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Australian Energy Regulator

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Preliminary position on the Transgrid's reopener

AGL Energy (AGL) welcomes the opportunity to respond to the Australian Energy Regulator's preliminary position on Transgrid's application to reopen its transmission revenue determination for Project EnergyConnect (PEC).

Overview

AGL supports the AER's preliminary position that Transgrid has not met all of the reopener criteria and that its application should be rejected. In particular, AGL supports the AER's preliminary findings that the contract failure is not a valid reopener event, was not beyond Transgrid's reasonable control, and could reasonably have been foreseen. AGL also agrees that Transgrid has not demonstrated the material adverse effects on reliability and security required by the rules. Rejecting the application would protect consumers from premature recovery of the overspend and preserve the rigorous ex post assessment of whether the expenditure was prudent and efficient.

Contract failure is not a valid reopener event (Q1)

AGL supports the AER's preliminary finding that Transgrid's contract failure does not fulfil the requirements of an event under the reopener rules. We agree with the AER's view that the relevant event cannot include future events as this would make the event merely a hypothetical.

As per our initial submission we consider the rules make a clear distinction between an event and its adverse consequences. With the flooding, labour shortages, inflation, and productivity shortfalls being the event and the contract failure being the adverse consequences. Accepting Transgrid's framing risks establishing a precedent in which the event is defined by an outcome it controls rather than by an external occurrence. This cannot be the intention of the rules.

The contract failure event was not beyond Transgrid's reasonable control (Q2–3)

The rules assess control over the event, not earlier contributing circumstances. Transgrid's lack of control over flooding, labour shortages, inflation and other contributing factors is therefore not relevant to whether the Contract Failure was beyond its reasonable control.

Transgrid's assertion that the contract failure was beyond its reasonable control ignores its obligation to consider all options reasonably available to it, including enforcing contractual obligations. Transgrid retained reasonable control over contract management, risk monitoring, escalation, enforcement strategy, decisions about whether to call on security and how to respond to warning signs that the EPC contract may not deliver the project as expected. Ex ante incentive regulation would collapse if TNSPs had no obligation to enforce contracts, including through litigation where appropriate.

Transgrid's increased capital expenditure was not due to a contract failure beyond its reasonable control, but rather to its failure to exercise effective oversight of its contractor and its failure to act as a prudent operator by not enforcing its contract. These were both opportunities for Transgrid to exercise control and avoid its exposure to increased capital expenditure, which it did not take.

The contract failure was reasonably foreseeable (Q4-6)

AGL considers that foreseeability should be assessed by reference to the information reasonably available during the determination process, including information available up to the point at which it could reasonably have informed the AER's final decision. The regulatory process allowed Transgrid to provide updated information after its revised proposal, and Transgrid's own April 2023 update confirms that the process remained open to new information. In this case, the assessment should include the material information available up to 28 April 2023 and should not be confined to Transgrid's proposed date of 2 December 2022. It cannot be the intention of the rules that a TNSP has no obligation to update the AER about a material change in circumstances before the final determination is made.

By 28 April 2023, the relevant risks were more than theoretical. Flooding had occurred, Clough had entered voluntary administration, productivity problems had emerged, the contractor had advanced escalation claims, material losses were forecast and the parent company had declined further financial support. A reasonable TNSP should therefore have foreseen that these factors could cumulatively strain the contractor and lead to material non-performance or financial distress under the fixed-price delivery model. The rules do not require the precise sequence or ultimate quantum of costs to have been predicted.

AGL suggests the AER assess whether an event could reasonably have been foreseen by a TNSP by considering what a prudent and efficient TNSP knew, or ought reasonably to have known, at the relevant time, having regard to the information available and the circumstances of the project. An event should not be considered unforeseeable merely because its precise timing, scale or combination of causes was uncertain. Rather, the question is whether a reasonable TNSP would have foreseen a material risk of the event, or an event of a similar kind, occurring.

Adverse effects on reliability and security must be likely and material (Q7-8)

AGL supports the AER's proposed distinction between an adverse effect on reliability and security and the loss of an improvement or economic benefit. This distinction is important to maintaining the threshold intended by the reopener. It should require evidence that the transmission system would become materially less capable of performing its required functions or remaining within relevant technical limits, not merely that consumers would forgo benefits associated with an augmentation. Clause 6 is directed specifically to adverse effects on reliability and security, not affordability or efficiency and therefore the impact on economic benefit is irrelevant.

AGL considers that 'likely' should be interpreted as what would reasonably be expected to occur, rather than outcomes that are merely possible. 'Materially' should be interpreted as a significant adverse effect in the context of the transmission system as a whole. Accordingly, Criterion 6 requires more than a theoretical or marginal impact on reliability and security. A loss of market benefits, increased costs or reduced affordability or efficiency is not sufficient.

Transgrid has not demonstrated a likely material adverse effect (Q9)

The evidence relied on by Transgrid does not establish that delaying or not completing PEC would be likely to materially adversely affect reliability and security. Criterion 6 requires more than the loss or deferral of PEC's benefits. The assessment must instead consider the residual effect after reasonably available mitigating actions are considered, rather than assuming that no mitigating action would be taken. Transgrid has therefore not demonstrated that the effects required by Criterion 6 were likely to occur.

The potential South Australian reliability gap also did not establish that the reopener threshold is met. AEMO's reliability processes are designed to elicit responses, and the delayed retirement of Torrens Island B addressed the forecast shortfall. This supports the AER's preliminary finding that Transgrid has not demonstrated a likely material adverse effect on reliability.

The relevant counterfactual should reflect the realistic delay associated with reasonable enforcement, alternative delivery or other mitigation action. Transgrid should not be permitted to establish the reopener threshold by comparing its preferred replacement contract with permanent abandonment where that was not the likely consequence of taking a different prudent course. The AER should test whether the period of delay reasonably associated with those alternatives would itself have been likely to cause a material adverse effect on reliability and security.

In its final decision, the AER should identify the specific reliability standard, security requirement, technical limit or required system function alleged to be affected. It should also identify the probability and expected duration of that effect, the realistic delay or non-delivery counterfactual, and the available market, operational and regulatory responses. This would ensure that PEC's consumer and market benefits are not conflated with the separate legal threshold for reopening the determination.

Conclusion

AGL supports the AER finalising its preliminary position and rejecting Transgrid's reopener application because Transgrid has not met the applicable criterion. It has not established a valid event beyond its reasonable control that could not reasonably have been foreseen or demonstrated the material adverse effects on reliability and security required by the rules. Rejecting the application would protect consumers from premature recovery of the overspend and preserve rigorous ex post assessment of whether the expenditure was prudent and efficient.

In any subsequent ex post assessment, AGL encourages the AER to examine whether Transgrid's decisions not to enforce available contractual remedies and to enter the replacement delivery arrangements before regulatory approval caused or increased the expenditure claimed.

For queries re this submission, please contact [REDACTED] at [REDACTED].

Yours sincerely,

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