23 August 2023

Mr Jesse Price
Director of Stakeholder Engagement
Australian Energy Regulator
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Electronic

Dear Jesse

Moorabool and Central Highlands Power Alliance Incorporated (Registration Number A0110107L) ("Alliance") Dispute Notice under NER 5.16B (AER Reference 47337 / AC 68/23)
AER Request for Information (RFI)

We refer to:

(a) the Alliance's Dispute Notice dated 26 June 2023 (**Dispute Notice**);

(b) the Alliance's Dispute Notice supplement letter dated 5 July 2023 (**Supplement Letter**);

(c) the Alliance's letter dated 18 July 2023 (**follow up letter**);

(d) the AER's letter dated 3 August 2023 (sent by email on 4 August 2023) (**Letter**);

(e) the Alliance's letter dated 10 August 2023; and

(f) the AER's letter dated 9 August 2023 (sent by email on 10 August 2023 and received after the Alliance had sent its 10 August 2023 letter).

Terms defined in the above correspondence have the same meaning in this letter.

Request for Submission

We are somewhat surprised to receive your request for a submission from the Alliance as to whether it is an "interested party". We make the following observations as to AER's dealings with the Alliance to date, and as to the AER's past approach to what appear to be similar disputes.

AER's dealings with the Alliance

The AER has previously dealt with the Alliance in the following ways:

(a) The Alliance has a long history of engaging substantively with the AER in respect of the Western Renewables Link project, including an online meeting with the AER in September 2021 (which is contextually relevant including in circumstances where it is linked to VNI West PACR). Never in the course of the Alliance's dealings with AER has it ever been suggested that (in effect) the Alliance lacked any relevant standing.

(b) The Alliance lodged its Dispute Notice on 26 June 2023 and submitted a Supplement Letter on 5 July 2023.

(c) Subsequently, the AER engaged with the Alliance on the substantive grounds in the Dispute Notice through both correspondence and at a meeting on 6 July 2023. It did so without raising any issue or concern as to whether the Alliance met the definition of "interested party".

(d) Indeed, subsequent to the meeting the Alliance's follow up letter to the AER dated 18 July 2023 records, among other things, that:

(i) the AER confirmed its acceptance of the Dispute Notice under clause 5.16B of the NER; and

(ii) moreover, that the AER would work collaboratively with the Alliance through the details of the dispute before making a determination.

(e) In a letter dated 3 August 2023, the AER notified the Alliance that it had extended the timeframe for its determination of the dispute in accordance with clause 5.16B(d) of the NER.

AER's approach to previous apparently similar disputes

We refer the AER to its approach to other disputes under clause 5.16B of the NER, including:

(a) The SA Energy Transformation RIT-T dispute (notice lodged on 15 March 2019 by the South Australian Council of Social Service);[1]

(b) The Reinforcing the NSW Southern Shared Network (Humelink) RIT-T dispute (notice lodged on 16 August 2021 by Wunelli Pty Ltd, Engineering and Project Consulting);[2] and

(c) The North West Slopes and Bathurst, Orange and Parkes RIT-T disputes (notice lodged on 26 July 2022 by the Public Interest Advocacy Centre).[3]

It is not apparent how the person who lodged the relevant dispute notice in each of the above disputes is in a position any different to the Alliance. It appears that the AER was satisfied in those cases that the relevant persons were "interested parties". It is not apparent to us how any relevant distinction would apply with respect to the Alliance and its Dispute Notice. In that respect, we refer you to the principle of consistency in administrative decision-making, and the proposition that the Executive "should treat like cases alike".[4]

The Alliance is an Interested Party

An *interested party* for the purposes of clause 5.16B of the NER means, pursuant to clause 5.15.1 of the NER, "a person including an end user or its *representative* who, in the *AER's* opinion, has the potential to suffer a material and adverse *NEM* impact from the investment identified as the *preferred option* in the *project assessment conclusions report* or the *final project assessment report* (as the case may be)" (emphasis added).

Notably, the phrase "material and adverse *NEM* impact" (appearing at clause 5.15.1 of the NER) is not defined in the NER. Nor, as the AER acknowledges, do the AER's "Regulatory Investment Test for Transmission (RIT-T) Application **Guidelines**" define (exhaustively or otherwise) that phrase.

It is clear, however, including in light of the Guidelines, that a consumer may be a person who has the potential to suffer a material and adverse NEM impact, if there is a potential for the investment identified as the *preferred option* in the PACR to result in either or both of:

- that consumer paying more for electricity; and / or
- that consumer suffering from reduced quality or reliability of their electricity supply,

than they would if a different investment were to be made.

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[1] See https://www.aer.gov.au/about-us/dispute-resolution/sa-energy-transformation-rit-t-dispute.
[2] See https://www.aer.gov.au/about-us/dispute-resolution/reinforcing-the-nsw-southern-shared-network-humelink-rit-t-dispute.
[3] See https://www.aer.gov.au/about-us/dispute-resolution/north-west-slopes-and-bathurst-orange-and-parkes-rit-t-disputes.
[4] See, e.g., *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 248 CLR 173 at [54], citing *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 201-205 and *Nevistic v Minister for Immigration and Ethnic Affairs* (1981) 51 FLR 325 at 333-335.

We note, in this context, that the definition of *preferred option* in the NER is the *credible option* that maximises the present value of net economic benefit to all those who, among other things, "consume" electricity in the *market*.

Without limitation, the Alliance relies on the following matters to demonstrate that it is an *interested party* to support that it has the "potential to suffer a material and adverse *NEM* impact":

(a) The Alliance is the representative of around 2,350 end users of electricity, all of whom are supplied with electricity to their households and businesses through the NEM operation in Victoria (**Members**).

(b) The investment identified as the "preferred option" in the purported (but we say invalid) VNI West PACR is a significant investment for the NEM in Victoria.

(c) There is, therefore, clearly a potential for the investment in the "preferred option" in the purported VNI West PACR to result in the Members paying more for electricity, or suffering from reduced quality or reliability of their electricity supply, than they would if a different investment were to be made.

Documents

The AER has requested a copy of the Alliance's rules of association and its register of Members kept in accordance with section 56 of the *Associations Incorporation Reform Act 2012* (Vic).

With regards to the request for the Alliance's rules of association, we are not presently satisfied that there is any necessity to provide this document. If the AER is able to explain why it needs this document, we would consider any such explanation offered.

As for the register of Members, we are not presently satisfied that it is appropriate for the Alliance to hand that over to the AER. The register includes a range of personal information. We also note there is no public right to inspect the register. There is a right of inspection under s 57 of the Act to which the AER refers, but that right is enjoyed only by a member.

It is also not clear to us, in light of the submissions above, why the AER needs that personal information. If the AER is able to explain why it needs any detail in the register, we would consider any such explanation offered. If, however, it would be sufficient for an officer of the Alliance to make a statutory declaration or the like as to the membership of the Alliance without disclosing personal information, please let us know and the Alliance may be readily able to do that.

Ministerial Orders

The AER has also asked the Alliance to explain "the basis on which [the Alliance] believes it may give a dispute notice in respect of [a material and adverse NEM] impact given the provisions of the Order disapplying clauses 5.16A and 5.16B of the NER".

There are two answers to this question.

First, as the AER would understand, the Alliance contends (and is contending in the Supreme Court Proceeding listed for hearing in early September 2023) that the Minister has not validly disapplied the clauses of the NER as applied in Victoria by section 6 of the *National Electricity (Victoria) Law* (Vic). Indeed, in that respect, the potential for the determination by the Supreme Court of the Proceeding to have an impact upon the AER's determination of the Alliance's Dispute Notice under clause 5.16B of the NER, is a reason why we suggest that the AER defer determining the Dispute Notice until the Supreme Court gives its judgment.

Second, in any event, as the AER would understand, VNI West is a single project with two co-proponents, being AEMO and Transgrid. That is recorded, for example, in the 2022 ISP. Even if the Victorian Minister's Order under s 16Y of the NEVA is valid (which we deny), the Victorian Minister did not purport to disapply, and could not in any event have disapplied, the relevant clauses of the NER as applied by s 6 of the *National Electricity (New South Wales) Act 1997* (NSW). Accordingly, on any view, the AER is required to determine the dispute under clause 5.16B as applied by the law of NSW.

If it would assist the AER to understand more fully the Alliance's position as to the legality of the Victorian Minister's Orders, then the Alliance would in principle be pleased to provide you with a copy of

our submissions. Those submissions, however, refer in part to material that the Victoria Minister has disclosed to the Alliance in discovery.

Accordingly, we are unable to provide those submissions to AER:

(a) until the relevant material is tendered in evidence (which we expect will occur on 7 September 2023); or

(b) the Minister consents.

If you would like to review our submissions before 7 September 2023, please let us know, and we will ask the Victorian Minister if she consents.

If you have any queries, please do not hesitate to contact me on vj1009@hotmail.com.

Yours sincerely

Vicki Johnson

Vice-Chair

On behalf of Moorabool and Central Highlands Power Alliance Inc.