

AER preliminary position on Transgrid's Project EnergyConnect Reopener Application

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- advocacy for systems change to deliver social justice.

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- Financial Counsellors Association of NSW;
- NSW Council of Social Service;
- Physical Disability Council of NSW;
- St Vincent de Paul Society of NSW;
- Salvation Army;
- Tenants Union NSW; and
- The Sydney Alliance.

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1. Introduction

The Justice and Equity Centre (JEC) welcomes the opportunity to provide a submission to the Australian Energy Regulator's (AER) consultation paper concerning its preliminary position on Transgrid's application to reopen the 2023-28 transmission revenue determination for Project EnergyConnect (Consultation Paper).¹

In the Reopener Application² Transgrid seeks approval to recover over \$1 billion of additional spending related to cost overruns on Project Energy Connect.

We agree with the AER's preliminary position that the Reopener Application fails to meet the requirements under the Reopener Clause.³ Specifically, we agree there has been no event which meets the requirements of clause 6A.7.1(a)(1) NER (Criterion 1), and that the reliability and security requirement clause 6A.7.1(a)(6) NER (Criterion 6) has not been demonstrated.

We also support a plain language interpretation of the Reopener Clause, that any spending approved under the clause must be for future spending, subsequent to the date of the application. In that context we reiterate that the spending which is the subject of the Transgrid application is not future spending. It relates to a spending commitment - the ICC Contract entered in December 2024 - made more than one year before the reopener application. At the time of the application the project was 95% complete.

Our response focuses on matters raised in the Consultation Paper and should be read in conjunction with our original submission to the reopener process. Our earlier submission provides more detail on why Transgrid's application does not meet the requirements of the Reopener Clause. These are adopted and repeated here by incorporation.⁴

All criteria of clause 6A.7.1(a) NER must be met for a reopener to be allowed. Transgrid has failed on multiple grounds to demonstrate its application meets the required criteria. Accordingly, Transgrid's application should be rejected.

¹ Australian Energy Regulator, 1 September 2026, *Consultation paper; AER preliminary position on Transgrid's application to reopen the 2023-2028 transmission revenue determination for Project EnergyConnect*, <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/update-application-reopen-capex-project-energyconnect>.

² Transgrid, *Project EnergyConnect – An application to reopen the 2023-2028 Revenue Determination*, 13 February 2026, <https://www.aer.gov.au/industry/registers/determinations/transgrid-determination-2023-28/update-application-reopen-capex-project-energyconnect> (the Reopener Application). The application includes supporting materials.

³ See, clause 6A.7.1, National Electricity Rules (NER), (Reopener Clause).

⁴ Justice and Equity Centre, 28 April 2026, *Project EnergyConnect – An application to reopen the 2023-2028 revenue determination*, <https://jec.org.au/wp-content/uploads/jec-publications/19283/2026-28-04-JEC-submission-in-response-to-Transgrid-PEC-reopener-request.pdf> (Prior Submission).

2. The ‘event’

This section addresses criterion 1, and questions 1-6

Criterion 1 defines an event – for the purposes of the Reopener Clause – as one which has occurred and is both beyond the reasonable control of the network service provider, and could not reasonably have been foreseen by the network service provider at the time of the making the revenue determination.⁵

We agree with the AER’s preliminary position that the event as defined by Transgrid is not a valid reopener event under Criterion 1.⁶

2.1 No event has occurred

We agree with the AER on the importance of the event having occurred. We agree with the AER analysis of the event as described by Transgrid, and the conclusion that elements of the described event had not occurred.⁷ We agree with the assessment that these were ‘Transgrid’s, prediction, opinion or belief,’ of what may occur.⁸

2.2 Control

The question of whether or not the event – Contract Failure – was beyond the reasonable control of Transgrid does not turn on whether or not they could direct or influence day to day delivery of the project. It was the case that

... Transgrid had reasonable control over contract management, risk monitoring, escalation, enforcement strategy, decisions about whether to call on security and about how to respond to warning signs that the EPC contract may not deliver the project as expected.⁹

The proper management of the EPC contract remained within Transgrid’s control notwithstanding the extent to which external events impacted the performance of the EPC contract. There were clear moments prior to 25 October 2023 where Transgrid could and should reasonably have responded to contract developments, and concerns raised by the contractors about these developments.¹⁰

We concur with the position of AGL that Transgrid’s failures to exercise effective contract oversight, or to enforce its contract, cannot reasonably be described as a lack of control.¹¹

⁵ Clause 6A.7.1(a)(1), NER.

⁶ *Consultation Paper*, pp.1, 8-14; *Reopener Application*, Attachment 6, pp.2, 4-6; See also *Reopener Application*, pp.15-18, and *Reopener Application*, Attachment 2, p.24.

⁷ *Consultation Paper*, pp. 9-10.

⁸ *Consultation Paper*, p. 10.

⁹ *Consultation Paper*, p.11.

¹⁰ See Prior Submission, pp.11-13.

¹¹ AGL, *Transgrid’s Project EnergyConnect reopener application*, [file:///Users/mlynch/Downloads/AGL%20Energy%20-%20Submission%20-%20Transgrid%E2%80%99s%20application%20to%20reopen%20capex%20-%20Project%20EnergyConnect%20-%20April%202026%20\(1\).pdf](file:///Users/mlynch/Downloads/AGL%20Energy%20-%20Submission%20-%20Transgrid%E2%80%99s%20application%20to%20reopen%20capex%20-%20Project%20EnergyConnect%20-%20April%202026%20(1).pdf), 28 April 2026, p.2.

In addition, we agree with the AER's analysis that the event as defined by Transgrid does not simply describe a series of external events, but rather references the Board decision. We concur with the AER that a board decision cannot be said to be beyond Transgrid's control.¹²

2.3 The date at which foreseeability is to be assessed

We agree that the appropriate date at which foreseeability for a reopener of the Transmission Revenue Determination 2023-28 is the date of the AER's final decision, 28 April 2023.¹³

The date of the AER's final decision reflects the reasonable interpretation of the phrase 'at the time of the making of the revenue determination'¹⁴ which adopts the natural and ordinary meaning.¹⁵

We reiterate the position and arguments of our prior submission that foreseeability should be assessed up to the date of the final decision.¹⁶ We draw specific attention to Transgrid's letter to the AER written on 3 April 2023. Transgrid informed the AER that they had

*'inadvertently omitted to include the as-commissioned capex related to the \$989.3 million in forecast as-incurred capex for the 2023-28 period.'*¹⁷

It is clear that Transgrid retained capacity to inform the AER of matters relevant to the Transmission Revenue Determination 2023-28 – extending to substantial, material adjustments of the application – well beyond 2 December 2022, the date of the Revised Revenue Proposal.

2.4 Foreseeability

Clause 6A.7.1(a)(1) requires that 'the occurrence of that event during that period (or of an event of a similar kind) could not reasonably have been foreseen by the provider at the time of the making of the revenue determination.'¹⁸

The foreseeability test is to be viewed from the position of the service provider. It does not require foreseeability by them of the exact event but includes foreseeability of an event of a similar kind.

We reiterate our position that at the time of the making of the 2023-28 revenue determination, a failure of the Engineering, Procurement and Construction (EPC) contract agreed between Transgrid and the Secure Energy Joint Venture (SEJV) was foreseeable. The various factors – including inflation, Australian infrastructure project density, floods in NSW, labour shortages and the insolvency of Clough – were known or reasonably foreseeable to Transgrid. Further, it was foreseeable that these would come together to put pressure on the delivery of the project under

¹² Consultation Paper, p.11.

¹³ Consultation Paper, p.12.

¹⁴ Clause 6A.7.1.(a)(1), NER.

¹⁵ Consultation Paper, p.12.

¹⁶ Prior Submission, pp.13-14.

¹⁷ Transgrid, *Transgrid letter to AER on PEC capex*, 3 April 2023, https://www.aer.gov.au/system/files/Transgrid%20letter%20to%20AER%20on%20PEC%20capex%20-%202023%20April%202023_0.pdf, p.2-3.

¹⁸ Clause 6A.7.1(a)(1), NER.

the EPC contract, and that remedial action would be required. The event as described by Transgrid, or an event of a similar kind, was foreseeable.¹⁹

3. Material adverse impacts on reliability and security

This section addresses criterion 6, and questions 7-11.

Criterion 6 requires consideration of whether failure to rectify the event would ‘be likely to materially adversely affect the reliability and security of the relevant transmission system’.²⁰

The JEC concurs with the AER analysis that Transgrid has not established that failure to deliver PEC would materially adversely affect reliability and security in either the NSW or South Australian electricity transmission networks.²¹

We concur with the AER’s interpretation that the adverse consequences referred to in NER 6A.7.1(a)(6) do not include a change resulting in consumers receiving fewer net benefits than would occur if the project were completed as originally planned.²² All network augmentation projects by definition provide a material net benefit relating to reliability and security even where that is only a marginal benefit. Interpreting Criterion 6 to include failure to enjoy the same positive future benefits expected had the project been delivered as planned, would render Criterion 6 meaningless.

4. Future spending

This section addresses criteria 3 and 4, and question 12.

4.1 The Reopener Clause concerns proposed future capital expenditure

We reiterate our position that the AER has no power to approve spending arising from a prior spending commitment under the Reopener Clause. Clause 6A.7.1 concerns applications for approval of anticipated future spending.²³

A plain and ordinary language interpretation of the rules supports our position that the Reopener Clause concerns only future spending. We agree with the AER’s analysis that “rejecting the JEC’s view requires that words be added to or substituted in the reopener clause.”²⁴

Further, an interpretation of the Reopener Clause contra to the plain language interpretation would subvert the ex-ante spending approval model. This would go against the explicit intentions of the AEMC per the comments made in the Rule Determination of the Reopener Clause.

¹⁹ See Prior Submission, pp.14-16

²⁰ Clause 6A.7.1(a)(6), NER.

²¹ Consultation Paper, pp.16-25.

²² Consultation Paper, pp.18-19.

²³ Prior Submission, pp.6-10.

²⁴ Consultation Paper, p.27.

We reject the argument that the application of the Reopener Clause using a plain and ordinary language interpretation subverts the intentions of the AEMC when the Reopener Clause was drafted, which was “to overcome the incentive for a TNSP to defer major vital investment.”²⁵ We concur with the AER that in the context of the regulatory control period, “without capex reopeners, the deferral period could otherwise be up to 5 years.”²⁶ That is, the Reopener Clause is designed to ensure there is no deferral.

In its rule determination, the AEMC outlined that the Reopener Clause only allows the revenue cap to be reopened if the various criteria are met. It went on to explain,

This approach is intended to ensure that the incentive properties of the ex ante cap and the contingent projects regime are maintained while at the same time limiting the exposure of TNSPs to the full risks and costs of addressing major disruptions to their networks in the process of meeting their regulatory obligations.²⁷

The Reopener Clause therefore maintains the fundamentals of the regulatory system, including the ex-ante propose and respond approval of spending. It does this while allowing for the AER to reopen the revenue cap of a given TNSP to respond to an unforeseen event that threatens reliability and security and necessitates TNSP spending before the end of the revenue period.

4.2 The project was 95% complete at the time of the application

At the time of Transgrid’s application, the project was approximately 95% complete.²⁸

We repeat the argument in our prior submission that the Reopener Application is almost wholly out of time, given the project was 95% complete.²⁹

The AER observes that even if large amounts of the ICC Contract spending has already occurred it cannot fully dismiss the request as there may remain some future spending which has not been incurred at the date of application, and which Transgrid proposes to undertake.³⁰ We do not contest this position. However, Transgrid does not detail what future spending – looking forward from the date of application – it ‘proposes to undertake’ to rectify the adverse consequences of the alleged event.³¹ Instead it seeks a substantial portion of the cost of the contract difference between the EPC and ICC contracts, despite the project being 95% complete at the time of the application. It is a reasonable assumption the majority of the costs under the ICC contract had already been incurred.³²

²⁵ Consultation Paper, p.27, citing Australian Energy Market Commission, Rule Determination – National Electricity Amendment (Economic Regulation of Transmission Services) Rule 2006 No. 18, November 2006, <https://www.aemc.gov.au/rule-changes/economic-regulation-of-transmission-services>, p.61 (Rule Determination). See also Reopener Application pp.9-10.

²⁶ Consultation Paper, p.27.

²⁷ Rule Determination, p.62.

²⁸ Prior Submission, pp.7-9; Consultation Paper, p.28.

²⁹ Prior Submission, pp.8-9.

³⁰ Consultation Paper, pp.27-28.

³¹ See Clause 6A.7.1(a)(3), NER.

³² See Prior Submission, pp.7-8; Consultation Paper, p.28.

For the reasons set out in more detail below, we contest that the AER can approve any future spending which is to be made against a prior spending commitment, including a contractual commitment, not approved ex ante by the AER. Additionally, Transgrid has not demonstrated its application meets the minimum spending requirements.

4.2.1 Prior spending commitments, including contractual commitments

We disagree with the AER's preliminary view that the Reopener Clause permits approval of future spending which is to be incurred on the basis of a contractual commitment made prior to the AER's approval of the expenditure.³³

The spending which is the subject of the Reopener Application relates to a spending commitment – the ICC Contract entered in December 2024 – made more than one year before the application.³⁴

Approving major project spending without some form of prior review of the spending commitment by the AER – including a review of the contractual commitment being entered into – is unreasonable and would amount to a 'backdoor' approval. This would undermine the ex-ante propose and respond model of regulation as it is intended to operate and protect the interests of consumers.

4.2.2 Minimum required spending

Criterion 4 requires that the future expenditure necessary to rectify any established event must exceed 5% of the regulated asset base of the relevant TNSP for the first year of the relevant regulatory control period.³⁵ Transgrid has not supplied sufficient information to demonstrate its application meets this criterion. Accordingly, the Reopener Application should be rejected.

At the time of Transgrid's application, the project was approximately 95% complete. To the extent there was anticipated future expenditure on the date of the Reopener Application (i.e. for the remaining approximately 5% of construction to be completed), Transgrid has not provided details of any expenditure outstanding at that date.

Further, any money Transgrid may have spent since the reopener application in respect of the alleged reopener event has been made without approval from the AER. Even if Transgrid were successful in establishing an event under the Reopener Clause, the AER must require Transgrid to provide updated details regarding what anticipated future spending remains today, and so is eligible to be claimed under the Reopener Clause.

Any assessment of additional information by Transgrid will be challenging, as there is no proper baseline against which to measure the amount of additional spending required. The estimate used in the Revenue Determination 2023-28 did not properly reflect all the information available to Transgrid at the time of the revenue determination. As a result of this, a calculation of the costs associated with rectifying the adverse consequences of the 'event' that is based on the

³³ Consultation Paper, p.27.

³⁴ Prior Submission, Timeline of Events, pp.3-5.

³⁵ Consultation Paper, p.28.

anticipated costs of the EPC contract as provided in the revenue proposal is not appropriate. This does not represent a reasonable assessment of the anticipated costs of the project at the moment at which foreseeability is measured.³⁶

5. Conclusion

We support the AER's preliminary decision and support a final determination rejecting Transgrid's application to reopen their 2023-28 revenue determination for Project EnergyConnect.

³⁶ See Prior Submission, pp.16-17. See also our prior arguments on Clause 6A.7.1(f), Prior Submission, p.18.