By Email 22 November 2013

Attention: Jacqui Thorpe, Acting General Manager, Retail Markets Branch

AERInquiry@aer.gov.au

Our ref 654/17196/80104159

Dear Ms Thorpe

SUBMISSION ON REGULATION OF ALTERNATIVE ENERGY SELLERS ISSUES PAPER

We act for, and have prepared this submission on behalf of, a client which operates data centres (**Data Centre Operator**). On behalf of our client, we would like to thank the Australian Energy Regulator for the opportunity to provide submissions in respect of the AER's *Regulation of alternative energy sellers under the National Energy Retail Law: Issues Paper* dated October 2013 (**Issues Paper**).

1. **BACKGROUND**

1.1 As part of a number of data centre services the Data Centre Operator provides to its customers, the Data Centre Operator provides electric energy that is used in equipment owned by its customers, and operates private networks in buildings it occupies in National Electricity Market jurisdictions.

1.2 We are instructed that:

(a) our client's data centres are buildings where customers house their computer servers and other electronic equipment for data processing and storage, and provide space for infrastructure to be located including for cloud IT services;

(b) in addition to providing space for customers to house such equipment, the Data Centre Operator's services include making available telecommunications and other information services to be used by the equipment and providing cooling for the equipment; and

(c) the data centres contain a large number of individual suites and equipment racks that house customers' equipment.

1.3 The adoption Acts for the National Energy Retail Law in various NEM jurisdictions state that the NERL applies only in relation to the sale of electricity to customers whose premises are connected, or are to be connected, to the interconnected national electricity system within the meaning of the NEL (see, for example, s. 16 of the National Energy Retail Law (South Australia) Act 2011 (SA) and s. 3 of the National Energy Retail Law (NSW)). However, the revised AER (Retail) Exempt Selling Guideline 2 published in July 2013 (**Revised Retail Exemption Guideline**) by its terms purports to apply to the sale of electricity to end use customers occupying an area that is within the boundaries of the premises of a customer (in this example, the Data Centre Operator) whose premises are connected to the interconnected national electricity system.

1.4 Because the Data Centre Operator levies a separate, discrete charge for energy used by its data suite and rack customers, the Data Centre Operator falls within the purported regulatory purview of the Revised Retail Exemption Guideline.

2. DATA CENTRE ALTERNATIVE ENERGY SELLING BUSINESS MODEL

2.1 The Issues Paper has requested input in relation to alternative energy selling business models of which stakeholders are aware. Our client would like to draw the AER's attention to the alternative energy selling business model typically used by data centre operators, and submits that this business model should be treated in the same way as data centres operated in conjunction with, or ancillary to, the provision of telecommunications information services (see deemed retail exemption class D9 of the Revised Retail Exemption Guideline in relation to the on-sale and supply of electricity to customers in conjunction with, or ancillary to, the provision of telecommunications information services. This exemption is referred to in this letter as the **Deemed Telco/Information Services Exemption**).

2.2 In order to operate its data centres, and in turn provide data centre services, the Data Centre Operator commonly provides electric energy for use in equipment that is owned by its customers. This involves the Data Centre Operator:

(a) buying electricity (in kilowatt hours) from a licensed retailer at connection points where the local distribution network connects with a data centre building;

(b) converting that electricity to the voltage required by data centre customers and providing the lower voltage electricity to equipment, some of which equipment is owned by the Data Centre Operator and some owned by customers of the Data Centre Operator;

(c) providing backup electricity in the form of generators; and

(d) providing air-conditioning to keep equipment cool.

2.3 Because the Data Centre Operator is both on-providing electricity purchased from a licenced retailer and providing electricity generated by the Data Centre Operator's own on-site generators, the Data Centre Operator is potentially an alternative energy seller as described in the Issues Paper.

2.4 Without the provision of electricity at or to these facilities (both the electricity purchased by the Data Centre Operator from the licensed retailer and the electricity generated on-site by the Data Centre Operator), neither the Data Centre Operator nor its customers would be able to utilise the equipment located in the facilities (whether owned by the customer or the Data Centre Operator) in connection with the contracted service. To this end, we understand that the electricity provided by the Data Centre Operator in connection with its data centre services:

(a) is only used by the customers to receive the contracted services from the Data Centre Operator, and for no other purpose; and

(b) is not used to supply electricity to residences or for any unrelated commercial purpose.

2.5 The terms and conditions which apply to the provision of electricity in connection with data centre services provided by the Data Centre Operator are dependent on the nature of the data centre service purchased by the relevant customer. For some products, we understand the Data Centre Operator provides electricity supply (up to a specified maximum volume) to the equipment of customers as part of the overall service charge. However, a customer will usually be given the ability to request additional electricity to be provided by the Data Centre Operator to the customer's equipment for an additional service charge. For other products, the Data Centre Operator may charge customers for electricity provided in connection with data centre services as a separate line item.

2.6 For both historical and practical reasons, we are advised that the Data Centre Operator does not charge some customers for electricity on a metered consumption basis. Instead, we are advised that the relevant arrangements include a methodology for charging for electricity that is agreed with the customer. We understand that, for any customer whose equipment is not supplied with a dedicated low voltage power distribution unit, this is often based on the forecast assumed maximum usage for equipment of that type in the industry. We are instructed that the costs of installing separate meters is likely to be significant, operationally impractical given the size and number of meters required and the cost/benefits to consumers would be minimal.

2.7 The data centre energy provision model is essentially identical to that covered by the Deemed Telco/Information Services Exemption, yet because data centre operators are arguably not "telecommunications companies" they do not have the benefit of these deemed exemptions. Instead, they must either register for, and comply with the more onerous conditions imposed on, the relevant registrable exemptions, or must undertake the individual exemption route which includes a public consultation process.

2.8 Our client submits that alternative energy providers with the same business model (such as data centre operators) should be treated on a level playing field in relation to exemptions, regardless of whether the operator of the data centre is a telecommunications company or a different business operator.

3. POLICY CONSIDERATIONS FOR ALTERNATIVE ENERGY SELLERS

3.1 The Issues Paper asks for stakeholders' views on the AER's proposed policy considerations set out in section 3 of the Issues Paper.

3.2 One of the factual assumptions made in section 3 of the Issues Paper is that, under most alternative energy selling models, the customer purchases their energy from two energy sellers - the first being an authorised energy retailer, and the second being a secondary energy provider. In our client's data centres our client is the only provider of energy, but the electricity provided to the customer's equipment by the Data Centre Operator is sourced from two energy providers, being the Data Centre Operator's licenced electricity retailer and the Data Centre Operator itself (in its capacity as operator of the on-site generators). Our client submits that the characterisation of an alternative energy selling model should not necessarily be limited to circumstances where a customer purchases their energy from two energy sellers.

3.3 Our client also submits that being the sole supplier of a customer's energy needs should not be the defining characteristic of whether the energy selling relationship needs to be regulated as an "essential" or "supplementary" service. Instead, our client submits that the relationship should also be considered holistically to determine whether the electricity being sold is so much a part of

the overall service being provided that the sale of the electricity on its own should not be regulated as an essential service. The primary purpose of data centres is to house computer servers and other electronic equipment for data processing and storage, and provide space for infrastructure to be located including for cloud IT services. Electricity is needed to operate this equipment as required, and to keep it at an ambient temperature, but the provision of that electricity is really part of the entirety of the service offered by a data centre operator rather than being a discrete service which is appropriate to be regulated as a sale of electricity. If a data centre customer wanted to receive different terms and conditions for its overall service (including the pass-through of electricity costs), it could select a data centre operator that met its requirements in the first instance, or if its data centre's terms change over time in a way which does not suit the customer, simply relocate to another data centre.

3.4 To not look at the data centre operations holistically also introduces an arbitrary distinction based on title to equipment. If in the course of the provision of data centre services electricity is used to power equipment which is owned by the Data Centre Operator it is not regulated, but if the electricity is used to power equipment owned by the customer it is potentially regulated. There is no public benefit served by regulating, or not regulating, a data centre service based on title to equipment, when the flow of electricity and the prices charged for the service may be otherwise identical.

4. PROPOSED APPROACH TO GRANTING EXEMPTIONS/AUTHORISATIONS FOR ALTERNATIVE ENERGY SELLERS

4.1 The Issues Paper asks for stakeholders' views on the AER's proposed approach to granting exemptions and authorisations for alternative energy sellers in section 4 of the Issues Paper.

4.2 The Issues Paper states that the AER considers that a retailer authorisation is generally necessary when an alternative energy seller is the sole supplier of energy at a premises and/or the alternative energy seller prohibits the customer from entering into a contract with another retailer. Similarly, the Issues Paper states that an exemption might be appropriate where the alternative energy seller is providing an "add on" service to the customer, for example, where the customer can buy energy from a retailer of its choice.

4.3 Our client submits that these considerations are not applicable at a data centre. Providing access to energy retailers of choice creates a significant commercial risk to a large scale data centre operator. Data centres are large and complex and installing separate NEM-compliant parent and child meters would be costly, difficult spatially and the costs/benefits to data centre customers would be minimal. The fact that it is difficult to foresee any customer electing this approach in no way mitigates the substantial business risk associated with such a requirement.

4.4 The Issues Paper advises that at this stage the AER considers individual exemptions are preferable for alternative energy sellers. Our client's concern in relation to the application process for such an exemption is that it involves a public consultation process, which puts applicants for such an exemption on an uneven playing field vis-à-vis those sellers who fall squarely within deemed and registrable exemptions. Our client submits that the AER should be given a discretion not to put a request for an individual exemption out for public consultation where the AER forms the view that the application does not raise material consumer protection issues.

4.5 The Issues Paper identifies that an obligation to sell energy that is metered is a likely condition that would be imposed on an individual exemption for an alternative energy seller. We are instructed that data centres often charge customers for energy consumed by equipment stored on racks by reference to a contractually-agreed assumed usage, and that it would be cost-prohibitive to install meters for such equipment. Our client submits that the proposed condition should be amended to refer to "an obligation to sell energy that is metered or, if the customer is a business customer, metered or is calculated in accordance with a contractually-agreed assumed usage".

Please contact us if you would like to discuss any aspect of the above.

Yours sincerely

Graeme Dennis, Partner
+61 2 9353 4106
gdennis@claytonutz.com

Faith Taylor, Consultant
+61 2 9353 4654
ftaylor@claytonutz.com