

1 April 2020

Mr Warwick Anderson
General Manager Network Financing and Reporting
Australian Energy Regulator

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Email [REDACTED]

Dear Mr Anderson

Nominated pass through events – Natural disaster event

I refer to:

- SA Power Networks' revised proposal for the 2020-25 regulatory control period submitted on 10 December 2019 (Revised Proposal) (and, in particular, to Attachment 13 (Pass through events) of the Revised Proposal); and
- recent dialogue with AER staff about the nominated pass through events referred to in Attachment 13, including the 'natural disaster event'.

The purpose of this letter is to reiterate some of the comments we made in our Revised Proposal concerning the 'natural disaster' pass through event in the context of the ongoing COVID-19 pandemic. As the AER would appreciate COVID-19 and the ensuing government declarations are likely to have serious ramifications for the provision of, and cost of providing, direct control services.

1. Background

In our Original Proposal, we set out a natural disaster event as a nominated pass through event.

In its draft decision on our Original Proposal, the AER accepted that a natural disaster event is consistent with the nominated pass through event considerations but made certain amendments to the definition of the event that we had proposed.

In our Revised Proposal, we made submissions in relation to the AER's proposed amended wording of the natural disaster event, namely in relation to:

- the insertion of the word 'unlawful' before the words 'acts or omissions of the service provider'; and
- the need, or otherwise, for there to be any consideration of whether a relevant government authority has made a declaration that a natural disaster event has occurred (referred to in this submission as the Declaration Consideration).

Our comments relate only to the second of these matters, ie the Declaration Consideration.

2. Declaration Consideration

In our Revised Proposal, we suggested two alternatives in relation to the Declaration Consideration. They were:

- removal of the reference to the Declaration Consideration, given that the AER had not included such a factor in some of its recent revenue determination (Alternative 1); or
- retention of the Declaration Consideration but with amendments so as to align with the terminology used in relevant South Australian legislation (Alternative 2).

In our Revised Proposal, we favoured the adoption of Alternative 1 mainly due to the fact that it reflected the AER's intention at the time to promote consistency between revenue determinations.

However, given the extremely serious nature of the ever-evolving COVID-19 pandemic, we now submit that Alternative 2, adjusted for some minor wording changes, should be adopted, as there is a clear need for the pass through event to contain clear and express language rather than leave serious issues to implication and potential ambiguity.

3. Alternative 2 – explanation and observations

Emergency Management Act 2004 (SA)

As noted in our Revised Proposal, there is no power under South Australian legislation to declare an event to be a 'natural disaster' as such. Rather, under the *Emergency Management Act 2004* (SA) (Emergency Management Act) there is a three-fold arrangement under which an 'identified major incident', a 'major emergency' or a 'disaster' can be declared.

Under the Emergency Management Act:

- the State Co-ordinator may:
 - declare an emergency to be an 'identified major incident'; or
 - declare an emergency to be a 'major emergency' (whether or not that emergency has previously been declared to be an identified major incident); and
- the Governor may declare an emergency to be a 'disaster' (whether or not that emergency has previously been declared to be an identified major incident or a major emergency).

An 'emergency' is defined as an event (whether occurring in South Australia, outside South Australia or in and outside South Australia) that causes, or threatens to cause:

- the death of, or injury or other damage to the health of, any person; or
- the destruction of, or damage to, any property; or
- a disruption to essential services or to services usually enjoyed by the community; or
- harm to the environment, or to flora or fauna.

The note to that definition indicates that an 'emergency' is not limited to events such as earthquakes, floods or storms, but includes, amongst other things, pandemics and epidemics.



Given the above, and as set out in our Revised Proposal, the wording of the Declaration Consideration should make clear references to 'identified major incidents', 'major emergencies' and 'disasters' under the Emergency Management Act such that they fall within the natural disaster event.

Public Health Act 2011 (SA)

Under section 87 of the *Public Health Act 2011 (SA)* (Public Health Act), if the Chief Executive of the Department for Health and Wellbeing considers that an 'emergency'¹ has occurred, is occurring or is about to occur, the Chief Executive has the power to declare the emergency to be a 'public health emergency'.

On 15 March 2020, the Chief Executive declared the transmission of COVID-19 to be a public health emergency.

Before making the declaration, the Chief Executive was required, by section 88 of the Public Health Act, to consult with the Chief Public Health Officer and the State Co-ordinator.

As noted in section 3 above, the State Co-ordinator is the person with authority to declare that a major emergency has occurred under the Emergency Management Act.

Under section 90 of the Public Health Act, upon the declaration of a public health emergency, a number of specified provisions of the Emergency Management Act automatically apply in relation to that public health emergency (subject to some specified modifications). By way of example, Part 4 of Division 4 of the Emergency Management Act (ie powers that may be exercised in relation to declared emergencies) apply with a number of modifications², including that:

- a reference to the 'State Co-ordinator' is to be read as a reference to the 'Chief Executive';
- a reference to a 'major emergency' is to be read as a reference to a 'public health emergency'; and
- a reference to a 'declaration' is to be read as a reference to a 'declaration' under Part 11 of the Public Health Act.

The effect of these provisions is that the declaration of a 'public health emergency' under the Public Health Act is deemed to be treated as the declaration of a 'major emergency' under the Emergency Management Act, and enlivens the emergency powers granted under the Emergency Management Act to the Chief Executive under the Public Health Act³.

Given this interaction between the Public Health Act and the Emergency Management Act, particularly in the light of the extremely serious arrival and continuing evolution and escalation of COVID-19, the wording of the Declaration Consideration as set out in our Revised Proposal should be amended to make clear reference to 'public health emergencies' under the Public Health Act.

¹ This has the same meaning as in the Emergency Management Act).

² Sections 25(1) and 25(2)(n) are excepted from the application of this Part.

³ On 22 March 2020 the State Coordinator declared a major emergency in respect of Covid-19 under the Emergency Management Act, which now supersedes the declaration of a public health emergency under the Public Health Act.



4. Proposed modified (Alternative 2) definition of natural disaster event

Given the above, we propose that the definition of the natural disaster event be as follows (with the amendments we already proposed in our Revised Proposal in relation to Alternative 2 being in red and the further amendments we now propose to that Alternative 2 being in blue):

'Natural disaster event means any natural disaster or other declared emergency including but not limited to cyclone, fire, flood, ~~or~~ earthquake, epidemic or pandemic ~~that occurs during the 2020-25 regulatory control period~~ that increases the costs to SA Power Networks in providing direct control services during the 2020-25 regulatory control period, provided the fire, flood or other event was not a consequence of the unlawful acts or omissions of the service provider.

Note: In assessing a natural disaster event pass through application, the AER will have regard to, amongst other things:

- whether SA Power Networks has insurance against the event,*
- the level of insurance that an efficient and prudent NSP would obtain in respect of the event, and*
- whether a relevant government authority has made a declaration that a natural disaster has occurred (which may include a declaration of an identified major incident, a major emergency or a disaster under, or pursuant to, the Emergency Management Act 2004 (SA) and / or a declaration of a public health emergency under, or pursuant to, the Public Health Act 2011 (SA)).'*

5. Confirmation, if the AER does not agree with the proposed modified Alternative 2

If, despite our proposal in section 4 above, the AER considers that Alternative 1 from our Revised Proposal should nevertheless be adopted, then we request express confirmation from the AER in its final decision that a declaration under the Emergency Management Act, and a declaration of a public health emergency under the Public Health Act, will fall within the scope of the Declaration Consideration.

If, despite our proposal in section 4 above, the AER considers that Alternative 2 from our Revised Proposal should be adopted, then we request express confirmation from the AER in its final decision that a declaration of a public health emergency under the Public Health Act will fall within the scope of the natural disaster event.

We request the opportunity to discuss this very important matter further with you as a matter of some urgency. My contact details are phone [REDACTED] or [REDACTED]

Yours sincerely [REDACTED]

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