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30 April 2010

Mr Tom Leuner
General Manager
Markets Branch
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

By email: AERInquiry@aer.gov.au

Dear Mr Leuner,

AER Consultation - Draft Retailer Authorisation Guideline

AGL welcomes the opportunity to provide comments on the *Draft for preliminary consultation: Retailer authorisation guideline* ('Guideline') published by the Australian Energy Regulator in March 2010.

Rule 505 of the proposed National Energy Retail Law ('NERL') requires the AER to grant a retailer authorisation if the applicant satisfies the three entry criteria; specifically relating to organisational and technical capacity, financial resources, and suitability. The current drafting of the Guideline suggests that the AER will only consider an application after the applicant has satisfied more than 40 'information requirements'. As the current jurisdictional regulators do not require all the information that is listed in the Guideline, AGL queries whether all the 'information requirements' are necessary for the AER to be satisfied that an applicant has met the entry criteria.

In this context, AGL supports the approach taken by most jurisdictional regulators where the onus in on the applicant to provide sufficient information to support its application and the 'information requirements' are not mandatory but a summary of the information that an applicant may provide. Such an approach, where the guidelines explains how the regulator will exercise its discretion rather than impose obligations, more accurately reflects the distinct and separate roles of the rule-maker (the Australian Energy Market Commission) and the regulator (the AER). Furthermore, a less prescriptive guideline would also offer the AER the flexibility in expediting the application process for a related entity of an existing authorised retailer or when an existing authorised retailer wishes to amend its authority to include an additional fuel or increase its geographical consumer base.

Our responses to the questions for consideration contained in the *Issues paper: Retailer authorisation guideline* are provided at Attachment A.

Should you have any questions pertaining to this submission please do not hesitate to contact Angela Gregory, Manager Regulatory Advice & Policy, on (03) 8633 6817 or angela.gregory@agl.com.au.

Yours sincerely,

Alex Cruickshank
General Manager Energy Regulation

Attachment A

3.1 Would prospective applicants benefit from briefings prior to the submission of an application? If so, please provide details of the form (for example, group or individual sessions) and content of briefings that would be most beneficial for prospective applicants.

If the Guideline and the accompanying information are clear and user friendly then an applicant should not require a briefing from the AER.

4.1 Is it appropriate for the AER to require only a compliance strategy rather than a compliance plan or systems at the time of the application? Please provide any reasons for your view.

Section 1202 of the proposed NERL requires a retailer to establish policies, systems and procedures to enable it to efficiently and effectively monitor its compliance with the requirements of the energy law. While the AER may not consider it appropriate for an applicant to have compliance systems and plans in place at the time of its application, the proposed NERL would apply to the applicant from the day it is issued with a retailer authorisation. Accordingly, it is only appropriate for the Guideline to require a compliance plan or systems if the AER considers that compliance plans or systems are necessary for an applicant to meet the entry criteria. Otherwise, it would be more appropriate to address compliance issues in the AER Compliance Procedures and Guidelines.

4.2 What guidance, if any, should the guideline provide on the types of risks that the AER would expect to be covered by a risk management strategy?

The Guideline could advise that the *Australian Standard for Risk Management – Principles and Guidelines AS/NZS ISO 31000:2009* may be a useful reference point in developing a risk management strategy. At a minimum, a robust risk management strategy covers risks associated with customer impact, regulation/ legal, business continuity, profitability and asset protection. It should also recognise that timely and accurate monitoring, review, communication and reporting of risks are critical for effective risk management.

4.3 Is 12 months an adequate period for the assessment of whether a retailer has the financial capacity to operate without reliance on customer takings? Please provide any reasons for your view.

A 12 month period for the assessment of whether a retailer has the financial capacity to operate without reliance on customer takings, coupled with a business plan showing the applicants financial projections (which should include projected profit and loss, revenue and expenditure figures) may assist the AER in ascertaining the financial capacity of an applicant.

4.4 The AER acknowledges the limitations of financial statements and declarations in establishing an applicant's financial health. What alternative methods of assessment may be appropriate?

While there are limitations in understanding a business's financial health through financial statements and declarations, AGL does not consider there is an alternative method of assessment that could replace entirely the usual financial assessment process. If an applicant with industry experience can demonstrate a sound long term credit rating with a recognised credit agency then this could be an alternative method of assessment for those applicants. However, a credit rating assessment is not a suitable method of assessment for a fledgling retailer.

4.5 Does the limitation on information that needs to be provided on compliance breaches—being those that have occurred in the past 10 years and that have led to enforcement action or an enforceable undertaking—strike an appropriate balance between ensuring a rigorous assessment and the information burden on applicants? Please provide any reasons for your view.

The requirement to provide details of any enforcement action or enforceable undertakings in business dealings in the previous 10 years is not a particularly onerous requirement. In most instances, jurisdictional regulators only take enforcement action against retailers who have either refused or failed to rectify a continuous and systemic breach.

4.6 What issues or concerns may arise from a requirement for applicants to provide certified criminal history checks?

Page 19 of the Guideline states that the AER *may* ask for a criminal history check from the Australian Federal Police to confirm details of criminal convictions disclosed in the application. If the AER only requests certified criminal history checks in such limited circumstances, rather than in every case, then the regulatory burden of providing such information is not particularly onerous.

4.7 What other information requirements not provided for in the draft guideline would be appropriate for the AER to impose? Please provide details of these requirements and the rationale for inclusion.

The Guideline states that if a proposed transferee holds an existing retailer authorisation then the AER will generally expedite the transfer process and will consider the applicant to have satisfied the entry criteria for the purposes of s 516(2)(a) of the proposed NERL. AGL believes that it would be appropriate for the Guideline to expressly allow an expedited process for when an existing authorised retailer wishes to amend their authority to include an additional fuel or increase its geographical consumer base. An expedited process should also apply to an applicant that is a related entity of an existing authorised retailer.

4.8 Which, if any, of the information requirements contained in the draft guideline seem unnecessary or unduly burdensome? Please provide details and the reasoning behind your comments.

As discussed above, any information that is not necessary for the AER to form the view that the applicant meets the entry criteria is unnecessary and unduly burdensome.

Also, page 10 of the Guideline states that "*[a]lthough not required by law, we would also encourage applicants to have in place training programs or strategies focussing on marketing*". In AGL's view, best practice regulation dictates that only regulatory obligations should be included in regulatory instruments. If training programs or strategies are not regulatory obligations then these references should not be included in the Guideline.

5.1 Is it appropriate to target retailers who wish to begin or resume retailing after a period of dormancy for compliance audits or monitoring? Please provide any reasons for your view.

While it may be considered appropriate to place a greater focus on auditing and assessing retailers after periods of dormancy to ensure that appropriate systems and processes are in place for the retailer to meet its obligations, such an issue is not relevant to the Guideline and would be more appropriately addressed in the issues paper for the proposed AER Compliance Procedures and Guidelines.

5.2 What matters should the AER have regard to, other than the rights of customers, when imposing conditions on the transfer, surrender or revocation of a retailer authorisation?

When considering imposing conditions on the transfer, surrender or revocation of a retailer authorisation the AER should have regard to its authority to impose conditions, the three entry criteria, and the objective of the NERL – which is to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to price, quality, safety, reliability and security of supply of energy.

Furthermore, rule 518(4) and rule 522(6) of the NERL requires the AER to consult with AEMO before imposing conditions on the transfer of customers to another retailer when a retailer's authorisation is surrendered or revoked. For that reason, AGL considers that it would be more appropriate for the AER to consult with AEMO at the time it was considering imposing a condition on a particular applicant rather than regulating for it in the Guideline.

5.3 What issues may arise, if any, in requiring the holder of the retailer authorisation to demonstrate that customers will remain on the same or better terms following a transfer or surrender of the retailer authorisation?

AGL queries the necessity of a condition that requires a retailer to demonstrate that its customers will remain on the same or better terms following a transfer or a surrender of an authorisation in a competitive energy market where all small customers are free to move at any time to a retailer of their choice. A transfer or surrender of an authorisation often occurs as part of a trade sale by a retailer in financial stress. Such trade sales are generally preferred to the alternative - a ROLR event, which can prove costly to the energy market and ultimately end customers. As a result, AGL believes that a requirement on a retailer to demonstrate that its customers will remain on the same or better terms following a transfer or a surrender of an authorisation would inhibit trade sales as a

potential purchaser is unlikely to want to redesign its products or processes to mirror those of a failing retailer.

In addition, the commentary on the role of AEMO and rules 518(4) and 522(6) of the NERL in 5.2 above is also relevant to this question.

5.4 Is it appropriate for the AER to require applicants to develop procedures for customers to take action against them following the revocation or surrender of the retailer authorisation? If not, what other protections for customers are / could be provided?

The NERL gives the AER power to revoke authorisations, grant or refuse applications to surrender and make retailer authorisation guidelines. It does not, however, give the AER a general power to make regulation. It is important that the separation between the roles of rule-maker (the AEMC) and regulator (the AER) is maintained in the retail sphere as it is in other areas of the energy regulation. For this reason, AGL does not consider that it is appropriate for the AER to regulate procedures for customers to take action against their former retailers. Even if the AEMC, in accordance with the retail consultation procedure, were to seek comments on such a proposal, AGL would not support energy specific regulation in an area that is already governed by general law, insolvency law and contract law.