



CitiPower, Powercor and United Energy

Request for jurisdictional scheme determination
February 2021

Contents

| | | |
|---|---|---|
| 1 | INTRODUCTION | 3 |
| 2 | PERSON MAKING THE REQUEST | 4 |
| 3 | DETAILS OF THE LAW ESTABLISHING THE SCHEME..... | 5 |
| 4 | ELIGIBILITY CRITERIA | 7 |

1 Introduction

CitiPower Pty Ltd, Powercor Australia Ltd and United Energy Distribution Pty Ltd (together, **the Businesses**) are required by section 8 of the *Electricity Safety Act 1998* (Vic) (**ESA**) to make annual payments to Essential Safe Victoria (**ESV**) in respect of its reasonable costs and expenses as determined by the Minister (**Levy Scheme**).

The purpose of this submission is to request that the Australian Energy Regulator (**AER**) determine that the Levy Scheme is a jurisdictional scheme in accordance with rule 6.18.7A of the National Electricity Rules (**NER**).

This submission sets out the following information as required by rule 6.18.7A(g):

- (1) the name and address of the person making the request;
- (2) details of the law of the participating jurisdiction under which the relevant scheme is established;
- (3) the commencement date of the relevant scheme; and
- (4) an explanation of how the relevant scheme meets the jurisdictional scheme eligibility criteria.

The provisions governing the recovery of jurisdictional scheme amounts were introduced in 2010 and were intended to improve efficiency by removing the requirements for scheme payments to be considered under the distribution determination process and cost pass through provisions. Instead, distributors can recover costs of approved jurisdictional schemes through the annual pricing proposal.

As acknowledged by the AER in previous decisions,¹ the AER is required to determine that a scheme is a jurisdictional scheme under rule 6.18.7A(l) if it considers that the scheme meets the jurisdictional scheme eligibility criteria set out in rule 6.18.7A(o). The NER do not provide the AER with any residual discretion to determine that a scheme is not a jurisdictional scheme if the criteria are satisfied.

As illustrated in this submission, the eligibility criteria are satisfied by the Levy Scheme. Accordingly, the AER must determine the Levy Scheme to be a jurisdictional scheme for the purposes of rule 6.18.7A(l).

The Businesses request that the AER:

- make a determination as to whether the Levy Scheme is a jurisdictional scheme within the 20 business day period provided for by rule 6.18.7A(l) and prior to its final decision on the Businesses' distribution determinations for the 2021-26 regulatory control period; and
- make a decision on how the Businesses are to report to the AER on the recovery of the jurisdictional scheme amounts for each regulatory year, as well as the adjustments for over or under recovery as part of the 2021-26 distribution determinations.

The Businesses consider the assessment of whether the Levy Scheme is straight-forward and cannot be said to give rise to issues of any complexity. The Businesses note in this regard that the Levy Scheme is directly analogous to the energy industry levy payable by Evoenergy in accordance with the *Utilities Act 2000* (ACT), which the AER recognised as a jurisdictional scheme in 2014. Accordingly, there is no reasonable basis for the AER to extend time for the making of its determination in accordance with rule 6.18.7A(m).

Should the AER determine that the Levy Scheme is a jurisdictional scheme, the Businesses will incorporate the jurisdictional scheme amounts into their annual pricing proposals commencing with that for the 2021-22 regulatory year in accordance with rules 6.18.2(b)(6A) and 6.18.7A of the NER.

¹ See AER, *Determination ActewAGL Distribution's request for schemes to be determined as jurisdictional schemes*, January 2014, p. 6 (available here: <https://www.aer.gov.au/networks-pipelines/guidelines-schemes-models-reviews/actewagl-determination-on-whether-a-scheme-is-a-jurisdictional-scheme>).

2 Persons making the request

Rule 6.18.7A(g)(1) of the NER requires the name and address of the persons requesting the AER to determine that a scheme is a jurisdictional scheme. These details are provided as follows:

| Name and contact details | |
|----------------------------|--|
| Persons making the request | CitiPower Pty Ltd, Powercor Australia Ltd and United Energy Distribution Pty Ltd |
| Contact Person | Mr Brent Cleeve |
| Address | Level 8/40 Market St Melbourne VIC 3000 |
| Postal Address | Locked Bag 14090 Melbourne City Mail Centre 8001 |
| Telephone | [REDACTED] |
| Email | [REDACTED] |

3 Details of the law establishing the scheme

Rule 6.18.7A(g)(2) of the NER requires that a request for the AER to determine whether a scheme is a jurisdictional scheme must include details of the law of the participating jurisdiction under which the relevant scheme is established. Under Chapter 10 of the NER, the term 'jurisdictional scheme obligations' is defined to include obligations imposed on a DNSP under an Act of a participating jurisdiction (other than the National Electricity Law (NEL) and the NER).

ESV is a statutory body established by the *Energy Safe Victoria Act 2005 (Vic) (ESVA)*. ESV is the independent technical regulator responsible for electricity, gas and pipeline safety in Victoria. On 1 January 2021, ESV became a three-person commission, appointed under the ESVA. The ESVA is administered by the Minister for Energy, Environment and Climate Change, the Hon. Lily D'Ambrosio.

The ESA regulates the safety of electricity supply and use in Victoria, and the efficiency of electrical equipment. It is a law of Victoria and is administered by ESV.

Section 8 of the ESA provides that a distribution company must pay to ESV at such time or times as the Minister determines such annual amount (if any) as the Minister determines to be payable by that distribution company in respect of the reasonable costs and expenses of ESV:

8 Funding

A distribution company must pay to Energy Safe Victoria at such time or times as the Minister determines such annual amount (if any) as the Minister determines to be payable by that distribution company in respect of the reasonable costs and expenses of Energy Safe Victoria.

As Victoria is a participating jurisdiction, the ESA is an Act of a participating jurisdiction. The obligation imposed on Victorian DNSPs by section 8 of the ESA is an obligation imposed on a DNSP under an Act of a participating jurisdiction.

On 30 April 2019, ESV communicated to the Businesses a material increase in its levy, including a 22% increase from 2018/19 to 2021/22 and annual 3% ongoing year-on-year increases.²

² Refer to attached minutes from the ESV's General Manager forum, dated 30 April 2019.

4 Commencement date

Rule 6.18.7A(g)(3) of the NER requires that a request that the AER determine whether a scheme is a jurisdictional scheme must specify the commencement date of the relevant scheme.

Section 8 of the ESA was introduced by section 45 of the ESVA as made, which commenced on 10 August 2005.

Accordingly, the Levy Scheme commenced on 10 August 2005.

5 Eligibility criteria

Rule 6.18.7A(g)(4) of the NER requires that an explanation be provided in relation to how the Levy Scheme meets the jurisdictional scheme eligibility criteria.

The jurisdictional scheme eligibility criteria are set out in rule 6.18.7A(x) of the NER and are as follows:

(x) The following are the jurisdictional scheme eligibility criteria:

- (1) the jurisdictional scheme obligations require a Distribution Network Service Provider to:
 - (i) pay a person;
 - (ii) pay into a fund established under an Act of a participating jurisdiction;
 - (iii) credit against charges payable by a person; or
 - (iv) reimburse a person, an amount specified in, or determined in accordance with, the jurisdictional scheme obligations;
- (2) the jurisdictional scheme obligations are imposed on a Distribution Network Service Provider in its capacity as a Distribution Network Service Provider;
- (3) the amount referred to in subparagraph (1) is not in the nature of a fine, penalty or incentive payment for the Distribution Network Service Provider; and
- (4) except as provided in these Rules, the Distribution Network Service Provider has no right to recover the amount referred to in subparagraph (1) from any person.

The Levy Scheme satisfies each of the jurisdictional scheme eligibility criteria for the reasons set out in Table 1 below. Accordingly, the AER must determine the Levy Scheme to be a jurisdictional scheme for the purposes of the NER.

| Criteria | Why the Levy Scheme satisfies the criteria |
|--|--|
| <p>The jurisdictional scheme obligations require a DNSP to:</p> <ul style="list-style-type: none"> (i) pay a person; (ii) pay into a fund established under an Act of a participating jurisdiction; (iii) credit against charges payable by a person; or (iv) reimburse a person, an amount specified in, or determined in accordance with, the jurisdictional scheme obligations. | <p>For the reasons explained in section 3 above, the obligation on Victorian DNSPs to pay the ESV levy is an obligation imposed under an Act of a participating jurisdiction and, thus, a 'jurisdictional scheme obligation'.</p> <p>'Person' is defined in the NEL to mean a body politic or body corporate, as well as an individual (NEL, clause 10 of Schedule 2, which provision applies to the NER by reason of NEL, section 3). ESV is a 'body corporate' as set out in s 4(2)(a) of the ESVA and thus ESV falls within the definition of 'person'. Accordingly, the 'jurisdictional scheme obligation' imposed by section 8 of the ESA requires DNSPs to 'pay a person' for the purposes of rule 6.18.7A(x)(1)(i).</p> <p>This obligation imposed by section 8 of the ESA is one to pay the amounts determined by the Minister responsible for ESV in respect of the reasonable costs and expenses of ESV. The 'jurisdictional scheme obligation' imposed by section 8 of the ESA is therefore one to pay a person, being ESV, 'an amount specified in, or determined in accordance with, the jurisdictional scheme obligations'.</p> |
| <p>The jurisdictional scheme obligations are imposed on a DNSP in its capacity as a DNSP.</p> | <p>Part 10 of the NER defines 'Distribution Network Service Provider' as 'a person who engages in the activity of owning, controlling, or operating a distribution system'. Each of the Businesses is such a person and is therefore a 'Distribution Network Service Provider' for the purposes of rule 6.18.7A(x)(2).</p> <p>The obligation in section 8 of the ESA expressly applies to a 'distribution company', which is defined in section 3 of the ESA to have the same meaning as in the <i>Electricity Industry Act 2000 (Vic) (EIA)</i>.</p> <p>Section 3 of the EIA, in turn, defines 'distribution company' to mean 'a person who is the holder of a licence to distribute electricity'. Under section 16 of the EIA, a person must not engage in the distribution of electricity unless they hold a licence authorising that activity or an exemption from the requirement to hold a licence in respect of that activity. Each of the Businesses is the holder of such a licence to distribute electricity.</p> <p>The 'jurisdictional scheme obligation' imposed by section 8 of the ESA is therefore imposed on a DNSP, being each of the Businesses, in its capacity as a DNSP.</p> |
| <p>The amounts are not in the nature of a fine, penalty or incentive payment for the DNSP.</p> | <p>The amount to be paid to ESV in accordance with section 8 of the ESA is the amount the Minister determines to be payable in respect of the reasonable costs and expenses of ESV. Levy income is based on cost recovery principles informed by aggregate resourcing levels determined in the ESV's corporate plan and approved by the Minister.³ The amount payable under section 8 is not in the nature of a fine, penalty or incentive payment.</p> |

³ ESV Corporate Plan 2020-23, p. 6: https://esv.vic.gov.au/wp-content/uploads/2020/06/ESV_CorporatePlan_2020-23.pdf

Except as provided in the NER, the DNSP has no right to recover the amounts from any person.

The Businesses have no right to recover the ESV levies except as provided in the NER.

Whether the AER allows for ESV levies in determining the Businesses' opex allowances for their distribution determinations for the 2021-26 regulatory control period is not relevant to whether this jurisdictional scheme eligibility criterion is satisfied (as this criterion is met when there is no right to recover under instruments other than the NER).⁴ Nonetheless, the Businesses observe, for completeness, that the proposed opex for the 2021-26 regulatory control period in their revised regulatory proposals made no allowance for the recovery of the ESV levies expected to be incurred in the period (as an adjustment was made to their base opex to exclude the amount of the ESV levy incurred in the base year and the Businesses did not press their step change for the increase in ESV levies in those revised proposals) and, if the AER determines that the Levy Scheme is a jurisdictional scheme, the Businesses not press its proposal for recovery of the ESV levies through the B-factor adjustment in the standard control services price control formula.

⁴ The AER implicitly recognised this in determining that the ACT Energy Industry Levy and Utilities Network Facilities Tax are jurisdictional schemes despite the fact that ActewAGL Distribution was then recovering those costs via the expenditure allowances in its distribution determination: AER, *Determination ActewAGL Distribution's request for schemes to be determined as jurisdictional schemes*, January 2014.