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Reference: J1298

Merger Investigations Branch
ACCC
Level 17, 2 Lonsdale Street
Melbourne 3000

Brookfield – Origin Energy acquisition – Hyslop Report dated 10 August 2023

I refer to my report to the Australian Competition and Consumer Commission, Brookfield – *Origin Energy acquisition: Response to questions* dated 10 August 2023.

In Clause 26 of the report, I referred to National Electricity Rule (“NER”), 5.2A.3 (e) with respect to a TNSP being prohibited from engaging in conduct to prevent or hinder access to prescribed or negotiated transmission services.

In Clause 27 of the report, I stated,

Therefore, a gentailer integrated with transmission that acts to discriminate or engage in other conduct that is adverse to generation competitors would breach its obligations under the NER. To succeed, such conduct would need to be opaque to, or at least have a strong chance of not being discovered by regulators or generator competitors.

I note that NER 5.2A commenced on 1 July 2018 under rule change *National Electricity Amendment (Transmission Connection and Planning Arrangements) Rule 2017 No. 4* and does not apply “in relation to connection and access to the declared transmission system of an adoptive jurisdiction. For adoptive jurisdictions, the *National Electricity Amendment (Transmission Connection and Planning Arrangements) Rule 2017 No. 4* preserved several rules that were in effect on 30 June 2018 as follows:

- (a) for a declared transmission system of an adoptive jurisdiction:
 - (1) former Chapter 6A continues to apply and the amendments made by the Amending Rule to Chapter 6A are of no effect;
 - (2) old rule 5.4A continues to apply and the deletion of rule 5.4A by the Amending Rule is of no effect;
 - (3) old clause 5.3.6(i) continues to apply and the deletion of clause 5.3.6(i) by the Amending Rule is of no effect; and
 - (4) new clause 5.3AA(e)(2) applies as amended below:
 - (i) insert the phrase “transmission network user access or” before “distribution network user access”; and
 - (ii) insert “transmission networks and” before “distribution networks”.

The Version of the NER in effect on 30 June 2018 was version 109. While NER 5.2A.3 did not apply in NER version 109, NER 6A.1.3 (3) states:

a Transmission Network Service Provider or a person who is provided prescribed transmission services or negotiated transmission services (whether the person is provided those services under an agreement, as a result of a

determination of a commercial arbitrator or otherwise under the Rules) must not engage in conduct for the purpose of preventing or hindering access to those services.

In addition, NER 6A.21.1 states:

All Transmission Network Service Providers including Market Network Service Providers, must comply with the Transmission Ring-Fencing Guidelines prepared in accordance with clause 6A.21.2 as from the time that any jurisdictional derogation from this rule 6A.21 ceases to apply in respect of the participating jurisdiction in which the Transmission Network Service Provider is located.

Clause 4.1 (b) of the current AER Ring-fencing Guideline Electricity Transmission state:

A TNSP must not discriminate (either directly or indirectly) between a related electricity service provider and a competitor (or potential competitor) of a related electricity service provider in connection with the provision of prescribed transmission services by the TNSP (whether to itself or to any other legal entity).

I acknowledge that NER 5.2A.3 (e) is classified as a tier 1 penalty¹ whereas NER 6A.1.3(3) is not classified as a civil penalty obligation. The transmission ring fencing obligation under NER 6A.21.1 has also been classified as a tier 1 penalty since 6 July 2023.²

When considering the potential behaviour outlined in clause 27 of my report, I did not place any emphasis on the presence or absence of a civil penalty as a disincentive. In my view it is sufficient for the potential behaviour to be a breach of a TNSP's obligations under the NER and for the breach to be sufficiently transparent as to be discoverable by regulators or generator competitors.

That Victoria is an adoptive jurisdiction, does not change my response to Question 1 provided to me by the ACCC.



Paul Hyslop
Chief Executive Officer

¹ Tier 1 provisions carry maximum penalties for corporations of \$10 million, or if greater, three times the benefit obtained from the breach if this can be determined, or if not, 10% of annual turnover.

² National Electricity (South Australia) Regulations under the National Electricity (South Australia) Act 1996, 6 July 2023, p. 20.