



Minister for Energy and Resources

AUST. COMPETITION &
CONSUMER COMMISSION
MELBOURNE

20 AUG 2010

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Mr Chris Pattas
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Australian Energy Regulator
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FILE No:

DOC: D10/3665771

MARS/PRISM:

Dear Mr Pattas,

SUBMISSION ON THE VICTORIAN ELECTRICITY DISTRIBUTION NETWORK SERVICE PROVIDERS' REGULATORY PROPOSALS FOR 2011-15

The Victorian Government welcomes the opportunity to provide a submission on the Australian Energy Regulator's (AER) draft determination on the revenue for the Victorian electricity distribution network service providers' (DNSPs) for 2011-15 and the DNSPs' revised regulatory proposals.

As indicated to you in my submission on the DNSPs' original submissions, this revenue determination marks an important milestone in the transition of responsibilities from the Essential Services Commission (ESC) to the AER.

The AER must ensure that the revenue determination protects the interests of Victoria's 2.5 million electricity customers, as required by the National Electricity Objective. The AER must also ensure that it strikes the right balance between the interests of the privatised DNSPs and Victoria's electricity customers.

Overall, it appears the draft determination has done a reasonably good job of striking this balance, particularly in light of the distributors' actual historical performance relative to previous forecasts.

However, I am concerned that the draft determination does not appear to have struck the right balance with respect to some issues, namely:

- Rolling the capital expenditure for 2006-10 into the regulatory asset base - the AER's conclusion that the National Electricity Rules (NER) do not allow it to remove unjustified related party margins from the capital expenditure before rolling it into the regulatory base fundamentally undermines the incentive-based economic regulatory regime. This interpretation of the NER by the AER provides a perverse incentive for the DNSPs to contract with a related party for their entire capital expenditure program for a fixed fee unrelated to the costs incurred in providing those services, with the knowledge that the contract value will be rolled into the regulatory asset base. This will mean Victorian customers paying more for electricity distribution than they would otherwise be with no increase in service.

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- The methodology foreshadowed for rolling depreciation into the regulatory asset base for the 2016-20 regulatory control period – the AER wants a nationally consistent approach of rolling in depreciation based on actual capital expenditure rather than forecast capital expenditure. The Victorian Government believes that the continuing use of depreciation based on forecast capital expenditure (regulatory depreciation) is much more suited to Victorian circumstances than using actual capital expenditure. Adopting the approach that is best for Victorian consumers is far more important than attempting to align with other states.
- The approach for setting targets for the Service Target Performance Incentive Scheme – the approach adopted by the AER provides for windfall gains or losses for the DNSPs, meaning Victorian electricity customers may end up paying more than they should.
- The possible removal of side constraints on the distribution tariffs that will apply in 2011, which may expose Victorian electricity customers to price shocks.

The definition of a regulatory change event – the AER is applying an unnecessarily narrow interpretation which is not in the long term interests of consumers.

These issues are detailed further in the attached submission.

In their revised regulatory proposals, submitted in response to the draft determination, the DNSPs have provided extensive additional material for the AER's consideration in making the final determination. Whilst revised regulatory proposals usually lie somewhere between the original regulatory proposals and the draft determination, on this occasion the revised regulatory proposals are reasonably consistent with the original proposals.

I would urge the AER to continue to rigorously assess the additional information that has been provided to it, in light of the distributors' actual performance relative to their past proposals, to ensure that Victorian electricity customers continue to benefit from efficient, reliable, safe and secure distribution services.

Should you have any queries in relation to this submission, please do not hesitate to contact Mr Peter Naughton, Executive Director, Energy Sector Development, Department of Primary Industries on telephone (03) 9658 4924 or by email on peter.naughton@dpi.vic.gov.au.

Yours sincerely,



Peter Batchelor MP
Minister for Energy and Resources

18/9 / 2010

Encl.

Victorian electricity distribution network service providers

Distribution determination 2011-15 – Draft decision

Submission from the Minister for Energy and Resources to the Australian Energy Regulator

Rolling the capital expenditure into the regulatory asset base

In its Draft Decision, the Australian Energy Regulator (AER) has undertaken considerable analysis with respect to outsourcing and related party transactions to assess the Victorian Distribution Network Service Providers' (DNSPs') operating and capital expenditure proposals. Notwithstanding the detailed analysis, the AER has not sought to make adjustments to the DNSPs' roll forward calculations with respect to related party margins.¹

By doing so, the AER has provided an incentive to the DNSPs to:

adjust their capitalisation policies to maximise the level of expenditure that is capitalised

- contract with a related party for their entire capital expenditure program for a fixed fee unrelated to the costs incurred in providing those distribution services, with the knowledge that the contract value will be rolled into the regulatory asset base without examination by the AER.

Over time this will increase the DNSPs' regulatory asset bases and result in a return on and return of the higher regulatory asset base for the life of the assets. That is, distribution tariffs will be higher than they would otherwise be with no increase in service.

If, for example, the total capital expenditure for providing distribution services was \$950 million per annum and a contract was established between related parties for \$1 billion, then under the AER's draft decision, \$1 billion would be rolled into the regulatory asset base with respect to each year rather than \$950 million. The distributors would earn an additional return on and return of the capital expenditure in the order of \$5 million for each additional \$50 million that is added to the regulatory asset base. Over five years, this would amount to in the order of \$70 million extra that would be paid by customers for the provision of no additional service. The additional amount paid by customers would continue to increase over time.

This is a perverse outcome which is not in the long term interests of consumers and fundamentally undermines the incentive-based economic regulatory regime.

The AER has reached this conclusion through its interpretation of clause S6.2.1(e)(1) of the National Electricity Rules (NER)², which states that:

The previous value of the regulatory asset base must be increased by the amount of all capital expenditure incurred during the previous control period.

¹ Australian Energy Regulator, Victorian Electricity Distribution Network Service Providers, Distribution Determination 2011-2015 – Draft Decision, June 2010, pages 190 and 452

² *ibid*, page 189

The AER (rightly) expresses considerable concern about this conclusion and points to the need for changes to the NER.

However, the conclusion that the AER has reached is not, in terms of a purposive interpretation of the NER consistent with the National Electricity Objective, correct.

Clause 7 of Schedule 2 of the National Electricity Law (NEL) mandates that the AER adopt an interpretation of the "Law" that will best achieve the purpose or object of the "Law" with such an interpretation to be preferred over any other interpretation. Pursuant to clause 41 of Schedule 2, clause 7 applies to the NER.

Further, in performing and exercising its "AER economic regulatory function or power", the AER must do so in a manner that will or is likely to contribute to the National Electricity Objective – see section 16 of the NEL. The making of the revenue determination for the Victorian DNSPs for 2011-15 is an exercise of the AER economic regulatory function or power.

Although there is no definition of "capital expenditure" in either the NEL or NER, there are important indications as to what is intended by the use of that term. Thus item 26B of Schedule 1 of the NEL expressly refers to rules being made in the NER for "the assessment, or treatment, by the AER of investment in distribution systems for the purposes of making a distribution determination". Item 26E refers to rules being made for "the regulatory asset base, for the purposes of making a distribution determination, of assets forming part of the asset base...". These two items reflect the traditional distinction between investment (ie the flow of resources into the production of new capital) and the capital itself (ie the assets held by the regulated entity).

In terms of the regulatory asset base itself, one starts with clause 6.5.1(a) of the NER which defines the nature of the regulatory asset base as:

the value of those assets that are used by the [DNSP] to provide standard control services, but only to the extent that they are used to provide those services

Schedule 6.2 (which contains clause S6.2.1(e)(1)) is then referred to in clause 6.5.1(f) as follows:

Other provisions relating to regulatory asset bases are set out in schedule 6.2

It is telling that clause 6.5.1(f) commences with the word "other"; what that speaks to is that schedule 6.2 must be read with the preceding provisions of clause 6.5.1 in mind, and (importantly) interpreted consistently with the mandate in clause 6.5.1(a), that it is the value of the assets that is to be included in the regulatory asset base. Such an interpretation is also consistent with the National Electricity Objective which is, as is well understood, an efficiency objective.

As recognised by the Essential Services Commission (ESC) in its last Electricity Distribution Price Review, the accuracy of the financial data provided by the DNSPs is critical in making revenue determinations:³

³ Essential Services Commission, Electricity Distribution Price Determination 2006-10, Volume I: Final Decision, October 2006, pages 159-160

The need to carefully review reported expenditure and make adjustments arises in the context of all forms of monopoly regulation that rely on business-specific cost information because of the associated incentive to report or represent that costs are greater than can properly be said to be the case.

At the time the 2008 comparative performance report was released, the AER was reviewing the financial data provided by the DNSPs and so did not make any comment on any adjustments that may be required to the reported financial data.

The analysis of outsourcing and related party transactions subsequently undertaken by the AER as part of the Draft Determination would indicate that the capital expenditure that has been allocated to the provision of standard control services by the DNSPs is likely to be overstated and does not represent the actual capital expenditure incurred in providing standard control services.

However and despite that, the AER then concludes that because clause S6.2.1(e)(1) refers to “all capital expenditure”, the AER cannot do anything other than accept the DNSP’s claims as to the amount of that past capital expenditure. On this basis there is no attempt to assess the investment, or to attribute any value thereto by the AER except that claimed by the DNSP.

That interpretation is not in accordance with the National Electricity Objective, nor is it an interpretation that best achieves the purpose or object of the NEL. It has, instead, the effect of permitting DNSPs to roll into the regulatory asset base expenditure that is completely untested in terms of efficiency, and thereby (and perversely) encourages inefficiency.

This is not to suggest that an ex post efficiency review be undertaken. Rather, it suggests that the AER is not prevented from examining expenditure to ensure that it accurately reflects the expenditure actually incurred in providing distribution services.

Indeed the problems associated with the AER’s interpretation of the NEL in this regard are made manifest by the fact that, on such an interpretation, forecast capital expenditure that was excluded as inefficient in the previous regulatory period, would (if the DNSP ignored that exclusion and went ahead anyway) be able to be rolled in for the next regulatory period – see clause S6.2.1(e)(3)(ii).

The NEL deliberately provides AER with the necessary powers to obtain the information that is required to assess the actual costs that have been incurred in providing distribution services. Section 28F of the NEL allows the AER to serve and make a regulatory instrument on a DNSP or a related party to ensure that the actual costs cannot be hidden from the AER.

The AER refers in its Draft Determination to the decision of the Australian Competition Tribunal in *Application by United Energy Distribution Pty Ltd (2009) ATPR 42-306*.

That decision is important because of its recognition (at para 55) that “in other contexts involving electricity pricing determinations” the AER should inquire into related party margins, which speaks to the Tribunal not sharing the same view of clause S6.2.1(e)(1) as the AER does. Or to put it another way, the Tribunal sees economic efficiency as relevant to the roll into the regulatory asset base of past capital expenditure and in that context, related party margins are open to inquiry by the AER when making a distribution determination.

But that is not the only importance of the decision.

It is also important because of the approach to interpretation endorsed by the Tribunal. At para 42 of its judgment, the Tribunal said the following:

As a general rule, a court is required to give effect to the literal words of a statute. But this rule is not of universal application. For instance, if it is clear that the literal meaning of the words used by Parliament will produce a result that plainly is not what was intended, then a court is permitted to depart from the literal meaning. Indeed, if what was intended is clear, the court should give effect to that intention, where necessary changing the language of the enactment by adding, deleting or substituting new words. This approach was sanctioned by Lord Diplock in Jones v Wrotham Park Settled Estates [1980] AC 74 and applied by the Federal Court in Handa v Minister for Immigration and Multicultural Affairs (2000) 106 FCR 95 [13] – [17].

The interpretation of clause S6.2.1(e)(1) that the AER contends is plainly an unintended one. That being the case, the AER can, indeed is required, to depart from the literal meaning of the clause.

A further difficulty with the AER's interpretation of the clause lies in it being inconsistent with the revenue and pricing principles specified in section 7A of the NEL, in particular the principle in subsection (4) which provides that regard should be had to the regulatory asset base adopted in any previous distribution determination. As the AER notes in its Draft Determination, the Victorian ESC limited or excluded related party margins in its previous distribution determination yet the AER allows them back in. This is not consistent with the principle in section 7A(4).

Section 16(2) of the NEL requires the AER to take the revenue and pricing principles into account when exercising a discretion in the making of a distribution determination or otherwise when performing another AER economic [regulatory] function or power.

It should also be noted that the provisions for the economic regulation of DNSP as set out in Chapter 6 of the NEL are not the same as the provisions for the economic regulation of Transmission Network Service Providers as set out in Chapter 6A of the NEL. The AER therefore needs to take care that a Chapter 6A interpretation of the NEL is not applied to the economic regulation of DNSPs.

That being the case, and to protect the long term interests of consumers, consistent with the National Electricity Objective, the AER should only increase the regulatory asset base by the capital expenditure incurred in providing standard control services and not for related party margins that are not justified.

Rolling depreciation into the regulatory asset base

The NEL require the AER to make:

A decision on whether depreciation for establishing the regulatory asset base as at the commencement of the following regulatory control period is to be based on actual or forecast capital expenditure.⁴

⁴ Section 6.12.1(18)

The flexibility provided in the National Electricity Rules to allow either actual or regulatory depreciation recognised that the appropriate choice would vary depending on the specific circumstances. Under the circumstances that exist in some jurisdictions, it is appropriate that the depreciation be based on actual capital expenditure, whilst in other jurisdictions, it is appropriate that the depreciation be based on forecast capital expenditure.

The Victorian Government supports the continuing use of depreciation based on forecast capital expenditure (regulatory depreciation) as this is considered to be the approach more suited to the specific circumstances that apply in Victoria, namely:

- The regulatory framework provides an incentive to DNSPs to forecast high capital expenditure
- ~~The capital expenditure forecast by the Victorian DNSPs is generally greater than actual capital expenditure, that is, the Victorian DNSPs generally underspend relative to forecast whereas DNSPs in other jurisdictions generally overspend relative to forecast~~
- The regulatory depreciation for the Victorian DNSPs is therefore generally greater than actual depreciation whereas the regulatory depreciation for DNSPs in other jurisdictions is generally less than actual depreciation
 - Victorian consumers have already paid for regulatory depreciation (as one component of the building blocks revenue) and will effectively pay twice for some depreciation if the (lower) actual depreciation is rolled into the asset base
 - Under these circumstances, the regulatory asset base will effectively be larger if actual depreciation is rolled in rather than regulatory depreciation
 - The use of regulatory depreciation rather than actual depreciation places downwards pressure on the capital expenditure forecasts – if the regulatory depreciation is too high relative to actual depreciation, the assets will be written off in the regulatory accounts much earlier than in the statutory accounts.

In its Draft Decision, the AER has concluded that actual depreciation rather than regulatory depreciation will be used to roll forward the asset base for the 2016-20 regulatory control period.⁵ The only justification that has been provided for moving from regulatory depreciation to actual depreciation is that it is consistent with transmission regulation and the AER's recent distribution determinations in New South Wales, Australian Capital Territory, Queensland and South Australia. However the AER recognises that the use of actual depreciation could result in windfall gains or losses.⁶ The AER does not appear to have considered the different circumstances in each of these determinations.

As indicated in the Ministerial Council on Energy's Standing Committee of Officials' response to stakeholder comments on the Exposure Draft of the National Electricity Rules for distribution revenue and pricing, the appropriate process to determine whether actual depreciation or

⁵ Australian Energy Regulator, Victorian Electricity Distribution Network Service Providers, Distribution Determination 2011-2015 – Draft Decision, June 2010, page 453

⁶ *ibid*, page 452

regulatory depreciation should be consistently applied in all determinations is through a rule change process.⁷

The AER should therefore not pre-empt a potential future rule change regarding rolling depreciation into the regulatory asset base and should reconsider whether it is appropriate to roll in actual depreciation rather than regulatory depreciation into the regulatory asset base given the circumstances that apply in Victoria.

Targets for the Service Target Performance Incentive Scheme

In developing its service incentive scheme (or S-factor) that applied with respect to the 2006-10 regulatory period, the ESC moved to a new approach in which the target for each year was the actual performance in the previous year with an incentive rate based on the value of customer reliability. As a result, the DNSP's revenue increased when there was an improvement in reliability from one year to the next and the DNSP's revenue decreased when there was a deterioration in reliability from one year to the next.

Under such a scheme, distributors would choose to improve reliability where it is efficient to do so. Customers would pay for these improvements when the outcomes are delivered, through the S-factor scheme. This approach minimises transitional issues other than to account for changes to service reliability measures, as it is based on relative performance from year to year rather than performance relative to targets. It thereby avoids adjustments that would otherwise be required to ensure that adjustments to targets do not result in windfall gains or losses.⁸

The AER's Service Target Performance Incentive Scheme (STPIS) states that the targets for the STPIS:

must be based on average performance over the past five regulatory years, modified by the following:

....

(2) any other factors that are expected to materially affect network reliability performance.

In its Draft Decision, the AER has indicated that the targets for the Victorian DNSPs will be the average of the past five years' historical performance.

The draft decision does not take into consideration the specific circumstances of the Victorian DNSPs. The Victorian DNSPs have been subject to a service incentive scheme, similar to the Service Target Performance Incentive Scheme, during the current regulatory period, whereas the DNSPs in the other jurisdictions either have not been subject to any form of service incentive scheme or have been subject to a scheme with a very different design.

Under the existing arrangements, reliability improvements have been funded through the S-factor scheme rather than through the expenditure building blocks. Customers (or DNSPs) have effectively

⁷ SCO response to stakeholder comments on the Exposure Draft of the National Electricity Rules for distribution revenue and pricing, page 57

⁸ Essential Services Commission, Electricity Distribution Price Determination 2006-10, Volume I: Final Decision, October 2006, pages 90-91

been paying for reliability improvements (or deteriorations) – these reliability improvements (or deteriorations) have effectively not been factored into setting of targets for the 2011-15 period.

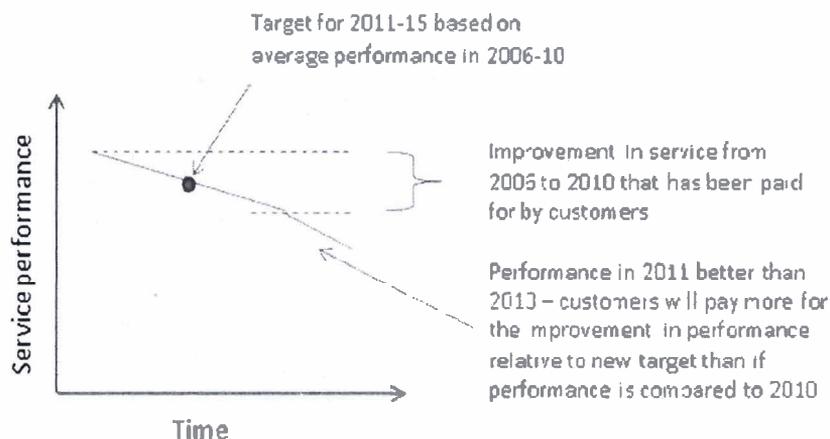
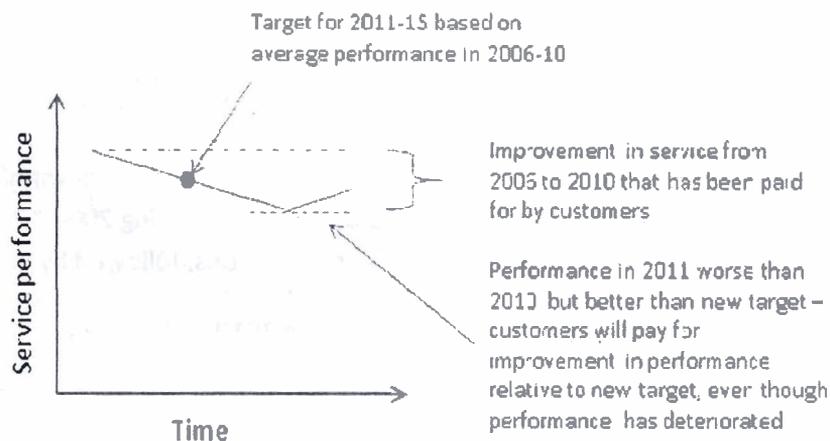
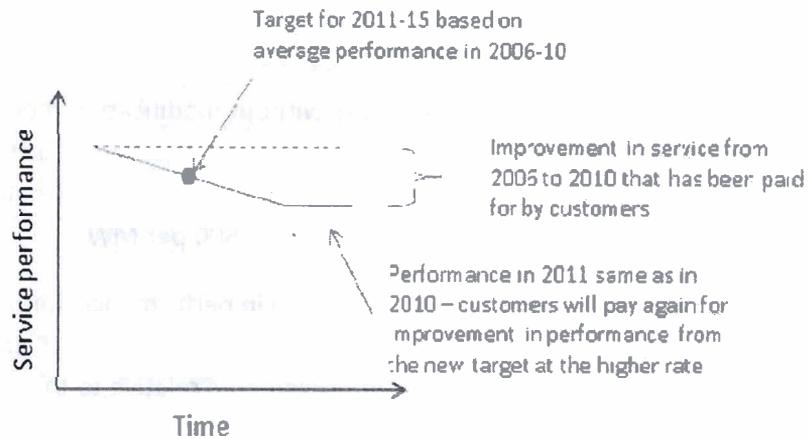
By using the average performance over the past five years without modification there will be windfall gains or losses to the DNSPs (and consumers). These windfall gains or losses will be magnified by an increase in the incentive rate to reflect the increase in the value that customers place on reliability from around \$32,000 per MWh to around \$47,500 per MWh.

This approach provides a perverse incentive for a deterioration in performance during the latter stages of the 2006-10 regulatory period so that the target is set higher for 2011-15 and the distributor can then earn rewards at a higher rate for improvements relative to this new higher target.

In making its Final Determination, the AER must carefully consider this transitional issue to minimise the potential for DNSPs (consumers) to experience windfall gains (losses) or vice versa and minimise perverse incentives.

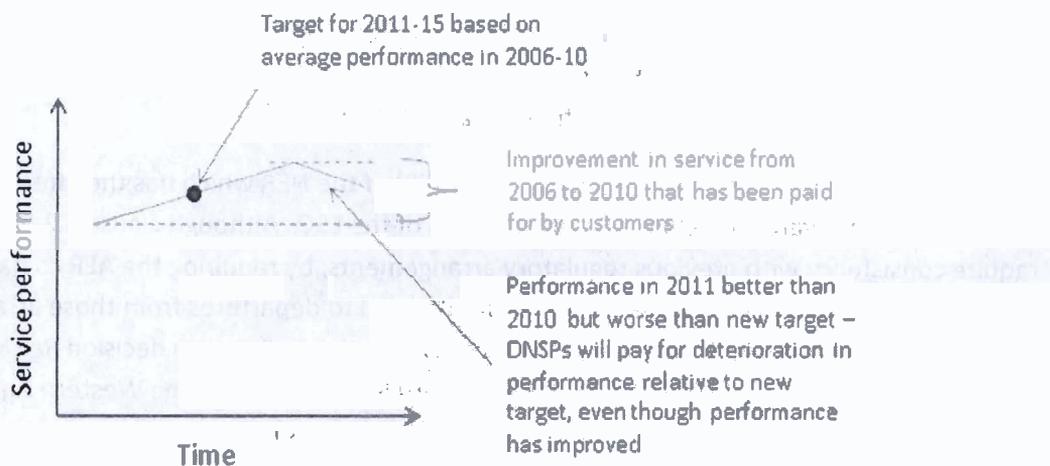
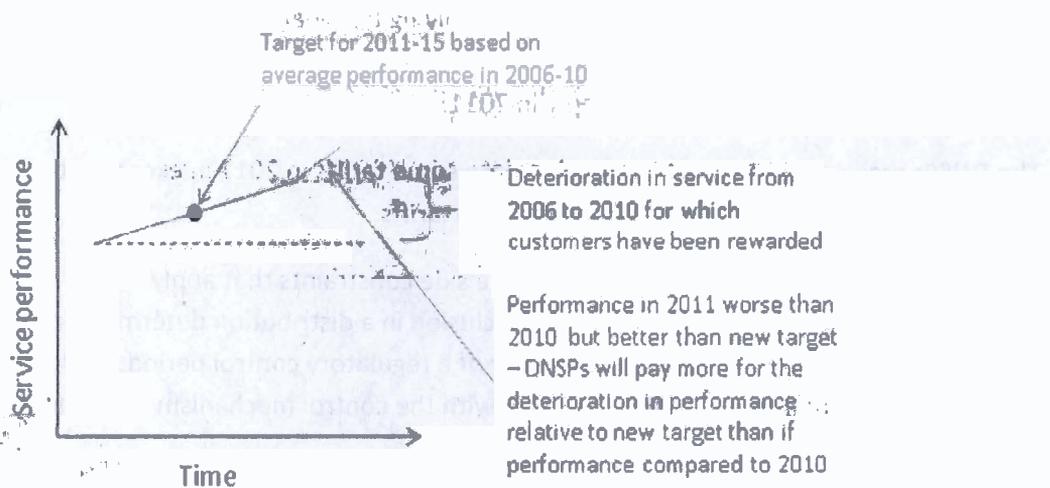
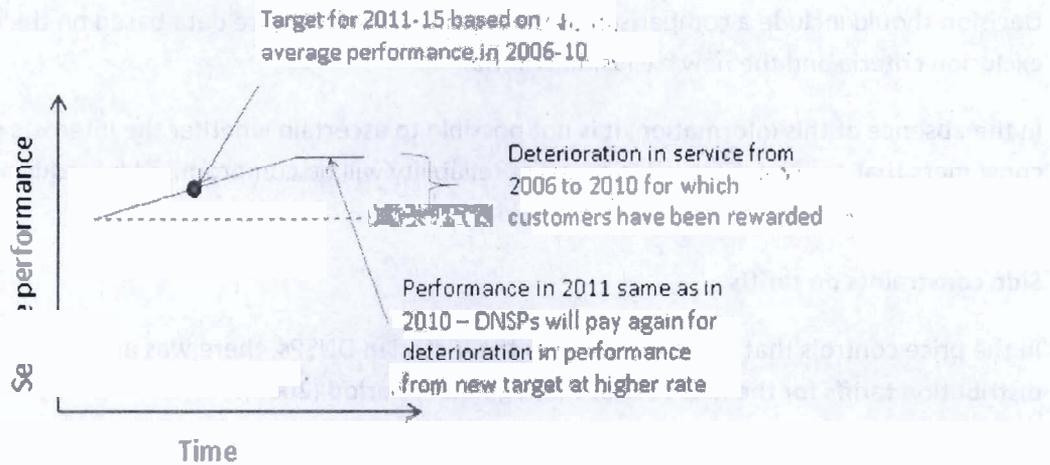
The following examples illustrate the ability for DNSPs (and consumers) to earn windfall gains and losses when there has been an improvement in service performance during 2006-10, that is, a reduction in the duration (SAIDI) or frequency (SAIFI) of interruptions, followed by:

- the same level of performance in 2011 experienced in 2010
- a deterioration in performance in 2011 relative to 2010
- an improvement in performance in 2011 relative to 2010.



The following examples illustrate the ability for DNSPs (and consumers) to earn windfall gains and losses when there has been a deterioration in service performance during 2006-10, that is, an increase in the duration (SAIDI) or frequency (SAIFI) of interruptions, followed by:

- the same level of performance in 2011 experienced in 2010
- a deterioration in performance in 2011 relative to 2010
- an improvement in performance in 2011 relative to 2010.



Impact of major event days

The Service Target Incentive Performance Scheme (STPIS) requires any change to the exclusion criteria to be considered in setting the targets for the STPIS.

The AER has made a significant change to the major event days exclusion criterion by changing from a criterion based on frequency to a criterion based on duration. To assist stakeholders understand the implications of this change on the STPIS and Guaranteed Service Level (GSL) payments, the Final

Decision should include a comparison of the historical performance data based on the existing exclusion criteria and the new exclusion criteria.

In the absence of this information, it is not possible to ascertain whether the interests of those consumers that are worst served in terms of reliability will be compromised by reducing the number of events with respect to which GSLs are paid.

Side constraints on tariffs

In the price controls that currently apply to the Victorian DNSPs, there was a side constraint on the distribution tariffs for the first year of the regulatory period (2006).⁹

The AER has indicated in its Draft Decision that it has interpreted the National Electricity Rules in such a way that they prevent side constraints applying between regulatory control periods.¹⁰ Whilst the side constraints that will apply in the next regulatory control period are similar to those in the current price controls, they will not apply in 2011.

The DNSPs may use this opportunity to increase some tariffs in 2011 in excess of the side constraints resulting in a price shock for customers on those tariffs.

Whilst clause 6.18.6(b) of the NER specifies the side constraints that apply within a regulatory control period, the NER do not prohibit the inclusion in a distribution determination of a specific side constraint applying in the first regulatory year of a regulatory control period. Indeed such a first year side constraint appears to be consistent with the control mechanism specified in the Draft Determination.

In that respect, the AER's attention is drawn to clause 6.18.6(e) of the NER which is in the nature of an avoidance of doubt provision and which, in its terms, recognises that clause 6.18.6 is not intended as exhaustive in terms of control mechanisms so long as those mechanisms otherwise accord with the pricing principles specified in clause 6.18.5.

The AER's attention is also drawn to clause 6.2.5(c)(3) of the NER which has the effect of requiring the AER to have regard to previous determinations of the ESC. Although clause 6.2.5(c)(3) does not require consistency with previous regulatory arrangements, by requiring the AER to have regard to those arrangements, the AER is required to turn its mind to departures from those arrangements and the reasons for those departures. This accords with the well known decision *Re Dr Ken Michael AM: Ex parte Epic Energy (2002) ATPR 41-886 at para 50 – 56* in which the Western Australian Court of Appeal held that use of the words like "have regard to" require the regulator to give weight to the factors to which it must have regard as "fundamental elements" in its decision making.

The Victorian Government seeks confirmation that side constraints will apply to distribution tariffs in 2011, consistent with the control mechanism specified in the Draft Determination, to avoid price shocks for Victorian consumers.

⁹ Essential Services Commission, Electricity Distribution Price Determination 2006-10, Volume II: Price Determination, October 2006, section 2.4.1

¹⁰ Australian Energy Regulator, Victorian Electricity Distribution Network Service Providers, Distribution Determination 2011-2015 – Draft Decision, June 2010, page 60

Administrative costs associated with feed-in tariff schemes

The AER indicated in its Draft Decision that administrative costs associated with feed-in tariff schemes are not permissible under the National Electricity Rules as the AER did not consider them to be a “distribution service”.¹¹

The Victorian Government notes that the Australian Energy Market Commission (AEMC) has subsequently made a rule change relating to feed-in tariffs in which it states that¹²:

The administration costs would fall into costs required to comply with all applicable regulatory obligations or requirements associated with the provision of standard control services. ... The Commission does not consider additional clarification under the Rules would be required at this time as the existing operating expenditure objectives under the Rules include costs required to comply with regulatory obligations.

The Victorian Government expects that AER will take the AEMC’s decision into consideration when making its Final Determination.

Regulatory change event

In its Draft Decision, the AER has stated that a ‘regulatory change event’ for the purposes of the pass through provision is restricted to changes in existing regulatory obligations and does not encompass the removal or imposition of a new regulatory obligation or requirement.¹³

The AER thus accepted United Energy’s argument that a regulatory change event did not include new regulatory obligations or requirements, which argument was based on a comparison of the definitions of “regulatory change event” and “tax change event” in Chapter 10 of the NER.¹⁴

However that comparison does not involve like for like. The definition of “tax change event” does not pick up the definition of “regulatory obligation or requirement” and it is for that reason, as well as the necessity to make the definition work with clause 6.6.1(j)(6) of the NER (which refers to countervailing taxes being imposed or removed), that the definition refers not only to change but also to imposition and removal of taxes. Accordingly the comparison is not a valid one.

Further, United Energy’s interpretation is inconsistent with the intent of the NER and limits a jurisdiction’s ability to introduce new legislation or regulations that change the regulatory obligations of DNSPs. It is also inconsistent with a purposive interpretation of the NEL and NER. This is not in the long term interests of consumers, particularly if a regulatory obligation or requirement is removed thus reducing the costs of providing distribution services, resulting in a negative pass through event.

The National Electricity Rules define a regulatory change event as:

¹¹ *ibid*, page 63

¹² Australian Energy Market Commission, Rule Determination – National Electricity Amendment (Payments under Feed-in Schemes and Climate Change Funds) Rule 2010, 1 July 2010, page 48

¹³ Australian Energy Regulator, Victorian Electricity Distribution Network Service Providers, Distribution Determination 2011-2015 – Draft Decision, pages 709

¹⁴ *ibid*, page 708.

A change in a regulatory obligation or requirement

A regulatory obligation or requirement is defined in section 2D of the National Electricity Law as:

(a) in relation to the provision of an electricity network service by a regulated network service provider –

- i. a distribution system safety duty or transmission system safety duty; or*
- ii. a distribution reliability standard or transmission reliability standard; or*
- iii. a distribution service standard or transmission service standard; or*

(b) an obligation or requirement under –

- i. this Law or Rules; or*
- ii. an Act of a participating jurisdiction, or any instrument made or issued under or for the purposes of the Act, that levies or imposes a tax or other levy that is payable by a regulated network service provider; or*
- iii. an Act of a participating jurisdiction, or any instrument made or issued under or for the purposes of that Act, that regulates the use of land in a participating jurisdiction by a regulated network service provider; or*
- iv. an Act of a participating jurisdiction, or any instrument made or issued under or for the purposes of the Act that relates to the protection of the environment; or*
- v. an Act of a participating jurisdiction, or any instrument made or issued under or for the purposes of the Act (other than national legislation or an Act of a participating jurisdiction or an Act or instrument referred to in subparagraphs (ii) to (iv)), that materially affects the provision, by a regulated network service provider, of electricity network services that are the subject of a distribution determination or transmission determination.*

A new regulatory obligation could be considered to be a change as it represents a change from the existing state of no regulatory obligation to the new state in which the regulatory obligation exists. Similarly the removal of a regulatory obligation could be considered to be a change as it represents a change from the existing state of a regulatory obligation to the new state in which no regulatory obligation exists.

Such an interpretation is consistent with the revenue and pricing principles in section 7A of the NEL, in particular the second principle set out in subsection (2) which provides that a DNSP :

Should be provided with a reasonable opportunity to recover at least the efficient costs the [DNSP] incurs in...complying with a regulatory obligation or requirement.

As previously noted, section 16(2) of the NEL requires the AER to take the revenue and pricing principles into account when exercising a discretion in the making of a distribution determination or otherwise when performing another AER economic [regulatory] function or power.

Further, such an interpretation is consistent with the common meanings of change which include¹⁵:

(an instance of) making or becoming different; the substitution of one thing or set of conditions for another; the following of one thing or set of conditions on another; (an) alteration in state or quality; variety; variation, mutation

As the AER will appreciate, the enactment of a new law that imposes a new regulatory obligation or requirement is a change (under one of the common meanings of that word) in that it involves a “variation”. It further involves the substitution of one thing (an unregulated state) with another (a regulated state).

In the absence of any change in the AER’s interpretation of a regulatory change event or a rule change, the jurisdictions will need to effectively regulate in this regard by explicitly specifying with any legislative or regulatory change that it constitutes a pass through event. This is not consistent with a national framework.

¹⁵ The New Shorter Oxford English Dictionary