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18 July 2023

Mr Daniel McCracken Hewson
General Manager | Merger Investigations Branch
Australian Competition and Consumer Commission
Level 17, 2 Lonsdale Street
Melbourne VIC 3000

By Email

Dear Mr McCracken Hewson

Brookfield and MidOcean application for merger authorisation for proposed acquisition of Origin Energy Limited

We refer to your letter of 11 July 2023 seeking additional information in response to questions set out in Attachment A to that letter (the *section 90(6) request*).

The Applicant's response is provided in **Annexure A** to this letter. Where the Applicant's response uses terms which are defined in the section 90(6)(b) request, the terms have the same meaning as the defined term in that request.

Please let us know if you have any questions in relation to the information provided in this letter.

Yours sincerely

[Redacted signature area]

Fiona Crosbie
Partner
Allens

[Redacted contact information]

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Annexure A

- 1 The Annexure is an extract of the Australian Competition Tribunal's Reasons for Determination in *Applications by Telstra Corporation Ltd and TPG Telecom Ltd (No 2) [2023] A CompT 2*, being Section C of those Reasons containing the Tribunal's statutory framework for its review in that proceeding. The Annexure has been excluded from the Tribunal's confidentiality orders that apply to the remainder of the Tribunal's reasons. Provide by 5:00pm on 18 July 2023 any additional information, of no more than 10 pages, in respect of how the Tribunal's Reasons contained in the Annexure affect how the ACCC should apply the statutory framework in the Act to the Application. In responding to this request, the ACCC would be assisted by additional information in respect of the following:
- (a) the use of the "future with" and "future without" framework when assessing the Application (Annexure, [144]ff);
 - (b) how the reasoning in paragraph [145] of the Annexure applies to the public benefits claimed in the Application;
 - (c) the identification of any conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought in the Application and how that conduct should be considered under the statutory framework in light of the reasoning in paragraphs [145] and [159] of the Annexure.

Scope of Brookfield and MidOcean Application for merger authorisation

- 1 The Applicants have sought merger authorisation for the following conduct:
the acquisition of Origin Energy Limited (**Origin**) constituted by their proposed acquisition of Origin, comprising two interdependent acquisitions:
- (a) the **Scheme Acquisition** being MidOcean Reef Bidco Pty Ltd's acquisition of 100% of the ordinary shares of Origin Energy Limited pursuant to a scheme of arrangement under the *Corporations Act 2001* (Cth); and
 - (b) the **On-Sale Acquisition** being EOS Aggregator (Bermuda) LP's (**Brookfield LP**) acquisition of the Origin Energy Markets business following the Scheme Acquisition.
- 2 The Applicants have requested that the ACCC grant a single merger authorisation for both the Scheme Acquisition and the On-Sale Acquisition pursuant section 88(5) of the CCA.

Tribunal Decision

- 3 The Australian Competition Tribunal's Reasons for Determination in *Applications by Telstra Corporation Ltd and TPG Telecom Ltd (No 2) [2023] A CompT 2* (the **Decision**) states that:

[145] It is clear that the statutory preconditions for authorisation in s 90(7) are directed to the conduct that is the subject of the application for authorisation. The statutory preconditions require the ACCC and the Tribunal on review, to assess the likely competitive effects of, and the public benefits and detriments likely to result from, that conduct. Both the competition test in s 90(7)(a) and the net public benefit test in s 90(7)(b) require a comparison of the future with, and without, the conduct for which authorisation is sought in order to assess the likely competitive effects of, and the public benefits and detriments likely to result from, that conduct. Nevertheless, the statutory test is directed to the effects of the conduct for which authorisation is sought, not the effects of other conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought.

...

[147] It would be inconsistent with the statutory regime for the ACCC (and the Tribunal on review) to take into account, for the purposes of applying s 90(7), the competitive effects and public benefits and detriments resulting from other coincident conduct that is not the subject of the application.

4 The Decision goes on to say:

[149] The reference to the "future with" and "future without" test is a reference to the well-established principle, applicable to the competition-based prohibitions in Pt IV of the CCA and the preconditions for authorisation in Pt VII of the CCA, that the relevant statutory provisions are to be applied on a forward-looking basis. In respect of those provisions of Pt IV which prohibit conduct that would have the effect, or would be likely to have the effect of substantially lessen competition, the necessary enquiry has been described as comparing the nature and extent of competition that would be likely to exist in the market in the future with the conduct occurring and without the conduct occurring. That description of the statutory test conveniently explains that the test is not a "before and after" analysis but a forward-looking exercise.

[150] But the "future with" and "future without" phraseology is not a substitute for the statutory language and cannot be applied in a manner that overlooks the need for causal connection between the impugned conduct and its competitive effects. As is clear from the statutory text, and is apparent from the earliest cases, the enquiry must remain focused on the effects of the impugned conduct.

...

[153] ... In *QCMA*, the Tribunal emphasised that "that there must be established a causal relationship between the acquisition and the claimed benefit". In *Qantas Airways*, the Tribunal explained that the statutory assessment requires that the benefit or detriment be "such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect."

5 Applying these principles, the Tribunal concluded that it could have regard to the public benefits and detriments flowing from the Spectrum Authorisation Agreement (for which authorisation had been sought) but could not have regard to the public benefits and detriments flowing from the MOCN Service Agreement and the Mobile Site Transition Agreement (for which authorisation had not been sought).

[154] ... The three agreements were entered into as part of the one commercial transaction. One agreement is not the effect or result of the other; rather, they are coincident agreements. Far less can the commercial and economic effects of the MOCN Service Agreement and the Mobile Site Transition Agreement be characterised as commercial and economic effects of Telstra's use of TPG's spectrum under the Spectrum Authorisation Agreement. The submission of the applicants and the ACCC to the contrary is founded solely on the submission that, in a future in which the Spectrum Authorisation Agreement is implemented, the applicants will also implement the MOCN Service Agreement and the Mobile Site Transition Agreement. While that may be accepted as a matter of likelihood, the submission ignores the causal nexus between the conduct for which authorisation is sought and relevant commercial and economic effects that is required by s 90(7).

6 In summary, the Decision suggests that public benefits should be assessed on a forward looking basis applying a 'future with or without' test. There must, however, also be a causal connection between the conduct for which authorisation is sought and any claimed public benefits arising from that conduct. Regard should not be had to the effects of other conduct that is coincident with, but not causally related to, the conduct for which authorisation is sought. The same tests would be applied in assessing public detriments and impacts on competition.

Application of Tribunal Decision to Brookfield and MidOcean merger authorisation application

7 In this case, Brookfield and MidOcean have applied for authorisation for the acquisition of Origin Energy Limited constituted by both the Scheme Acquisition and the On-Sale Acquisition. That is conduct to which section 50 applies:

- (a) in respect of the Scheme Acquisition, being the acquisition of shares in the capital of a body corporate; and
- (b) in respect of the On-Sale Acquisition, being the acquisition of shares in the capital of a body corporate and the acquisition of assets of any person.

The application is therefore a merger authorisation within the meaning of s 4 of the CCA.

- 8 The public benefits claimed are all consequences of the combined effect of the two acquisitions of Origin by means of the two identified acquisitions. The public benefits have a 'causal connection' with the Proposed Acquisition and are not merely 'coincident' with the Proposed Acquisition
- 9 The Applicants have sought merger authorisation for both the Scheme Acquisition and the On-Sale Acquisition and the ACCC should have regard to all public benefits that are a consequence of the two acquisitions. In its Decision, the Tribunal recognised that 'it was open to the applicants to have applied for authorisation to enter into and give effect to the Proposed Transaction agreements' ([70] and [156]). That is precisely what the Applicants have done here.
- 10 The Decision does not alter the approach that should be taken in assessing when public benefits should be treated as a consequence of conduct. The ACCC should have regard to public benefits where there has been 'established a causal relationship between the acquisition and the claimed benefit' (*QCMA*). The statutory assessment requires that the benefit or detriment be 'such that it will, in a tangible and commercially practical way, be a consequence of the relevant agreements if carried into effect' (*Qantas Airways*).
- 11 Brookfield LP's acquisition of Origin Energy Markets will lead, in a tangible and commercially practical way, to the implementation of Brookfield's green build-out plan, which will deliver up to 14 GW of renewable generation and storage assets and the transformation of Origin Energy Markets, thereby materially contributing to Australia's energy transition given the scale of the emissions reduced. All of the public benefits claimed in the Application are a consequence of the Proposed Acquisition. None of them is merely coincident.
- 12 BGTF has been established specifically to fund a successful transition to renewables. It has dual objectives – to achieve attractive risk adjusted financial returns and to generate measurable environmental change. As to the first objective, BGTF's investment mandate requires that investments achieve a minimum internal rate of return (*IRR*). Brookfield's business plan for Origin Energy Markets – and the detail of how it will achieve this *IRR* – depends on delivering the green build out, the target date of which is 2033. As BGTF is a closed-end fund, with an expected operating term of 12 years (with option for two one-year extensions), BGTF will need to achieve the green build before the end of the fund's operating term so that BGTF can generate returns on exit (i.e., it will take place within the medium term which is the relevant time period according to the Decision at [162]). Brookfield is therefore incentivised to deploy its capital and deliver on the green build out as quickly as possible. As to the second objective, Brookfield and BGTF's very reason for investing in Origin Energy Markets is to transition it, which can only be achieved through the green build-out plan. For BGTF to invest in a company or asset, the investment must meet certain criteria, central to which is 'additionality'. 'Additionality' means that BGTF will not make an investment where its capital does not meaningfully advance the impact outcomes over and above the status quo. 'Additionality' can only be achieved through the green build-out plan.
- 13 The green build-out plan and the contribution that it will make to Australia's energy transition all flow from, and are a direct consequence of, Brookfield's acquisition of the Origin Energy Markets business (i.e., are a consequence of the acquisitions for which authorisation has been sought). This compares with the counterfactual position in which Origin, with its current listed company ownership

structure, faces significant challenges in its ability to raise substantial new equity and debt to fund an ambitious transition program of the scale of the green build out plan.

- 2 (a) To what extent does the Victorian Transmission Investment Framework Final Design Paper released by the Victorian Government in June 2023 (the VTIF Final Design Paper) announce or envisage changes:
- (i) to the Australian Energy Market Operator’s (AEMO) declared network functions in respect of the transmission network in Victoria;
 - (ii) to AEMO’s functions under Part H of Chapter 8 of the National Electricity Rules, in respect of augmentations to the transmission network in Victoria; or
 - (iii) that otherwise materially impact the role that AEMO has in planning, procuring augmentations to, facilitating access to, or that AEMO otherwise has in respect of, the transmission network in Victoria?

- 14 In June 2023, the Victorian government published its Final Design Paper for the proposed Victorian Transmission Investment Framework (VTIF). The VTIF is available at <https://engage.vic.gov.au/victorian-transmission-investment-framework>
- 15 The VTIF, which sets out ‘a new approach to developing major electricity transmission infrastructure and Renewable Energy Zones,’ outlines the Victorian government’s proposals for an integrated approach for planning and delivering electricity transmission infrastructure.
- 16 The Final Design Paper outlines the proposed timeline and consultation process for the implementation of the framework outlined in the VTIF. In particular:
- (a) The State government is currently developing and implementing the core elements of the new framework outlined in the VTIF and anticipates that the overarching requirements for some core elements will be implemented in 2024 while other elements require further detailed policy and design work before being implemented.
 - (b) The Victorian government will implement the reforms described in the framework and anticipates that a first tranche of legislation will be introduced into the Victorian Parliament in 2024.
 - (c) The first Victorian Transmission Plan, which will identify potential key transmission projects for the next 15 years, is to be published in mid-2025.
- 17 The VTIF identifies VicGrid as the body to coordinate renewable energy development with transmission investment and to deliver community benefits and community engagement across the State. The VTIF notes that many stakeholders considered that VicGrid should be seen as an independent body and flags a three-stage evolution of VicGrid’s corporate status:
- (a) VicGrid is currently a division within the Victorian Department of Energy, Environment and Climate Action (DEECA);
 - (b) in late 2023, VicGrid will transition to an administrative office of DEECA; and
 - (c) the government will consider options to establish VicGrid as a more independent corporate form.
- 18 The VTIF states that VicGrid will perform the following roles and responsibilities.

Activity	Roles and Responsibilities
Planning process	VicGrid will be responsible for development of the Victorian Transmission Plan.

Activity	Roles and Responsibilities
REZ declaration	VicGrid will develop and publish a draft REZ declaration for stakeholder feedback and a final REZ declaration.
	It is proposed that a REZ will be declared by Order in Council on recommendation of the Minister for Energy and Resources.
Review	VicGrid will be responsible for undertaking the Victorian Transmission Plan review processes with appropriate governance arrangements ensuring that the review process meets Victorian energy needs and the needs of the Victorian Government, stakeholders and communities.
Community funds	VicGrid will be responsible for establishing community funds.
Community engagement	VicGrid will be responsible for coordinating engagement, providing local engagement staff and partnering with community, government agencies and industry, as set out under the framework
Traditional Owners partnership	VicGrid will partner with Traditional Owner Groups to enable Indigenous Victorians to play an active role in the energy transition and minimise impacts to Country from REZ development.

19 As will be evident from the preceding description, the VTIF is still under development, with key policy decisions and implementation legislation to be progressed over the next 18 months. While the details are yet to be confirmed, the policy direction on key issues seems reasonably clear.

- (a) Planning: It is likely that VicGrid will be responsible for Victorian transmission planning, which is likely to necessitate a transfer of functions from AEMO to VicGrid.
- (b) Procurement: The VTIF suggests there was consensus that any new arrangement should avoid duplication and minimise complexity, and therefore, there is a preference for a single entity responsible for planning, procurement, delivery and contract management. While the VTIF does not state a definitive policy decision on this, it seems likely that the two candidates would be for AEMO to retain this function or (more likely) for VicGrid to assume all these functions.
- (c) Augmentations: The VTIF notes that industry feedback indicated that the current contestability threshold (\$10 million) should not be raised as this would lead to a less competitive environment. It appears unlikely there will be any change in the \$10 million threshold. The VTIF flags that there will be a 'new procurement framework' but does not identify which entity will conduct augmentation procurement.

20 The VTIF reforms are likely to have a neutral to positive impact on the competitive outcomes for electricity transmission in the context of the Proposed Acquisition. In particular, it is likely that:

- (a) transmission planning and procurement will continue to be performed by an independent body, AEMO or, most likely, VicGrid. There is no suggestion these functions would revert to AusNet; and
- (b) VicGrid will be supported by additional legislative functions which are designed to confirm its independence and operations.

(b) To what extent do:

- (i) each Ministerial Order made under section 16Y of the National Electricity (Victoria) Act 2005 (Vic) since the commencement of that section on 23 March 2020; and/or**
- (ii) the VTIF Final Design Paper, implement, announce or envisage changes to the contestability of augmentations to the transmission network in Victoria?**

- 21 Section 16Y of the *National Electricity (Victoria) Act 2005 (Vic)* (**NEVA**) is part of a suite of provisions in Division 7 of the NEVA (Modification of regulatory arrangements for specified declared transmission system augmentations and related services).
- 22 Division 7 allows the Victorian Minister for Energy to streamline and provide directions in relation to electricity transmission augmentations, including directing that relevant provisions of the NER are modified or do not apply to the procurement or operation of the augmentations.
- 23 Section 16Y allows the Minister to declare that:
- (a) the carrying out of, or operation of, an augmentation of the Victorian transmission system is a **specified augmentation**;
 - (b) services provided or to be provided in relation to or by means of a specified augmentation are **specified augmentation services**; and
 - (c) non-network services are specified **non-network services**.
- 24 To date, there have been 9 Ministerial Orders made under section 16Y, which relate to the following transmission projects:

Project	Relevant Ministerial Order(s)
Mortlake Turn In	NEVA Order No. S 10 11 January 2022
Victoria – New South Wales Interconnector SIPS non-network services;	NEVA Order No. S 238 15 May 2020 NEVA Order No. S 566 5 November 2020
VNI West interconnector	NEVA Order No. S 60 20 February 2023
Western Renewables Link	NEVA Order No. S 267 27 May 2023
Augmentations to support the REZ Stage 1 Projects: South West REZ, Murray River REZ, Central North REZ, Western Victoria REZ	NEVA Order No. S 417 3 August 2021 NEVA Order No. S 547 14 October 2022 NEVA Order No. S 501 27 September 2022 NEVA Order No. S 600 26 October 2022

- 25 While the detail of the NEVA Orders is complex, in broad terms they mandate one or more of the following revised arrangements:
- (a) Directing AEMO (as Victorian transmission planner) to pursue particular transmission augmentations including, where relevant, suspending specific NER requirements (for example in the RIT-T process);
 - (b) Directing AEMO to enter into particular transmission agreements following a tender process (for example Victorian SIPS); and

(c) Directing AEMO and the relevant TNSP to enter into augmentation agreements in relation to the TNSP's network assets (for example, augmentations to support the REZ Stage 1 Projects).

26 The effect of the NEVA Orders is that the relevant transmission augmentations are subject to an enhanced dual oversight, comprising both the Minister (who identifies specified augmentations) and AEMO (which remains responsible for contracting for the specified augmentations).

(c) What impact:

(i) would any of the changes referred to in questions (a) and (b) have; and/or

(ii) have any such changes already had, on the ability or incentive for AusNet to engage in anticompetitive conduct?

27 Please refer to our comments at paragraphs 20 and 26. In addition, the changes referred to above are likely to further reduce any ability for AusNet to engage in anticompetitive conduct in the transmission sector by reason of the enhanced statutory functions (for example in relation to planning and community engagement) that VicGrid will have as compared to AEMO. As outlined in the Application, the current transmission framework for Victoria significantly constrains AusNet's competitive power, particularly in relation to transmission planning and augmentations. The proposed VTIF changes will continue the independent planning and augmentation process (likely conducted by VicGrid with enhanced statutory powers).

28 The changes referred to above are unlikely to adversely affect the incentive for AusNet to engage in anticompetitive conduct in the transmission sector.