

Opening remarks for Energy Consumers Coalition of South Australia

1. In its application to intervene the Energy Consumers Coalition of South Australia observed that our intent was “to seek to intervene in the proceedings generally in support of the AER’s decision, save that the Energy Consumers Coalition does not consider the amount of \$29 million should be added to the opening regulatory asset base (as referred to in paragraph 3.2(ii)(B)(1) of the AER’s Statement of Facts Issues and Contentions dated 2 July 2008)”.
2. The Energy Consumers Coalition has intervened in the proceedings generally because the Energy Consumers Coalition does not consider that any amount should have been added to the RAB for easements neither the amount of \$29m for easement compensation costs nor the \$52m for easement transaction costs.
3. Since reading the detail behind the AER decision, the Energy Consumers Coalition is now of the view that the AER decision is unreasonable considering what it did not do in developing its decision to allow the inclusion of the \$29m for easements in the ElectraNet RAB
4. Furthermore since reading the Applicant’s reply to the Energy Consumers Coalition outline of submission, the Energy Consumers Coalition feels it incumbent to make some preliminary observations.
5. Firstly, the supplementary material we have placed before the Tribunal is not intended to supplant our primary submission but to assist the parties to this review, by drawing their attention to relevant case law and expert opinion which supports the submissions which the Energy Consumers Coalition has made.
6. Secondly, the Energy Consumers Coalition is concerned that the applicant’s reply to our submission’s statement of issues makes assertions in relation to economic theory that we would not accept as being self evident and which require expert opinion which should be tested in evidence. The Energy Consumers Coalition realizes however that this review is not the appropriate forum for (and notes that the time and scope of this review do not permit us the luxury of) dealing with every error of economic logic with which the Energy Consumers Coalition would take issue. We have been granted leave to intervene on the subject of easements and their valuation and we will confine ourselves to these issues.
7. To start off, as regards legitimate expectations we feel that consumers have some legitimate expectations too, namely that they will not be exploited by a purchaser of strategic infrastructure assets.
8. ElectraNet as a purchaser **[deleted]**
9. ElectraNet maintains that its investors **[deleted]**.
10. This raises the question whether consumers should be required to pay for easements when they probably have paid for these easements earlier when under the control of the Electricity Trust of SA, and when the

- jurisdictional value of easements included has been declared at a historical cost of \$3.1m.
11. In its application to the ACCC in 2002, ElectraNet claimed that easements costs were \$215m although it reduced this value to \$27.5m in a revised application after the ACCC draft decision opined that easements should be valued at \$3.1m.
 12. Despite there being many assessments of asset values made (HMA in 1995, MFS 1997, SKM 1998) prior to ElectraNet trading as a government owned business and certainly prior to the sale of ElectraNet [in October 2000], the jurisdiction still forbore to revalue easements above \$3.1m until the [SA] Treasury and Finance letter to ElectraNet nearly 12 months [after the sale] in August 2001, when it observed that the ACCC "...has some discretion to amend..." the amount of the RAB
 13. There has been reference yesterday to an allocation of easements held by the Electricity Trust between ElectraNet and ETSA Utilities. In this regard we wish to draw to the Tribunal's attention that ETSA Utilities had an easement value of 6m for its RAB (page 110, Essential Services Commission of SA, Final Decision), and that the Essential Services Commission stated
"For completeness, the Commission also notes that it has twice confirmed with the South Australian government its understanding that there are no records of representations made to bidders [for ETSA Utilities] that there would be "upside" in the treatment of the value of easements and substation land by regulators in the future." (ESCOSA Final Decision page 117). I hand these pages to the Tribunal.
 14. Questions were raised yesterday about the basis for setting the RAB in other jurisdictions. Other jurisdictions set their asset bases under Code 6.10.3(e)(5)(ii)

"...subject to clause 6.10.3(e)(5)(i), assets (also known as "sunk assets") in existence and generally in service on 1 July 1999 are valued at a value determined by the *Jurisdictional Regulator* or consistent with the regulatory asset base established in the *participating jurisdiction*;".
- The SA gov't included \$3.1m for easements.
15. The Energy Consumers Coalition notes that in the ACCC final decision of 2002, it clearly states that the jurisdiction had valued easements at \$3.1m This value was used in the RAB for ElectraNet charges set by the Electricity Pricing Order which commenced in 1999, and was included in ElectraNet's annual reports while it was still a government owned corporation for years 1999 and 2000
 16. The sale of ElectraNet occurred October 2000. The Treasury and Finance letter advising that easements might be valued at a higher level by the

- ACCC, was written 10 August 2001, after the sale process had been completed
17. The only consideration was that ACCC would consider the issue of easements in its 2002 review, and the Rule Chapter 11 also only requires the AER to consider the issue of easements
 18. The ACCC noted that there were no records of easements costs.
 19. This is what one would expect from accounting records if costs had been expensed at the time and charged against revenue received from consumers.
 20. Naturally in the light of this accounting evidence (book value means a figure derived from accounting records), we support the AER decision to exclude the \$52m for easement transaction costs
 21. In this regard ElectraNet observed that it is not seeking easement costs associated with easements over Crown land. Despite the fact that ElectraNet's predecessor in title would have incurred transaction costs in developing these easements, ElectraNet's decision not to claim these costs for Crown land easements is indicative that such costs were expensed at the time. Therefore it is natural to assume this same approach applied for easements over private land, and the historical costs of \$3.1m would support this view. In other words ElectraNet is not claiming transaction costs for Crown land easements, even though there would have been transaction costs for both Crown and private land easements. There is no logic in this concession by ElectraNet, which calls into question its underlying premise.
 22. ECSA submits that under s71M(1) of the [Electricity] Law the Tribunal may find that the AER was incorrect in the exercise of its discretion or was unreasonable or both in terms of s71C(1) (c) and (d) because the AER did not have regard to either the material underpinning the ACCC 2003 decision or relevant law regarding the valuation of easements enjoyed by privately owned public utilities
 23. Until the Energy Consumers Coalition read the affidavit of **[deleted]**, The Energy Consumers Coalition is of the view that it was unreasonable for the AER to effectively set aside the decision of the ACCC without examining the material before the ACCC which helped form the ACCC decision.
 24. If the Tribunal finds that the AER discretion has miscarried as argued by ElectraNet, the Energy Consumers Coalition submits that the decision should be remitted back to the AER under s71P(2)(b) of the Law for consideration de novo with a direction that the AER take into account the ACCC ElectraNet decision with its supporting materials and relevant law and practice in Australia, and Anglo American law dealing with valuation of easements enjoyed by privately owned public utilities
 25. In this connection we draw the Tribunal's attention to US and UK jurisprudence noted in the Energy Consumers Coalition supplementary submission and I now hand up relevant US and UK case law and materials from books on public utility regulation which were referred to in our supplementary submission

26. In relation to easements the Energy Consumers Coalition goes back to first principles and submits the following points:-
- a. The Law is about efficient costs; the objective of the Law is to serve the long run interests of consumers with respect to price, quality safety security and reliability. It is not a function of the Law or the Rules to grant returns on costs that "...were never incurred, that no one pretends were incurred and may never be incurred by anyone..." to paraphrase Mr Justice Brandeis of the US Supreme Court in Southwestern Bell case in 1923.
 - b. As a matter of logic, economics and simple justice costs can be recovered once and once only. The Energy Consumers Coalition is unaware of any economic theory which suggests that charging consumers twice for the same service is economically efficient. On the other hand the Energy Consumers Coalition is aware that there are economic theories of monopoly rent seeking.
 - c. Where a business is sold the price paid for that business franchise or monopoly value constitutes no justification for imposing charges on customers of the business in respect of costs already recouped. In a competitive market regulation is not necessary to prevent this sort of pricing abuse.
 - d. Monopolies are different. That is why there is a long history of regulation in US, UK and Australia in order to prevent monopoly pricing abuses.
 - e. Accounting records regularly kept by a government authority and accepted by its successor entity (ElectraNet) are presumed to be regularly kept and are evidence of the facts they state or necessarily imply.
 - f. Those records show only \$3.1m of easement related costs (and no more) remain uncharged to consumers. To quote US Power Commission in Hope Natural Gas Co case 1944, (page 320 US 599). "No greater injustice to consumers could be done than to allow items as operating expenses and a later date include them in the rate base thereby placing multiple charges upon the consumers." The Tribunal is not alone in wondering about questions of double dipping. It appears that great minds in Anglo American jurisprudence have been there before all of us sitting here today.
 - g. The initial capital base set by the jurisdiction reflects that amount of \$3.1m
 - h. The valuation of the ICB is a proxy for costs incurred and should not be undertaken where there is direct evidence of those costs which stands uncontradicted by the jurisdiction, ElectraNet, the ACCC and the AER.
 - i. The Energy Consumers Coalition notes that there is a large body of Law and practice in common law countries that deals with the valuation of easements enjoyed by public utilities which appears

not to have been examined by the ACCC or the AER in the course of their decision making.

- j. It appears there is a body of persuasive if not binding precedent which holds that the value of easements as such is Nil because these are rights **granted** for the benefit of the public to any operator of the utility rather than being property of the utility as such. I refer to the Edinburgh Tramways case by the House of Lords which was treated as binding authority by the Privy Council in the Melbourne Tramways case where Sir Leo Cussen was the arbitrator.
- k. In relation to easements, under s5 of the SA Electricity Corporations Act 1994, any electricity corporation was **granted** a general statutory easement over land used for the transmission system.
- l. Under s8 of the SA Electricity Corporations (Restructuring and Disposals) Act 1999, easements were **granted** or extinguished by Ministerial transfer orders. Easements were not sold as private rights from one utility to another. For ElectraNet to claim that easement rights should be valued as its assets in its RAB, ElectraNet has to show not merely that it enjoys easement rights but that it owns them as private property and not as statutory rights. (For example we can all walk down the same street but none owns the street as property) **[deleted]**. [The easements] were **granted** by a minister of the crown as statutory rights. Transfer of assets and liabilities are clearly distinguished in the legislation from the **grant** of easements.
- m. If easements are statutory rights **granted** to utility operators for a public benefit, they are not assets of any particular corporation which happens to own the physical transmission assets. If they are not assets of the corporation they do not belong in the RAB. (Edinburgh Tramways supports this)
- n. Easement related acquisition and compensation costs appear to be properly costs for establishing the network infrastructure rather than a cost for easements as an asset of any utility. If an easement is not an asset, then the costs of acquisition should rightly be expensed (and included in the opex) or capitalised as part of the transmission lines and depreciated with the transmission lines.
- o. In fairness to the parties to this review the Energy Consumers Coalition has sought to bring this additional information supportive of our views, to the attention of the Tribunal and the parties as soon as our research started to bring these matters and overseas experiences to light. We made our original submission on the basis of first principles and logic. It appears the same questions have been raised elsewhere and have received extensive judicial consideration.
- p. The Energy Consumers Coalition therefore submits that given the potential complexity of this matter and its potential precedential

importance if the Tribunal considers that the AER has miscarried in exercise of its discretion, the matter should be remitted back to the AER for a full reconsideration de novo so that all issues including relevant Law and practice here and overseas can be properly considered.

- q. If on the other hand the Tribunal considers that the matter is overdue for resolution (and the Energy Consumers Coalition has some sympathy for that view) we submit that the Tribunal should simply vacate the AER decision and impose the \$3.1m valuation for easements determined by the jurisdiction and the ACCC in its 2003 decision.