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23 June 2017

Mr John Pierce
Chairman
AEMC
(by email)

Dear Mr Pierce

Re: Participant derogation - revenue smoothing rule change

The AER welcomes the opportunity to respond to the AEMC's draft rule regarding the respective revenue smoothing rule change requests from ActewAGL and the NSW distributors (the NSW/ACT distributors). Our submission is attached.

We support the aim of the proposed participant derogations: to reduce price volatility that may arise from the outcome of the appeal process concerning the NSW/ACT distributors' 2015 determinations, and to smooth these revenue adjustments over two regulatory control periods. While the Full Federal Court recently handed down its judgement on the AER's appeal, there is still uncertainty over what the final impact of this will be on network prices, and much work remains to resolve this.

We also welcome the changes the AEMC has made in its draft rule determination, which has reduced the extent of prescription and complexity that was evident in the NSW/ACT proposed derogations.

That said, the AEMC's draft rule is still more detailed and complex than necessary and could still give rise to unintended consequences. We therefore include comments and suggestions for specific changes to particular provisions of the draft rule in attachments to our submission to reduce these risks. Our main suggestion in this regard is that a revenue recovery principle (that distributors are able to recover the revenue to which they are entitled and should not receive any windfall gains or losses as a result of the revenue smoothing process) should be stated in the rule itself.

The contact officers for this matter are Scott Sandles on (03) 9290 1487 or by email on scott.sandles@aer.gov.au and Israel del Mundo on (03) 9290 6935 or by email on israel.delmundo@aer.gov.au.

Yours sincerely

Chris Pattas
General Manager, Networks

NSW and ACT revenue smoothing rule change

AER submission to Australian Energy Market Commission draft rule

June 2017

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Contents

1 Summary of AER's comments

The AER welcomes the opportunity to respond to the AEMC's draft rule regarding the respective revenue smoothing rule change requests from ActewAGL and the NSW distributors (the NSW/ACT distributors).[1]

As we submitted in response to the AEMC's consultation paper, we consider the NER as currently drafted is likely to be able to accommodate revenue smoothing across different regulatory control periods. [2] However, given other parties considered this was unclear, we support a rule change that explicitly provides for such smoothing.

As we also submitted previously, we support the aim of the proposed participant derogations (proposed derogations) to reduce the price volatility that may arise from the outcome of the appeal process concerning the NSW/ACT distributors' 2015 determinations. We also support smoothing these revenue adjustments over two regulatory control periods.[3] While the Full Federal Court recently handed down its judgement on the AER's appeal, there is still a degree of uncertainty over what the final impact of this will be on network prices, and much work remains to resolve this.

While we supported these objectives, we noted our concerns about the detailed and legalistic nature of the NSW/ACT distributors' proposed derogations.[4] We therefore support the following changes made by the AEMC in its draft rule determination, which has partially pulled back from this prescription. The draft rule:

- Reduces the level of prescription from the approach in the proposed derogations—the draft rule provides the AER greater flexibility to determine the amounts to facilitate revenue smoothing across regulatory control periods.
- Improves the decision-making and consultation process from the approach in the proposed derogations—the draft rule reduces the duplication of regulatory processes, and creates a better decision-making process that allows for more meaningful consultation with stakeholders and analysis by the AER.
- Focuses the assessment of price volatility at the right level—the draft rule directs the AER to focus on reducing price volatility at the level of total network charges (network use of system (NUOS) charges), which takes into account all factors influencing network charges, not just particular components.

Given the greater flexibility the AEMC has proposed in the draft rule to provide the AER in smoothing revenue amounts between periods, we consider it useful to outline to stakeholders at this stage our preliminary and non-exhaustive view on how we propose to approach the task of exercising this discretion to determine the revenue amounts to be smoothed across regulatory control periods (see section 4).

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1 The NSW distributors are Ausgrid, Endeavour Energy and Essential Energy.

2 AER, *NSW and ACT revenue smoothing rule change: AER submission to Australian Energy Market Commission consultation paper*, December 2016, p. 2.

3 AER, *NSW and ACT revenue smoothing rule change: AER submission to Australian Energy Market Commission consultation paper*, December 2016, p. 1.

4 AER, *NSW and ACT revenue smoothing rule change: AER submission to Australian Energy Market Commission consultation paper*, December 2016, p. 1.

The AEMC has significantly redrafted the rule proposed by the NSW/ACT distributors. However, the AEMC's draft rule is still more detailed and complex than necessary and is still difficult to understand. These factors increase the risk of unintended consequences. As with our previous submission, we consider it is preferable to have principles-based rules that focus on the outcome which the rule seeks to achieve, rather than rules which detail the process or complex mechanics of achieving this outcome (see section 3.1).

In particular, the draft rule (and the distributors' proposed rule) do not explicitly state the NSW/ACT distributors are able to recover the revenue to which they are entitled and should not receive any windfall gains or losses as a result of the revenue smoothing process (we call this the 'revenue recovery principle'). Rather, the draft rule focuses on specifying mechanics of the calculations rather than outcomes (see section 3.2). Ensuring that distributors do not receive any windfall gains or losses from the revenue smoothing process includes, among other matters, that distributors face the intended volume risk properties of their control mechanisms when determining this revenue 'entitlement' (see section 3.3).

While we would prefer a short, simple, clear, and principles-based final rule, we understand the AEMC may decide to retain some level of detail and complexity in the final rule, considering this was the starting point for consultations as reflected in the proposed rules from the NSW/ACT distributors. We therefore include our comments and concerns on specific provisions of the draft rule in attachment A of this submission. In attachments C and D we propose specific rule amendments which are aimed at reducing the risk of unintended consequences. Our main suggestion here is that the revenue recovery principle should be stated in the rule itself, not just discussed in the AEMC's rule determination document, as is currently the case. We also offer a recommendation on how this principle could be phrased and where it could fit in the rules.

2 Summary of the proposed derogations and draft rule

2.1 Background

On 26 February 2016, the Australian Competition Tribunal (the Tribunal) handed down its decisions on the NSW/ACT limited merits review of our April 2015 determinations (2015 determinations).[5] The Tribunal set aside our 2015 determinations and remitted them back to the AER to be remade in accordance with the Tribunal's directions.

On 24 March 2016, we applied to the Full Federal Court for judicial review of the Tribunal's decisions. On 24 May 2017, the Full Federal Court upheld our appeal on gamma. However, the Full Federal Court dismissed our appeal in relation to operating expenditure and cost of debt (transition to a trailing average approach).

At this point, it remains unclear what the final impact of this will be on network prices, and how long it will take to resolve this, and there is much work still to do.

Regardless of the ultimate outcome, there is a risk of price shocks to consumers. Price shocks could occur if the NSW/ACT distributors are required to recover revenue adjustments in the current regulatory control period only.[6]

2.2 Proposed derogation

The NSW distributors submitted their proposed derogations to the AEMC on 15 July 2016. ActewAGL submitted its proposed derogation to the AEMC on 23 September 2016, which largely mirrored that of the NSW distributors with variations to reflect ActewAGL's circumstances.[7]

The proposed derogations would smooth revenue through the following general steps:

1. Calculate the total change in allowed revenue (increase or decrease) as a result of the appeal process. This is labelled the 'adjustment amount'.
2. Determine the portion of this amount that will be recovered in the current regulatory control period; the rest will be recovered in the future regulatory control period. This process is termed the 'adjustment amount allocation determination', and follows a highly detailed and prescriptive approach.
3. Make any required adjustments in the current regulatory control period via the pricing proposal process.

5 The Tribunal also handed down its decision on the limited merits review of our June 2015 determination for Jemena Gas Networks (NSW). We do not consider this appeals process in this submission.

6 The proposed derogations and the draft rules refer to the 2014–19 regulatory control period as the 'current regulatory control period'; they also refer to the following regulatory control period as the 'subsequent regulatory control period'. As we note in attachments C and D, the latter term is ambiguous. We therefore use 'future regulatory control period' in this submission.

7 For example, an average revenue cap is the control mechanism that applies to ActewAGL for the current regulatory control period (the NSW distributors are under a revenue cap).

4. Make any required adjustments in the future regulatory control period via the building blocks determination.
5. At the pricing proposal stage, the proposed derogations allow the NSW/ACT distributors to propose and the AER to determine revenue smoothing that differs from the 'adjustment amount allocation determination'.

If the 2015 determinations are not remade, varied or affirmed in time for the 2018–19 pricing proposals,[8] revenue is smoothed in the future regulatory control period via our building block determination.[9]

2.3 Draft rule

On 26 April 2017, the AEMC published draft rules on revenue smoothing for the NSW distributors and ActewAGL, respectively. The draft rules are more preferable rules, which incorporate elements of the NSW/ACT distributors' proposed derogations.

The draft rules envisaged three scenarios:

Scenario 1. The appeals/remittal process is resolved in time for the AER to make an active decision on the amount of revenue moved from the current regulatory control period into the future regulatory control period (or vice versa). There is only one year left in the current regulatory control period (2018–19) where we could effect changes to revenue recovery.

Scenario 2. The appeals/remittal process is not resolved in time for scenario 1 to apply, and so the AER calculates *ex post* the amount of revenue over or under recovered in the current regulatory control period. This then determines the amount of revenue that must be moved (a positive or negative amount) into the future regulatory control period. We have time to incorporate this revenue adjustment into our distribution determination for the future regulatory control period.

Scenario 3. The appeals/remittal process is not resolved in time for either scenario 1 or scenario 2 to apply. The AER makes the same *ex post* calculation as in scenario 2, but will now need to reopen the distribution determination for the future regulatory control period. This reopening is necessary because, under this scenario, the appeals/remittal process is finalised too late to be incorporated in the distribution determination for the future regulatory control period.

Under scenario 1, the draft rule allows us to facilitate revenue smoothing by determining:

- the 'adjustment amount', which is a revenue amount added to (or deducted from) the revenue allowance for the 2018–19 year. The addition or deduction of the 'adjustment amount' occurs through the pricing proposal for 2018–19.
- the 'subsequent adjustment amount', which is a revenue amount deducted from (or added to) the unsmoothed revenue allowance for the 2019–20 year. It is a balancing

8 The 2018–19 regulatory year is the final year of the current regulatory control period.
9 See clause 8A.14.1(c) on the NSW distributors' proposal and clause 8A.15.1(c) of ActewAGL's proposal.

amount, equivalent in net present value terms to the ‘adjustment amount’ but with opposite sign. We then smooth revenue for the future regulatory control period through the building block determination.

When considering scenario 1, it is helpful to note that the initial NSW proposed derogation and the AEMC draft rule use the term ‘adjustment amount’ and ‘subsequent adjustment amount’ to refer to different concepts.[10]

Under scenarios 2 and 3, we would facilitate revenue smoothing by determining the ‘variation amount’, which is equivalent to the difference between allowed revenue for 2018–19 and any undertaking for that year. We would then add the variation amount to the unsmoothed revenue allowance for the 2019–20 year, then smooth revenue for the 2019–24 regulatory control period through the building block determination.

We discuss these processes in more detail in sections A.1and A.2.

10 In the NNSW proposal, the adjustment amount is the total change in the unsmoothed revenue requirement for the current regulatory period as a result of the Tribunal decision. A specified formula calculates the portion of this adjustment amount that will not be recovered in the current regulatory period, which NNSW labels the ‘expected subsequent adjustment amount’. The NNSW ‘expected subsequent adjustment amount’ is equivalent to the ‘adjustment amount’ in the AEMC draft rule, which is the amount deducted from (or added to) revenue in the current regulatory control period for smoothing purposes. The AEMC draft rule then uses the term ‘subsequent adjustment amount’ to refer to the balancing amount in the future regulatory period, an amount that is equal in NPV terms to the adjustment amount but with opposite sign.

3 Main comments

3.1 Preference for a principles-based approach

As we previously submitted, we consider the NER as currently drafted is likely to be able to accommodate revenue smoothing across different regulatory control periods. However, given other parties considered this was unclear, we support a rule change that explicitly provides for such smoothing.[11] We reiterate these points in this submission to the draft rules.

In our previous submission, we also supported the high-level objectives of the NSW/ACT distributors' proposed derogations. However, we were concerned with the detailed and legalistic nature of the proposed derogations.[12] We submitted it was preferable to have a high-level principles-based approach to the derogations that focus on the core problems (allowing for the revenue determined through the appeals process to be recovered while reducing potential price shocks) and the core solution (empowering the AER to smooth some revenue from this regulatory control period into the future regulatory control period).[13]

The draft rule significantly reduced the level of detail and prescription compared to the proposed derogations. On the other hand, the draft rule retained some level of detail and complexity regarding the processes and mechanics for revenue smoothing. In the draft rule determination, the AEMC stated:

> Whilst allowing the smoothing of revenue across two regulatory control periods is a relatively simple concept, the draft rule needs to include a level of detail as it involves processes that relate to the making (and potential remaking by the AER, or affirming or varying by the Tribunal) of distribution determinations as well as the pricing proposal processes.[14]

While the draft rule is preferable to that of the proponents, it remains more detailed and complex than necessary which increases the risk of unintended consequences. The longer and more detailed the rule is, the greater is the probability that some part of the rule has not been drafted correctly, despite the best of intentions. These problems in the drafting of the rules may only surface too late, after the rule has already been finalised and is being applied. Similarly, the more detailed and complex the rule drafting, the greater is the likelihood that disputes and disagreements will arise in interpreting and applying the rule, which may lead to the objectives of the rule not being realised.

In section A.2 of attachment A, for example, we describe an instance in which the draft rule may result in the NSW distributors recovering more (or less) revenue than they are entitled

11 AER, *NSW and ACT revenue smoothing rule change: AER submission to Australian Energy Market Commission consultation paper*, December 2016, p. 2.

12 AER, *NSW and ACT revenue smoothing rule change: AER submission to Australian Energy Market Commission consultation paper*, December 2016, p. 1.

13 In this submission, the term 'revenue smoothing' refers to the allocation of revenue across regulatory control periods to minimise variations in use of system charges that may arise out of the appeals process. Unless specified, it does not refer to revenue smoothing through our building block determinations.

14 AEMC, *Draft rule determination: National Electricity Amendment (Participant derogation - NSW DNSPs revenue smoothing) Rule 2017*, 26 April 2017, p. 25; AEMC, *Draft rule determination: National Electricity Amendment (Participant derogation - ACT DNSP revenue smoothing) Rule 2017*, 26 April 2017, p. 22.

to recover, which is not consistent with the revenue recovery principle. This complication arises in large part because of certain detailed factors in the draft rule regarding the calculation of the revenue to be smoothed.[15]

We would caution against attempting to address such complications with more prescription or alternative prescription, as these may give rise to further unintended consequences.

Furthermore, there is still uncertainty over what the final impact of the appeals will be on network prices, and much work to do to resolve this (as we noted in section 1). We have not yet delved into all the detailed adjustments and reconciliations we will have to perform to facilitate revenue smoothing. It is possible we will uncover other issues once we are in the midst of performing these detailed adjustments and reconciliations. Under these circumstances, the risk of unintended consequences rises with the level of detail and prescription in the rules.

We therefore consider it is preferable to have principles-based rules, rather than rules that prescribe the process or mechanics of revenue smoothing. If the AEMC, however, intends for its preferred rule to be more detailed, there are a number of amendments that should be made to reduce the risk of unintended consequences. These are detailed in the attachments. The following section focusses on the need for more fundamental addition to the rule, a revenue recovery principle.

3.2 Revenue recovery principle

We consider the final rule should include a provision that explicitly states the revenue recovery principle. We recommend this principle be phrased as follows:

> The AER… must be satisfied that the adjustment determination will result in the relevant NSW DNSP recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, and any control mechanisms specified in the remade 2015 determination had been implemented in each relevant regulatory year.

Attachment C to this submission contains our drafting suggestions for the NSW rule which includes this principle. Attachment D contains an equivalent set of drafting suggestions for the ACT rule.

As we alluded to in section 1, the proposed derogations and the draft rules identify the core problem (potential price shocks as a result of the appeals process and revenue recovery within the current regulatory control period), and suggest a solution (smoothing of revenue across regulatory control periods).

An important principle underpinning the draft rules is that the NSW/ACT distributors recover only the revenues they are entitled to recover. Indeed, the AEMC's determination document for the draft rules iterates this fundamental principle:[16]

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15 As we discuss in section A.2 of attachment A, the reference to the enforceable undertakings in the calculation is a complicating factor.

16 AEMC, *Draft rule determination: National Electricity Amendment (Participant derogation - NSW DNSPs revenue smoothing) Rule 2017*, 26 April 2017, p. i; AEMC, *Draft rule determination: National Electricity Amendment (Participant*

> The draft rule is designed to allow each proponent to recover only the revenue that it is entitled to recover, and not derive any windfall gains or losses as a result of the application of the draft rule.

The draft rules contain provisions that explicitly require any revenue shocks as a result of the appeals process to be smoothed across regulatory control periods. Clause 8A.14.4(b) of the NSW draft rule, for example, allows us to smooth revenues across regulatory control periods if we consider it is 'reasonably likely to minimise variations in *use of system* charges':[17]

- between the final two years of the current regulatory control period, and
- between the final year of the current regulatory control period and the first year of the future regulatory control period.

In all scenarios (see section 2.3), the draft rules allow smoothing in the future regulatory control period through the X factors we set in the respective distribution determinations.

On the other hand, the draft rule does not include any provisions that reflect the revenue recovery principle. In other words, only one of the two core principles underlying the derogations is actually stated in the rules themselves.

There are defined terms and wording in the draft rules which suggest the NSW/ACT distributors are able to recover only the revenue to which they are entitled (see section A.1 for a more detailed discussion). However, we are concerned this drafting of defined terms is subject to interpretation and may result in a distributor earning windfall gains or losses (we discuss examples in sections A.1 and A.2).

We therefore consider the final rule should include a provision that explicitly reflects the revenue recovery principle. Such a provision would guide the process for determining revenue amounts to be smoothed across regulatory control periods, including any disputes arising during that process. This provision would also ensure revenue smoothing accounts not only for adjustments resulting from the appeals process, but also other 'indirect' adjustments to revenue that we have not performed due to the appeals. Such indirect adjustments include unders and overs accounts and S factor adjustments. Attachment B lists the adjustments we will need to account for to ensure the NSW/ACT distributors recover only the revenues they are entitled to recover.

In addition, this provision should enable us to ensure distributors face the intended properties of their control mechanism when determining this revenue 'entitlement'. The revenue entitlements for the NSW distributors are relatively straight-forward, given they are subject to a revenue cap control mechanism in the current regulatory control period. That is, the NSW distributors are entitled to earn the total revenue requirement we determined in the applicable distribution determinations (including adjustments set out in attachment B). The situation is more complicated for ActewAGL, who is subject to an average revenue cap, and therefore faces the revenue increases or decreases associated with volume risk (i.e. actual volumes being different from forecast) over the current regulatory control period. We discuss this further in the next section.

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17 *derogation - ACT DNSP revenue smoothing) Rule 2017*, 26 April 2017, p. i.
Clause 8A.15.4(b) is the equivalent clause in the ACT draft rule.

3.3 Revenue recovery principle in the context of ActewAGL's average revenue cap

In section 3.2 above, we stated that the revenue recovery principle should ensure that the NSW/ACT distributors should recover only the revenue they are entitled to, with regard to the particular control mechanism for each distributor. The NSW distributors operate under a revenue cap, so even if actual revenue differs from target revenue in a given year (for instance, because energy throughput is lower than forecast), the distributor is still entitled to recover (only) this target revenue. Under a revenue cap, the unders and overs account operates to make up any over or under recovery from one year in subsequent year(s).

On the other hand, ActewAGL is under an average revenue cap control mechanism in the current regulatory control period. Under an average revenue cap, ActewAGL would set prices based on the formula in our distribution determination, which expresses allowed revenue in terms of total forecast energy throughput. This means ActewAGL is meant to bear the volume risk (positive and negative) over the regulatory control period.[18] We consider the final rule should preserve the volume risk inherent in ActewAGL's control mechanism.

In other words, the net effect of the final rule should be to put ActewAGL back in the position it would have been in had the remade determination been in place from the commencement of the current regulatory control period. The forecast energy throughput as at 2015 should be used to set ActewAGL's control mechanism X factors, and be used in the iterative (retrospective) annual updates in accordance with that control mechanism. Where actual energy throughput is higher than (or lower than) forecast, ActewAGL's revenue entitlement should reflect the increase (or decrease) in line with the difference in energy volumes.

Revenue smoothing across regulatory control periods while preserving the properties of ActewAGL's control mechanism could be a complex process. We, therefore, do not consider it would be pragmatic for the final rule to prescribe the mechanics of resolving this issue. Rather, we consider it would be more appropriate to include high level principles regarding this consideration. We, in consultation with stakeholders, can then determine the details of resolving this issue in the adjustment determination.

We note the considerations we discussed above should apply to revenue smoothing where the distributor bears the volume risk. This includes ActewAGL's proposal to include the smoothing of revenues related to its annual metering charges, which are under a price cap control mechanism (see section A.4 for other discussion on alternative control services).

[18] If volumes are higher than forecast, ActewAGL earns more than the notional allowed revenue under average revenue caps. If volumes are lower than forecast, ActewAGL earns less than the notional allowed revenue.

4 Consultation when making the adjustment determination

The draft rule removed the 'default' allocations to revenue smoothing contained in the distributors' proposed derogations. Instead, determination of the adjustment amount between regulatory control periods is a matter left to the AER's judgement, exercised in accordance with the requirements of the draft rule. We support this approach.

We will consult with stakeholders when making our adjustment determination. We consider that their input will be important if we are to make a decision that advances the key aims of this derogation: minimising price volatility at the use of system level and ensuring the distributor recovers (only) the revenue to which it is entitled.

We do not consider that the matters to be consulted on, or other details of the consultation process, need to be stipulated in the derogation. Indeed, this would further exacerbate problems with the overly detailed nature of the rule. However, it is already possible to identify the following non-exhaustive list of matters we would include in our consultation on the adjustment determination:

- the appropriate maximum increase or decrease at the use of system level in any one year (for example, whether a maximum nominal increase of 10 or 15 per cent or some other percentage was appropriate)
- the appropriate maximum increase or decrease if that rate of change was sustained for multiple consecutive years (for example, if a maximum nominal increase of 10 or 15 per cent or some other number was appropriate for two or three years in a row)
- the expected path of additional revenue components (for example, transmission and jurisdictional charges) across the relevant years.

Under scenario 1 in the draft rule, we will need to make an active decision on the revenue to be recovered in 2018–19. In this case, our consultation would therefore also include these more detailed matters (again, as a non-exhaustive list):

- the total expected revenue for 2017–18, incorporating the target revenue specified in the 2017–18 undertakings but also additional revenue (transmission and jurisdictional charges) that will impact on the overall use of system charges
- the expected path of additional revenue components (transmission and jurisdictional components) across 2018–19 and 2019–20
- the likely level of unsmoothed revenue (building block revenue) in 2019–20, noting that we would also consult on the level of uncertainty around this figure.

This consultation would be used to inform our decision on an overall revenue path (at the total use of system level) that would smoothly transition from 2017–18 to 2019–20.

A. Comments on specific provisions and issues

This section addresses certain details of the draft rules. We include them here as issues for the AEMC's consideration when drafting the final rules. We also include our suggested amendments to the NSW draft rule and ActewAGL draft rule in attachments C and D that we consider address the issues discussed in this attachment A (as well as other issues of detail).

A.1 Definition of 'adjustment amount'

As we discussed in section 3.2, we are concerned the draft rules do not explicitly set out the revenue recovery principle. In this section, we discuss terminology and certain wording in the draft rules that we consider implicitly facilitates this principle. However, we are concerned such terminology and wording may be open to interpretation and so result in windfall gains or losses to the NSW/ACT distributors and consumers.

We therefore suggest the final rule should include a provision that explicitly reflects the revenue recovery principle. We consider including such a provision can reduce any ambiguity with the aforementioned terminology and wording. Alternatively, it may obviate the need to include such terminology and wording in the final rule. We consider this would further simplify the rules while still allowing for revenues to be smoothed across periods as intended. Removing such terminology would provide us with greater flexibility in determining the nature of revenue smoothing. It would also reduce ambiguity that may arise from the use of defined terms.

If the AEMC opts to largely retain the draft decision's definition of the 'adjustment amount', we suggest this definition should explicitly reference the revenue recovery principle to reduce any scope for windfall gains or losses (see attachments C and D).

As we noted in section 2.3, we may determine the 'adjustment amount' and the 'subsequent adjustment amount' to facilitate revenue smoothing under scenario 1. The draft rules define the 'adjustment amount' as an amount that operates as if it were a revenue increment or decrement to a NSW/ACT distributor's allowed revenue for the 2018–19 year 'in accordance with the annual revenue requirement and control mechanism' under the applicable determination.[19]

The wording, 'in accordance with the annual revenue requirement and control mechanism', appears in provisions for all three scenarios in the draft rules. We interpret this wording as the key to the AEMC's stated intention of enabling the NSW/ACT distributors to recover only revenue to which they are entitled.

To achieve this stated intention, we consider that the current drafting should be read as follows:

- First, the phrase 'annual revenue requirement and control mechanism' needs to be read jointly as a reference to smoothed revenue within the current regulatory control

[19] That is, the 2015 determination remade by the AER, affirmed by the Tribunal or varied by the Tribunal.

period. In isolation, *annual revenue requirement* refers to the sum of building blocks each year (unsmoothed revenue).[20] The NER specifies that a *control mechanism* (in the form of an X factor) will then be used to generate a smoothed revenue series equivalent in NPV terms to the unsmoothed revenue stream. In the transmission context this smoothed revenue has a defined name (maximum allowed revenue), but there is no equivalent term in the distribution rules.[21]

- Secondly, the 'control mechanism' component must also be read to include the annual operation of the tariff variation mechanism each year within the current regulatory control period. Each distribution decision includes a detailed mathematical description of the adjustments made to smoothed revenue each year to arrive at a final revenue entitlement that will the basis for prices set that year. These calculations are iterative, in that the output from one year forms an input into the next year's calculation.

The proposed drafting also relies on a number of other assumptions about the regulatory process:

- First, if we are required to remake the 2015 determinations, we would set X factors so that smoothed revenue for the first four years of the current regulatory control period are equal to actual revenue for those years in our distribution determination.[22] The effect of this is that the cumulative effect of net over or under recovery across the first four years of the current regulatory period is shown in year five smoothed revenue, since the smoothed revenue must equal unsmoothed revenue in NPV terms.
- Second, we will be able to make the iterative calculations that would have been made each year of the regulatory control period, had the remade determination been in place all along. Given that these 'carry-over' adjustments were not made (and could not be made) while the appeals process was occurring, they must now be made in a retrospective fashion. There is an interaction with the first point, since it will be necessary to incorporate (or 'back-solve') certain revenue adjustments into the X factors for the first four years. This would result in the DUOS unders and overs account having a zero opening balance for the 2018–19 regulatory year.
- Third, the control mechanism in the remade determination will continue to use the term 'total annual revenue' to refer to the final revenue entitlement in a given year (smoothed revenue plus any iterative adjustments under the annual tariff adjustment). The use of this term in the draft rule appears to be a deliberate alignment of the derogation with the (current) control mechanism.

Under this particular scenario and interpretation of the draft rules, we consider we would be able to ensure the NSW/ACT distributors recover only the revenue they are entitled to. The determination of total annual revenue in the last year of the current regulatory control period (that is, 2018–19) would reflect the correct revenue entitlement that prevented any windfall

20 NER cl. 6.4.3(a)

21 NER cl. 6A.6.8

22 The NSW/ACT distributors have already earned revenues for the first three years of the current regulatory control period. The revenues for the fourth year will most likely be available by the time we are remaking the 2015 determinations.

gain or loss. This would be the correct basis from which we would make our determination of the adjustment amount in order to minimise pricing volatility while meeting the revenue recovery principle.

However, it is possible there are other interpretations of the wording, 'in accordance with the annual revenue requirement and control mechanism'. This would open up the possibility for the NSW/ACT distributors to incur windfall losses or gains. We consider adding a provision that explicitly reflects the revenue recovery principle will remove or at least minimise the potential for such windfall losses or gains.

To illustrate the potential for windfall losses or gains, consider the scenario where this key clause was not read so as to allow ex post application of the annual tariff variation mechanism across the 2014–19 regulatory control period. This control mechanism was designed to be applied in an iterative manner each year. As such, the formula specified in the tariff variation mechanism does not refer to all previous years within the regulatory control period, but only the previous two years.[23] If, under scenario 1 of the AEMC's draft rules, we were applying the tariff variation mechanism in year 5 (only), the formula would not refer to the first two years in the regulatory control period at all. This interpretation would therefore lead to uncertainty over the status of the variation between target revenue and actual revenue in years 1 and 2. If the business had net over recovered (or under recovered) in these years, but its subsequent revenue entitlement was not adjusted to reflect this fact, it would result in a windfall gain (or loss) to the distributor.

A.2 Definition of 'variation amount'

In this section, we discuss several complications we consider may arise from the current definition of the term, 'variation amount'. We consider it would be preferable to simplify the definition of 'variation amount' such that it is principles-based and not reliant on a mathematical formula. If the AEMC opts to largely retain the draft decision's definition of the 'variation amount', we suggest this definition should explicitly reference the revenue recovery principle to reduce any scope for windfall gains or losses (see attachments C and D).

The draft rules require us to determine the 'variation amount' under scenarios 2 and 3 (see section 2.3). In these scenarios, we do not make an active decision on revenue smoothing across regulatory control periods, because the appeals process does not conclude in time for us to make changes to revenue (and prices) during the current regulatory control period. At the highest level, the variation amount is an *ex post* calculation of the difference between actual revenue and allowed revenue across the current regulatory control period (a positive or negative amount). We would then add this amount to the annual revenue requirement(s) in the future regulatory control period; smoothing within that period would occur via our building block determination.[24]

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23 For example, when setting tariffs for year 5, the formula includes actual revenue outcomes in year 3 and estimated revenue outcomes in year 4 (actual revenue for year 4 is not yet known, since that year is not complete when year 5 tariffs are set).

24 Under scenario 2, we would add this amount to the annual revenue requirement of the first year of the future regulatory control period. Under scenario 3, we would add this amount to the annual revenue requirement of one or more years of the future regulatory control period.

The 'variation amount' is defined to be the difference between:[25]

- the total annual revenue for the 2018–19 regulatory year, as determined by the annual revenue amount and control mechanism under the remade, affirmed or varied 2015 determination, and
- any undertaking that applies for the 2018–19 regulatory year.

On face value, this definition appears to focus only on the final year of the current regulatory period, not the cumulative difference between allowed and actual revenue across the entire period. However, our interpretation of this definition is that it can be read to achieve the stated aim across the entire current regulatory period. This relies on the same interpretation and assumptions about regulatory process detailed in section A.1. That is, we would:

- set X factors so that smoothed revenue was equal to actual revenue in years one to four of the current regulatory control period
- make the series of retrospective iterative annual calculations required by the control mechanism.

Following this process, the total annual revenue in year five will reflect the revenue entitlement that avoids windfall gain or loss to the business, placing them back in the position they would have been had the remade determination been in place at the commencement of the current regulatory control period.

Accordingly, our concerns regarding the possible alternative interpretation of the key phrase, 'annual revenue requirement and control mechanism' apply here as well. In addition, the draft rule makes assumptions about the required regulatory process when calculating the variation amount:

- First, that we would issue undertakings for 2018–19 (the final year of the regulatory control period), continuing our practice from earlier years.
- Second, the 'unders and overs' (carry-over) mechanism specified for the future regulatory control period would adjust for differences between the revenue entitlement in the 2018–19 *undertakings* (not 2018–19 total annual revenue) and actual revenue for that year.

Enforceable undertakings act as 'placeholders' only: they enable distributors to propose prices for their services when a distribution determination is not in operation. They do not represent revenue a distributor is entitled to under a distribution determination, and nor do they necessarily equal the actual revenues a distributor earns for any year. With the exception of Essential Energy, which has agreed to a two year undertaking, there is no certainty that the businesses will offer the AER enforceable undertakings for the 2018-19 year.

The current DUOS unders and overs mechanism requires taking the difference between total annual revenue and actual revenues (not the revenue from an undertaking) for any

[25] AEMC, *Draft National Electricity Amendment (Participant derogation - NSW DNSPs Revenue Smoothing) Rule 2017*, 26 April 2017, pp. 6–7; AEMC, *Draft National Electricity Amendment (Participant derogation - ACT DNSP Revenue Smoothing) Rule 2017*, 26 April 2014, pp. 5–6.

given year[26]. Applying the same mechanism in the future regulatory control period would lead to double-recovery of the difference between actual revenue and the undertaking revenue.

To see why this is the case, suppose we determine the total allowed revenue for 2018–19 to be $150 million for a distributor in remaking the 2015 determination under scenario 2. Let us also suppose a revenue cap is in place for the current regulatory control period and an enforceable undertaking is in place for that year 'allowing' notional revenues of $100 million. The 'variation amount' under our interpretation would be $50 million in revenue (a positive amount). This is then added to the annual revenue requirement for first year of the future regulatory control period and smoothed under our building block determination.

However, the $100 million specified in the undertaking is only a target, and actual revenue recovered in 2018–19 will vary from this amount. If the distributor's actual revenue for 2018–19 is $120 million, the distributor will double-recover the $50 million:

- +$20 million as an over-recovery relative to the undertaking
- +$30 million as the under-recovery relative to the total annual revenue is then added to revenue in subsequent years through the unders and overs account
- +$50 million through the variation amount, as described above.

Of course, we would be able to avoid this double-recovery by amending the DUOS unders and overs mechanism in the future regulatory control period. Alternatively, we can include a variable that removes this double-recovery in the control mechanism formulas in the future regulatory control period. That is, if the carryover amount was specified with regard to the 2018–19 undertaking, the distributor would recover only the net $50 million:

- +$20 million as an over-recovery relative to the undertaking
- –$20 million as the over-recovery relative to the undertaking is then deducted from revenue in subsequent years through the unders and overs account (or through a variable in the control mechanism formula)
- +$50 million through the variation amount, as described above.

This highlights the importance of the assumptions about regulatory process underlying the draft rule. This is driven by the structure of the draft rule. If the variation amount was defined with regard to actual revenue in 2018–9 (not undertaking revenue), then it would require the opposite assumption about the construction of the unders and overs account in the future regulatory control period.

This also highlights the inter-relationships between the three independent processes (the remittal, adjustment determination and upcoming distribution determinations). Similarly, prescriptive rules can add complications to the process because greater prescription can result in greater inter-relationships between provisions. These inter-relationships in turn can have unintended knock-on effects. For example, we are currently considering our options in light of the recent decisions of the Full Federal Court. One option under consideration is to

[26] AER, *Final decision: Ausgrid distribution determination 2015−16 to 2018−19: Attachment 14: Control mechanisms*, April 2015, pp. 22–23; AER, *Final decision: Endeavour Energy distribution determination 2015−16 to 2018−19: Attachment 14: Control mechanisms*, April 2015, pp. 18–19; AER, *Final decision: Essential Energy distribution determination 2015−16 to 2018−19: Attachment 14: Control mechanisms*, April 2015, pp. 18–19.

complete the remittals concurrently with distribution determinations for the future regulatory control period (and the adjustment determination). One potential advantage of this option is it would enable iterative calculations and cross-checking of the three separate, but highly inter-dependent processes, to arrive at an optimal outcome. As we discuss in section A.3, however, specific cut-off dates prescribed in the draft rule may hinder our ability to perform these processes concurrently.

A.3 Prescription of processes within the draft rules

In this section, we provide an example in which prescriptive rules—relating to process in this case—may result in unintended consequences. We therefore reiterate that it is preferable to have principles-based rules, as we discussed in section 3.1.

As we noted in section 2.3, the draft rule contain separate provisions for the three different scenarios.[27] These provisions prescribe the dates that trigger the relevant provisions for the respective scenarios. We provide an example below in which rules that prescribe processes may result in unintended consequences.

We note the provisions for scenario 2 are triggered if 'a remade 2015 determination is made by the AER [in respect of the relevant distributor] on or after 1 March 2018, but prior to 1 February 2019'.[28] We understand the intention of the 1 February 2019 cut-off date is to provide us with sufficient time to complete the adjustment determination, and then incorporate the results of the adjustment determination into our final determinations for the future regulatory control period. We discussed this reasoning with the AEMC at a staff level stakeholder meeting and supported the inclusion of the 1 February 2019 cut-off date.

However, as we discussed in section A.2, we now realise this cut-off date would limit the consultation options available to the AER for conducting the remittal process. In particular, the 1 February date would not permit the option of the AER completing the remittals concurrently with the adjustment determination and the distribution determinations for the future regulatory control period in light of the recent decisions of the Full Federal Court. The prescribed cut-off date of 1 February 2019 would not allow us this option, but instead would require a re-opening of the distribution determination for the future regulatory control period.[29] While this particular issue can be remedied by substituting a cut-off date of 30 April 2019 in place of 1 February 2019, it illustrates the complications that may arise out of rules that are overly prescriptive. In this case, the 1 February 2019 cut-off date had broad support at the initial drafting stage, but including this process detail might result in unforeseen consequences that subsequently hinder the effective operation of the rule.

A.4 Alternative control services

ActewAGL's proposed derogation, and the subsequent draft rule, would enable ActewAGL to smooth revenues related to annual metering charges, which are alternative control services. We understand any change to the rate of return would affect the notional revenues

27 See clauses 8A.14.4 to 8A.14.6 in the NSW draft rule and clauses 8A.15.4 to 8A.15.6 in the ActewAGL draft rule.
28 See clause 8A.14.5(a)(1) in the NSW draft rule and clause 8A.15.5(a)(1) in the ActewAGL draft rule.
29 See clause 8A.14.6(a) in the NSW draft rule and clause 8A.15.5(a) in the ActewAGL draft rule.

ActewAGL used to derive prices from its building block model.[30] If the appeals see an increase in the rate of return, for example, the notional revenues (and prices) for the current regulatory control period would also increase. The converse would apply if the appeals process results in a lower rate of return. If there were no provisions for revenue smoothing for these services, this would result in ActewAGL recovering all adjustments to notional revenue through annual metering charges in the 2018–19 regulatory year only (under scenario 1).[31] Under scenarios 2 and 3, ActewAGL may not be able to recover such adjustments to notional revenue.

In the sub-sections below, we discuss the following issues regarding the inclusion of alternative control services:

- the use of the term, 'annual revenue requirement' in the draft rule
- equity or fairness issues with revenue smoothing across regulatory control periods.

A.4.1The use of 'annual revenue requirement' in the draft rule

It is unclear whether the draft rule for ActewAGL as it is currently written would facilitate revenue smoothing for alternative control services.

As with the NSW draft rule, the draft rule for ActewAGL facilitates revenue smoothing through the determination of the 'adjustment amount' and 'variation amount'.[32] An important reference point for these two amounts is the 'total annual revenue', which is defined in the ActewAGL draft rule as:[33]

> the total revenue that ActewAGL is entitled to earn from:
>
> (a) the provision of *standard control services*;
>
> (b) the provision of *transmission standard control services*; and
>
> (c) type 5 and 6 metering services classified as *alternative control services* and in respect of which annual metering service charges were specified in the 2015 determination,
>
> for the relevant regulatory year.

The definitions for both 'adjustment amount' and 'variation amount' require us to determine the 'total annual revenue' for a relevant regulatory year in accordance with the *annual revenue requirement* and control mechanism. The NER defines annual revenue requirement as:

> An amount representing revenue for a Distribution Network Service Provider, for each regulatory year of a regulatory control period, calculated in accordance with Part C of Chapter 6.

30 Because it relates to standard control services only, we do not consider the appeal relating to base opex affects prices for metering services.

31 It is unclear at this stage whether such adjustments would be significant.

32 The 'subsequent adjustment amount', which is equivalent to the 'adjustment amount' or the 'variation amount' depending on the scenario, is also important to this process.

33 AEMC, *Draft National Electricity Amendment (Participant derogation - ACT DNSP Revenue Smoothing) Rule 2017*, 26 April 2017, p. 5.

As we discussed in section A.1, this is the 'unsmoothed' revenue that we determine in a distribution determination under chapter 6 of the NER. Part C of chapter 6 of the NER contains the provisions that guide our building block determinations for standard control services. From a strict legal interpretation of the NER, therefore, we consider the draft rule for ActewAGL does not facilitate smoothing of revenues across regulatory control periods related to metering services.[34]

On the other hand, the NER includes the calculation of revenues associated with transmission standard control services under part C of chapter 6.[35] We therefore consider the draft rule enables the smoothing of revenue related to those services.

A.4.2 Equity issues with revenue smoothing across regulatory control periods

ActewAGL's annual metering charge

ActewAGL's proposed derogation, and the subsequent draft rule, would enable ActewAGL to smooth revenues related to annual metering charges, which are alternative control services. Distributors recover the costs of providing alternative control services through a selection of fees, most of which are charged on a 'user pays' basis.[36] Revenue smoothing may therefore result in future customers subsidising customers in the current regulatory control period, or vice-versa. As we discuss below, we do not consider this would be an issue with ActewAGL's annual metering charges because the customer base is consistent across regulatory control periods. This is so because ActewAGL will only have to smooth prices for those who are metering customers of ActewAGL at 30 November 2017. After that date, the new metering arrangements will apply and ActewAGL will not be able to acquire new metering customers. Therefore, existing meter customers revenues can be smoothed across regulatory control periods without causing equity concerns among customers.

Figure 1 shows the allocation of customers to ActewAGL's annual metering charges in our final decision (which is not subject to the appeals process). It shows only existing connections prior to 30 June 2015 are required to pay the regulated annual metering charge for capital.[37] The customer base subject to this capital charge would therefore be largely the same across regulatory control periods, so revenue smoothing would not lead to equity issues.[38]

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34 We have not identified any other issues with ActewAGL smoothing revenues related to its metering services across regulatory control periods (see also our discussion in section A.4).

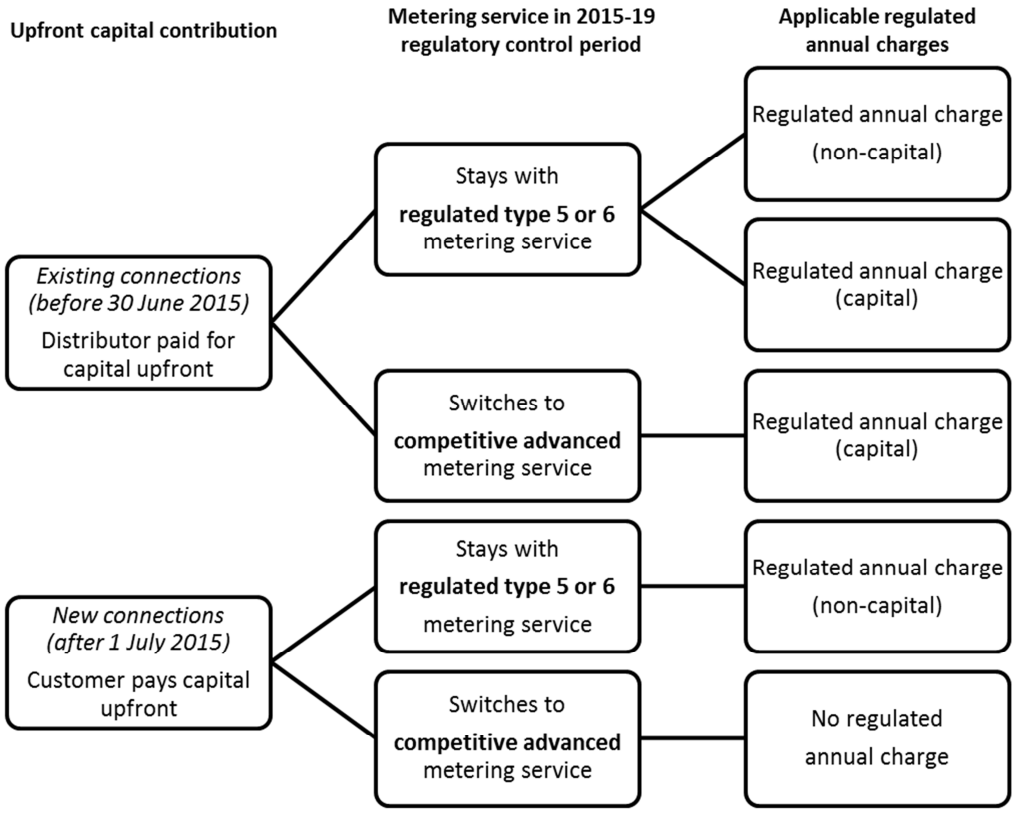
35 NER, cl 6.26(b)(1).

36 AER, *Final decision: ActewAGL distribution determination 2015−16 to 2018−19: Attachment 16: Alternative control services*, April 2015, p. 6.

37 Distributors do not earn a rate of return on the non-capital charge.

38 This assumes the arrangement in Figure 1 is retained in the future regulatory control period.

Figure 1 ActewAGL's approved metering charges



Source: AER, *Final decision: ActewAGL distribution determination 2015−16 to 2018−19: Attachment 16: Alternative control services*, April 2015, p. 23.

Note: This diagram shows regulated annual charges only. In addition, customers who switch may incur charges for their competitive advanced metering service. Any such charges are not subject to AER oversight and are not shown in the diagram above.

Other alternative control services

ActewAGL's proposed derogation, and the subsequent draft rule, did not include ancillary network services within its scope. The NSW distributors' proposed derogation, and the subsequent draft rule, did not include any alternative control services within its scope.[39] For completeness, this section discusses our consideration of potential equity issues that may arise in smoothing revenue for these services. We include this discussion here as we understand the NSW distributors are considering whether to propose expanding the revenue smoothing derogation to cover alternative control services. If the NSW distributors propose that their derogation remain confined to standard control services, then the following comments can be ignored.

We consider this issue of equity across regulatory control periods would be an issue if revenue smoothing were to apply to ancillary network services. These services range from special meter reads to supply of conveyancing information to temporary network

39 The NSW distributors' alternative control services include metering services, public lighting and ancillary network services.

connections. These are non-routine services distributors provide to and charge individual customers for on an 'as needs' basis. We would therefore expect customers for many ancillary network services to be different across regulatory control periods.

However, labour is the main, if not the only, input for a majority of ancillary network service.[40] We therefore do not consider any aspect of the appeals have a significant impact on the notional revenues related to such services. Indeed, ActewAGL did not include ancillary network services in its proposed derogation (and neither does the draft rule).

We note the NSW distributors did not include revenues from alternative control services in their proposed derogations; although we understand they may address this issue in their submission to the NSW draft rule.[41] If the NSW distributors propose to include alternative control services in their participant derogation, our discussion regarding metering services and ancillary network services also applies.

Regarding public lighting (which applies only to the NSW distributors), we also consider the issue of equity across regulatory control periods would not be an issue if revenue smoothing were to apply. Similar to metering services, the customer base for public lighting is largely the same across periods. However, we consider consultation with affected stakeholders will be imperative in identifying such issues if we are to decide whether to smooth revenue smoothing across regulatory control periods for public lighting.

40 AER, *Final decision: ActewAGL distribution determination 2015−16 to 2018−19: Attachment 16: Alternative control services*, April 2015.

41 Meeting between staff from the AER, AEMC and NSW/ACT distributors, 23 May 2017.

B. Annual revenue adjustments

The following subsections list the adjustments we would ordinarily make to revenues and prices each year, in accordance with a distributor's distribution determination.

However, given the Tribunal set aside the NSW/ACT distribution determinations, we have set revenues and prices in accordance with enforceable undertakings offered to us by each distributor. These undertakings are 'placeholder' arrangements until the appeals process is finalised. Given the placeholder nature of these instruments, the approaches to setting revenues and prices under the undertakings have not included all of the adjustments below. We note the undertakings are offered to the AER by each distributor, individually, so there are differences between the undertakings.[42] Some of these adjustments have already been reflected in the revenues/prices for some distributors and not others. Further, the calculation of some of these adjustments will be affected by the appeal outcome.

In order to give effect to the revenue recovery principle, it is important that the rules permit us to reflect these adjustments in future revenues and prices, following the completion of the appeals process.

Figure 2 summarises these adjustments.

B.1 Adjustments within the scope of the proposed participant derogations and draft rules

The NSW/ACT distributors' proposed derogation would enable the smoothing of revenue associated with standard control services (DUOS revenues). The subsequent draft rule would also enable the smoothing of DUOS revenues; however, it requires consideration of the effect of this smoothing on total network (NUOS) revenues (and charges). Section B.1.1 lists the adjustments we make to NUOS revenues and charges for the NSW/ACT distributors.

ActewAGL's proposed derogation, and the subsequent draft rule, would also enable the smoothing of revenues associated with prescribed transmission services and annual metering services.[43] Section B.1.2 lists the adjustments we make to revenues and charges related to ActewAGL's prescribed transmission services and annual metering services.

B.1.1 Network use of system (NUOS) revenues

We ordinarily apply the following annual adjustments to determine the NSW distributors' annual revenue and ActewAGL's annual average revenue for standard control services. That is, the allowed revenue (or average revenue) is determined by starting with the previous year's allowed revenue (or average revenue) and making the following adjustments.

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42 The nature of the undertakings differs not only between each distributor, but they may differ across regulatory years for the same distributor.

43 ActewAGL's annual metering services are under a price cap control mechanism, so we would smooth the notional revenue associated with that service. ActewAGL also faces the volume risk under this control mechanism, so the discussion in section 3.3 is also relevant to revenue smoothing regarding this service.

- CPI
- X factor—revised annually for return on debt updates
- S factor—relates to service performance incentives
- Pass throughs
- D factor amounts (NSW distributors only)—relates to demand management incentives
- DUOS unders and overs account (NSW distributors only) – accounts for differences between the allowed revenue in previous years that the distributor was targeting to earn and the actual revenue it did earn
- Forecast consumption (ActewAGL only)
    - This converts the B-factor (pass through amounts) into an average revenue figure
- Actual consumption (ActewAGL only)
    - This converts notional revenue from its proposed prices into an average revenue figure

In addition, we apply the following adjustments to revenues related to designated pricing proposal charges (DPPC) and jurisdictional schemes (JS):

- DPPC unders and overs account
- JS unders and overs account

Revenues related to standard control services, DPPC and JS together constitute network use of system (NUOS) revenues and charges. DPPC relate to the cost of the transmission network which is recovered by distributors then forwarded to the transmission business. JS charges relate to the cost of government environment schemes, which distributors recover through all customers. Both transmission and jurisdictional scheme costs are recovered by distributors on an actual cost recovery basis. That is, each year, the distributors adds on to its DUOS prices an amount to recover the transmission and jurisdictional scheme costs it expects to incur for the upcoming regulatory year. However, if it recovers more (less) than its actual costs, the difference is passed back (through) to customers in future years through their respective unders and overs accounts.

B.1.2 Other revenues

ActewAGL's proposed derogation includes provisions for prescribed transmission services and metering (alternative control services).[44] We adjust the revenues and prices, respectively, for these services for CPI and X factors.

For metering, we do not revise X factors annually for return on debt updates (but we do so for prescribed transmission services).

Figure 2 Adjustments to revenues/prices within scope of rule change

[44] Alternative control services also include ancillary network services for ActewAGL. However, the appeals do not have any effect on the prices for these services (see our discussion in section A.4).

	Standard control services								Other NUOS	
	CPI	X	S	Pass through	D factor amounts	DUOS unders/overs	Forecast consumption	Actual consumption	DPPC unders/overs	JS unders/overs
Ausgrid	✓	✓	✓	✓	✓	✓	×	×	✓	✓
Endeavour Energy	✓	✓	✓	✓	✓	✓	×	×	✓	✓
Essential Energy	✓	✓	✓	✓	✓	✓	×	×	✓	✓
ActewAGL	✓	✓	✓	✓	×	×	✓	✓	✓	✓

	Prescribed transmission services	
	CPI	X
ActewAGL	✓	✓

	Alternative control services	
	Metering	
	CPI	X
ActewAGL	✓	✓

B.2 Adjustments outside the scope of the proposed participant derogations and draft rule

The NSW distributors' proposed derogation, and the subsequent draft rule, did not include alternative control services and prescribed transmission services within its scope.[45] If scenario 1 occurs, all adjustments to these services would be captured in revenues and/or charges for the last year of the current regulatory control period (2018–19). If either scenario 2 or 3 occur, there may be no adjustments to revenues and/or charges related to these services.

For completeness, this section summarise the adjustments we make to revenues and prices associated with these services. We understand the NSW distributors are considering whether these services should be included in their proposed derogation.[46]

The appeals process potentially affects the prices the NSW distributors charge for alternative control services, particularly metering and public lighting.[47] We adjust metering prices by CPI and X factors. We adjust public lighting prices annually by CPI, with X factors being implicit in the NSW distributors' public lighting models.

For alternative control services, we do not revise X factors annually for return on debt updates.

45 Only Ausgrid provides prescribed transmission services among the NSW distributors.

46 Meeting between staff from the AEMC, AER, NSW distributors and ActewAGL, 23 May 2017.

47 Alternative control services also include ancillary network services for the NSW distributors. However, the appeals do not have any effect on the prices for these services (see our discussion in section A.4).

The appeals process may also affect Ausgrid's allowed revenues for prescribed transmission services. We adjust these revenues annually for CPI and X factors. As with standard control services, we revise X factors annually for return on debt updates.

Figure 3 summarises these adjustments.

Figure 3 Adjustments to revenues/prices outside the scope of the rule change

	Prescribed transmission services	
	CPI	X
Ausgrid	✓	✓

	Alternative control services			
	Metering		Public lighting	
	CPI	X	CPI	X
Ausgrid	✓	✓	✓	✓ (Model)
Endeavour Energy	✓	✓	✓	✓ (Model)
Essential Energy	✓	✓	✓	✓ (Model)

C. Alternative NSW rule

See attached document setting out the AER's recommended alternative rule for the NSW distributors.

D. Alternative ACT rule

See attached document setting out the AER's recommended alternative rule for the ACT distributors.

Draft National Electricity Amendment (Participant Dderogation - NSW DNSPs Revenue Smoothing) Rule 2017

1 Title of Rule

This Rule is the *Draft National Electricity Amendment (Participant Dderogation - NSW DNSPs Revenue Smoothing) Rule 2017*.

2 Commencement

This Rule commences operation on [COMMENCEMENT_DATE].

3 Amendment of the National Electricity Rules

The National Electricity Rules are amended as set out in Schedule 1.

Schedule 1 Amendment to the National Electricity Rules

(Clause 3)

[1] Chapter 8A New Part 14

In Chapter 8A, after Part 13, insert:

Part 14 Derogations granted to Ausgrid, Endeavour Energy and Essential Energy

8A.14 Derogations from Chapter 6 for the current regulatory ~~control~~ period and future ~~subsequent~~ regulatory control period

8A.14.1 Definitions

In this *participant derogation*, rule 8A.14:

2015 determination, in respect of each ~~applicable~~ affected NSW DNSP, means the following applicable distribution determination:

(a) the distribution determination for the current regulatory ~~control~~ period ~~published by the *AER* on 30 April 2015 (as corrected in accordance with the *AER's* letter dated 20 May 2015)~~ in respect of Ausgrid;

(b) the distribution determination for the current regulatory ~~control~~ period ~~published by the *AER* on 30 April 2015 (as corrected in accordance with the *AER's* letter dated 20 May 2015)~~ in respect of Endeavour Energy; and

(c) the distribution determination for the current regulatory ~~control~~ period ~~published by the *AER* on 30 April 2015 (as corrected in accordance with the *AER's* letter dated 20 May 2015)~~ in respect of Essential Energy.

AER comments: The AER has considered whether the definition of "2015 determination" might be amended so as to differently deal with the amendments anticipated by the AER's letter to the businesses, dated 20 May 2015. (The AER is currently minded to make the amendments the subject of these letters at the same time as the remittal determination.)

In addition to the formulation above, noting the strikethrough text, an alternative preliminary formulation might be as follows: "...the distribution determination, including as in effect since the operation of rule 6.13, for the current regulatory period in respect of ...". See cl 6.13(b), which concerns the period of operation of the determination.

- On 16 April 2014, the AER made "placeholder" determinations for the transitional regulatory control period of 1 July 2014 to 30 June 2015;

- The placeholder allowance for the transitional year was to be replaced by the revenue allowance the AER approved in the full determination;

- On 30 April 2015, the AER made its final decisions in respect of the 2015−19 regulatory control period, but truing-up the allowed revenue for 2014-15. For example, in relation to Ausgrid, the allowed revenue for 2015-19 was $6576.4M, but for the whole of the regulatory control period of 14-19 (including the true-up of the placeholder determination), the allowed revenue was $8785.2M. As noted in the Final Ausgrid determination at footnote 4, p. 7 ("Overview") and p. 22:

NER, cll. 6.3.1 and 6.8.2. As we explained in our draft decision, the regulatory control period is 2015-19. However, the NER requires us to determine a notional annual revenue requirement for each year of the 2014-19 period. We must then true this up with the placeholder 2014-15 annual revenue requirement we determined in the placeholder decision we made in 2014. As a result, this decision often refers to the 2014-19 period, rather than the 2015-19 regulatory control period.
...
In our transitional decision, we determined the placeholder revenue for 2014–15. In this final decision to update the 2014–15 revenue for our assessment of efficient costs we determined X factors for the final four years of the 2014–19 period. This is to adjust Ausgrid's total revenue requirement for the 2015–19 regulatory control period for the difference between the placeholder revenue and our decision on Ausgrid's efficient costs for 2014–15.

- Note also rules 11.56.1 and 11.56.4(c) of the NER, and the discussion of the transitional year, for example, in 1.4.1 of the Final Determination in relation to Ausgrid.

- It is only the Final Decision in respect of the 2015−19 regulatory control period that has been the subject of merits review and judicial review.

It seems that, in light of the above, one option is to change the definition of "2015 determination" in the AEMC Draft Rule so as to replace the reference to "current regulatory control period" (2014-2019) to "subsequent regulatory control period" as defined in cl 11.55.1 of the NER ("subsequent regulatory control period, of an affected DNSP, means the regulatory control period for the affected DNSP that immediately follows the transitional regulatory control period"), or to expressly define it as comprising the regulatory years in 2015 to 2019.

Having considered the above, the AER considers that only the 2015 determinations need to be referred to in the Rule.

adjustment amount in respect of a NSW DNSP, means, ~~if~~ where clause 8A.14.4(a)(1) applies, an amount that operates as if it were:

(a) a revenue increment; or

(b) a revenue decrement,

to the total annual revenue that may be earned by that NSW DNSP for the final regulatory year of the current regulatory ~~control~~ period in accordance with the *annual revenue requirement* and control mechanism that apply under the remade 2015 determination, and which accounts for any applicable adjustments made by taking into account the considerations specified in cl 8A.14.4(c)~~:~~

~~(c) if clause 8A.14.4(a)(1) applies, the remade 2015 determination; or~~

~~(d) if clause 8A.14.4(a)(2) applies, the affirmed or varied 2015 determination.~~

AER comments: The AER notes that it will make a determination on remittal for the NSW DNSPs, following the outcome of the Full Federal Court judicial review proceedings. As such, the AER

considers that all references in the AEMC Draft Rule to the Tribunal "affirming" or "varying" the AER's 2015 determinations can be removed. The AER accordingly proposes the above amendment.

The AER was also initially concerned about the incorporation of the terms "revenue increment" and "revenue decrement" in this definition. These are terms used in the Rules in 6.4.3 (Building block approach - distribution) and 6A.5.4 (Building block approach – transmission) (but are not terms in the NEL). However, the words "operates as if it were" gives some comfort in relation to these concerns. A related concern nevertheless remains in relation to "subsequent adjustment amount" (see below).

The AER is also concerned as to whether the definition of "adjustment amount" is sufficient to achieve the underlying objective of making the businesses "whole", or putting them back to the position that they should have been in. The DNSPs also appear to agree that additional adjustments need to be made in order to leave them "whole". These adjustments not only include the changes to allowed revenue directly flowing out of any changes to the opex allowance and rate of return, but also include adjustments that would have ordinarily occurred, but which have not flowed through into prices given the approach taken in the undertakings. The undertakings have effectively been a one-on-one negotiation between the AER and each distributor. The undertakings vary across distributors, and across years (the AER accepted undertakings from each NSW DNSP for 2016/17 and has finalised undertakings for 2017/18). As such, there are idiosyncratic differences between the undertakings that mean the exact nature of the required adjustments to leave each distributor "whole" will need to be tailored to the particular distributor.

Presently, the Draft Rule does not explicitly state that the DNSPs should ultimately only recover what they are entitled to – that is, that no windfall gains or losses should be incurred, nor does the Draft Rule expressly provide for the adjustments that need to be made in light of the undertakings that have been in place. The AER considers that the Draft Rule should contain a provision that explicitly requires the DNSPs to recover only the revenue to which it is entitled. The AER has suggested proposed amendments to address this concern. An alternative form of drafting is as follows:

"…and which accounts for any relevant adjustments by application of the applicable control mechanism formulae and the operation of unders and overs accounts".

This alternative formulation would in turn involve some further definitions, including in relation to "unders and overs accounts", or could alternatively be accompanied by a non-exhaustive list of the adjustments to be made (e.g. "including, but not limited to…").

By way of observation, the AER notes the following:

(A) It remains concerned about the use of the different terms of "adjustment amount" and "variation amount", which are being used in the Draft Rule to describe the same sum of money, but which is dependent on when the required adjustment to total revenue is determined. This would appear to introduce unnecessary confusion, and a more streamlined drafting approach could have been adopted.

(B) This definition assumes that the AER is able to apply the unders/overs account ex post facto. This involves a series of iterative calculations, which are not presently accommodated in express terms in the Draft Rule.

adjustment determination means the *AER's* determination:

(a) under clause 8A.14.4, of any, and the relevant amounts of the, adjustment amount and subsequent adjustment amount; and

(b) under clauses 8A.14.5 and 8A.14.6, the relevant amounts of the variation amount and subsequent adjustment amount.

~~**affirms or varies the 2015 determination** means the Tribunal affirms or varies the 2015 determination under section 71P(2)(a) or (b) of the *National Electricity Law*, respectively, or any other relevant power of the Tribunal, and makes no concurrent order to set aside and remit the matter back to the AER under section 71P(2)(c) of the *National Electricity Law* or under any other relevant power of the Tribunal.~~

AER comments: The AER considers that this definition is no longer required as a number of alternative scenarios considering the initial process by which the existing 2015 determinations are going to be remade is now not a matter of speculation – the AER will make a determination on remittal.

Ausgrid means~~ Ausgrid, the energy services corporation of that name (formerly known as EnergyAustralia), which is constituted under section 7 of the *Energy Services Corporations Act 1995* (NSW) and specified in Part 2 of Schedule 1 of that Act, or any successor to its business (including any 'authorised distributor' of Ausgrid's 'network infrastructure assets' (as those terms are defined in the *Electricity Network Assets (Authorised Transactions) Act 2015* (NSW)) following the transfer of the whole, or part, of those network infrastructure assets to the private sector).~~ the Ausgrid Operator Partnership (ABN 78 508 211 731) of 570 George Street, Sydney NSW 2000 comprising of:

(a) Blue Op Partner Pty Ltd (ACN 615 217 500) as trustee for the Blue Op Partner Trust;

(b) ERIC Alpha Operator Corporation 1 Pty Ltd (ACN 612 975 096) as trustee for ERIC Alpha Trust 1;

(c) ERIC Alpha Operator Corporation 2 Pty Ltd (ACN 612 975 121) as trustee for ERIC Alpha Trust 2;

(d) ERIC Alpha Operator Corporation 3 Pty Ltd (ACN 612 975 185) as trustee for ERIC Alpha Operator Trust 3; and

(e) ERIC Alpha Operator Corporation 4 Pty

AER comments: The AER has adopted an alternative definition, suggested by Ausgrid, which is consistent with the s 59A undertakings.

current regulatory ~~control~~ period, for each NSW DNSP, means the period of five years that commenced on 1 July 2014 and ends on 30 June 2019, which includes the 'transitional regulatory control period' and 'subsequent regulatory control period' as those terms are defined in clause 11.55.1.

AER comments: The AER notes the derogation as initially proposed by the NSW DNSPs, in relation to which the businesses observed that each of the "transitional regulatory control period" and the "subsequent regulatory control period" are "regulatory control periods" for the purposes of the NER, but that the five year period comprised of the "transitional regulatory control period" and

the "subsequent regulatory control period" is not (cl 11.55.1, cl 11.56.3(a)(2), cl 11.56.4(g) and (k)). As such, the NSW DNSPs had revised the term to refer to that five-year period, using instead the phrase "current regulatory period" (since that period is not a regulatory control period). The AER considers that such an amendment should be made if its primary proposal is not adopted.

Endeavour Energy means Endeavour Energy, the energy services corporation of that name (formerly known as Integral Energy), which is constituted under section 7 of the *Energy Services Corporations Act 1995* (NSW) and specified in Part 2 of Schedule 1 to that Act, or any successor to its business (including any 'authorised distributor' of Endeavour Energy's 'network infrastructure assets' (as those terms are defined in the *Electricity Network Assets (Authorised Transactions) Act 2015* (NSW)) following the transfer of the whole, or part, of those network infrastructure assets to the private sector).

Essential Energy means Essential Energy, the energy services corporation of that name (formerly known as Country Energy), which is constituted under section 7 of the *Energy Services Corporations Act 1995* (NSW) and specified in Part 2 of Schedule 1 of that Act, or any successor to its business.

AER comments: The AER notes that the definition of "Endeavour Energy" will need to be amended in due course, given the pending acquisition.

NSW DNSP means <u>any</u> ~~each~~ of the following Distribution Network Service Providers:

(a) Ausgrid;

(b) Endeavour Energy; and

(c) Essential Energy.

regulatory year means each consecutive period of 12 calendar months in the current regulatory ~~control~~ period or <u>future</u> ~~subsequent~~ regulatory control period (as the case may be) (the current regulatory ~~control~~ period and <u>future</u> ~~subsequent~~ regulatory control period each being <u>deemed to be</u> a **regulatory control period**), the first such 12 month period commencing at the beginning of the regulatory ~~control~~ period <u>or regulatory control period (as the case may be)</u> and the final 12 month period ending at the end of the regulatory ~~control~~ period <u>or regulatory control period (as the case may be).</u>

AER comments: The AER notes the definition of "regulatory year" in the Glossary in Chapter 10 of the Rules: "*Each consecutive period of 12 calendar months in a* regulatory control period, *the first such 12 month period commencing at the beginning of the* regulatory control period *and the final 12 month period ending at the end of the* regulatory control period. *For* AEMO, *each* financial year *is a* regulatory year."

The AER notes that this separate and different definition in the Draft Rule is nevertheless required given the absence of a "distribution determination" in relation to which the related definition of "regulatory control period" for a DNSP depends – "*In respect of a* Distribution Network Service Provider, *a period of not less than 5 regulatory years for which the provider is subject to a control mechanism*

imposed by a distribution determination". The different definition in the Draft Rule is limited to the participant derogation.

The proposed amendment by the AER is necessarily complicated, but this flows from the observations made in relation to the definition of "current regulatory control period (or, as suggested, "current regulatory period"), which are addressed above.

remade 2015 determination, in respect of each NSW DNSP, means ~~the 2015 determination of that NSW DNSP as remade by the AER following the Tribunal's decision~~ the distribution determination made by the *AER* in relation to the current regulatory period, after the Tribunal's decision in respect of that NSW DNSP.

AER comments: The AER notes an alternative formulation of the definition of "remade 2015 determination" above. See also the comments below in relation to the definition of "Tribunal's decision".

subsequent adjustment amount, in respect of a NSW DNSP, means:

(a) if clause 8A.14.4 applies, an amount that:

(1) is equivalent in net present value terms to the adjustment amount; and

(2) represents a revenue ~~increment~~ increase (where the adjustment amount is a negative amount) or a revenue ~~decrement~~ decrease (where the adjustment amount is a positive amount) to the *annual revenue requirement* of the first regulatory year of the future ~~subsequent~~ regulatory control period; or

(b) if clause 8A.14.5 applies, an amount that is equivalent in net present value terms to the variation amount; or

(c) if clause 8A.14.6 applies, an amount that is equivalent in net present value terms to the variation amount.

AER comment: As noted above in respect of the definition of "adjustment amount", the AER is concerned about the use of the terms "revenue decrement" and "revenue increment", which are terms used in the Rules in 6.4.3 (Building block approach - distribution) and 6A.5.4 (Building block approach – transmission) (but are not terms in the NEL).

The AER considered whether the language of "operates as if it were" could be applied here, as in the definition to "adjustment amount". An alternative formulation, however, is suggested above, which is to use different terms to avoid confusion, being "revenue increase" and "revenue decrease".

Future ~~subsequent~~ distribution determination, in respect of each NSW DNSP, means the distribution determination of that NSW DNSP made by the *AER* for the future ~~subsequent~~ regulatory control period.

AER comments: The AER proposes the amendments above, which are consistent with the proposed change to the definition of "subsequent regulatory control period".

Future ~~subsequent~~ regulatory control period, in respect of a NSW DNSP, means the *regulatory control period* for that NSW DNSP that immediately follows the current regulatory ~~control~~ period.

AER comments: The AER is concerned about this definition, given that it is used in a different fashion elsewhere in the Rules in Chapter 11, which concerns "Savings and Transitional Rules". As such, the AER has proposed the alternative formulation.

The term is defined in Chapter 11 in relation to "Transitional provisions for NSW/ACT Distribution Network Service Providers" in cl 11.55.1 to mean "the *regulatory control period* for the affected DNSP that immediately follows the transitional regulatory control period". (Note: The definition of "regulatory control period" for the purposes of this definition is affected by clause 11.56.4(k).)

The term also has a specific definition in relation to rule 11.80 (National Electricity Amendment ("Aligning TasNetworks' regulatory control periods) Rule 2015") in comparable terms to the definition proposed by the AEMC in this Draft Rule.

The term also has a specific definition in relation to rule 11.93 ("Rules consequential on the making of the National Electricity Amendment (Rate of Return Guidelines Review) Rule 2016") in comparable terms to the definition proposed by the AEMC in this Draft Rule.

The term "regulatory control period" is a defined term in the Glossary in Chapter 10 of the Rules such that the composite phrase does not have a definition of *general* application in the Rules. This appears to be the approach taken in relation to cl 11.80.1 and 11.93.1. On balance, the definition proposed by the AEMC in this Draft Rule could be retained (if the AEMC were not minded to depart from consistent drafting).

An alternative formulation might also take the following form: "**future regulatory control period**, in respect of a NSW DNSP, means the *regulatory control period* for that NSW DNSP that immediately follows the current regulatory period, with a putative operation over regulatory years occurring in 2019 to 2024".

substituted total annual revenue amount has the meaning given in clause 8A.14.4(e)~~(d)~~.

total annual revenue, in respect of a NSW DNSP, means the total revenue that the NSW DNSP is entitled to earn from the provision of *standard control services* for the relevant regulatory year.

Tribunal means the Australian Competition Tribunal.

Tribunal's decision means the decision of the Tribunal in relation to the 2015 determination delivered on 26 February 2016 to remit the matter back to the *AER* pursuant to s 71P(2)(c) of the NEL, ~~as varied or remade~~ as a consequence of the outcome of judicial review of that ~~decision~~ determination.

AER comments: The AER notes that the Tribunal will remit the decision to the AER in accordance with the orders arising out of the Full Federal Court's judgment in the judicial review proceedings.

The AER considers the definition of 'remade 2015 determination' and 'Tribunal's decision' should be updated to reflect the Full Federal Court's orders, which we anticipate will be finalised shortly.

The definition is convoluted, and can be interpreted to mean different things. A preferable approach would be to collapse this definition in to the definition of "remade 2015 determination", as that includes the only use of the term Tribunal's decision".

undertaking, in respect of a NSW DNSP, means an undertaking given to, and accepted ~~approved~~ by, the *AER* under section 59A of the *National Electricity Law* in respect of the revenue earned and/or prices charged by that NSW DNSP for the relevant regulatory year.

AER comments: The proposed amendment reflects the language of s 59A(1) of the NEL.

variation amount, in respect of a NSW DNSP, means~~:~~

(a) if clause 8A.14.5 applies, an amount equivalent to the difference between:

(1) the total annual revenue for the NSW DNSP for the final regulatory year of the current regulatory ~~control~~ period under ~~:(1) if clause 8A.14.5(a)(1) applies:(i)~~ the *annual revenue requirement* and control mechanism under the remade 2015 determination; and

(2) ~~(ii)~~ any undertaking that applies for that regulatory year, as adjusted to account for any applicable adjustments by taking into account the considerations specified in cl 8A.14.5(c)~~:~~,

provided that if the total annual revenue under the undertaking, as adjusted, is greater than the total annual revenue under the remade 2015 determination, the variation amount will be a negative amount; or

~~(2) if clause 8A.14.5(a)(2) applies:~~

~~(i) the *annual revenue requirement* and control mechanism under the affirmed or varied 2015 determination (as applicable); and~~

~~(ii) any undertaking that applies for that regulatory year,~~

~~provided that if the total annual revenue under the undertaking is greater than the total annual revenue under the varied or affirmed 2015 determination (as applicable), the variation amount will be a negative amount; or~~

AER comments: The AER considers that this sub-clause is no longer necessary, as the Tribunal will remit the decision to the AER to remake.

(b) if clause 8A.14.6 applies, an amount equivalent to the difference between:

(1) the total annual revenue for the NSW DNSP for the final regulatory year of the current regulatory ~~control~~ period under ~~:(1) if clause 8A.14.6(a)(1) applies:(i)~~ the *annual revenue requirement* and control mechanism under the remade 2015 determination; and

(2)~~(ii)~~ any undertaking that applies for that regulatory year, as adjusted to account for any applicable adjustments by taking into account the considerations specified in cl 8A.14.6(c)~~:~~,

provided that if the total annual revenue under the undertaking, as adjusted, is greater than the total annual revenue under the remade 2015 determination, the variation amount will be a negative amount; or

~~(2) if clause 8A.14.6(a)(2) applies:~~

~~(i) the *annual revenue requirement* and control mechanism under the affirmed or varied 2015 determination (as applicable); and~~

~~(ii) any undertaking that applies for that regulatory year,~~

~~provided that if the total annual revenue under the undertaking is greater than the total annual revenue under the varied or affirmed 2015 determination (as applicable), the variation amount will be a negative amount.~~

AER comments: As noted above, the AER is concerned about the use of the different terms of "adjustment amount" and "variation amount" within the Draft Rule, which are effectively being used to describe the same sum of money. The AER queries whether this introduces unnecessary confusion.

The AER also queries whether this makes provision for the "truing up" of actual revenues in relation to the allowed revenues and the undertaking revenues.

The AER has proposed amendments above to expressly allow for the making of adjustments required to be made in light of the undertakings in place, as noted above in relation to the comments concerning the definition of "adjustment amount".

8A.14.2 Expiry date

This *participant derogation* expires on the date that immediately follows the end of the future ~~subsequent~~ regulatory control period.

8A.14.3 Application of Rule 8A.14

(a) This *participant derogation* prevails to the extent of any inconsistency with any other provision of the Rules.

(b) Nothing in this *participant derogation* has the effect of:

(1) changing the application of the *Rules* to the making of a

remade 2015 determination; or

(2) rendering a change, in whole or in part, to the terms of a ~~distribution determination that applies in respect of the current regulatory control period~~ 2015 determination.

AER comments: The AER is uncertain of the scope of cl 8A.15.3 and suggests the above amendment by way of clarification.

(c) To the extent of any inconsistency between this *participant derogation* and a:

~~(1)~~ remade 2015 determination~~; or~~

~~(2) 2015 determination affirmed or varied by the Tribunal,~~

this *participant derogation* prevails.

8A.14.4 Recovery of revenue across the current regulatory ~~control~~ period and future ~~subsequent~~ regulatory control period

General

(a) This clause 8A.14.4 applies in respect of a NSW DNSP if~~:(1)~~ a remade 2015 determination is made by the *AER* in respect of that NSW DNSP prior to 1 March 2018~~; or~~.

~~(2) the Tribunal affirms or varies the 2015 determination in respect of that NSW DNSP prior to 1 December 2017.~~

AER comments: The AER is concerned as to whether the Draft Rule deals with certain scenarios within the different time periods contemplated in cl 8A.14.4, 8A.14.5 and 8A.14.6. For example, the concern is that the Rule, as presently drafted, does not accommodate a situation in which the AER's decision on remittal is appealed. It is suggested that a more flexible approach may be able to accommodate more variables.

As noted in the AER Submission, dated December 2016, with respect to the business' proposal, the drafting of the Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is completed within the 2014-19 period. Accordingly, the AER raises the question whether an additional provision, or amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Draft Rule is maintained.

Another concern raised by the AER is how the Rule will be able to accommodate different approaches being taken in respect of the different NSW DNSPs.

Adjustment determination under cl 8A.14.4

(b) The *AER* may ~~: (1)~~ if subparagraph (a)~~(1)~~ applies, determine at the time of making the remade 2015 determination~~; or (2) if subparagraph (a)(2) applies, determine by 28 February 2018,~~ for the relevant NSW DNSP:

(1) ~~(3)~~ an adjustment amount; and

(2) ~~(4)~~ a subsequent adjustment amount.~~,~~

(c) In making an adjustment determination under cl 8A.14.4(b), the *AER:*

(1) must be satisfied that the adjustment determination will result in the relevant NSW DNSP recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, and any control mechanisms specified in the remade 2015 determination had been implemented in each relevant regulatory year;

(2) must be satisfied ~~if the *AER* is satisfied~~ that the application of the adjustment amount and subsequent adjustment amount under paragraphs (e) ~~(d)~~ and (f) ~~(e)~~, respectively, would be reasonably likely to minimise variations in *use of system* charges:

(i) between the penultimate and final regulatory years of the current regulatory ~~control~~ period; and

(ii) between the final regulatory year of the current regulatory ~~control~~ period and the first regulatory year of the future ~~subsequent~~ regulatory control period,

for the relevant NSW DNSP~~.~~;

(3) may have regard to any factor considered relevant.

Note:

When determining the adjustment amount and subsequent adjustment amount, the AER must also take into account the *national electricity objective* and may take into account the revenue and pricing principles: see *National Electricity Law*, s.16(1)(a) and (2)(b).

AER comments: As noted above, the AER considers that a primary policy objective is making the businesses "whole" as a result of the adjustment determination, and the above amendments propose to address this.

The AER considers that any references to 'reasonably satisfied' ought not to be included as they have a confounding dimension.

The AER notes that the use of the word "likely" could introduce uncertainty as to what sense the word is being used. That is, as a probability or likelihood, or as a real and not remote chance.

Another formulation to address the objective of not permitting any windfall gains or losses would be to adapt the language from cl S6.2.1(e)(3) of the NER: *"The adjustment must also remove any benefit or penalty associated with any difference between the estimated and actual expenditure."* The alternative formulation may take the following forms:

"...must be reasonably satisfied that the adjustment determination will not result in any windfall benefit or penalty accruing to the relevant NSW DNSP";

"...must be reasonably satisfied that the adjustment determination will only result in the relevant NSW DNSP recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, without also recovering any windfall gain, or incurring a windfall loss."

(d) ~~(c)~~ Paragraphs (e) ~~(d)~~ and (f) ~~(e)~~ do not apply in respect of a NSW DNSP if the AER has not determined an adjustment amount and subsequent adjustment amount under paragraph (b) for that NSW DNSP.

Recovery in current regulatory ~~control~~ period

(e) ~~(d)~~ A *pricing proposal* submitted by a NSW DNSP, and accepted ~~approved~~ by the AER, for the final regulatory year of the current regulatory ~~control~~ period must only provide for the recovery of:

(1) where the applicable adjustment amount operates as if it were a revenue increment:

(i) the NSW DNSP's total annual revenue in accordance with the *annual revenue requirement* and control mechanism under the distribution determination in force for the final regulatory year of the current regulatory ~~control~~ period; plus

(ii) the adjustment amount; or

(2) where the applicable adjustment amount operates as if it were a revenue decrement:

(i) the NSW DNSP's total annual revenue in accordance with the *annual revenue requirement* and control mechanism under the distribution determination in force for the final regulatory year of the current regulatory ~~control~~ period; minus

(ii) the adjustment amount,

(such amount being the **substituted total annual revenue amount**).

Recovery in future ~~subsequent~~ regulatory control period

(f) ~~(e)~~ The *AER* must include the subsequent adjustment amount determined for a NSW DNSP under paragraph (b) as:

(1) if subparagraph (e) ~~(d)~~(1) applies, a revenue ~~decrement~~ decrease; or

(2) if subparagraph (e) ~~(d)~~ (2) applies, a revenue ~~increment~~ increase~~-~~,

to the *annual revenue requirement* determined under rule 6.4 for the first regulatory year of that NSW DNSP's future ~~subsequent~~ regulatory control period.

AER comments: See the above comments in relation to "revenue decrement" and "revenue increment".

By way of observation, the AER is also concerned about whether the Draft Rule fails to deal with certain scenarios within the different time periods contemplated in cl 8A.14.4, 8A.14.5 and 8A.14.6. For example, the concern is that the Draft Rule, as presently drafted, does not accommodate a situation in which the remitter decision is appealed. It is suggested that a more flexible approach may be able to accommodate more variables.

As noted in the AER Submission, dated December 2016, with respect to the business' proposal, the drafting of the Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is completed within the 2014-19 period. Accordingly, the AER has raised whether an additional provision, or amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Rule is maintained.

8A.14.5 Recovery of revenue in future ~~subsequent~~ regulatory control period only and no reopening of future ~~subsequent~~ distribution determination required

General

(a) This clause 8A.14.5 applies in respect of a NSW DNSP if ~~:(1)~~ a remade 2015 determination is made by the *AER* in respect of that NSW DNSP on or after 1 March 2018, but prior to ~~1 February~~ 1 May 2019~~; or~~.

~~(2) the Tribunal affirms or varies the 2015 determination in respect of that NSW DNSP on or after 1 December 2017, but prior to 1 February 2019.~~

AER comments: The AER considers that this date should be changed to 1 May 2019, as this timing aligns with the NER timing of the final distribution determination for the future regulatory control period.

As noted above, the AER has raised the question whether the drafting of the Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is completed within the 2014-19 period (and not the subject of further challenge). Accordingly, the AER has raised whether an additional provision, or an amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Rule is maintained. For example, to accommodate a situation in which the remitter decision is appealed.

Another concern raised by the AER is how the Rule will be able to accommodate different approaches being take in respect of the different NSW/ACT DNSPs.

Adjustment determination under cl 8A.14.5

(b) The *AER* must ~~:(1)~~ if subparagraph (a)~~(1)~~ applies, determine at the time of making the remade 2015 determination~~; or~~

~~(2) if subparagraph (a)(2) applies, determine by 31 March 2019,~~

the variation amount and subsequent adjustment amount for the relevant NSW DNSP.

(c) In making an adjustment determination under cl 8A.14.5(b), the *AER:*

(1) must be satisfied that the adjustment determination will result in the relevant NSW DNSP recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the

current regulatory period, and any control mechanisms specified in the remade 2015 determination had been implemented in each relevant regulatory year;

(2) may have regard to any factor considered relevant.

Note:

When determining the adjustment amount and subsequent adjustment amount, the AER must also take into account the *national electricity objective* and may take into account the revenue and pricing principles: see *National Electricity Law*, s.16(1)(a) and (2)(b).

The principle in 8A.14.4(c)(2) is not repeated in 8A.14.5(c), as the minimisation in price volatility will be achieved through the application of the ordinary smoothing mechanisms of the distribution determination.

AER comments: Note the comments above in relation to 8A.14.5(c).

Recovery in future ~~subsequent~~ regulatory control period

(d) ~~(c)~~ The *AER* must include the future ~~subsequent~~ adjustment amount determined for a NSW DNSP under paragraph (b) as:

(1) if the applicable variation amount is a positive amount, a revenue ~~increment~~ increase; or

(2) if the applicable variation amount is a negative amount, a revenue ~~decrement~~ decrease,

to the *annual revenue requirement* determined under rule 6.4 for the first regulatory year of that NSW DNSP's future ~~subsequent~~ regulatory control period.

8A.14.6 Recovery of revenue in future ~~subsequent~~ regulatory control period only and reopening of distribution determination is required

General

(a) This clause 8A.14.6 applies in respect of a NSW DNSP if ~~: (1)~~ a remade 2015 determination is made by the *AER* in respect of that NSW DNSP~~; or~~

~~(2) the Tribunal affirms or varies the 2015 determination in respect of that NSW DNSP,~~

on or after ~~1 February~~ 1 May 2019, but prior to 1 December of the fourth last regulatory year of the future ~~subsequent~~ regulatory control period.

AER comments: As noted above, the AER has raised the question whether the Draft Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is completed within the 2014-19 period. Accordingly, the AER has raised whether an additional provision, or amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Rule is maintained. For example, to accommodate a situation in which the AER's decision on remittal is appealed.

Another concern raised by the AER is how the Draft Rule will be able to accommodate different approaches being take in respect of the different NSW/ACT DNSPs.

Adjustment determination under cl 8A.14.6

(b) The *AER* must ~~:(1)~~ if subparagraph (a)~~(1)~~ applies, determine at the time of making the remade 2015 determination~~; or~~

~~(2) if subparagraph (a)(2) applies, determine by 28 February of the fourth last regulatory year of the subsequent regulatory control period,~~

the variation amount and subsequent adjustment amount for the relevant NSW DNSP.

(c) In making an adjustment determination under cl 8A.14.6(b), the *AER:*

(1) must be satisfied that the adjustment determination will result in the relevant NSW DNSP recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, and any control mechanisms specified in the remade 2015 determination had been implemented in each relevant regulatory year;

(2) may have regard to any factor considered relevant.

Note:

When determining the adjustment amount and subsequent adjustment amount, the AER must also take into account the *national electricity objective* and may take into account the revenue and pricing principles: see *National Electricity Law*, s.16(1)(a) and (2)(b).

The principle in 8A.14.4(c)(2) is not repeated in 8A.14.6(c), as the minimisation in price volatility will be achieved through the application of the ordinary smoothing mechanisms of the distribution determination.

Recovery in ~~subsequent~~ future regulatory control period

(d) ~~(c)~~ If paragraph (a) applies in respect of a NSW DNSP, the *AER* must revoke the future ~~subsequent~~ distribution determination of that NSW DNSP and make a new distribution determination in substitution for that revoked determination, that:

(1) applies to the remainder of the future ~~subsequent~~ regulatory control period; and

(2) includes the subsequent adjustment amount for that NSW DNSP as:

(i) if the applicable variation amount is a positive amount, a revenue increment; or

(ii) if the applicable variation amount is a negative amount, a revenue decrement,

to the *annual revenue requirement* of one or more of the regulatory years for the remainder of the future ~~subsequent~~ regulatory control period, subject to the aggregate of all such increases or decreases for the relevant regulatory years being equivalent in net present value terms to the subsequent adjustment amount.

(e) ~~(d)~~ The substituted distribution determination made under paragraph (d) ~~(c)~~ must only depart ~~:(1) vary~~ from the revoked distribution determination to the extent necessary to reflect the increase

or decrease (as the case may be) to the *annual revenue requirement* of one or more of the regulatory years for the future ~~subsequent~~ regulatory control period under paragraph (d) ~~(c); and~~

~~(2) be made after the AER has first consulted with the relevant NSW DNSP and such other persons as the AER considers appropriate.~~

AER comments: The AER has a policy preference to leave matters of procedural fairness to the operation of general administrative law requirements in the context of the decisions giving effect to smoothing.

(f) ~~(e)~~ If the *AER* revokes and substitutes the future ~~subsequent~~ distribution determination under paragraph (d) ~~(c)~~, that revocation and substitution must take effect from the commencement of the next regulatory year.

AER comments: See the above comments in relation to "revenue decrement" and "revenue increment".

8A.14.7 Requirements for adjustment determination

The *AER* must:

~~(a) make the adjustment determination after consulting with the relevant NSW DNSP and any other persons as the *AER* considers appropriate;~~

AER comments: As noted above, the AER has a policy preference to leave matters of procedural fairness to the operation of general administrative law requirements in the context of the decisions giving effect to smoothing.

(a) ~~(b)~~ *publish* its adjustment determination~~:~~

~~(1) if clause 8A.14.4(a)(1), 8A.14.5(a)(1) or 8A.14.6(a)(1) applies,~~ at the time of publication of the remade 2015 determination;

~~(2) if clause 8A.14.4(a)(2) applies, by 28 February 2018;~~

~~(3) if clause 8A.14.5(a)(2) applies, by 31 March 2019; or~~

~~(4) if clause 8A.14.6(a)(2) applies, by 28 February of the fourth last regulatory year of the subsequent regulatory control period; and~~

(b) ~~(c)~~ include in its adjustment determination, the reasons for the *AER's* determination of:

(1) if clause 8A.14.4 applies, the adjustment amount and subsequent adjustment amount or, where the *AER* has not determined an adjustment amount and subsequent adjustment amount, the reasons for that decision; or

(2) if clause 8A.14.5 or 8A.14.6 applies, the variation amount and subsequent adjustment amount.

8A.14.8 Application of Chapter 6 under participant derogation

(a) Except as otherwise specified in this rule 8A.14 or Chapter 11, Chapter 6 applies to:

(1) the remainder of the current regulatory ~~control~~ period; and

(2) the making of a future ~~subsequent~~ distribution determination,

in respect of each NSW DNSP.

(b) For the purposes of the application of clauses 8A.14.4, 8A.14.5 and 8A.14.6 (as applicable) in respect of a NSW DNSP, Chapter 6 is amended for the remainder of the current regulatory ~~control~~ period as follows:

(1) clause 6.18.1A(c) does not apply to the extent necessary to allow for the submission of a *pricing proposal* by a NSW DNSP, and subsequent approval of such *pricing proposal* by the AER, in accordance with clause 8A.14.4(e)~~(d)~~;

(2) if clause 8A.14.4 applies, if any variation in proposed tariffs occurs as a result of:

(i) if clause 8A.14.4(a)(1) applies, the remade 2015 determination; or

~~(ii) if clause 8A.14.4(a)(2) applies, the affirmed or varied 2015 determination; and~~

(iii~~i~~) incorporation of the substituted total annual revenue amount in the pricing proposal under clause 8A.14.4(e)~~(d)~~,

such variation~~s~~ will be taken to be explained by the relevant NSW DNSP for the purposes of clause 6.18.8(a)(2);

(3) if clause 8A.14.4 applies, the reference to 'any applicable distribution determination' in clauses 6.18.2(b)(7), 6.18.2(b)(8), 6.18.8(a)(1) and 6.18.8(c) will be taken to be the applicable distribution determination as supplemented by the requirements for the NSW DNSP's *pricing proposal* under clause 8A.14.4(e)~~(d)~~;

(4) to the extent that a NSW DNSP's tariffs vary from tariffs which would result from complying with the pricing principles in clause 6.18.5(e) to (g) due to the application of this participant derogation, such variation is taken to be a variation from the pricing principles permitted under clause 6.18.5(c);

(5) clause 6.18.6 does not apply to the extent that a NSW DNSP's tariffs vary from tariffs which would otherwise result from complying with clause 6.18.6, due to the application of this *participant derogation*; and

AER comments: The AER has questioned whether reference should be made to the fact that this clause is only relevant to recovering revenue in the current regulatory period and that revenue recovered in the next period will be part of the X factors.

(6) if the *AER* amends a *pricing proposal* under clause 6.18.8(b)(2) or 6.18.8(c), then in addition to the requirements in clause 6.18.8(c1), the AER must also have regard to:

(i) if clause 8A.14.4(a)(1) applies, any variation in proposed tariffs as a result of the remade 2015 determination;

~~(ii) if clause 8A.14.4(a)(2) applies, any variation in proposed tariffs as a result of the affirmed or varied 2015 determination (as the case may be);~~ and

(iii) if the *AER* determines an adjustment amount and subsequent adjustment amount under clause 8A.14.4(b), any variations in proposed tariffs as a result of the application of the substituted total annual revenue amount under clause 8A.14.4(e)~~(d)~~.

(c) For the purposes of the application of clauses 8A.14.4, 8A.14.5 and 8A.14.6 (as applicable) in respect of a NSW DNSP, Chapter 6 is amended for the future ~~subsequent~~ regulatory control period as follows:

(1) if clause 8A.14.6 applies, clause 6.5.9(b)(2) does not apply to the extent necessary to include the subsequent adjustment amount as a revenue increment or revenue decrement (as the case may be) to the *annual revenue requirement* of one or more regulatory years for the future ~~subsequent~~ regulatory control period for the relevant NSW DNSP under clause 8A.14.6(d)~~(c)~~; and

(2) the reference to 'the other revenue increments or decrements' referred to in clauses 6.4.3(a)(6) and 6.4.3(b)(6) is taken to include such increments or decrements as adjusted to the extent necessary to take into account the application of the substituted total annual revenue amount under clause 8A.14.4(e)~~(d)~~.

Draft National Electricity Amendment (Participant ~~D~~derogation - ACT DNSP Revenue Smoothing) Rule 2017

1 Title of Rule

This Rule is the *Draft National Electricity Amendment (Participant ~~D~~derogation - ACT DNSP Revenue Smoothing) Rule 2017*.

2 Commencement

This Rule commences operation on [COMMENCEMENT_DATE], immediately following Schedule 1 of the *National Electricity Amendment (Participant derogation – NSW DNSPs Revenue Smoothing) Rule 2017*.

3 Amendment of the National Electricity Rules

The National Electricity Rules are amended as set out in Schedule 1.

Schedule 1 Amendment to the National Electricity Rules

(Clause 3)

[1] Chapter 8A New Part 15

In Chapter 8A, after Part 14, insert:

Part 15 Derogations granted to ActewAGL

8A.15 Derogations from Chapter 6 for the current regulatory ~~control~~ period and future ~~subsequent~~ regulatory control period

8A.15.1 Definitions

In this *participant derogation*, rule 8A.15:

2015 determination means the distribution determination for the current regulatory ~~control~~ period ~~published by the *AER* on 30 April 2015 (as corrected in accordance with the *AER*'s letter dated 20 May 2015)~~ in respect of ActewAGL.

AER comments: The AER has considered whether the definition of "2015 determination" might be amended so as to differently deal with the amendments anticipated by the AER's letter to the businesses, dated 20 May 2015. (The AER is currently minded to make the amendments the subject of these letters at the same time as the remittal determination.)

In addition to the formulation above, noting the strikethrough text, an alternative preliminary formulation might be as follows: "...the distribution determination, including as in effect since the operation of rule 6.13, for the current regulatory period in respect of ...". See cl 6.13(b), which concerns the period of operation of the determination.

- On 16 April 2014, the AER made "placeholder" determinations for the transitional regulatory control period of 1 July 2014 to 30 June 2015;

- The placeholder allowance for the transitional year was to be replaced by the revenue allowance the AER approved in the full determination;

- On 30 April 2015, the AER made its final decisions in respect of the 2015−19 regulatory control period, but truing-up the allowed revenue for 2014-15. For example, the allowed revenue for 2015-19 was $590.9M, but for the whole of the regulatory control period of 14-19 (including the true-up of the placeholder determination), the allowed revenue was $764.1M. As noted in the Final ActewAGL determination at footnote 4, p. 7 ("Overview") and p. 22:

NER, cll. 6.3.1 and 6.8.2. As we explained in our draft decision, the regulatory control period is 2015-19. However, the NER requires us to determine a notional annual revenue requirement for each year of the 2014-19 period. We must then true this up with the placeholder 2014-15 annual revenue requirement we determined in the placeholder decision we made in 2014. As a result, this decision often refers to the 2014-19 period, rather than the 2015-19 regulatory control period.

...

In our transitional decision, we determined the placeholder revenue for 2014–15. In this final decision to update the 2014–15 revenue for our assessment of efficient costs we determined X factors for the final four years of the 2014–19 period. This is to adjust AcewtAGL's total revenue requirement for the 2015–19 regulatory control period for the difference between the placeholder revenue and our decision on ActewAGL's efficient costs for 2014–15.

- Note also rules 11.56.1 and 11.56.4(c) of the NER, and the discussion of the transitional year, for example, in 1.4.1 of the Final Determination in relation to ActewAGL.

- It is only the Final Decision in respect of the 2015−19 regulatory control period that has been the subject of merits review and judicial review.

It seems that, in light of the above, one option is to change the definition of "2015 determination" in the AEMC Draft Rule so as to replace the reference to "current regulatory control period" (2014-2019) to "subsequent regulatory control period" as defined in cl 11.55.1 of the NER ("subsequent regulatory control period, of an affected DNSP, means the regulatory control period for the affected DNSP that immediately follows the transitional regulatory control period"), or to expressly define it as comprising the regulatory years in 2015 to 2019.

Having considered the above, the AER considers that only the 2015 determinations need to be referred to in the Rule.

ActewAGL means ActewAGL Distribution, the joint venture between Icon Distribution Investments Limited ACN 073 025 224 and Jemena Networks (ACT) Pty Ltd ACN 008 552 663, providing *distribution services* in the Australian Capital Territory, or any successor to its business.

adjustment amount means, if clause 8A.15.4(a)(1) applies, an amount that operates as if it were:

(a) a revenue increment; or

(b) a revenue decrement,

to the total annual revenue that may be earned by ActewAGL for the final regulatory year of the current regulatory ~~control~~ period in accordance with the *annual revenue requirement* and control mechanism, and the revenue derived from metering services, that apply under the remade 2015 determination, and which accounts for any applicable adjustments made by taking into account the considerations specified in cl 8A.15.4(c).~~:~~

~~(c) if clause 8A.15.4(a)(1) applies, the remade 2015 determination; or~~

~~(d) if clause 8A.15.4(a)(2) applies, the affirmed or varied 2015 determination.~~

AER comments: The AER notes that it will make a determination on remittal for ActewAGL, following the outcome of the Full Federal Court judicial review proceedings. As such, the AER considers that all references in the AEMC Draft Rule to the Tribunal "affirming" or "varying" the AER's 2015 determinations can be removed. The AER accordingly proposes the above amendment.

The AER was also initially concerned about the incorporation of the terms "revenue increment" and "revenue decrement" in this definition. These are terms used in the Rules in 6.4.3 (Building block approach - distribution) and 6A.5.4 (Building block approach – transmission) (but are not terms in the NEL). However, the words "operates as if it were" gives some comfort in relation to these concerns. A related concern nevertheless remains in relation to "subsequent adjustment amount" (see below).

The AER is also concerned as to whether the definition of "adjustment amount" is sufficient to achieve the underlying objective of making the businesses "whole", or putting them back to the position that they should have been in. This manifests itself in three respects. These adjustments not only include the changes to allowed revenue directly flowing out of any changes to the opex allowance and rate of return, but also include adjustments that would have ordinarily occurred, but which have not flowed through into prices given the approach taken in the undertakings. The undertakings have effectively been a one-on-one negotiation between the AER and each distributor. The undertakings vary across distributors, and across years (the AER accepted undertakings from ActewAGL for 2016/17 and has finalised undertakings for 2017/18). As such, there are idiosyncratic differences between the undertakings that mean the exact nature of the required adjustments to leave each distributor "whole" will need to be tailored to the particular distributor.

First, the Draft Rule does not explicitly state that ActewAGL should ultimately only recover what they are entitled to – that is, that no windfall gains or losses should be incurred. The AER considers that the Draft Rule should contain a provision that explicitly requires ActewAGL to recover only the revenue to which it is entitled. The AER has suggested the proposed drafting to address this concern. An alternative, more prescriptive form of drafting is as follows:

"…and which accounts for any relevant adjustments by application of the applicable control mechanism formulae".

This alternative formulation would in turn involve some further definitions, or could alternatively be accompanied by a non-exhaustive list of the adjustments to be made (e.g. "including, but not limited to").

Second, the AER considers there should be a provision that preserve the properties and risks of the control mechanism in circumstances where ActewAGL is under an "average revenue cap" and bears the volume risk: if volumes turn out to be more than forecast, they earn more revenue (and converse). This consideration also applies to metering services, which are under a "price cap" and has similar volume risks. The AER has suggested the proposed drafting to address this concern.

Third, the AER notes that there is a disconnect between this definition and the definition of "total annual revenue", the latter of which includes metering services, which are alternative control services. The definition of "adjustment amount" does not presently seem to accommodate alternative control services, but only standard control services. As such, the AER has proposed the above amendment, by including the words "and the revenue derived from metering services".

By way of observation, the AER notes that it remains concerned about the use of the different terms of "adjustment amount" and "variation amount", which are being used in the Draft Rule to describe the same sum of money, but which is dependent on when the required adjustment to total revenue is determined. This would appear to introduce unnecessary confusion, and a more streamlined drafting approach could have been adopted.

adjustment determination means the *AER's* determination:

(a) under clause 8A.15.4, of any, and the relevant amounts of the, adjustment amount and subsequent adjustment amount; and

(b) under clauses 8A.15.5 and 8A.15.6, the relevant amounts of the variation amount and subsequent adjustment amount.

~~**affirms or varies the 2015 determination** means the Tribunal affirms or varies the 2015 determination under section 71P(2)(a) or (b) of the *National Electricity Law*, respectively, or under any other relevant power of the Tribunal, and makes no concurrent order to set aside and remit the matter back to the *AER* under section 71P(2)(c) of the *National Electricity Law* or under any other relevant power of the Tribunal.~~

AER comments: The AER considers that this definition is no longer required as a number of alternative scenarios considering the initial process by which the existing 2015 determinations are going to be remade is now not a matter of speculation – the AER will make a determination on remittal.

current regulatory ~~control~~ period means the period of five years that commenced on 1 July 2014 and ends on 30 June 2019, which includes ActewAGL's 'transitional regulatory control period' and 'subsequent regulatory control period' as those terms are defined in clause 11.55.1.

AER comments: The AER notes the derogation as initially proposed by ActewAGL, in relation to which the business observed that each of the "transitional regulatory control period" and the "subsequent regulatory control period" are "regulatory control periods" for the purposes of the NER, but that the five year period comprised of the "transitional regulatory control period" and the "subsequent regulatory control period" is not (cl 11.55.1, cl 11.56.3(a)(2), cl 11.56.4(g) and (k)). As such, ActewAGL had revised the term to refer to that five-year period, using instead the phrase "current regulatory period" (since that period is not a regulatory control period). The AER considers that such an amendment should be made if its primary proposal is not adopted.

regulatory year means each consecutive period of 12 calendar months in the current regulatory ~~control~~ period or <u>future</u> ~~subsequent~~ regulatory control period (as the case may be) (the current regulatory ~~control~~ period and <u>future</u> ~~subsequent~~ regulatory control period each being <u>deemed to be</u> a **regulatory control period**), the first such 12 month period commencing at the beginning of the regulatory ~~control~~ period <u>or regulatory control period (as the case may be)</u> and the final 12 month period ending at the end of the regulatory ~~control~~ period <u>or regulatory control period (as the</u>

case may be).

AER comments: The AER notes the definition of "regulatory year" in the Glossary in Chapter 10 of the Rules: "*Each consecutive period of 12 calendar months in a* regulatory control period*, the first such 12 month period commencing at the beginning of the* regulatory control period *and the final 12 month period ending at the end of the* regulatory control period. *For* AEMO*, each* financial year *is a* regulatory year.*"*.

The AER notes that this separate and different definition in the Draft Rule is nevertheless required given the absence of a "distribution determination" in relation to which the related definition of "regulatory control period" for a DNSP depends – "*In respect of a* Distribution Network Service Provider*, a period of not less than 5 regulatory years for which the provider is subject to a control mechanism imposed by a distribution determination*". The different definition in the Draft Rule is limited to the participant derogation.

The proposed amendment by the AER is necessarily complicated, but this flows from the observations made in relation to the definition of "current regulatory control period (or, as suggested, "current regulatory period"), which are addressed above.

remade 2015 determination, ~~means the 2015 determination as remade by the *AER* following the Tribunal's decision~~ the distribution determination made by the *AER* in relation to the current regulatory period concerning ActewAGL, after the Tribunal's decision.

AER comments: The AER notes an alternative formulation of the definition of "remade 2015 determination" above. See also the comments below in relation to the definition of "Tribunal's decision".

subsequent adjustment amount means:

(a) if clause 8A.15.4 applies, an amount that:

(1) is equivalent in net present value terms to the adjustment amount; and

(2) represents a revenue ~~increment~~ increase (where the adjustment amount is a negative amount) or a revenue ~~decrement~~ decrease (where the adjustment amount is a positive amount) to ActewAGL's *annual revenue requirement* for the first regulatory year of the future ~~subsequent~~ regulatory control period; or

(b) if clause 8A.15.5 applies, an amount that is equivalent in net present value terms to the variation amount; or

(c) if clause 8A.15.6 applies, an amount that is equivalent in net present value terms to the variation amount.

AER comment: As noted above in respect of the definition of "adjustment amount", the AER is concerned about the use of the terms "revenue decrement" and "revenue increment", which are terms used in the Rules in 6.4.3 (Building block approach -

distribution) and 6A.5.4 (Building block approach – transmission) (but are not terms in the NEL).

The AER considered whether the language of "operates as if it were" could be applied here, as in the definition to "adjustment amount". An alternative formulation, however, is suggested above, which is to use different terms to avoid confusion, being "revenue increase" and "revenue decrease".

future ~~subsequent~~ distribution determination means the distribution determination for ActewAGL made by the *AER* for the future ~~subsequent~~ regulatory control period.

AER comments: The AER proposes the amendments above, which are consistent with the proposed change to the definition of "subsequent regulatory control period".

future ~~subsequent~~ regulatory control period means the *regulatory control period* for ActewAGL that immediately follows the current regulatory ~~control~~ period.

AER comments: The AER is concerned about this definition, given that it is used in a different fashion elsewhere in the Rules in Chapter 11, which concerns "Savings and Transitional Rules". As such, the AER has proposed the alternative formulation.

The term is defined in Chapter 11 in relation to "Transitional provisions for NSW/ACT Distribution Network Service Providers" in cl 11.55.1 to mean "the *regulatory control period* for the affected DNSP that immediately follows the transitional regulatory control period". (Note: The definition of "regulatory control period" for the purposes of this definition is affected by clause 11.56.4(k).)

The term also has a specific definition in relation to rule 11.80 (National Electricity Amendment ("Aligning TasNetworks' regulatory control periods) Rule 2015") in comparable terms to the definition proposed by the AEMC in this Draft Rule.

The term also has a specific definition in relation to rule 11.93 ("Rules consequential on the making of the National Electricity Amendment (Rate of Return Guidelines Review) Rule 2016") in comparable terms to the definition proposed by the AEMC in this Draft Rule.

The term "regulatory control period" is a defined term in the Glossary in Chapter 10 of the Rules such that the composite phrase does not have a definition of *general* application in the Rules. This appears to be the approach taken in relation to cl 11.80.1 and 11.93.1. On balance, the definition proposed by the AEMC in this Draft Rule could be retained (if the AEMC were not minded to depart from consistent drafting).

An alternative formulation might also take the following form: "**future regulatory control period**, means the *regulatory control period* for ActewAGL that immediately follows the current regulatory period, with a putative operation over regulatory years occurring in 2019 to 2024".

substituted total annual revenue amount has the meaning given in

clause 8A.15.4(e)~~(d)~~.

total annual revenue means the total revenue that ActewAGL is entitled to earn from:

(a) the provision of *standard control services*;

(b) the provision of *transmission standard control services*; and

(c) type 5 and 6 metering services classified as *alternative control services* and in respect of which annual metering service charges were specified in the 2015 determination,

for the relevant regulatory year.

AER comments: The AER notes a disconnect with the definition of "adjustment amount" referred to above. That is, the "annual revenue requirement", used in the definition of "adjustment amount", applies only to "standard control services" in light of Part C of Chapter 6 of the NER. A suggested amendment is to expressly include metering services in the definition of "adjustment amount", which has been proposed above.

Tribunal means the Australian Competition Tribunal.

Tribunal's decision means the decision of the Tribunal in relation to the 2015 determination delivered on 26 February 2016 to remit the matter back to the *AER* pursuant to s 71P(2)(c) of the NEL, ~~as varied or remade~~ as a consequence of the outcome of judicial review of that ~~decision~~ determination.

AER comments: The AER notes that the Tribunal will remit the decision to the AER in accordance with the orders arising out of the Full Federal Court's judgment in the judicial review proceedings. The AER considers the definition of 'remade 2015 determination' and 'Tribunal's decision' should be updated to reflect the Full Federal Court's orders, which we anticipate will be finalised shortly.

The definition is convoluted, and can be interpreted to mean different things. A preferable approach would be to collapse this definition in to the definition of "remade 2015 determination", as that includes the only use of the term Tribunal's decision".

undertaking means an undertaking given to, and accepted ~~approved~~ by, the *AER* under section 59A of the *National Electricity Law* in respect of the revenue earned and/or prices charged by ActewAGL for the relevant regulatory year.

AER comments: The proposed amendment reflects the language of s 59A(1) of the NEL.

variation amount means:

(a) if clause 8A.15.5 applies, an amount equivalent to the difference between:

(1) the total annual revenue for ActewAGL for the final regulatory year of the current regulatory ~~control~~ period under ~~:(1) if clause 8A.14.5(a)(1) applies:(i)~~ the *annual revenue requirement* and control mechanism under the remade 2015 determination, and the revenue derived from metering services; and

(2) ~~(ii)~~ any undertaking that applies for that regulatory year, as adjusted to account for any applicable adjustments by taking into account the considerations specified in cl 8A.15.5(c),

provided that if the total annual revenue under the undertaking, as adjusted, is greater than the total annual revenue under the remade 2015 determination, the variation amount will be a negative amount; or

~~(2) if clause 8A.15.5(a)(2) applies:~~

~~(i) the *annual revenue requirement* and control mechanism under the affirmed or varied 2015 determination (as applicable); and~~

~~(ii) any undertaking that applies for that regulatory year,~~

~~provided that if the total annual revenue under the undertaking is greater than the total annual revenue under the varied or affirmed 2015 determination (as applicable), the variation amount will be a negative amount; or~~

AER comments: The AER considers that this sub-clause is no longer necessary, as the Tribunal will remit the decision to the AER to remake.

(b) if clause 8A.15.6 applies, an amount equivalent to the difference between:

(1) the total annual revenue for ActewAGL for the final regulatory year of the current regulatory ~~control~~ period under ~~:(1) if clause 8A.14.6(a)(1) applies:(i)~~ the *annual revenue requirement* and control mechanism under the remade 2015 determination, and the revenue derived from metering services; and

(2)~~(ii)~~ any undertaking that applies for that regulatory year, as adjusted to account for any applicable adjustments by taking into account the considerations specified in cl 8A.15.6(c),

provided that if the total annual revenue under the undertaking, as adjusted, is greater than the total annual revenue under the remade 2015 determination, the variation amount will be a negative amount; or

~~(2) if clause 8A.15.6(a)(2) applies:~~

~~(i) the *annual revenue requirement* and control mechanism under the affirmed or varied 2015 determination (as applicable); and~~

~~(ii) any undertaking that applies for that regulatory year,~~

~~provided that if the total annual revenue under the undertaking is greater than the total annual revenue under the varied or affirmed 2015 determination (as applicable), the variation amount will be a negative amount.~~

AER comments: As noted above, the AER is concerned about the use of the different terms of "adjustment amount" and "variation amount" within the Draft Rule, which are effectively being used to describe the same sum of money. The AER queries whether this introduces unnecessary confusion.

The AER also queries whether this definition makes provision for the "truing up" of actual revenues in relation to the allowed revenues and the undertaking revenues.

The AER has proposed amendments above to expressly allow for the making of adjustments required to be made in light of the undertakings in place, as noted above in relation to the comments concerning the definition of "adjustment amount".

The AER notes that ActewAGL has indicated that it may provide alternative drafting in relation to this definition, but any such alternative has not yet been provided to the AER.

8A.15.2 Expiry date

This *participant derogation* expires on the date that immediately follows the end of the <u>future</u> ~~subsequent~~ regulatory control period.

8A.15.3 Application of Rule 8A.15

(a) This *participant derogation* prevails to the extent of any inconsistency with any other provision of the *Rules*.

(b) Nothing in this *participant derogation* has the effect of:

(1) changing the application of the *Rules* to the making of a remade 2015 determination; or

(2) rendering a change, in whole or in part, to the terms of ~~a distribution determination that applies in respect of the current regulatory control period.~~ <u>the 2015 determination.</u>

AER comments: The AER is uncertain of the scope of cl 8A.15.3 and suggests the above amendment by way of clarification.

(c) To the extent of any inconsistency between this *participant derogation* and a:

~~(1) remade 2015 determination; or~~

~~(2) 2015 determination affirmed or varied by the Tribunal,~~

this *participant derogation* prevails.

8A.15.4 Recovery of revenue across the current regulatory ~~control~~ period and future ~~subsequent~~ regulatory control period

General

(a) This clause 8A.15.4 applies in respect of ActewAGL if:

~~(1)~~ a remade 2015 determination is made by the *AER* prior to 1 March 2018~~; or~~

~~(2) the Tribunal affirms or varies the 2015 determination prior to 1 December 2017.~~

AER comments: The AER is concerned as to whether the Draft Rule deals with certain scenarios within the different time periods contemplated in cl 8A.15.4, 8A.15.5 and 8A.15.6. For example, the concern is that the Rule, as presently drafted, does not accommodate a situation in which the AER's decision on remittal is appealed. It is suggested that a more flexible approach may be able to accommodate more variables.

As noted in the AER Submission, dated December 2016, with respect to the business' proposal, the drafting of the Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is completed within the 2014-19 period. Accordingly, the AER raises the question whether an additional provision, or amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Draft Rule is maintained.

Adjustment determination under cl 8A.15.4

(b) The *AER* may ~~:(1)~~ if subparagraph (a)~~(1)~~ applies, determine at the time of making the remade 2015 determination ~~; or (2) if subparagraph (a)(2) applies, determine by 28 February 2018,~~ for ActewAGL:

(1) an adjustment amount; and

(2) a subsequent adjustment amount~~;~~.

(c) In *making* an adjustment determination under cl 8A.15.4(b), the *AER:*

(1) must be satisfied that the adjustment determination will result in ActewAGL recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, and any control mechanisms specified in the remade 2015 determination had been implemented in each relevant regulatory year;

(2) must be satisfied ~~if the *AER* is satisfied~~ that the application of the adjustment amount and subsequent adjustment amount under paragraphs (e) ~~(d)~~ and (f) ~~(e)~~, respectively, would be reasonably likely to minimise variations in *use of system* charges:

(i) between the penultimate and final regulatory years of the current regulatory ~~control~~ period; and

(ii) between the final regulatory year of the current regulatory ~~control~~ period and the first regulatory year of the future ~~subsequent~~ regulatory control period,

for ~~the relevant~~ ActewAGL~~.~~;

(3) may have regard to any factor considered relevant.

Note:

When determining the adjustment amount and subsequent adjustment amount, the *AER* must also take into account the *national electricity objective* and may take into account the revenue and pricing principles: see *National Electricity Law*, s.16(1)(a) and (2)(b).

AER comments: As noted above, the AER considers that a primary policy objective is making the businesses "whole" as a result of the adjustment determination, and the above amendments propose to address this.

The AER considers that any references to 'reasonably satisfied' ought not to be included as they have a confounding dimension.

The AER notes that the use of the word "likely" could introduce uncertainty as to what sense the word is being used. That is, as a probability or likelihood, or as a real and not remote chance.

Another formulation to address the objective of not permitting any windfall gains or losses would be to adapt the language from cl S6.2.1(e)(3) of the NER: *"The adjustment must also remove any benefit or penalty associated with any difference between the estimated and actual expenditure."* The alternative formulation may take the following forms:

"...must be reasonably satisfied that the adjustment determination will not result in any windfall benefit or penalty accruing to ActewAGL";

"...must be reasonably satisfied that the adjustment determination will only result in ActewAGL recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, without also recovering any windfall gain, or incurring a windfall loss."

(d) ~~(c)~~ Paragraphs (e) ~~(d)~~ and (f) ~~(e)~~ do not apply in respect of ActewAGL if the *AER* has not determined an adjustment amount and subsequent adjustment amount under paragraph (b).

Recovery in current regulatory ~~control~~ period

(e) ~~(d)~~ A *pricing proposal* submitted by ActewAGL, and accepted ~~approved~~ by the *AER*, for the final regulatory year of the current

regulatory ~~control~~ period must only provide for the recovery of:

(1) where the applicable adjustment amount operates as if it were a revenue increment:

(i) ActewAGL's total annual revenue in accordance with the *annual revenue requirement* and control mechanism under the distribution determination in force for the final regulatory year of the current regulatory ~~control~~ period; plus

(ii) the adjustment amount; or

(2) where the applicable adjustment amount operates as if it were a revenue decrement:

(i) ActewAGL's total annual revenue in accordance with the *annual revenue requirement* and control mechanism under the distribution determination in force for the final regulatory year of the current regulatory ~~control~~ period; minus

(ii) the adjustment amount,

(such amount being the **substituted total annual revenue amount**).

Recovery in future ~~subsequent~~ regulatory control period

(f) ~~(e)~~ The *AER* must include the subsequent adjustment amount determined under paragraph (b) as:

(1) if subparagraph (e) ~~(d)~~(1) applies, a revenue ~~decrement~~ decrease; or

(2) if subparagraph (e) ~~(d)~~ (2) applies, a revenue ~~increment~~ increase,

to ActewAGL's *annual revenue requirement* determined under rule 6.4 for the first regulatory year of the future ~~subsequent~~ regulatory control period.

AER comments: See the above comments in relation to "revenue decrement" and "revenue increment".

By way of observation, the AER is also concerned about whether the Draft Rule fails to deal with certain scenarios within the different time periods contemplated in cl 8A.14.4, 8A.14.5 and 8A.14.6. For example, the concern is that the Draft Rule, as presently drafted, does not accommodate a situation in which the remitter decision is appealed. It is suggested that a more flexible approach may be able to accommodate more variables.

As noted in the AER Submission, dated December 2016, with respect to the business' proposal, the drafting of the Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is completed within the 2014-19 period. Accordingly, the AER

has raised whether an additional provision, or amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Rule is maintained.

8A.15.5 Recovery of revenue in future ~~subsequent~~ regulatory control period only and no reopening of future ~~subsequent~~ distribution determination required

General

(a) This clause 8A.15.5 applies in respect of ActewAGL if:

~~(1)~~ a remade 2015 determination is made by the *AER* on or after 1 March 2018, but prior to ~~1 February~~ 1 May2019~~; or~~

~~(2) the Tribunal affirms or varies the 2015 determination on or after 1 December 2017, but prior to 1 February 2019.~~

AER comments: The AER considers that this date should be changed to 1 May 2019, as this timing aligns with the NER timing of the final distribution determination for the future regulatory control period.

As noted above, the AER has raised the question whether the drafting of the Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is completed within the 2014-19 period (and not the subject of further challenge). Accordingly, the AER has raised whether an additional provision, or an amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Rule is maintained. For example, to accommodate a situation in which the remitter decision is appealed.

Another concern raised by the AER is how the Rule will be able to accommodate different approaches being take in respect of the different NSW/ACT DNSPs.

Adjustment determination under cl 8A.15.5

(b) The *AER* must:

~~(1)~~ if subparagraph (a)~~(1)~~ applies, determine at the time of making the remade 2015 determination~~; or~~

~~(2) if subparagraph (a)(2) applies, determine by 31 March 2019,~~

the variation amount and subsequent adjustment amount for ActewAGL.

(c) In making an adjustment determination under cl 8A.15.5(b), the *AER:*

(1) must be satisfied that the adjustment determination will result in ActewAGL recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, and any control mechanisms specified in

the remade 2015 determination had been implemented in each relevant regulatory year;

(2) may have regard to any factor considered relevant.

Note:

When determining the adjustment amount and subsequent adjustment amount, the AER must also take into account the *national electricity objective* and may take into account the revenue and pricing principles: see *National Electricity Law*, s.16(1)(a) and (2)(b).

The principle in 8A.15.4(c)(2) is not repeated in 8A.15.5(c), as the minimisation in price volatility will be achieved through the application of the ordinary smoothing mechanisms of the distribution determination.

AER comments: Note the comments above in relation to 8A.15.5(c).

Recovery in future ~~subsequent~~ regulatory control period

(d) ~~(c)~~ The *AER* must include in the future ~~subsequent~~ adjustment amount determined under paragraph (b) as:

(1) if the applicable variation amount is a positive amount, a revenue ~~increment~~ increase; or

(2) if the applicable variation amount is a negative amount, a revenue ~~decrement~~ decrease,

to ActewAGL's *annual revenue requirement* determined under rule 6.4 for the first regulatory year of the future ~~subsequent~~ regulatory control period.

AER comments: See the above comments in relation to "revenue decrement" and "revenue increment".

8A.15.6 Recovery of revenue in future ~~subsequent~~ regulatory control period only and reopening of distribution determination is required

General

(a) This clause 8A.15.6 applies in respect of ActewAGL if~~:~~

~~(1) a remade 2015 determination is made by the *AER*; or~~

~~(2) the Tribunal affirms or varies the 2015 determination,~~

on or after ~~1 February~~ 1May 2019, but prior to 1 December of the fourth last regulatory year of the future ~~subsequent~~ regulatory control period.

AER comments: As noted above, the AER has raised the question whether the Draft Rule assumes that the ultimate outcome of the appeals process is that the distribution determination is remitted back to the AER and that the remittal determination is

completed within the 2014-19 period. Accordingly, the AER has raised whether an additional provision, or amendment to a provision, is required to deal with alternative scenarios if the structure of the existing Rule is maintained. For example, to accommodate a situation in which the AER's decision on remittal is appealed.

Another concern raised by the AER is how the Draft Rule will be able to accommodate different approaches being take in respect of the different NSW/ACT DNSPs.

Adjustment determination under cl 8A.15.6

(b) The *AER* must:

~~(1)~~ if subparagraph (a)~~(1)~~ applies, determine at the time of making the remade 2015 determination~~; or~~

~~(2) if subparagraph (a)(2) applies, determine by 28 February of the fourth last regulatory year of the subsequent regulatory control period,~~

the variation amount and subsequent adjustment amount for ActewAGL.

(c) In making an adjustment determination under cl 8A.15.6(b), the *AER:*

(1) must be satisfied that the adjustment determination will result in ActewAGL recovering the same revenue (in net present value equivalent terms) as it would have had if the remade 2015 determination had been in place from the commencement of the current regulatory period, and any control mechanisms specified in the remade 2015 determination had been implemented in each relevant regulatory year;

(2) may have regard to any factor considered relevant.

Note:

When determining the adjustment amount and subsequent adjustment amount, the AER must also take into account the *national electricity objective* and may take into account the revenue and pricing principles: see *National Electricity Law*, s.16(1)(a) and (2)(b).

The principle in 8A.15.4(c)(2) is not repeated in 8A.15.6(c), as the minimisation in price volatility will be achieved through the application of the ordinary smoothing mechanisms of the distribution determination.

Recovery in ~~subsequent~~ future regulatory control period

(d) ~~(c)~~ If paragraph (a) applies, the *AER* must revoke ActewAGL's future ~~subsequent~~ distribution determination and make a new distribution determination in substitution for that revoked determination, that:

(1) applies to the remainder of the future ~~subsequent~~ regulatory control period; and

(2) includes the subsequent adjustment amount as:

(i) if the applicable variation amount is a positive amount, a revenue increment; or

(ii) if the applicable variation amount is a negative amount, a revenue decrement,

to the *annual revenue requirement* of one or more of the regulatory years for the remainder of ActewAGL's future ~~subsequent~~ regulatory control period, subject to the aggregate of all such increases or decreases for the relevant regulatory years being equivalent in net present value terms to the subsequent adjustment amount.

(e) ~~(d)~~ The substituted distribution determination made under paragraph (d) ~~(c)~~ must only~~: (1) vary~~ f depart from the revoked distribution determination to the extent necessary to reflect the increase or decrease (as the case may be) to the *annual revenue requirement* of one or more of the regulatory years for the future ~~subsequent~~ regulatory control period under paragraph (d) ~~(c); and~~

~~(2) be made after the *AER* has first consulted with ActewAGL and such other persons as the *AER* considers appropriate.~~

AER comments: The AER has a policy preference to leave matters of procedural fairness to the operation of general administrative law requirements in the context of the decisions giving effect to smoothing.

(f) ~~(e)~~ If the *AER* revokes and substitutes the future ~~subsequent~~ distribution determination under paragraph (d) ~~(c)~~, that revocation and substitution must take effect from the commencement of the next regulatory year.

AER comments: See the above comments in relation to "revenue decrement" and "revenue increment".

8A.15.7 Requirements for adjustment determination

The *AER* must:

~~(a) make the adjustment determination after consulting with ActewAGLand any other persons as the AER considers appropriate~~

AER comments: As noted above, the AER has a policy preference to leave matters of procedural fairness to the operation of general administrative law requirements in the context of the decisions giving effect to smoothing.

(a) ~~(b)~~ *publish* its adjustment determination:

~~(1) if clause 8A.15.4(a)(1), 8A.15.5(a)(1) or 8A.15.6(a)(1) applies,~~ at the time of publication of the remade 2015 determination;

~~(2) if clause 8A.15.4(a)(2) applies, by 28 February 2018;~~

~~(3) if clause 8A.15.5(a)(2) applies, by 31 March 2019; or~~

~~(4) if clause 8A.15.6(a)(2) applies, by 28 February of the fourth last regulatory year of the subsequent regulatory control period; and~~

(b) ~~(c)~~ include in its adjustment determination, the reasons for the *AER's* determination of:

(1) if clause 8A.15.4 applies, the adjustment amount and subsequent adjustment amount or, where the *AER* has not determined an adjustment amount and subsequent adjustment amount, the reasons for that decision; or

(2) if clause 8A.15.5 or 8A.15.6 applies, the variation amount and subsequent adjustment amount.

8A.15.8 Application of Chapter 6 under participant derogation

(a) Except as otherwise specified in this rule 8A.15 or Chapter 11, Chapter 6 applies to:

(1) the remainder of the current regulatory ~~control~~ period; and

(2) the making of a future ~~subsequent~~ distribution determination,

in respect of ActewAGL.

(b) For the purposes of the application of clauses 8A.15.4, 8A.15.5 and 8A.15.6 (as applicable) in respect of ActewAGL, Chapter 6 is amended for the remainder of the current regulatory ~~control~~ period as follows:

(1) clause 6.18.1A(c) does not apply to the extent necessary to allow for the submission of a *pricing proposal* by ActewAGL ~~a NSW DNSP~~, and subsequent approval of such *pricing proposal* by the *AER*, in accordance with clause 8A.15.4(e)~~(d)~~;

(2) if clause 8A.15.4 applies, if any variation in proposed tariffs occurs as a result of:

(i) if clause 8A.15.4(a)(1) applies, the remade 2015 determination; or

~~(ii) if clause 8A.15.4(a)(2) applies, the affirmed or varied 2015 determination; and~~

(iii~~i~~) incorporation of the substituted total annual revenue amount in the *pricing proposal* under clause 8A.15.4(e)~~(d)~~,

such variations will be taken to be explained by ActewAGL for the purposes of clause 6.18.8(a)(2);

(3) if clause 8A.15.4 applies, the reference to 'any applicable distribution determination' in clauses 6.18.2(b)(7), 6.18.2(b)(8), 6.18.8(a)(1) and 6.18.8(c) will be taken to be the applicable distribution determination as supplemented by the requirements for ActewAGL's *pricing proposal* under clause 8A.15.4(e)~~(d)~~;

(4) to the extent that ActewAGL's tariffs vary from tariffs which would result from complying with the pricing principles in clause 6.18.5(e) to (g) due to the application of this *participant derogation*, such variation is taken to be a variation from the pricing principles permitted under clause 6.18.5(c);

(5) clause 6.18.6 does not apply to the extent that ActewAGL's tariffs vary from tariffs which would otherwise result from complying with clause 6.18.6, due to the application of this *participant derogation*; and

AER comments: The AER has questioned whether reference should be made this clause is only relevant to recovering revenue in the current regulatory period and that revenue recovered in the next period will be part of the X factors.

(6) if the *AER* amends a *pricing proposal* under clause 6.18.8(b)(2) or 6.18.8(c), then in addition to the requirements in clause 6.18.8(c1), the *AER* must also have regard to:

(i) if clause 8A.15.4(a)(1) applies, any variation in proposed tariffs as a result of the remade 2015 determination;

~~(ii) if clause 8A.15.4(a)(2) applies, any variation in proposed tariffs as a result of the affirmed or varied 2015 determination (as the case may be);~~ and

(iii) if the *AER* determines an adjustment amount and subsequent adjustment amount under clause 8A.15.4(b), any variations in proposed tariffs as a result of the application of the substituted total annual revenue amount under clause 8A.15.4(e)~~(d)~~.

(c) For the purposes of the application of clauses 8A.15.4, 8A.15.5 and 8A.15.6 (as applicable) in respect of ActewAGL, Chapter 6 is amended for the future ~~subsequent~~ regulatory control period as follows:

(1) if clause 8A.15.6 applies, clause 6.5.9(b)(2) does not apply to

the extent necessary to include the subsequent adjustment amount as a revenue increment or revenue decrement (as the case may be) to the *annual revenue requirement* of one or more regulatory years for the future ~~subsequent~~ regulatory control period for ActewAGL under clause 8A.15.6(d)~~(c)~~; and

(2) the reference to 'the other revenue increments or decrements' referred to in clauses 6.4.3(a)(6) and 6.4.3(b)(6) is taken to include such increments or decrements as adjusted to the extent necessary to take into account the application of the substituted total annual revenue amount under clause 8A.15.4(e)~~(d)~~.