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Katy Brady

Senior Manager, Network Economic Regulation

NSW Department of Climate Change, Energy, the Environment and Water

By email: energy.infrastructure@dcceew.nsw.gov.au

Dear Ms Brady,

Draft Network-to-Network Connection Guidelines – Transgrid comments

Transgrid thanks the NSW Department of Climate Change, Energy, the Environment and Water (**DCCEEW**) for the opportunity to respond to the Draft Network-to-Network Connection Guidelines Consultation Paper (**Consultation Paper**) and provide feedback on the Draft Network-to-Network Connection Guidelines (the **Draft Guidelines**).

Transgrid is generally supportive of measures that improve network-to-network connection arrangements. Transgrid has previously engaged with DCCEEW on an earlier draft of these Draft Guidelines and is pleased that some of Transgrid's concerns have been addressed in the current draft.

However, we have concerns that there are still several aspects of the current Draft Guidelines that require amendment. These areas include that:

- The Draft Guidelines introduce an additional regulatory overlay into a bilateral contractual process, increasing regulatory risk and creating a compliance framework that lacks proportionality.
- The Draft Guidelines represent a significant change to existing processes without a clearly articulated case for change or adequate consideration of resourcing impacts, raising concerns about increased costs being borne by consumers.
- The proposed information sharing requirements may undermine the value of, and confidentiality protections applying to, transmission network service provider intellectual property.

Transgrid would appreciate the opportunity to discuss these issues with DCCEEW to ensure improvements to the Draft Guideline can be incorporated ahead of finalisation.

If you or your staff require any further information or clarification on this submission, please contact Oliver Derum, Policy & Advocacy Manager, at oliver.derum@transgrid.com.au.

Yours faithfully



Jason Krstanoski

EGM Network

1. Feedback on Draft Guidelines

Transgrid supports improved network-to-network connection arrangements, building on the work to date by Transgrid and EnergyCo. We support refining and adapting the existing National Electricity Rules (**NER**) processes, particularly those in Chapter 5, through targeted reforms that enhance clarity, coordination and efficiency.

The purpose and principles outlined in the Draft Guidelines cover the key issues that require clarity. However, in Transgrid's view additional work is warranted in a number of areas prior to the Draft Guidelines being finalised. Some key themes are discussed in this section and more detailed commentary on specific issues is provided in Appendix A.

The Draft Guidelines increase regulatory compliance risk for Existing Network Operators, such as Transgrid. Non-compliance with the Guidelines and project specific schedules may result in financial penalties, directions, enforceable undertakings, or even licence cancellation.

Transgrid is concerned that the proposed framework lacks proportionality, particularly where any departure from a schedule could constitute a licence breach. This risk is exacerbated if a schedule is imposed on, rather than agreed by, Transgrid. The Guidelines would impose a prescriptive project management regime where one is not required, given the existing contractual enforcement mechanisms and the licence consequences that already apply for breaches of Ministerial Directions under the Electricity Infrastructure Investment Act 2020 NSW (EII Act). The Guideline is also unduly strict, requiring Transgrid's blanket compliance with project schedules, even where factors causing or contributing to the delay may be beyond our control.

A live example is the Middle East conflict causing supply chain disruption and fuel shortages across the globe, causing downstream impact to project schedules and delivery. In effect, Transgrid could be subject to adverse regulatory, financial and reputational impacts for technical non-compliance with the Guidelines despite taking every effort to comply. This could have a perverse outcome and be inconsistent with the fundamental principles of fair and proportionate regulation and enforcement action.

In effect, the Draft Guidelines introduce additional regulatory obligations into what is intended to be a bilateral contractual negotiation between Existing Network Operators and Connecting Network Operators. Transgrid considers that bilateral negotiation should remain central to the network-to-network process, without the imposition of an additional regulatory overlay.

The Draft Guidelines also introduce an extensive set of requirements and would represent a significant change to existing processes. Transgrid considers that the case for such change has not been clearly articulated, nor has sufficient regard been given to the resourcing required across multiple agencies and network companies. Accordingly, Transgrid is concerned that the proposed approach may increase costs borne by consumers without a clearly demonstrated need.

Finally, Transgrid and proponent TNSPs have invested significantly in developing intellectual property (IP) which should not be undermined by the broad disclosure approach contemplated by the Draft Guidelines. While Transgrid accepts that relevant information may be required to be disclosed, the practical operation of the Guidelines must not erode the value of, or confidentiality protections applying to, TNSP intellectual property. In particular, the disclosure of key IP such as designs, system models and operations manuals raises significant concerns. Transgrid's position is that the disclosure of intellectual property is most appropriately addressed in negotiated commercial agreements between the parties, in which terms for the use and disclosure of the IP can be agreed to facilitate the project while protecting the interests of the party that developed the IP.

Transgrid recommends that the Guidelines are reviewed from the perspective of applying proportionate and practical regulatory requirements. Transgrid also recommends that the NSW Government allow for an appropriate transition period for the finalised Guidelines.

Based on prior experience in implementing regulatory change, a change of this nature which impacts people, processes and systems would take approximately 12 months to undertake to ensure the relevant change management activities are completed and embedded.

However, Transgrid acknowledges the NSW Government's desire to enact the Guidelines as quickly as possible to facilitate the renewable energy transition, accordingly, a six-month transition period may be appropriate. Transgrid notes that to implement the Guidelines in any shorter time period would risk disrupting current and ongoing operations and/or hampering implementation, both of which come with additional costs.

Transgrid's detailed comments on the Draft Guidelines are provided in Appendix A.

2. Feedback on the proposed licence condition

Transgrid is committed to full and continuous compliance with its NSW Transmission Operator's Licence. We maintain robust governance, systems and assurance processes to ensure we uphold the obligations required of a licenced transmission network operator in NSW.

The Consultation Paper (section 5) proposes the following condition which would be imposed on transmission and distribution licences:

The Licence Holder must comply with the Network-to-network Connection Guidelines, including any associated Project-specific Schedule(s).

Transgrid is concerned that if the condition above is imposed on its transmission licence, minor non-compliances with the Guidelines and project-specific schedules or non-compliances that are not fully within Transgrid's control (such as timing for the execution of agreements, international energy or supply chain shocks) could result in a breach of licence condition for Transgrid. Given the volume of projects being undertaken is increasing and the potential number of project specific schedules that could be in place with various milestones and dates, there is a heightened risk of repeated breaches of the Guidelines and therefore breach of a licence condition even where Transgrid has taken every effort to comply. This could have

serious adverse consequences for Transgrid, including monetary penalties (on the licensee or a person who is a director of or concerned in the management of the licensee), directions and enforceable undertakings, or even licence cancellation. Such penalties, for even minor licence violations, place disproportionate regulatory risk on companies such as Transgrid.

Transgrid proposes that the new licence condition expressly recognise that Transgrid must take best effort to comply with the Guidelines, whilst acknowledging that non-compliance with the Guidelines for reasons outside its control should not be considered a licence breach. This would be consistent with the updated Guidelines more broadly, including principle 6(g), that “the Parties will take all reasonable steps to meet timelines required for the NTN Connection Project”. A requirement for Transgrid to demonstrate and evidence the reasonable steps that have been taking in relation to each instance of non-compliance with the Guidelines could form part of this approach.

Transgrid therefore submits that the new licence condition should state:

The Licence Holder must take all reasonable steps to comply with the Network-to-network Connection Guidelines, including any associated Project-specific Schedule(s).

Finally, Transgrid maintains that any enforcement action taken in respect of non-compliance should be fair and proportionate, reflecting the materiality of the breach and the extent of any demonstrated harm or risk.

3. Relationship with the NER

Transgrid is supportive of the approach of making minimal departures from the NER, and maintaining consistency with the NER wherever possible.

We understand that the Infrastructure Planner role in initiating the network-to-network connection process will require disallowing clauses relating to the connection enquiry process. In doing so, the NTN Connection Notification should, at a minimum, provide information equivalent to that in a connection enquiry. Upon appointment of the Connecting Network Operator, the application to connect and offer to connect stages could then be progressed through the NTN Connection working group. This process would largely align with the Chapter 5 requirements, with technical matters informed by Schedule 5.1.

Disapplication of NER dispute resolution process, where dispute resolution clauses within executed agreements between the Existing Network Operator and Connecting Network Operator supersede 8.2 of the NER, also appears to be a possibility. Clarity in this regard is essential.

Appendix A – Detailed feedback on Draft Guidelines

Transgrid has reviewed the Draft Guidelines and noted a number of areas that require further consideration. We have provided a table detailing our specific concerns below.

#	Item	Issue / Observation
1	3.2 Interaction with NER	<ul style="list-style-type: none"> The Guidelines should explicitly state that where there is a direct inconsistency between the Guidelines and the NER, the NER should prevail. The Infrastructure Planner could be given the role to determine if there is an inconsistency. The Guidelines state an intention that there should be no inconsistency, but in the event of inconsistency, the expectations should be made clear.
2	3.9 Interaction with contracts	<ul style="list-style-type: none"> Similar to the comment regarding clause 3.2, a contract between the parties should override the Guidelines if there is an inconsistency. The purpose of the Guidelines is to facilitate contracting – they should not override the express agreement of the parties, otherwise this would undermine the negotiation and contract process and give rise to legal liability risks for contracting parties.
3	5.8 Pro-forma agreements risk allocation	<ul style="list-style-type: none"> Although the pro forma agreements issued by the Minister are only intended to provide a starting point for negotiations, Transgrid considers that these should not be issued without consultation, to ensure that they are suitable and shorten (rather than prolong) the negotiation period.
4	5.9 Customising the pro-forma agreements	<ul style="list-style-type: none"> Engagement by the Infrastructure Planner with the Existing Network Operator is both prudent and essential when customising the pro-forma agreements, given Transgrid's expertise in these matters and the implications for our operations. The clause should be strengthened from stating that consultation "may" occur with the existing network operator to stating that it 'must' occur.

#	Item	Issue / Observation
5	7 Provision and use of information	<ul style="list-style-type: none"> • Whilst 7.7 has been added to limit the use of information to the planning, negotiation and delivery of the NTN Connection Project in relation to which it is provided, the clause 7 drafting is still very broad. • A carve out should be provided for commercially sensitive or “competitive” information, or a general qualification that the section does not require the provision of competitively sensitive information to the parties, other than the Infrastructure Planner.
6	9 NTN Connection Notification	<ul style="list-style-type: none"> • Obligations arising from the notification should be subject to funding commitment being made at the same time – refer to our comments under item #6
7	10 NTN Connection working group	<ul style="list-style-type: none"> • More clarity is required regarding the terms of reference, governance and decision-making authority of the working group • Clarity is required on how the Existing Network Operator will fund the initial working group functions (for example, clauses 10.5, 10.6 and 10.7). Transgrid cannot commit resources without an agreed cost recovery arrangement. We recommend using an existing Master Services Agreement, under which the Infrastructure Planner could issue an RFP with, or prior to, the initial notification. This approach would also address confidentiality requirements under clause 10.4.
8	11 Project-specific Schedule	<ul style="list-style-type: none"> • Developing a project-specific schedule within a 30-business day period is neither realistic nor practical. Based on Transgrid’s experience, it is unlikely that the scope of a connection project can be sufficiently defined in that time, despite this being an essential pre-requisite for a robust and deliverable project schedule. Imposing such an artificial deadline for a key milestone does not support best practice project delivery and should not be pursued. • If the requirement to develop a project specific schedule is retained, it is critical that the schedules are realistic and achievable. To promote transparency and accountability for all parties, the dependencies

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		<p>between deliverables in the project schedule, and the responsible party for each deliverable, should be clearly defined.</p>
9	11.16 Project-specific Schedule amendment	<ul style="list-style-type: none"> The sentence that a revised Schedule does not excuse any earlier non-compliance, even where the Minister requires amendment, should be deleted.
10	13.6 and 13.7 Unfair terms	<ul style="list-style-type: none"> Clause 13.6 should delete the prescribed list of unfair terms and instead adopt a principle of mutuality, except where there are legitimate reasons for departure. The current list is overly prescriptive and inappropriately imports consumer style provisions into contracts between sophisticated commercial parties undertaking complex infrastructure projects. Clause 13.7 allows the Infrastructure Planner to propose alternative terms where the Parties are unable to agree fair terms. Given that the Infrastructure Planner may, in some cases, be a Party to the agreement, the appropriateness of this provision and the circumstances in which it may be exercised should be reconsidered.
11	17 Particular project circumstances	<ul style="list-style-type: none"> This is a new clause that requires clarification of its intent. Clause 17.3 suggests that the Connecting Network Operator may not always be the connection applicant, and that different connection applicants may apply at different connection locations. It is unclear whether this would require multiple connection agreements and processes for a single NTN Connection Project, which would add further complexity to an already complex framework. Clause 17 is likely to create confusion regarding the respective roles of the parties, rather than clarifying the network-to-network connection process. By definition, the Existing Network Operator operates the network to which a new or augmented EII Act project seeks connection. Consistently applying this

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		<p>principle, the Connecting Network Operator should be the party seeking access to the Existing Network Infrastructure. Clause 17 undermines this clarity and should therefore be removed.</p>
12	18.1 Compliance	<ul style="list-style-type: none"> • The drafting of this clause has been revised and now clarifies that compliance is on an “all reasonable steps” basis. • As stated above in our response to the proposed licence condition, Transgrid proposes that the new licence condition include wording that considers that circumstances beyond Transgrid’s control that results in a breach of the Guideline should not be taken to be a licence condition breach by Transgrid. • Transgrid can be expected to take all reasonable steps to comply with the Guidelines and to evidence this, if needed. This reasonableness provision would be consistent with the Guidelines more broadly, including principle 6.1(g), that “the Parties will take all reasonable steps to meet timelines required for the NTN Connection Project”. A requirement to demonstrate what constitutes all reasonable steps in any particular instance could be part of this approach. • Proportionality should be embedded throughout section 18 in respect of compliance with the Guidelines, management of non-compliance, breach notification and enforcement approach (e.g. materiality thresholds and recognition of good faith efforts).
13	18.2 Management of potential non-compliance	<ul style="list-style-type: none"> • Transgrid had previously proposed that this should only apply to <u>material</u> non-compliances that result in delays to final energisation of the new network. DCCEEW has set out its rationale in the consultation paper not to adopt this approach because it introduces uncertainty as to what constitutes a material breach. Transgrid notes that significance criteria could be introduced which would help to define what constitutes a material breach (e.g., period of delay, frequency of occurrence, contributing factors, demonstration of reasonable steps taken to mitigate delay).

#	Item	Issue / Observation
		<ul style="list-style-type: none"> Transgrid recommends that DCCEEW reconsider this approach. Materiality thresholds are an important consideration in any compliance management, reporting and enforcement regime and is effectively in place under the Australian Securities Investment Commission (ASIC) and Office of Australian Information Commissioner (OAIC) compliance and breach reporting regimes.
14	18.7 Non-compliance by a licenced Network Operator	<ul style="list-style-type: none"> Transgrid had previously proposed that the Tribunal's consideration of any non-compliance should take into account mitigating factors such as delays outside a Party's control. The Guidelines have been updated to include a clarification that IPART is required to notify the licensee, give reasonable opportunity for licensee to make submissions, and that the submissions are given due consideration. Consistent with other comments in this submission, Transgrid proposes that penalties for non-compliance should not be applied if it can be demonstrated that factors beyond a party's control were the reason for the outcome.
15	18.8 Compliance with Tribunal's requests	<ul style="list-style-type: none"> Clause 17.8 requires a licenced Network Operator to comply with any reasonable request from the Tribunal in the event of non-compliance. This provision is broadly drafted and lacks sufficient constraints to ensure predictable and fair application. We recommend instead that the Network Operator be required to develop and comply with a cure plan, consistent with the approach applied to the Preferred Candidate or Connecting Network Operator under clause 17.9. This would also be consistent with the approach to compliance set out in section 2.6 of the Consultation Paper.