The Hon Josh Frydenberg MP
Minister for the Environment and Energy
Parliament House
CANBERRA ACT 2600

By email: josh.frydenberg@environment.gov.au

15 June 2018

Re: Binding Rate of Return Bill

I previously wrote to you on 24 April 2018 outlining concerns that many investors including Spark Infrastructure have that the Binding Rate of Return Bill (**the Bill**) will put long term private investment in energy infrastructure at risk and will put upwards pressure on debt and equity costs in the sector leading to higher prices for consumers.

We appreciate the consultation undertaken by the Senior Committee of Officials (**SCO**) of the COAG Energy Council including the amendments that they have included in their latest draft which we believe are intended to address some of the concerns raised by ourselves and other stakeholders.

We understand that the intent of the Bill is to introduce a legally binding instrument to lock in the approach to calculating the rate of return earned by regulated businesses and investors to provide enhanced regulatory certainty and transparency for networks, investors and consumers. We support this policy objective. We also support the additional process requirements for the AER in making the rate of return guideline (**RORG**) and to improve the likelihood that contested issues can be addressed through the AER's primary process.

Nevertheless, we consider that the Bill (including the most recent amendments provided by COAG on 29 May 2018) will fall short of achieving this policy intent and will continue to create additional uncertainty and risk to investors and lead to higher prices for consumers.

We understand that there is a view that the Bill will not completely remove access to judicial review. Instead, the Bill is designed to prevent excessive appeals that would delay the development or implementation of the RORG. However, this is not the case. By making the RORG a legislative instrument it will only be reviewable on extremely limited judicial review grounds, if at all.

Regardless of improvements in the primary process, the limited ability to seek judicial review will mean errors cannot be addressed and limit accountability with the risk that the quality of decisions will be reduced over time. We are firmly of the view that the removal of access to judicial review exacerbates both sovereign and regulatory risk.

It is not necessary to make the RORG a legislative instrument to make it binding. Therefore, removing access to judicial review will not be an unfortunate consequence of implementing a binding RORG but rather a deliberate policy decision of the COAG Energy Council.

We maintain that removing the guidance provided by the current National Electricity Rules on rate of return reduces certainty. The current rules provide important guidance to the AER about how to determine returns that would be consistent with the National Electricity Objective (**NEO**), National Gas Objective (**NGO**), and Regulatory Pricing Principles (**RPPs**) and have a life beyond one RORG period. This is critical to investors making long term investments. The requirements in the Bill for the AER to have regard to the RPPs and to make an instrument that will, or is most likely to, contribute to the NEO or NGO are insufficient. The AER may also have regard to other information and there is no requirement to demonstrate that the RORG would achieve the NEO, NGO and RPPs. Further, the RORG provides certainty for only four years, with any errors remaining in place for those four years.

Level 29, 225 George Street, Sydney NSW 2000 ABN 36 114 940 984
t +61 (0)2 9086 3600 f +61 (0)2 9086 3666 e info@sparkinfrastructure.com w www.sparkinfrastructure.com

We have sought legal advice on the Bill (attached to this letter) and propose that the COAG Energy Council consider further amendments to the Bill to mitigate the uncertainty and risk created by the Bill.
In our view, the amendments required to make the Bill consistent with COAG's objectives include:

- Making the RORG an administrative decision with non-compliance being a contravention of the relevant Act;
- Require the AER to ensure that the RORG achieve, or be consistent with, the NEO, NGO and RPPs rather than simply having regard to them; and
- Include the following principles from s 44ZZCA of the Competition and Consumer Act 2010 (Cth) as additional factors in section 18I(4) of the National Electricity Law and section 30D(4) of the National Gas Law:

  The [regulated network service provider / service provider] must be provided with a return on investment:

  - *commensurate with the regulatory and commercial risks involved; and*
  - *that provide incentives to reduce costs or otherwise improve productivity.*

We urge the COAG Energy Council to continue meaningful engagement with investors on this important policy and legislative process in the interests of all consumers. We are seeking the opportunity to review a further draft of the legislation, together with a statement of policy intent, to enable us to contribute and work with SCO and the COAG Energy Council to deliver on the policy intent whilst mitigating risk to long term investment and any consequential impact on consumers.

Private investment in electricity network assets has delivered savings for consumers. We will continue to invest to progress innovation and new technologies in the appropriate investment environment. We fear that if the current amendments are adopted, Australia will be a global outlier when competing internationally for efficient funding.

We look forward to further discussions with SCO officials in this regards. Please contact Sally McMahon, Economic Regulatory Advisor, on 0421057821.

Yours sincerely,

Rick Francis
Managing Director & CEO
Spark Infrastructure

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