align the timetables for the AER's transmission and distribution WACC Reviews. The AEMC's National Electricity Amendment (WACC, alignment of reviews) Rule 2008, No. 4 commenced on 1 July 2008.

³ AER, 2008, *Explanatory Statement of the revised WACC parameters (transmission) & Statement of regulatory intent on the revised WACC parameters (distribution)*, December, p. 16.

⁴ See clause 6A.6.2(b) of the Rules.

⁵ See clause 6.5.4(g) of the Rules.

complexity of the issues raised have been compounded by the impact of current economic conditions; and

- Additional consultation with interested parties on particular matters may be required.⁶

1.3 The AER's proposed solution

The AER is seeking to extend the timeframe for the release of its final decision on its WACC Review by one month, to 1 May 2009. The effect of the AER's proposed Rule is that it would allow the AER to publish its final decision on its WACC Review by 1 May every five years.

The AER suggests that its proposed Rule will ensure that "the AER can properly consider all issues in forming its final decision in accordance with its obligations under the NER [National Electricity Rules] and the NEL".⁷ The AER considers that this will contribute to the robustness of its final decision and ensure that it will be able to properly take into account current developments in global financial markets.⁸

The AER does not expect its Rule change proposal to impose any costs on electricity network businesses or electricity consumers.⁹ The AER notes that Queensland and South Australian DNSPs will be required to use the outcomes from the WACC Review to prepare regulatory proposals to be lodged by 31 May 2009.¹⁰ However, the AER expects that granting it an extension until 1 May 2009 to complete its WACC Review "will not materially affect" the ability of the Queensland and South Australian DNSPs to lodge their proposals by their 31 May 2009 deadline.¹¹

1.4 The Commission's process

On 19 February 2009, the Commission published a notice under sections 95 and 96 of the NEL, advising of its intention to commence first round consultation on the Rule Change Proposal and expedite the Rule change process on the grounds that the proposal is non-controversial, subject to the receipt of written objections.

On 4 March 2009, the Commission received a Rule change proposal from ETSA Utilities, seeking to provide the AER with a one off one month extension to complete its first WACC Review. ETSA Utilities' proposed Rule would also allow ETSA Utilities to submit its regulatory proposal to the AER within 60 days of the release of the AER's statement of regulatory intent on its WACC Review. ETSA Utilities requested that its Rule change proposal be treated as non-controversial and expedited under section 96 of the NEL. ETSA Utilities also requested that its

⁶ AER, Rule Change Proposal, p. 3.

⁷ Ibid.

⁸ AER, Rule Change Proposal 2009, p. 4.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

proposal be consolidated with the AER's Rule Change Proposal under section 93(1)(a) of the NEL and treated as having been received by the Commission on 16 February 2009, when the AER's Rule Change Proposal was received.¹²

On 10 March 2009, the Commission notified stakeholders of the receipt of ETSA Utilities' Rule change proposal, and invited stakeholders to also provide comments on ETSA Utilities' Rule change proposal when providing submissions on the AER's Rule change proposal.

Written objections to the expedition of the Rule Change Proposal were due on 6 March 2009. No written objections were received. As a result, the AER's Rule Change Proposal was expedited by the Commission in accordance with section 96 of the NEL.

1.5 Consultation on the Rule Change Proposal

Submissions on the Rule Change Proposal closed on 20 March 2009. 7 submissions were received in total from the following organisations:

- ETSA Utilities;
- ENERGEX;
- Ergon Energy;
- Joint Industry Associations (Energy Networks Association, the Australian Pipeline Association, Grid Australia).¹³

In general, all of the submissions received presented relatively consistent views on the Rule Change Proposal.

Most submissions noted the complexity of issues raised during the AER's WACC Review and the consequent need for the AER to be granted additional time to finalise its decision.¹⁴ However, submissions from ETSA Utilities, ENERGEX, Ergon Energy and the Joint Industry Associations indicated that this extension should only be granted if:

- the time for South Australian and Queensland DNSPs to submit their regulatory proposals to the AER was not affected; and

¹² Under section 93(1)(a) of the NEL, the Commission may treat two or more Rule requests as a consolidated Rule request, if the Commission considers it "necessary or desirable". Under section 93(2) of the NEL the Commission may treat a Rule which has been consolidated under section 93(1)(a) of the NEL as being "received by it on the day it receives either the first or last of the Rule requests forming part of the consolidated Rule request".

¹³ Supplementary submissions were received from ETSA Utilities, ENERGEX and Ergon Energy during the Commission's consultation period. These supplementary submissions did not vary in substance from the initial submissions made by these organisations.

¹⁴ See submissions on the Rule Change Proposal from: ENERGEX, p. 3; Joint Industry Associations, p. 1; ETSA Utilities, p. 2.

- the AER's time extension only applied to the AER's current WACC Review.¹⁵

ENERGEX and Ergon Energy also submitted that the start date for the next regulatory control period of the South Australian and Queensland DNSPs should not be affected by the AER's proposed Rule.¹⁶

¹⁵ See submissions on the Rule Change Proposal from: ENERGEX, p. 4; Joint Industry Associations, p. 1; ETSA Utilities, p. 4; Ergon Energy (supplementary submission), p. 4.

¹⁶ ENERGEX, Submission to the Rule Change Proposal, p. 4; Ergon Energy, Supplementary submission to the Rule change proposal, p. 4.

2 Rule Determination

2.1 The Commission's Determination

In accordance with section 102 of the NEL the Commission has made and published this Rule determination. In accordance with section 103 of the NEL the Commission has made the *National Electricity Amendment (WACC Reviews: Extension of Time) Rule 2009* (Rule as Made).

The Rule as Made will commence on 31 March 2009.

The Rule as Made, which is different from the proposed Rule included in the Rule Change Proposal, is attached at **Appendix A**.¹⁷

2.2 The Commission's Considerations

This Rule determination sets out the Commission's reasons for making the Rule as Made. In coming to its decision in favour of the Rule as Made, the Commission has taken into account:

- the Commission's powers under the NEL to make the Rule as Made;
- the revenue and pricing principles set out in section 7A of the NEL;
- the Rule Change Proposal and proposed Rule;
- the submissions received on the Rule Change Proposal, including the alternative Rule proposed by ETSA Utilities; and
- the Commission's analysis as to the ways in which the Rule Change Proposal will, or is likely to, contribute to the National Electricity Objective (NEO) so that the Rule making test is satisfied.

The Commission considers that the Rule as Made will, or is likely to, contribute to the achievement of the NEO. The Rule as Made satisfies the Rule making test because it:

- ensures the AER will be able to exercise appropriate regulatory scrutiny in making its final decision on its WACC Review, which will lead to a more rigorous and considered decision by the AER;
- ensures procedural fairness for South Australian and Queensland DNSPs as it preserves their current two month period following the AER's final decision on its WACC Review for them to make their regulatory proposals to the AER; and

¹⁷ Under section 103(3) of the NEL, a Rule as Made that is made in accordance with section 103(1) of the NEL need not be the same as the draft of the proposed Rule to which a notice under section 95 relates.

- is a proportionate solution to the issues raised by the Rule Change Proposal and in the submissions received, which is consistent with good regulatory practice.

The Commission considers that this is likely to lead to more efficient investment in electricity networks across the NEM and as a result, improved reliability and security of the national electricity system. It is also consistent with the revenue and pricing principles.

2.3 Differences between the Rule as Made and the proposed Rule

The Rule as Made differs from the proposed Rule by the AER in the following respects.

The Rule as Made amends clauses 6A.6.2(g), 6A.6.4(c) and 6.5.4(b) of the Rules to provide the AER with a one-off extension of one month for it to complete its first WACC Review, rather than a permanent time extension which would allow the AER to publish its final decision on its WACC Review by 1 May every five years. Under the Commission's Rule as Made, the AER will be able to complete its current WACC Review for transmission and distribution by 1 May 2009. Subsequent WACC reviews by the AER must be concluded by 31 March.

The Rule as Made also inserts a clause in Chapter 11 of the Rules to provide ETSA Utilities, Ergon Energy and ENERGEN with a corresponding one-off one month extension to submit their regulatory proposals to the AER for the regulatory control period of 2010-2015. ETSA Utilities, Ergon Energy and ENERGEN will now be able to submit their regulatory proposals to the AER for the regulatory control period of 2010-2015 by 1 July 2009. ETSA Utilities, Ergon Energy and ENERGEN will be required to submit subsequent regulatory proposals in accordance with clause 6.8.2(b)(1) of the Rules (i.e. at least 13 months before the expiry of their building block determinations).

Minor drafting changes have also been made to the AER's proposed Rule to improve the clarity of the Rule as Made.

2.4 The Commission's power to make the Rule

The Commission is satisfied that the Rule as Made falls within the subject matters for which the Commission may make Rules as set out in section 34 of the NEL and in Schedule 1 to the NEL. The proposed Rule is within the matters set out in:

- Section 34 (1)(a)(iii) of the NEL as it relates to the activities of persons participating in the NEM or involved in the operation of the national electricity system; and
- Item 33(a) of Schedule 1 of the NEL as it relates to reviews by the AER.

3 The Commission's assessment against the NEO

This Chapter sets out the Commission's assessment of the Rule Change Proposal and its reasons for making the Rule as Made.

3.1 Methodology

In assessing the Rule Change Proposal, the Commission has considered the counterfactual arrangements against which the Rule change is being compared to in light of the NEO. In this case, the relevant counterfactual would be the continuation of the current arrangements in the Rules under which:

- the AER would be required to publish its final decision on its WACC Review by 31 March 2009;
- South Australian and Queensland DNSPs would be required to submit their regulatory proposals for their revenue resets to the AER by 31 May 2009;
- the AER would be required to complete its building block determinations for the South Australian and Queensland DNSPs by 1 May 2010; and
- the next regulatory control period for the South Australian and Queensland DNSPs would commence on 1 July 2010.

3.2 Rule making test and the National Electricity Objective

The Rule making test states that 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 NEO.¹⁸

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

- price, quality, safety, reliability and security of supply of electricity; and
- the reliability, safety and security of the national electricity system.¹⁹

The NEO is founded on the concepts of economic efficiency (including productive, allocative and dynamic dimensions of efficiency), good regulatory practice (which refers to the means by which regulatory arrangements are designed and operated) as well as reliability, safety and security priorities. Of particular relevance for the Rule Change Proposal is good regulatory practice; including appropriate regulatory scrutiny, procedural fairness, and proportionality.

¹⁸ See section 88(1) of the NEL.

¹⁹ See section 7 of the NEL.

As the AER considers that its proposed Rule is non-controversial in nature, the AER does not expect the proposed Rule will have a significant effect on the NEM.²⁰ However, the AER considers that its proposed Rule would or is likely to contribute to the NEO by promoting efficient investment in electricity networks across the NEM, as it will allow:

- all of the key issues raised in submissions to the WACC Review to be given full and proper consideration by the AER, particularly those related to the current conditions in financial markets; and
- ensure that the AER's final decision in its WACC Review is not hampered by time constraints.²¹

3.3 Revenue and pricing principles

As the matters raised by this Rule Change Proposal concern the regulatory framework governing transmission and distribution revenue and pricing, the Commission has also taken into account the revenue and pricing principles as set out in section 7A of the NEL.

The revenue and pricing principles relate to:

- providing a reasonable opportunity for regulated network service providers to recover at least their efficient costs;
- effective incentives to promote efficiency;
- ensuring that prices provide regulated network service providers with a return commensurate with the regulatory and commercial risks involved in providing their services; and
- regard to the economic costs and risks of the potential for under and over utilisation and investment in a distribution or transmission system.

3.4 The Commission's analysis

The Commission's assessment of the Rule Change Proposal has involved a consideration of the issues raised by the AER and in the submissions that have been received. The issues include:

- the need for appropriate regulatory scrutiny of the issues raised in the AER's WACC Review (as raised by the AER in the Rule Change Proposal); and
- the need to retain procedural fairness in the process for South Australian and Queensland DNSPs to submit their regulatory proposals to the AER for their

²⁰ AER, Rule Change Proposal, p. 3.

²¹ AER, Rule Change Proposal, pp. 3-4.

revenue resets (as raised in submissions from ETSA Utilities; ENERGEX; Ergon Energy; and the Joint Industry Associations).

In addition, as noted in section 3.1 above, in undertaking its assessment of the Rule Change Proposal, the Commission has considered the effect of the relevant counterfactual arrangements to the Rule Change Proposal (i.e. the continuation of the current arrangements in the Rules).

3.4.1 Regulatory scrutiny in the AER's WACC Review

3.4.1.1 AER's Rule change proposal

Under the Rules, the AER is currently required to complete its first WACC Review for electricity transmission and distribution businesses by 31 March 2009 and generally complete subsequent reviews at five year intervals thereafter.

In the Rule Change Proposal, the AER is seeking to extend the timeframe for it to complete its first WACC Review by one month, to 1 May 2009. However, the effect of the AER's proposed Rule is that it would allow the AER to publish its final decision on its WACC Review by 1 May permanently, not just for its current WACC Review.

The AER suggests that the main benefit of its proposed Rule change will be improved regulatory scrutiny in its WACC Review as it will allow:

- "all of the key issues raised in submissions to be given full and proper consideration, in particular those related to the current conditions in financial markets; and
- ensure that the outcome of the AER's final decision is not hampered by time constraints".²²

3.4.1.2 Submissions to the AER's Rule change proposal

Most submissions recognised and appreciated the importance of the WACC Review and the need for the AER to have sufficient time to make a robust final decision.²³ Most submissions also noted the complexity of issues raised during the WACC Review and the consequent need for the AER to be granted additional time to finalise its decision.²⁴

As submitted by ENERGEX:

²² AER, Rule Change Proposal, pp. 3-4.

²³ See submissions on the Rule Change Proposal from: ENERGEX, p. 3; Joint Industry Associations, p. 1; ETSA Utilities, p. 2.

²⁴ Ibid.

ENERGEX recognises and appreciates the significance of the rate of return review and the extensive material that has been developed and assessed through the consultation period. ENERGEX is also very keen to provide the opportunity for the AER to issue a well consulted and considered decision.²⁵

However, while acknowledging this need submissions from ETSA Utilities, ENERGEX, Ergon Energy and the Joint Industry Associations indicated that this extension should only be granted if:

- the time for South Australian and Queensland DNSPs to submit regulatory proposals to the AER was not affected; and
- the AER's time extension only applied to the AER's current WACC Review.²⁶

As submitted by the Joint Industry Associations:

The JIA [Joint Industry Associations] can only support the requested extension of time if the AER is able to ensure that the affected businesses are not adversely impacted by the delay by entering into suitable arrangements with those businesses. In addition, the JIA is strongly of the view that any change to the timing of the Review should apply to the current review only. It is not appropriate for an urgent Rule change request to permanently change the timing of future cost of capital reviews to be undertaken by the AER.²⁷

ENERGEX's submission suggested that a permanent time extension for the AER's future WACC Reviews would impair the ability of South Australian and Queensland DNSPs to prepare their regulatory proposals, and would effect:

every future Regulatory Proposal to be submitted by the distribution entities if the regulatory control period is to be 5 years. This places the Queensland and South Australian distribution entities at a distinct disadvantage in relation to the timing of the current and future reviews. All other entities have more time available to them to address the SoRI [Statement of Regulatory Intent] and propose departures in the relevant Regulatory Proposals as envisaged by the Rules.²⁸

ENERGEX and Ergon Energy also argued that the start date for the next regulatory control period of the South Australian and Queensland DNSPs should not be affected by the AER's proposed Rule.²⁹

²⁵ ENERGEX, Submission to the Rule Change Proposal, p. 3.

²⁶ See submissions on the Rule Change Proposal from: ENERGEX, p. 4; Joint Industry Associations, p. 1; ETSA Utilities, p. 4.; Ergon Energy (supplementary submission), p. 4.

²⁷ Joint Industry Associations, Submission to the Rule Change Proposal, p. 2.

²⁸ ENERGEX, Submission to the Rule Change Proposal, p. 3.

²⁹ ENERGEX, Submission to the Rule Change Proposal, p. 4; Ergon Energy, Supplementary submission to the Rule Change Proposal, p. 4.

3.4.1.3 The Commission's assessment

The Commission notes the importance of the AER's WACC Reviews and the direct impact they have on the revenue and building block determinations made by the AER. These determinations have consequent impacts on the revenues earned by TNSPs and DNSPs and the level and efficiency of investment in electricity networks in the NEM. The AER's revenue determinations also impact on end use consumers, as network charges comprise a significant portion of the prices paid by end use consumers for electricity.

The Commission notes that a large number of submissions have been received on the AER's WACC Reviews and that the AER's current WACC Reviews are its first. The Commission also acknowledges the AER's need to consider the potential impact of the global financial situation on its final decision.

As a result, due to the potentially wide ranging impact of the AER's decisions in its WACC Reviews, the Commission considers that it is imperative that the AER's final decision is well considered and that an appropriate level of regulatory scrutiny is applied to all of the relevant issues that have been raised in the AER's current WACC Review. The Commission also acknowledges that most of the submissions received on the Rule Change Proposal supported an extension of time for the AER's WACC Review to ensure the AER is able to make a well considered decision.

The Commission accepts the AER's need for more time to fully consider all of the complex issues raised during its WACC Reviews. Without such additional time, there is a risk that the AER may not be able to fully assess all of the issues associated with the WACC Review and its final decision may not be as considered and rigorous as it could be with additional time. Accordingly, the Commission has determined to provide the AER with a one month extension to complete its current WACC Review in its Rule as Made. The AER will now be required to complete its first (and current) WACC Review for transmission and distribution by 1 May 2009.

The Commission considers that the AER's one month time extension to complete its WACC Review should be a one-off extension and should only apply to the AER's first WACC Review for transmission and distribution. As a result, under the Commission's Rule as Made the AER will be required to complete subsequent WACC Reviews by 31 March.

The Commission considers that its Rule as Made is a proportionate response to the issues raised in the Rule Change Proposal, as the Rule Change Proposal related to current circumstances only. The AER did not provide adequate reasoning in the Rule Change Proposal for a permanent time extension for the completion of its WACC Reviews.

The Commission also notes that a number of submissions to the Rule Change Proposal do not support a permanent time extension for the AER's future WACC Reviews, and have suggested that such a change to the Rules is likely to impair the ability of Queensland and South Australian DNSPs to submit robust regulatory proposals into the future. The impact of the AER's proposed Rule on the regulatory proposals of Queensland and South Australian DNSPs is discussed further in section 3.4.2 below.

3.4.2 Procedural fairness in the process for DNSPs to submit regulatory proposals

3.4.2.1 AER's Rule change proposal

In its Rule Change Proposal, the AER indicates that its proposed Rule "is not expected to impose costs on electricity network businesses or electricity consumers".³⁰ The AER notes that the first businesses to submit regulatory proposals which are subject to the outcomes of the AER's WACC Review are currently required to lodge their regulatory proposals to the AER by 31 May 2009.³¹ However, the AER states that providing the AER with a one month extension to complete its WACC Review "will not materially affect the ability of Queensland and South Australian electricity businesses to prepare building block proposals to be lodged by 31 May 2009".³²

3.4.2.2 Submissions to the AER's Rule change proposal

Submissions to the Rule Change Proposal strongly disagree with the AER's assertion regarding the impact of its proposed Rule on the ability of South Australian and Queensland DNSPs to submit their regulatory proposals by 31 May 2009.

ENERGEX noted in its submission:

The reduction in time between the finalisation of the SoRI [Statement of Regulatory Intent] and the date for the submission of the Regulatory Proposal materially and significantly diminishes ENERGEN's rights under the Rules to assess the SoRI and to develop and incorporate persuasive evidence to depart from the SoRI in the Regulatory Proposal and then progress that Proposal through the necessary (and organisationally dependant) governance and sign off framework.³³

Ergon Energy and ETSA Utilities also voiced similar concerns, with ETSA Utilities stating:

In any normal revenue reset proposal a wealth of inputs must be assembled in the short period before lodgment using the latest demand forecasts, energy flow patterns, project information and input costs. If in addition ETSA Utilities is required, in a short timeframe, to adopt and develop persuasive evidence supporting adjusted parameters, the timeframe within which this is to be accomplished is very short. Thus, in circumstances where AER has proposed that ETSA Utilities lose 30 days from the original timeframe for

³⁰ AER, Rule Change Proposal, p.4.

³¹ Ibid.

³² Ibid.

³³ ENERGEN, Submission to the Rule Change Proposal, p. 3.

submission of its proposal, there is a very serious risk that our proposal will be detrimentally affected.³⁴

ETSA Utilities indicated that it is likely that it would need to seek an expert opinion on whether it should propose alternative WACC parameters in its regulatory proposal, which would take additional time.³⁵ It was also noted by ETSA Utilities that the internal review and sign off process of its regulatory proposal by its Executive and Board could take more than a month, particularly as some of its Directors are based overseas.³⁶

To ensure that ETSA Utilities would be able to formulate a robust regulatory proposal, ETSA Utilities has proposed a consequential Rule change to the Rule Change Proposal, which would enable ETSA Utilities to submit its regulatory proposal within 60 days of the publication of the AER's final decision in its WACC Review.³⁷

Ergon Energy's submission provided qualified support for ETSA Utilities' Rule change proposal, but suggested that the Queensland DNSPs should also benefit from ETSA Utilities' proposed time extension to submit its regulatory proposal.³⁸

Submissions from ENERGEX, Ergon Energy and the Joint Industry Associations indicated that the Rule Change Proposal should be amended to ensure that the South Australian and Queensland DNSPs should not be disadvantaged and are able to commence their next regulatory control period as scheduled.³⁹

3.4.2.3 The Commission's assessment

The Commission notes the importance of regulatory proposals to the long term revenues of DNSPs and that a significant amount of time is required by DNSPs to prepare and sign off their regulatory proposals, in accordance with good corporate governance and the requirements in the Rules.⁴⁰ The Commission acknowledges that additional time would also be required by DNSPs to build a sufficient evidence base, if they are intending to request a departure in their regulatory proposal from the WACC parameters determined by the AER.

As discussed above in section 3.4.1.3, the Commission has determined to provide the AER with a one-off time extension of one month for it to complete its first WACC

³⁴ ETSA Utilities, Submission to the Rule Change Proposal, p. 3. Also, see pp. 2-4 of Ergon Energy's supplementary submission to the Rule Change Proposal.

³⁵ ETSA Utilities, Submission to the Rule Change Proposal, p. 2.

³⁶ ETSA Utilities, Submission to the Rule Change Proposal, p. 3.

³⁷ ETSA Utilities, Submission to the Rule Change Proposal, p. 8.

³⁸ Ergon Energy, Submission to the Rule Change Proposal, p. 1.

³⁹ See submissions on the Rule Change Proposal from: ENERGEX, p. 4; Joint Industry Associations, p. 2; Ergon Energy (supplementary submission), p. 4.

⁴⁰ Clauses S6.1.1(5) and S6.1.2(6) of the Rules require sign off by directors of the key assumptions made in regulatory proposals relating to capital and operation expenditure forecasts.

Review for transmission and distribution. The AER will now be required to complete its first WACC Review by 1 May 2009 instead of 31 March 2009.

Without any further changes to the Rules, this would mean that the South Australian and Queensland DNSPs would have four weeks instead of eight weeks to finalise their regulatory proposals following completion of the AER's WACC Review. This reduced timeframe could create some risks for the South Australian and Queensland DNSPs. The Commission considers that the South Australian and Queensland DNSPs may have insufficient time to fully develop and submit their regulatory proposals to the AER by their current 31 May 2009 deadline. The South Australian and Queensland DNSPs may not have a reasonable opportunity to develop a sufficient evidence base in their regulatory proposals, if they are intending to request a departure from the AER determined WACC parameters. This would not be consistent with the principles of procedural fairness.⁴¹

In the interests of maintaining procedural fairness in the process for the South Australian and Queensland DNSPs to submit their regulatory proposals, the Commission has determined to make consequential amendments to the AER's proposed Rule to enable Ergon Energy, ENERGEX and ETSA Utilities to submit their regulatory proposals by 1 July 2009 for the regulatory control period of 2010-2015. The Commission considers that ensuring that the South Australian and Queensland DNSPs have sufficient time to develop a robust and comprehensive regulatory proposal is likely to lead to more effective decision making by the AER in its building block determinations, which will improve the efficiency of investment in networks in the NEM.⁴²

It should be noted that the Commission's Rule as Made only provides for a one-off time extension for the regulatory proposals relating to the regulatory control period of 2010-2015 for Ergon Energy, ENERGEX and ETSA Utilities. The Commission considers that this is a proportionate response to the issues raised in submissions to the Rule change proposal. The timing for other DNSPs and TNSPs in the NEM to submit their regulatory/revenue proposals to the AER will not be affected by the Commission's Rule as Made. Further, the timing of subsequent regulatory proposals by Ergon Energy, ENERGEX and ETSA Utilities (i.e. for the regulatory control period of 2015-2020 and beyond) will also be unaffected by the Commission's Rule as Made.

⁴¹ Procedural fairness relates to the processes that are used by decision makers and ensures that decision making processes are fair and reasonable. It requires decision makers to provide persons or bodies which may have an interest in a decision with a reasonable opportunity to put forward their case as to why a particular decision should or should not be made. Decisions which are made in accordance with the principles of procedural fairness are likely to be more rigorous, as they will have been made after the full consideration of all of the issues raised by key stakeholders.

⁴² Under clause 11.16.7 of the Rules, Ergon Energy and ENERGEX may submit their first regulatory proposals to the AER with revised prices and proposed X factors on or before 1 July 2009, if the AER's statement of regulatory intent in its WACC Review differs materially from its proposed statement of regulatory intent. The Commission notes that no such corresponding jurisdictional derogation applies to ETSA Utilities in the Rules. However, as these provisions only enable the Queensland DNSPs to revise their prices and proposed X factors rather than resubmit their entire regulatory proposal, the Commission has considered it appropriate to also extend the 1 July 2009 time extension for the submission of regulatory proposals to Ergon Energy and ENERGEX in its Rule as Made.

As a result, Ergon Energy, ENERGEX and ETSA Utilities will be required to submit subsequent regulatory proposals to the AER in accordance with clause 6.8.2(b)(1) of the Rules (i.e. at least thirteen months prior to the expiry of their existing building block determinations).

The Commission notes that submissions on the Rule Change Proposal from ENERGEX and the Joint Industry Associations have indicated that the South Australian and Queensland DNSPs should be able to commence their next regulatory control period as scheduled on 1 July 2010.⁴³ The Commission has not received any proposals to change the timing of the next regulatory control period of the South Australian and Queensland DNSPs. As a result, the Commission has not considered this issue in making its final Rule determination and Rule as Made. Therefore, the next regulatory control period of ETSA Utilities, Ergon Energy and ENERGEX will commence on 1 July 2010 as currently scheduled, and the AER will publish the building block determinations for these distributors by 1 May 2010 as required under the Rules.⁴⁴

3.5 Assessment against Rule making test

The Commission has analysed and assessed the Rule Change Proposal. The Commission considers that its Rule as Made satisfies the Rule making test as the Rule as Made would:

- ensure the AER will be able to exercise appropriate regulatory scrutiny in making its final decision in its WACC Review, which is likely to lead to more rigorous and considered decisions by the AER; and
- ensure procedural fairness for South Australian and Queensland DNSPs as it preserves their current two month period following the AER's final decision on its WACC Review for them prepare and submit their regulatory proposals to the AER. The Commission suggests that this time extension is likely to lead to more comprehensive and robust regulatory proposals from the affected DNSPs.

The Commission considers that a more rigorous and considered decision by the AER in its WACC Review together with more comprehensive and robust regulatory proposals from the South Australian and Queensland DNSPs, is likely to provide for more efficient investment in electricity networks across the NEM and as a result, improved reliability and security of the national electricity system.

As the Rule Change Proposal relates to the AER's current circumstances (and not WACC Reviews more generally), the Rule as Made provides a one-off extension for concluding the AER's current WACC Reviews only. The Rule as Made also provides the South Australian and Queensland DNSPs with a corresponding one-off extension

⁴³ ENERGEX, Submission to the Rule Change Proposal, p. 4; Joint Industry Associations, Submission to the Rule Change Proposal, p. 2.

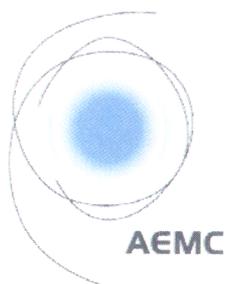
⁴⁴ Under clause 6.11.2 of the Rules, the AER is required to make its building block determinations as soon as practicable and no later than 2 months before the commencement of the next regulatory control period.

for submitting their regulatory proposals. The Commission considers that this is a proportionate response to address the issues that have been raised by the Rule Change Proposal and in submissions.

Therefore, the Commission considers that the Rule as Made would give effect to the revenue and pricing principles and would, or is likely to, contribute to the achievement of the NEO.

A Rule as Made

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National Electricity Amendment (WACC Reviews: Extension of Time) Rule 2009 No. 6

under the National Electricity Law as applied by:

- (a) the National Electricity (South Australia) Act 1996;
- (b) the Electricity (National Scheme) Act 1997 of the Australian Capital Territory;
- (c) the National Electricity (New South Wales) Act 1997 of New South Wales;
- (d) the Electricity - National Scheme (Queensland) Act 1997 of Queensland;
- (e) the Electricity - National Scheme (Tasmania) Act 1999 of Tasmania;
- (f) the National Electricity (Victoria) Act 2005 of Victoria; and
- (g) the Australian Energy Market Act 2004 of the Commonwealth.

The Australian Energy Market Commission makes the following Rule under the National Electricity Law.

A handwritten signature in black ink, appearing to read 'John Tamblyn', is written over the printed name and title. The signature is fluid and cursive, with a large loop at the beginning and end.

John Tamblyn
Chairman

Australian Energy Market Commission

National Electricity Amendment (WACC Reviews: Extension of Time) Rule 2009 No. 6

1. Title of Rule

This Rule is the *National Electricity Amendment (WACC Reviews: Extension of Time) Rule 2009 No. 6*.

2. Commencement

This Rule commences operation on 31 March 2009.

3. Amendment of the National Electricity Rules

The National Electricity Rules are amended as set out in Schedule 1.

Schedule 1 Amendment of National Electricity Rules

(Clause 3)

[1] Clause 6.5.4 Review of rate of return

Omit clause 6.5.4(b) and substitute:

- (b) The first review is to be concluded by 1 May 2009 and further reviews are to follow at intervals not exceeding, in any case, five years with the first interval starting from 31 March 2009.

[2] Clause 6A.6.2 Return on capital

Omit clause 6A.6.2(g) and substitute:

- (g) The *AER* must conclude the first review by 1 May 2009 and conclude subsequent reviews at intervals of five years with the first interval starting from 31 March 2009.

[3] Clause 6A.6.4 Estimated cost of corporate income tax

Omit clause 6A.6.4(c) and substitute:

- (c) The *AER* must conclude the first review by 1 May 2009 and conclude subsequent reviews at intervals of five years with the first interval starting from 31 March 2009.

[4] Rule 11.26 Rules consequential on the making of the National Electricity Amendment (WACC Reviews: Extension of Time) Rule 2009

After rule 11.25, insert:

Part V WACC Reviews: Extension of Time

11.26 Rule consequential on the making of the National Electricity Amendment (WACC Reviews: Extension of Time) Rule 2009

11.26.1 Definitions

In this rule 11.26:

regulatory control period 2010-2015 means the *regulatory control period* commencing on 1 July 2010 in relation to *Distribution Network Service Providers* in South Australia and Queensland.

11.26.2 Extension of time to submit a regulatory proposal for the regulatory control period 2010-2015

- (a) This rule 11.26 applies to *Distribution Network Service Providers* in South Australia and Queensland.
- (b) Despite clause 6.8.2(b)(1), where a relevant *Distribution Network Service Provider* is required to submit a *regulatory proposal* for the *regulatory control period* 2010-2015 to the AER under clause 6.8.2(a), that *regulatory proposal* must be submitted by 1 July 2009.

END OF RULE AS MADE
