



Further response to the AER's staff views on the allowed rate of return

30 October 2023

Responsibilities

This document is the responsibility of the Marinus Link Team, Marinus Link Pty Ltd PO Box 606 Moonah Tasmania 7009, ABN 47 630 194 562 (hereafter referred to as MLPL).

Enquiries regarding this document should be addressed to:

Ben Wagner

Head of Customer Projects

Marinus Link

PO Box 606

Moonah TAS 7009

Email: team@marinuslink.com.au

1 Introduction

Marinus Link Pty Ltd (MLPL) received an email from the Australian Energy Regulator (AER) in relation to the MLPL Revenue Proposal Stage 1 – Part A (Early works)¹, which sets out the AER's staff view on the allowed rate of return and whether MLPL's Revenue Proposal – Part A (Early works) complies with the National Electricity Rules (the Rules) and the National Electricity Law (NEL).

MLPL responded to the AER staff's views on 18 October, which explained that:

- MLPL's first regulatory control period will commence on 1 July 2025, rather than 1 July 2021 as indicated in the AER's staff view.
- The AER's determination for Part A (Early works) relates to a period that pre-dates the commencement of the first regulatory control period for MLPL. As such, the allowed rate of return provisions in the Rules do not apply to MLPL for the AER's determination for Part A (Early works).
- MLPL will be the network service provider following the completion of the AER's Stage 1 determination, but not for Part A (Early works). This observation confirms MLPL's contention that the allowed rate of return provisions do not apply to MLPL for the AER's determination for Part A (Early works).
- MLPL's allowed rate of return proposal is consistent with the Rules and the National Electricity Law because MLPL proposes to adopt TasNetworks' allowed rate of return, which complies with the applicable Rate of Return instrument.

MLPL has received follow-up queries from the AER's staff², which are reproduced in the next section. To address these AER queries, we first provide a high-level response setting out our position and reasoning. We conclude with a more detailed response to each of the queries raised by the AER in a Q&A format.

There are no confidentiality claims nor supporting documents for this response.

¹ Email from AER to MLPL dated 12 October 2023.

² Email from AER to MLPL dated 24 October 2023.

2 AER's further queries

2.1 AER's staff queries

The AER's further queries are reproduced in the box below.

We would be grateful for MLPL's consideration and views on the following matters:

1. MLPL submits that (a) TasNetworks is the service provider in relation to the AER's determination for Part A (Early Works), and that, (b) if Marinus Link does not proceed, TasNetworks will be able to recover expenditure by MLPL on the Marinus Link project. This is not consistent with our understanding, and we would like to discuss the basis of these submissions. It appears to us that MLPL is the service provider for expenditure on Marinus Link services. It is not apparent to us on what basis TasNetworks could recover MLPL's expenditure on Marinus Link from Tasmanian consumers. We would like to understand how MLPL proposes that the AER apply the provisions of the NEL and the NER to arrive at these results.

2. MLPL submits that the period to which the AER's Stage 1 determination applies is not a regulatory control period (RCP). On that basis, it submits that the allowed rate of return provisions in the NER do not apply to the AER's Stage 1 determination. (At the same time, MLPL submits its rate of return proposal is consistent with the RORI.) We would like to understand how MLPL characterises the early works period (1 July 2021 – 31 December 2024), and the AER's Stage 1 determination, from a legal and regulatory perspective. What governs the AER's Stage 1 determination (generally, and with respect to the rate of return)? It seems to us that MLPL will be subject to regulatory control, and the beneficiary of certain regulatory protections, from the commencement of the AER's Stage 1 determination during the early works period. Further, if the years during the early works period are not characterised as "regulatory years", we do not see how the regulatory framework in the NEL, the NER and the RORI applies to MLPL or its expenditures. Does MLPL agree we are making a revenue determination under clause 6A.9.4 of the NER? Is the AER exercising an "AER economic function or power"?

2.2 High-level comments

We provide the following comments to assist with the AER's further queries:

- We have not made any submission about whether TasNetworks would be able to recover the costs of early works if Marinus Link did not proceed.

- We have not made any submission that the allowed rate of return provisions do not apply to the Stage 1 determination. Our submission is focused on how best to apply these provisions in MLPL's circumstances.
- Our position is that the right approach to applying the allowed rate of return provisions in the Rules is to consider how the definitions in those provisions apply to MLPL's circumstances. We then test whether this interpretation is reasonable by considering two matters:
 - The context for the AER's decisions on Part A (Early works) and Part B (Construction costs), which together form the AER's Stage 1 determination for MLPL; and
 - The logical consequence of our proposed approach, having regard to the overarching objective that the allowed revenue should reflect the efficient costs of undertaking the early works activities, including the financing costs³.
- Our reading of the Rules definitions is that there are two problems in calculating an allowed rate of return for MLPL in relation to early works:
 - MLPL will only become a network service provider if the project proceeds. At the time of the AER's decision for Part A (Early works), being December 2023, it is unknown whether the project will proceed as the Final Investment Decision will not be made until 2024. So, in relation to the AER's decision for Part A (Early works), it is reasonable to ask: 'which party is the network service provider in relation to the AER's decision for Part A (Early works)?' We also ask the same question in relation to the AER's decision for Part B (Construction costs).⁴
 - MLPL's first regulatory control period commences on 1 July 2025, if the project proceeds. Therefore, it cannot be said that the early works expenditure, which covers the period 1 July 2021 to 31 December 2024, takes place during a regulatory control period for MLPL.
- In examining the wording of the 'allowed rate of return' provisions in the Rules we are not making any claim about the general applicability of the Rate of Return Instrument. Our approach is to read the definitions and consider how they should be applied in MLPL's circumstances. We reach the following conclusions:
 - For Part A (Early works), it is appropriate to adopt TasNetworks' allowed rate of return, rather than estimate an allowed rate of return for MLPL.

³ National Electricity Law, Section 7A—Revenue and pricing principles, subsection (2).

⁴ Please refer to our earlier response, dated 20 October, section 3.3.

- For Part B (Construction costs), it is appropriate to estimate an allowed rate of return for MLPL.

These different approaches reflect the following facts:

- For Part A (Early works), MLPL could not give effect to this decision because it has no means of recovering these costs unless the project proceeds. The AER's decision in relation to Part A (Early works) also relates to a period before the commencement of MLPL's first regulatory control period.
 - For Part B (Construction costs), MLPL is the party that would give effect to this decision because construction will only take place if there is a positive Final Investment Decision. The AER's decision for Part B (Construction costs) also relates to a period during MLPL's first regulatory control period.
- In relation to context, our submission makes two points that reinforce our proposed interpretation of the allowed rate of return provisions:
 - TasNetworks is financing MLPL's early works expenditure. It is therefore reasonable to adopt TasNetworks' allowed rate of return.
 - If Marinus Link did not proceed, TasNetworks is the only party that could, in principle, give effect to the AER's Part A (Early works) decision, by recovering the costs of early works. This is because TasNetworks would continue to be a TNSP, whereas Marinus Link would never be a TNSP.

In relation to the latter point, we are not suggesting that TasNetworks is able to recover the costs of early works. Instead, we are asking a hypothetical question about how the AER's decision on Part A (Early works) could be implemented in order to gain an insight into whether the decision could be regarded as applying to TasNetworks. This 'thought experiment' reveals that it is reasonable to take that view.

As an aside, the AEMC's position is that TNSPs should have certainty that the early works costs are recoverable:⁵

"The Commission considers that it is important for TNSPs to have certainty that they can recover at least their efficient costs for preparatory activities and early works."

Having said that, we are not making any submission on whether these costs would be recoverable by TasNetworks if Marinus Link did not proceed.

⁵ AEMC, Transmission Planning and Investment Review – Stage 2, 27 October 2022, page 38.

3 Question and answer

AER query #1

MLPL submits that (a) TasNetworks is the service provider in relation to the AER's determination for Part A (Early Works), and that, (b) if Marinus Link does not proceed, TasNetworks will be able to recover expenditure by MLPL on the Marinus Link project. This is not consistent with our understanding, and we would like to discuss the basis of these submissions.

MLPL answer #1

MLPL is not making a submission that TasNetworks will be able to recover expenditure incurred by MLPL. Our position is that the efficient costs of early works should be recoverable, consistent with the AEMC's conclusions in its Transmission Investment and Planning Review – Stage 2.

We explain that, hypothetically, if Marinus Link does not proceed the only way to achieve cost recovery is through TasNetworks. This observation illustrates that it is reasonable to conclude that TasNetworks could be regarded as the network service provider in relation to early works.

The reason for making this point is to test the reasonableness of our proposition that TasNetworks' allowed rate of return should be applied for the purpose of establishing the early works opening RAB as at 1 July 2025. As already noted, we are not making any claims regarding whether TasNetworks would seek to recover the costs of early works if Marinus Link did not proceed, nor are we making any comments about how this outcome could be achieved.

AER query #2

It appears to us that MLPL is the service provider for expenditure on Marinus Link services. It is not apparent to us on what basis TasNetworks could recover MLPL's expenditure on Marinus Link from Tasmanian consumers. We would like to understand how MLPL proposes that the AER apply the provisions of the NEL and the NER to arrive at these results.

MLPL answer #2

We are not making any submissions in relation to TasNetworks' cost recovery because our expectation is that Part B will proceed. Our paper only considers the Rules provisions in relation to the allowed rate of return and considers how they should be interpreted in MLPL's unique circumstances.

As an aside, there are sound economic and regulatory reasons why efficient early works costs should be recovered from customers, whether or not the project

proceeds. There are questions about whether this outcome could be achieved in this instance, but these questions are not relevant to the rate of return issue that is being considered here.

AER query #3

MLPL submits that the period to which the AER's Stage 1 determination applies is not a regulatory control period. On that basis, it submits that the allowed rate of return provisions in the NER do not apply to the AER's Stage 1 determination. (At the same time, MLPL submits its rate of return proposal is consistent with the RORI.)

MLPL answer #3

MLPL does not submit that the period to which the AER's Stage 1 determination applies is not a regulatory control period. MLPL also does not submit that the allowed rate of return provisions in the NER do not apply to the AER's Stage 1 determination. Our earlier submission explained that an allowed rate of return for MLPL should apply in relation to Part B (Construction costs).

We explain that the AER's decision in relation to Part A (Early works) occurs prior to the first regulatory control period and relates to expenditure that ceases on 31 December 2024, which is 6 months prior to the first regulatory control period. For those reasons, there is no regulatory control period for MLPL to which the AER's Part A (Early works) decision relates. A regulatory control period for MLPL will commence on 1 July 2025, if there is a positive FID in December 2024, following the successful completion the AER's decision for Part B (Construction costs).

AER query #4

We would like to understand how MLPL characterises the early works period (1 July 2021 – 31 December 2024), and the AER's Stage 1 determination, from a legal and regulatory perspective.

MLPL answer #4

The period from July 2021 – 31 December 2024 is a period prior to the first regulatory control period. Stage 1 comprises Part A (Early works) and Part B (Construction costs).

AER query #5

What governs the AER's Stage 1 determination (generally, and with respect to the rate of return)? It seems to us that MLPL will be subject to regulatory control, and the beneficiary of certain regulatory protections, from the commencement of the AER's Stage 1 determination during the early works period. Further, if the years during the early works period are not characterised as "regulatory years", we do

not see how the regulatory framework in the NEL, the NER and the RORI applies to MLPL or its expenditures.

MLPL answer #5

The Stage 1 determination comprises two parts – Part A (Early works) and Part B (Construction costs). In the absence of Part B being completed and a positive FID so that MLPL proceeds with the project, there will be no active determination applying to MLPL. In these circumstances, MLPL will cease to be an Intending TNSP and will not become a network service provider.

For the period prior to the commencement of the first regulatory period, the AER and MLPL are working towards achieving the Stage 1 determination. Both parties are engaged in the regulatory process to deliver this outcome. In working through the regulatory process, Chapter 6A applies in accordance with clause 6A.9.4 and the Commencement and Process Paper. In relation to the AER's decision for Part A (Early works), the principal purpose is to enable the recovery of the prudent and efficient costs of early works by establishing the opening RAB, as at 1 July 2025. Once Stage 1 is completed, it will only be given effect if MLPL decides to proceed with the project. If these pre-conditions are met, the first regulatory control period will commence on 1 July 2025.

AER query #6

Does MLPL agree we are making a revenue determination under clause 6A.9.4 of the NER? Is the AER exercising an "AER economic function or power"?

MLPL answer #6

As explained in our answer to AER query #5, Part A (Early works) is the first part of a two-part determination process, which is being conducted under clause 6A.9.4. For MLPL, the AER's decision for Part A (Early works) cannot be given effect in the absence of the successful completion of Part B (Construction costs) and a positive FID.