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Tuesday, 30 September 2025

Mr Scott Haig  
Acting General Manager,  
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Australian Energy Regulator  
GPO Box 3131  
CANBERRA ACT 2601

Submitted by email: [REZ@aer.gov.au](mailto:REZ@aer.gov.au)

Dear Mr Haig

## **2025 Review of revenue determination guideline for NSW non-contestable projects**

Transgrid welcomes the opportunity to respond to the Australian Energy Regulator's (**AER**) Draft Transmission Efficiency Test and revenue determination guideline for non-contestable network infrastructure projects Guideline (**Draft Guideline**) and accompanying Explanatory Statement. The Draft Guideline proposes to introduce a new chapter 7 in the Non-contestable Guideline that outlines how the AER will address hybrid revenue determinations. Hybrid revenue determinations include at least one contestable component derived as a result of a competitive assessment process.

As the primary Transmission Network Service Provider (**TNSP**) and System Strength Service Provider (**SSSP**) for NSW, Transgrid is committed to delivering outcomes that promote the long-term interests of consumers. Transgrid operates the high voltage transmission network in New South Wales (**NSW**) and the Australian Capital Territory (**ACT**), which services about 4 million customers. Appropriate treatment and decisions regarding expenditure, revenues and transmission prices is vital to ensuring that there are appropriate funds to continue to supply the 4 million customers across NSW and the ACT.

The Transmission Efficiency Test and revenue determination guideline for NSW non-contestable network infrastructure projects (**Non-contestable Guideline**) sets out how the AER will exercise its functions under Part 5 of the EII Act for non-contestable revenue determinations. The AER has based the non-contestable revenue determination process and regulatory framework on Chapter 6A of the National Electricity Rules (**NER**). This Non-Contestable Guideline also includes how the AER will enable the EII Act framework to adopt rule changes and ensure the AER has a clear basis to apply an approach consistent with the relevant NER chapter.

We broadly support the Draft Guideline including:

- Clarity on upcoming revenue determinations critical to the security and reliability of the NSW transmission system,
- Key clauses such as financeability treatment remain intact and incentives schemes are excluded for contestable components of a hybrid revenue determination, and

- broad alignment with the NSW *Electricity Infrastructure Investment Act 2020* (**EII Act**) to ensure clarity.

Transgrid appreciates the ongoing, detailed and constructive engagement with the AER in relation to a number of projects that will be subject to these changed regulatory arrangements. Transgrid would welcome further engagement with the AER during the development of the proposed guidance note. For example, we would value further discussion on how, under the EII Act and Electricity Infrastructure Investment Regulation 2021 (**EII Regulation**), incentive schemes will be applied in a non-contestable revenue determination noting the complexities involved.

We would appreciate the AER clarifying several matters outlined below. In addition, the table contained in Attachment 1 provides further commentary and seeks clarification on a number of the below-mentioned points.

### **The timeliness of the Hybrid revenue determination process warrants further consideration**

The proposed amendments to the Non-contestable Guideline to address hybrid revenue determinations includes the evaluation of the competitive assessment process, procurement strategy and the process for making a revenue determination.

Transgrid supports a hybrid determination process that is proportionate to the risk to consumers. Where the competitive procurement process (overseen and approved by the AER) determines the majority of the project costs, the hybrid revenue determination could, where practicable, be time-bound to reflect the contestable pathway (i.e. closer to 42 business days rather than 126 business days). This recognises that the AER has tested the genuineness and competitiveness of the process and, therefore, the efficiency of the resulting costs.

We acknowledge that a hybrid determination process may be more complex than either a sole contestable or non-contestable determination. The hybrid determination must carefully consider the critical delivery milestones set by the Infrastructure Planner (**IP**). To ensure projects directed under the Priority Network Infrastructure Projects (**PNIP**) framework can meet urgent system needs, we consider that the determination timetable could fast-track contestable-driven cost reviews while maintaining the appropriate checks on non-contestable elements.

### **There is an opportunity to streamline AER approval of the procurement report for hybrid revenue determinations**

As is the case for contestable revenue proposals, the AER requires the IP to provide a report at the conclusion of the procurement process for hybrid revenue determinations. The AER expects to receive this report prior to the network operator submitting its revenue proposal, to determine whether the competitive assessment process was genuine and appropriate for the contestable component. Where the AER is satisfied that the competitive process was genuine and appropriate, the AER presumes the principles under section 37 of the EII Act, and the Transmission Efficiency Test have been met and would make a revenue determination consistent with the outcome of the competitive process.

The NSW Government is increasingly directing network operators to carry out projects under the PNIP framework. A direction issued under EII Act becomes a condition of a network operator's licence under the *NSW Electricity Supply Act 1995*. The timing for projects subject to a PNIP direction are often very tight, reflecting the urgency of the projects to address network needs and deliver benefits to consumers; a PNIP direction will often require the submission of a revenue proposal by a certain date.

To assist with compliance and timely submission of the hybrid revenue proposal in accordance with the direction, we encourage the AER to streamline the approval time period for the report or adopt a deemed compliant report approach. This is because the AER is closely involved in the procurement process up until that point. Under the 'Revenue determination guideline for NSW contestable network projects' (**Contestable Guidelines**) the AER has three procurement roles:

1. To approve the procurement strategy via the IP to indicate that the AER is satisfied that the proposed competitive assessment process was likely to be 'genuine and competitive'. Additionally, the AER may endorse other tender related documentation such as the Tender Evaluation Plan and Negotiation Plan (following approval by the IP).
2. Monitoring the competitive procurement process. The AER would likely act as an observer for all procurement and tendering processes, and an AER representative may attend meetings.
3. To approve the final procurement report via the IP to confirm that the process was genuine and competitive. The same AER team will also assess the revenue proposal and as a result the outcome of the procurement process should be able to be reflected in the revenue determination in a timely manner.

#### **Further guidance on schedule of payment commencement would support revenue proposals**

Network Operators are required to include within their revenue proposals a schedule of payments setting out quarterly amounts proposed to be paid to the Network Operator by the Scheme Financial Vehicle for carrying out the project. The proposal must also include the methodology by which these quarterly amounts are to be calculated from the total revenue.

Given this, and the importance of revenue timing for project financeability, we request that the final guideline or associated guidance provide direction as to when a Network Operator can propose the commencement of payments.

#### **Further clarity on use of adjustment mechanisms for contestable components**

The AER notes in the explanatory statement that adjustment mechanisms included in the contractual arrangements entered into as required as part of a genuine and appropriate competitive assessment process will also be included in our hybrid revenue determination.

We encourage the AER to provide further clarity on the use of adjustment mechanisms for contestable components of a hybrid determination. To this end, we have included in Attachment 1 several detailed commentary and clarifications on the Draft Guidelines for the AER's consideration.

In broad terms, the AER could provide further examples and guidance as to the translation of adjustment mechanisms into a hybrid determination. This will assist the IP and Network Operators in efficient procurement and negotiation processes and lower the overall cost to consumers. Furthermore, we consider that the Final Guideline should highlight that an adjustment event in the contractual arrangement may trigger a corresponding event in a non-contestable adjustment mechanism. For example, where a contestable project is delayed, it may result in a network operator incurring additional project management costs for the non-contestable components.

#### **Aligning with Chapter 6A of the NER to reflect the recent non-network option rule change**

The Non-contestable Guideline includes a set of rules, known as 'EII Chapter 6A', which is a modified version of Chapter 6A of the NER applied to NSW network infrastructure projects.

The AER is required, as far as is reasonably practicable, to make its Non-contestable Guideline (including EII Chapter 6A) consistent with Chapter 6A of the NER, as it applies to making a revenue determination.

EII Chapter 6A was last updated in July 2024. Since that time, there have been important changes to Chapter 6A of the NER, in particular the March 2025 rule change, 'Improving the cost recovery arrangements for transmission non-network options' (**Rule Change**).<sup>1</sup>

The Rule Change was requested by Transgrid to address regulatory barriers that were limiting the delivery of non-network options.<sup>2</sup> Prior to the Rule Change, there was uncertainty for TNSPs and network support service providers that network support payments that are commercially agreed in a network support agreement would be approved as prudent and efficient for the life of a network support agreement. The AEMC considered that changes to the NER were required to provide TNSPs with additional cost recovery certainty when implementing non-network options, reducing the risk of delayed project delivery and reduced consumer benefits. To address these issues, the Rule Change created an ex-ante process that allows TNSPs to adjust their network support allowance when significant non-network options change or emerge mid regulatory control period.

As this rule change is specifically designed to allow cost recovery during a regulatory control period, it presents no alignment or compatibility issues with the cost recovery structures under the EII Act. They are intended to provide flexibility and certainty and do not displace or override the existing EII Act revenue proposal, revenue determination and annual adjustments processes for non-contestable components of hybrid projects.

We recommend that the Non-contestable Guideline be updated to reflect the current revision of Chapter 6A of the NER, version 235 dated 4 September 2025, or otherwise, incorporate and reflect the important changes made by the AEMC to reduce cost recovery uncertainty for non-network options.

We agree with the AER's view that *"it is likely that most updates to Appendix A resulting from relevant changes to Chapter 6A of the NER will be minor or administrative in nature"*.<sup>3</sup> Given this, we encourage the AER to incorporate the changes required to align with the Final Rule as a matter of priority in this review process, rather than postpone it to the AER's anticipated review in 2026. This will assist in providing network operators with adequate certainty around the acceptability of long-term contractual arrangements by the AER and therefore, avoid any prolonged cost recovery uncertainty. Furthermore, this will support our ability to commit to long-term non-network solutions under the EII Act particularly in situations which require a contractual agreement similar to those that drove the March 2025 Rule Change<sup>4</sup>.

We look forward to working with the AER to further develop the Guideline. If you or your team require any further information or clarification on this submission, please contact Zainab Dirani, Policy and Advocacy Manager, at [zainab.dirani@transgrid.com.au](mailto:zainab.dirani@transgrid.com.au).

Yours sincerely



Alex McPherson

General Manager of Regulation & Policy

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<sup>1</sup> See ['Improving the cost recovery arrangements for Transmission non-network options'](#).

<sup>2</sup> See [National Electricity Rules change proposal \(non-controversial\)](#), Transgrid, 17 April 2024.

<sup>3</sup> See [Transmission Efficiency Test and revenue determination guideline for non-contestable network infrastructure projects](#)

<sup>4</sup> See AEMC - [Improving the cost recovery arrangements for Transmission non-network options | AEMC](#)

## Attachment 1 – Specific Transgrid commentary

Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
<b>Draft Guideline (Non-Contestable Network infrastructure projects)</b>  <b>EII Regulation</b>	7.1  51 (2)	7.1 - Framework for hybrid revenue determinations  Adjustment of amounts - the Act, ss 38(10)(f), 40 and 42	<b>Reviewing and Remaking Hybrid Determinations (contestable element) based on construction risk adjustment mechanisms - threshold and nature of adjustments</b>	<p>Section 7.1 of the Draft Guidelines indicates that the EII Regulation requires that <i>"all adjustments for a contestable component of a hybrid revenue determination, whether or not the revenue determination is reviewed and remade, must be carried out in accordance with the contractual arrangements the Network Operator entered into as required under the relevant authorisation."</i> This is based on section 51(3)(b) of the EII Regulation.</p> <p>Section 51(2) of the EII Regulation indicates a provision in a revenue determination for adjustment may specify <i>"that a particular adjustment may or may not require the revenue determination to be reviewed and remade"</i>. It provides an example where <i>"the occurrence of a significant event may require the revenue determination to be reviewed and remade"</i>.</p> <p>Further, in the context of the above it is important to note that other recent revenue determinations for fully contestable projects under the Contestable Guidelines have used language such as <i>"whether an adjustment mechanism requires a revenue determination to be "reviewed and remade" necessarily involves a case by case approach, requiring consideration of the individual facts and circumstances of the proposed adjustment, including whether the adjustment reflects the occurrence of a significant event. There is no quantitative cost threshold applied. However, where the adjustment is not mechanical in nature or requires a more rigorous assessment, we consider the adjustment may require the revenue determination to be reviewed and remade."</i></p>

Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
				<p>The language of "<i>significant event</i>" is used, without any detailed guidance on what cost threshold or assessment criteria might apply. The drafting also speaks to applying review and remaking process where "not mechanical" adjustments are made.</p> <p>In a hybrid setting with a Design and Construct (<b>D&amp;C</b>) contract, negotiated by the Infrastructure Planner, construction risks entitle the D&amp;C Contractors to claim Delay Costs and Direct Costs that may occur. These claims are not necessarily "mechanical" given they require a submission that details actual costs incurred.</p> <p>Further within a contract of a megaproject construction, adjustments of 5-10% for construction based risks such as Unknown Utility Services or Unknown Contamination would not necessarily be seen to be "significant" (being otherwise allowed for in contingency in the absence of adjustment events being included in a revenue determination) and a Network Operator may presume adjustment events such as these do not require any review and remaking of the revenue determination if they occur. It is unclear if the AER's view on "significant" and "mechanical" would align with that of the Network Operator's in the context of administering a megaproject D&amp;C contract.</p> <p>Understanding how the AER views these adjustment events (by way of additional drafting in the Draft guidelines) will allow the Infrastructure Planner and Network Operator to better understand the AER's view on this prior to contract negotiation and finalisation of D&amp;C Contracts. This may allow engagement with the market to negotiate and amend contracts before they are executed.</p> <p>We would encourage the AER to consider provision of additional guidance in the Draft Guidelines as to what constitutes a "significant event" and what it defines as "mechanical", specifically with a focus upon adjustment events relating to construction risks under the D&amp;C</p>

Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
				Contracts procured and negotiated by the Infrastructure Planner (for instance Unknown Utility Services and Unknown Contamination Risk).
<b>Draft Guideline</b>	Draft Guideline 7.2.3	7.2.3 Monitoring and assessment of a competitive assessment process	<b>AERs expectation of supporting information justifying the inclusion of adjustment events (particularly complex construction risk adjustments) into the Network Operator's revenue proposal</b>	<p>Section 7.2.3 of the Draft Guidelines indicates that the Network Operator, following assessment of the genuineness and appropriateness of the competitive process by the AER may incorporate relevant information regarding the competitive process into Network Operator's revenue proposal.</p> <p>Section 7.2.3 goes on to mention paragraph 1 of section 6.1 of the Contestable Guidelines regarding provision of a statement of consistency of the revenue proposal with the contractual arrangements entered into by the Network Operator.</p> <p>We encourage the AER to provide clarity in their Draft Guidelines if the Network Operator is only required to address paragraph 1 in section 6.1 of the Contestable Guideline? Or does the AER anticipate the Network Operator's revenue proposal would address other items in section 6.1 including paragraph 5.</p> <p>Paragraph 5 requires "<i>a formulaic description of any mechanisms</i>" and for each mechanism, provide: "<i>detailed explanation of the proposed method of indexation, escalation or adjustment</i>" and "<i>authoritative source (or sources) of indices or data</i>". This is particularly relevant for complex construction risk adjustment events, for which it is not possible (or not standard industry practice) for the D&amp;C contract to nominate a simple "formula" for assessing these risks adjustments. Please note that these construction based risk events are highly dissimilar to mechanical and formulaic adjustments such as FOREX or Escalation Adjustments.</p> <p>Outlined below is a typical complex construction risk adjustment event process as anticipated under a D&amp;C Contract.</p>
<b>Contestable Guidelines</b>	Contestable Guideline 6.1	6.1 – Contents of a revenue proposal		



Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
				<p>If the D&amp;C Contract(s) negotiated by the Infrastructure Planner and entered into by the Network Operator provide adjustment mechanisms for Unknown Utility Services, or Unknown Contamination, the D&amp;C contract will set out:</p> <ul style="list-style-type: none"> <li>- the conditions precedent to submitting a claim;</li> <li>- the timing for submitting a claim;</li> <li>- the definition of claim entitlement (e.g Delay Costs, and/or Direct Costs);</li> <li>- the definition of what a contractor can claim as a Delay Costs (e.g site based overheads);</li> <li>- the definition of what a contractor can claim as a Direct Costs (e.g change in subcontractor's costs, materials costs etc).</li> </ul> <p>The Contractor will build up a claim of all the Delay Costs and Direct Costs it considers are associated with the event, using the rate cards from the Contract, and using the definition of Delay Costs and Direct Costs to justify what it puts in the bucket for recovery.</p> <p>The Network Operator will receipt, review and meet with the contractor regarding the claim before making an assessment and formalising the D&amp;C Contract.</p> <p>Ultimately for these construction risk based adjustments, a formula cannot simply be applied. Therefore, it is important that the Network Operator understand the AER's expectation on what supporting information the Network Operator is required to provide in its revenue proposal with respect to section 6.1 of the Contestable Guidelines.</p>



Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
Draft Guideline	Draft Guideline - 7.2.6	7.2.6 Adjustments	<b>AER's acceptance of adjustment mechanisms (negotiated into D&amp;C Contracts by the Infrastructure Planner) into the revenue proposal and the AERs acceptance of these adjustments in its determination</b>	<p>Section 7.2.6 of the Draft Guidelines speaks to all adjustments being made in accordance with the contractual arrangements the Network Operator entered into as required under the relevant authorisation.</p> <p>In some hybrid instances, the Infrastructure Planner is conducting the procurement process for a D&amp;C contractor(s), which the Network Operator will then enter into, alongside an upstream Delivery Contract with the Infrastructure Planner.</p> <p>The hybrid guidelines do not appear to definitively confirm that the AER will accept the inclusion of the adjustment mechanisms as drafted into the D&amp;C Contracts (which the Infrastructure Planner negotiates with the market) into the Network Operator's revenue proposal (assuming the AER finds the D&amp;C procurement process to be genuine and appropriate).</p> <p>If the AER determines the competitive process to be genuine and appropriate but then does not accept the adjustment mechanisms in the revenue proposal, or seeks substantive changes to the operative provisions for these adjustment mechanisms, there is a gap risk to the Network Operator (being an inability to later claim adjustments included by the Infrastructure Planner in the D&amp;C Contracts which are not accepted by the AER in its determination). Alternatively, there is a requirement to re-negotiate/amend D&amp;C Contracts after they have been executed to close this gap risk (resulting in project delays, loss of competitive tension and potential cost increases).</p> <p>We encourage the AER to consider updating guideline to indicate that the adjustment mechanisms negotiated by the Infrastructure Planner in the D&amp;C Contract(s) (to which the Network Operator signs up to) are to be included in the revenue proposal and will be approved by the Regulator in its determination (on the basis of a genuine and appropriate assessment of the competitive process).</p>

Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
<b>Draft Guideline</b>  <b>Contestable Guidelines</b>	Draft Guideline - 7.2.6	7.2.6 Adjustments	<b>AERs reference to section 7.5 of the Contestable Guidelines and the key differences between section 7.5 philosophy and the hybrid approach to contestable components</b>	Section 7.2.6 of the Draft Guidelines indicates that section 7.5 of the Contestable Guidelines will apply in reviewing adjustments.
	Contestable Guideline - 7.5	7.5 Adjustment of a revenue determination		<p>As a general comment, section 7.5 of the Contestable Guidelines is drafted on the premise that the Network Operator is a tenderer in the competitive process and enters a single contract upstream with the Infrastructure Planner. This is reflected in the drafting of <i>"approaches to cost variations and risk allocation are matters that <u>potential Network Operators...will compete on as part of the competitive assessment process</u>. Where we are satisfied that the competitive process was genuine and appropriate, our revenue determination will facilitate adjustments to the revenues where these adjustments are set out in a contractual arrangement that has been <u>agreed between the Infrastructure Planner and the success proponent</u>".</i></p> <p>Our understanding is that the logic is based on the premise a Network Operator is the tenderer and has proposed the adjustment mechanisms in a single contract upstream with the Infrastructure Planner.</p> <p>Importantly in some Hybrid arrangements, the Network Operator is not competing on the approach to cost variation and risk allocation, but are inheriting what the Infrastructure Planner negotiates with the D&amp;C Contractors. Further, the adjustments are not reflected in a single contract between Network Operator with the Infrastructure Planner, but the contract(s) between Network Operator and D&amp;C Contractor(s) and a separate upstream deed between the Network Operator and the Infrastructure Planner.</p> <p>In light of the drafting of section 7.5 of the Contestable Guidelines, the drafting of 7.2.6 of the Draft Guidelines could provide further</p>

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				<p>clarity that the revenue determination will facilitate adjustments where these adjustments are included in the D&amp;C Contractual arrangement (which the Infrastructure Planner negotiated) and that the Network Operator has not "competed" on adjustment mechanisms as part of the competitive process, but that the D&amp;C Contractor(s) has competed on the adjustment mechanisms and the Infrastructure Planner has accepted.</p> <p>We encourage the AER to provide certainty to the Network Operator that it does not inherit a gap risk whereby the Infrastructure Planner includes an adjustment mechanism in the D&amp;C Contracts, however, is not subsequently accepted by the AER. As this would leave the Network Operator with a downstream contractual liability and no ability to recover.</p>
<b>Draft Guideline</b>  <b>Contestable Guidelines</b>	Draft Guideline - 7.2.6  Contestable Guideline - 7.5.1	7.2.6 Adjustments  7.5.1 Adjustment not requiring a redetermination	<b>AERs reference to section 7.5 of the Contestable Guidelines and the key differences between section 7.5 philosophy and the hybrid approach to contestable components - Infrastructure Planner's role in adjustment events</b>	<p>Section 7.2.6 of the Draft Guidelines indicates that section 7.5 of the Contestable Guidelines will apply in reviewing adjustments.</p> <p>Section 7.5.1 (Adjustments not requiring a redetermination), item 2 discusses the evidence required by the AER to support proposed adjustments, including: details of inputs into the revenue adjustment mechanism and supporting information; and <u>notification from the Infrastructure Planner of the amounts of any agreed variations and their consistency with the contractual arrangement</u>.</p> <p>We understand that this approach is based the assumption that the Network Operator is competing as a tenderer, with the result being a single contract upstream with the Infrastructure Planner whereby the Infrastructure Planner assesses all adjustments under the contract and approves these adjustments.</p> <p>The hybrid model is based on the Infrastructure Planner procuring a D&amp;C Contract (with adjustment mechanisms) which the Network</p>

Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
				<p>Operator executes, with an upstream Deed to the Infrastructure Planner. The approach anticipated under the hybrid model is that the upstream contract identifies which D&amp;C adjustment events are recoverable under the AER adjustment mechanisms (reflected in the Revenue Determination) which then allows the Network Operator to administer the downstream deeds with confidence that it can recover the adjustments paid to D&amp;C Contractor(s) by following the AERs process relating to adjustment events once they occur.</p> <p>In the hybrid model, the D&amp;C Contractor submits a claim to the Network Operator under the D&amp;C Contract for assessment. The Network Operator assesses the claim in accordance with the D&amp;C Contract and approves the cost adjustment. The Network Operator is then entitled to apply for adjustment recovery via the regulatory process.</p> <p>The Infrastructure Planner does not administer the adjustment mechanism or approve the "<i>amounts of any agreed variations</i>" as is currently drafted in section 7.5 of the Contestable Guidelines.</p> <p>We encourage the AER to consider additional wording under 7.2.6 to indicate that Network Operator's evidence does not require compliance with the sub element of section 7.5 of the Contestable Guidelines requiring "<i>notification from the Infrastructure Planner of the amounts of any agreed variations</i>".</p>
<b>Draft Guideline</b>  <b>Contestable Guidelines</b>	Draft Guideline - 7.2.6  Contestable	7.2.6 Adjustments  7.5.1 Adjustment not requiring a redetermination	<b>AERs evidentiary requirements to support the AER's compliance check of proposed</b>	We encourage the AER to provide additional guidance in section 7.2.6 of the Draft Guidelines on what the AER considers to be additional evidence and supporting information (required under 7.5.1 Item 2 of the Contestable Guidelines) in the context of a D&C adjustment claim for construction risks. This is important in the context of the above comment whereby the Infrastructure Planner is

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	Guideline - 7.5.1		<b>revenue adjustments (Adjustments not requiring a redetermination)</b>	<p>not assessing the amounts of any agreed adjustments.</p> <p>For instance, if the D&amp;C Contract(s) negotiated by the Infrastructure Planner and entered into by the Network Operator provide for adjustments due to Unknown Utility Services, or Unknown Contamination, the D&amp;C contract will set out:</p> <ul style="list-style-type: none"> <li>- the conditions precedent to submitting a claim;</li> <li>- the timing for submitting a claim;</li> <li>- the definition of claim entitlement (e.g Delay Costs, and/or Direct Costs);</li> <li>- the definition of what a contractor can claim as a Delay Costs (e.g site based overheads);</li> <li>- the definition of what a contractor can claim as a Direct Costs (e.g change in subcontractor's costs, materials costs etc)</li> </ul> <p>Importantly it is not possible (or standard industry practice) for the contract to nominate a simple "formula" for assessing (with construction based risk events being highly dissimilar to FOREX or Escalation Adjustments which are mechanical and formulaic in nature).</p> <p>The Contractor will build up a claim of all the Delay Costs and Direct Costs it considers are associated with the event, use the rate cards from the Contract, and use the definition of Delay Costs and Direct Costs to justify what it puts in the bucket for recovery.</p> <p>The Network Operator will receipt, review and meet with Contractor regarding the claim before making an assessment in accordance with the contract.</p> <p>Ultimately for these construction risk based adjustments, there is no formula, and so it is important that the Network Operator understand the evidentiary requirements sought by the AER to ensure that all adjustment events which are consistently administered by the</p>

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				Network Operator in accordance with the D&C Contracts are successfully accepted in full under the AERs review of the adjustment events.
<b>Draft Guideline</b>  <b>Contestable Guidelines</b>	Draft Guideline - 7.2.6  Contestable Guideline - 7.5	7.2.6 Adjustments  7.5 Adjustment of a revenue determination	<b>AER's conduct of "compliance checks" of proposed revenue adjustments - particularly in respect of construction risk adjustments</b>	<p>We encourage the AER to provide guidance on what it considers a "compliance" check, referred to in section 7.5.1, Item 3 of the Contestable Guidelines, constitutes in the context of a D&amp;C adjustment claim for construction risks in the hybrid model.</p> <p>We understand that for simple "mechanical" or "formulaic" adjustment such as a FOREX adjustment of Escalation adjustment this would likely be confirmation that the Network Operator applied the step by step process under the contract, in accordance with the indices and methodology nominated and that the revenue determination allowed for this adjustment.</p> <p>However, in the context of a construction risk adjustment (eg. Unknown Utility Services or Unknown Contamination), it is unclear if a compliance check is limited to procedural checking that the D&amp;C adjustment mechanism exists under the contract, that the contractor submitted a valid claim and the Network Operator administered the D&amp;C contract appropriately, or if the AER envisages some right to "re-assess" the D&amp;C contractor's claims made under the contract and provide a view on the appropriateness of the Network Operator's claim quantum assessment.</p> <p>We encourage the AER' to provide further clarity on their approach to a compliance check for construction risk events. This will provide further detail and certainty to the Network Operator in advance of any D&amp;C contract construction risk adjustment event, such that the Network Operator can fully meet the AER's expectations and appropriately recover adjustment amounts already paid to D&amp;C</p>

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				Contractors in accordance with D&C Contracts.
<b>Draft Guideline</b>  <b>Contestable Guidelines</b>	Draft Guideline - 7.2.6  Contestable Guideline - 7.5	7.2.6 Adjustments  7.5 Adjustment of a revenue determination	<b>AER's expectation on Network Operator's approach to submitting "trigger" based adjustment events - frequency of submission of D&amp;C construction risk adjustment events</b>	<p>Section 7.5.1 of the Contestable Guidelines indicates that contractual arrangements may specify a trigger event which requires the AER to assess a proposed revenue adjustment outside of the annual process.</p> <p>Construction risk based claims under a D&amp;C contract may occur at any time under the D&amp;C Contract(s) and with unknown frequency. We recommend the AER advise its expectation on the approach to submitting to them adjustment events (i.e. does the AER expect that as and when any construction based risk claim is finalised that the Network Operator provide an adjustment event submission "as soon as possible practicable following the trigger event" or does it expect an aggregation of adjustment events and submission on a time based cycle (e.g quarterly, six monthly or annually)).</p> <p>Network Operator's seek to pragmatically optimise the AER's review process (i.e frequency of submissions to the AER), without unduly deferring the submission of adjustment events which impacts on the timing for commencement of revenue recovery under an adjusted capital cost inclusive of adjustments.</p>
<b>Draft Guideline</b>  <b>Explanatory Statement</b>	Draft Guideline - 7.2.3  2.1	7.2.3 Monitoring and assessment of a competitive assessment process  Reasons for amending the	<b>Alignment of section 7.2.3 and 7.5.1 drafting intent</b>	<p>Section 7.2.3 of the Draft Guidelines indicates that the Infrastructure Planner "<i>provide us [AER] with a report at the conclusion of the competitive process and prior to the submission of the Network Operator's revenue proposal.</i>"</p> <p>Section 7.5.1 clearly states the AER makes its assessment of "genuine and appropriate" at pre-lodgement stage of hybrid revenue determination process.</p>



Referenced document	Document Section	Section Title	Comment Topic	Transgrid's response
		Non-Contestable Guideline		<p>Section 7.2.3 of the Draft Guidelines does not quite go as far as to say the AER review will occur prior to revenue proposal, but that submission of the report should occur.</p> <p>We encourage the AER to consider the wording of section 7.2.3 and consider if it could be amended to reflect the assessment process being completed prior to revenue submission, to align with section 7.5.1 drafting. Whilst there is minor inconsistency between the two sections, this is an important change it would make it clear that the AER's assessment is a pre-lodgement requirement early in the Guideline.</p>
<b>Draft Guideline</b>	Draft Guideline - 7.5.1	7.5.1 - Additional pre-lodgement steps	<b>AER's pre-lodgement steps including the AERs completion of its review that the competitive process is "genuine and appropriate"</b>	<p>Section 7.5.1 of the Draft Guideline includes for additional pre-lodgement steps, including the submission of the report on the conduct of the competitive process, followed by the AER's review. The AERs review is indicatively 42 Business Days, based on a best endeavour basis. This pre-lodgement step is to allow the AER to make a decision on whether the competitive assessment process was genuine and appropriate before the Network Operator submits its revenue proposal (inclusive of both contestable and non-contestable components). Section 7.5.1 also indicates an additional period of 126 business days from date of receipt of Network Operator's revenue proposal to the AER's determination.</p> <p>There may be some time critical projects where a sequential program such as this is disadvantageous to timely delivery of the project.</p> <p>In the current drafting of the Draft Guidelines the AER requires the Infrastructure Planner to fully complete its competitive process (e.g for a D&amp;C Contract(s)) and submit the report to the AER, sequentially followed by the AER's review and outcomes (42 Business days). The outcome of the AER's review then allows the</p>

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				<p>Network Operator to finalise its revenue proposal for submission, leading to the 126 business day period for AER to make its final determination.</p> <p>We would encourage the AER to consider in extenuate circumstances, providing a provision for the Infrastructure Planner to submit an "interim" submission for the report on the conduct of the competitive processes, with an update on the successful D&amp;C proponent and final D&amp;C contract(s) in a secondary submission.</p> <p>This could allow the AER to perform the majority of its review of the genuineness and appropriateness of the competitive process in parallel to the Infrastructure Planner's finalisation of the competitive process, saving up to 30 Business Days (noting the back end of a competitive process is typically final negotiations of contract drafting and internal governance approvals prior to allow execution of contracts). This would allow a faster transition between procurement exercise to the Network Operator executing D&amp;C contract(s) and subsequently submitting its revenue proposal shortly after the competitive process is completed.</p> <p>The intent is that this provision would be applied in extenuate circumstances only, and the Infrastructure Planner could liaise with the AER to seek their prior approval to adopting this approach.</p> <p>Separately, we encourage the AER to consider if there is any room to further optimise the 126 business day period for determination noting that as a pre-lodgement step it would have already assessed the genuine and appropriateness of the competitive process, being a substantive subset of the revenue proposal.</p> <p>Overall, we believe the 126 business day timeframe can be drastically reduced.</p>

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<b>Draft Guideline</b>	Draft Guideline - 7.5.1	7.5.1 - Additional pre-lodgement steps	<b>Timing of the AER's advice to Infrastructure Planner and Network Operator as part of the review of adjustment mechanisms prior to AERs determination</b>	<p>A recent determination by the AER for a Contestable project determined in accordance with the Contestable Guidelines included a statement that <i>"as part of our review of the adjustment mechanisms, we engaged with ACERZ and EnergyCo to ensure the mechanisms could be practically applied and were unambiguous. ACERZ and EnergyCo agreed to a number of changes to the adjustment mechanisms to provide additional clarity as to their operation."</i></p> <p>We encourage the AER to provide clarity on the timing on when this engagement is proposed to occur (if at all) in the context of a hybrid arrangement (section 7.5.1 of the Draft Guideline) whereby the Infrastructure Planner has competitively procured a D&amp;C Contract(s) for the Network Operator to enter into.</p> <p>In this circumstance, there are three or more parties requiring agreement to changes to adjustment mechanisms (being the Infrastructure Planner, the Network Operator and the D&amp;C Contractor(s)). The timing and nature of amendments to contractual terms in the D&amp;C Contracts is of importance, noting the intent for the Network Operator to execute D&amp;C Contract(s) at the culmination of the competitive assessment process in the hybrid model.</p> <p>The negotiation of the original drafting of the D&amp;C adjustment mechanisms will have occurred during the competitive process (under competitive tension) to ensure a genuine and appropriate process has been undertaken with sufficient competitive tension.</p> <p>The Infrastructure Planner's report is due to the AER as a pre-lodgement requirement (section 7.5.1 of the Draft Guidelines), but occurs after the completion of the competitive process. If the AER has comments on approaches to make the adjustments "unambiguous" with respect to their operation, does the AER intend</p>

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				<p>this occurs in its review of the competitive assessment report, or does it envisage this to occur after a revenue proposal is received. In either instance, this is after the D&amp;C contract(s) have been fully negotiated and likely after they have been executed by the Network Operator.</p> <p>Considering the above and in the context of complex construction risk adjustment mechanisms (e.g Unknown Utility Services and Unknown Contamination which may entitle D&amp;C Contractors to Direct Costs and Delay Costs adjustments), we encourage the AER to provide advise on the nature of adjustments that may be sought to ensure "mechanisms can be practically applied" and are "unambiguous".</p> <p>This guidance will allow the Infrastructure Planner, Network Operator and D&amp;C Contractor(s) to appropriately draft the mechanisms such that the AER does not seek amendment to the provisions after D&amp;C Contracts are negotiated and executed, losing the benefit of competitive tension in these negotiations.</p>
<b>Draft Guideline</b>	Draft Guideline - 7.5.2	7.5.2 - Stakeholder engagement and confidentiality	<b>AERs preferred approach for representing "Adjustment amounts" in the revenue proposal and subsequent revenue determination</b>	<p>Section 7.5.2, Table 3 of the Draft Guidelines indicates the approach to stakeholder engagement and confidentiality for hybrid determinations. The submission and publication of the revenue proposal stage speaks to inclusion of <i>"a summary of the competitive process, as well as the contestable cost component amount and any adjustments to this amount"</i>.</p> <p>We encourage the AER to provide clarity on its expectations for how it considers the "adjustment to this amount" is presented in the revenue proposal for hybrid projects, particularly ones where the Infrastructure Planner has procured D&amp;C Contract(s) for the Network Operator to enter into. Does the AER expect a risk based estimate</p>

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				<p>driven off each of the D&amp;C contract adjustment mechanisms included in the contractual agreement and aggregated into an "Adjustment" bucket (akin to how project contingency is shown). Or does the AER anticipate visibility between individual adjustment mechanisms.</p> <p>Of note, unlike a revenue proposal inclusive of capped approved project contingency, any estimate of the "Adjustment" amount at this time, is just that - an estimate, which is then subject to the adjustments that then actually occur under the contract and are not capped at the estimated value. This is particularly true for construction risk based adjustment mechanisms such as for Unknown Contamination or Unknown Utility Services, which are subject to the site conditions experienced on the project.</p>
<b>Draft Guideline</b>  <b>Explanatory Statement</b>  <b>Contestable Guidelines</b>	Draft Non-Contestable Guideline 7.1 & 7.2.3  Explanatory Guideline - 2.1  Contestable Guideline - 5.3	7.1 Framework for hybrid revenue determinations  7.2.3 Monitoring and assessment of a competitive assessment process  2.1 Reasons for amending the Non-contestable Guideline  5.3 Assessment of the competitive	<b>Alignment of section 7.2.3 (Draft Guidelines) drafting with drafting in section 5.3 of the Contestable Guidelines.</b>	<p>The Explanatory Statement, section 2.1 indicates the AER "will" apply the Non-contestable Guideline to a contestable component if it is determined not to be a genuine and appropriate competitive process. The Non-contestable guidelines section 7.1 aligns with the Explanatory Statement in this regard.</p> <p>Section 7.2.3 of the Draft Non-Contestable Guidelines indicates that <i>"We will apply section 5.3 of the Contestable Guideline when assessing competitive process."</i></p> <p>The Contestable Guidelines, section 5.3 indicate that the AER may decline to make a determination on the basis of the outcome of the competitive assessment process. In these circumstances the AER would consult with Infrastructure Planner on the approach to progressing the project, including possibly using the non-contestable processes.</p>

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		assessment process		<p>Both the Explanatory Guideline and Draft Non-contestable guideline offers a fixed pathway resulting in the use of non-contestable processes if a competitive assessment is determined not to be genuine and appropriate, whilst section 7.2.3 refers to the Contestable Guidelines. The Contestable Guidelines presents a possible (but not fixed) pathway to using non-contestable assessment processes.</p> <p>We encourage the AER to consider updating wording of 7.2.3 to provide certainty that Non-Contestable assessment will apply in these circumstances (if this is the intent).</p>