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13 July 2006

Mr Sebastian Roberts  
General Manager  
Australian Energy Regulator  
GPO Box 560J  
Melbourne VIC 3001

Dear Mr Roberts

### **Re: Scoping Paper - Gas and Electricity Distribution Regulatory Guidelines**

Thank you for your letter of 29 June 2006 advising that the AER has decided to postpone its decision on regulatory guidelines until August 2006. In view of that delay, and in response to the invitation in your letter, AGL is making this further short submission.

The AER has cited the imminent releases of the AEMC's Draft Determination on the National Electricity Rules and exposure drafts of national energy legislation as reasons for delaying its decision. AGL agrees with this rationale. It was a matter of considerable concern to AGL in its original submission that the proposed guidelines pre-empted the extent of any authority that the AER may be given to produce guidelines under the new Laws and Rules being developed for distribution. AGL considers that the distribution legislative framework needs a great deal more clarification before the need for guidelines can be ascertained.

The other major concern in AGL's submission was the nature of the guideline-making power itself. AGL discerned the potential for guidelines to become (inappropriately) de facto Rules if there was a power to impose substantive obligations on market participants. This outcome would contradict the MCE's policy intent to separate rule making and rule administration. AGL put the view that regulatory guidelines should be:

- Non-mandatory, and
- Should be restricted (by the Rules which authorise the making of guidelines) to low-level technical or procedural issues on any matter to do with economic regulation. Guidelines should not have the function of creating substantive obligations in the economic regulatory framework.

In this regard, AGL notes that the AER has recently finalised its Confidentiality Guidelines for Dispute Resolution under clause 8.2 of the National Electricity Rules. While these guidelines have been made under NEL provisions dealing with market operation (and not economic regulation), AGL supports the approach taken by the AER in that context and believes it is equally applicable to economic regulation. The AER's approach is reflected in the following quotations from its consultation documents:

- *The guidelines are not binding. They do not, and can not, impose requirements or obligations on Registered Participants that are inconsistent with, or not already imposed by, the Rules<sup>1</sup>*
- *Essentially, the draft guidelines should be read in context of what is allowed by the Rules<sup>2</sup>*
- *While clause 8.2.10(c) allows the AER to issue guidelines in relation to the information confidentiality obtained, used or disclosed for the purposes of resolving a dispute, these*

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<sup>1</sup> AER Draft Report *Confidentiality Guidelines* June 2006, page 3

<sup>2</sup> Ibid

*guidelines are no more binding on the Adviser than on registered participants, members of a DRP or third parties*<sup>3</sup>.

The AER has described the confidentiality guidelines as providing *general guidance relating to the Rules provisions*<sup>4</sup> and in AGL's view this is the appropriate role for guidelines in economic regulation. That is, they should clarify and define existing obligations within the Rules, and not create new regulatory obligations. A logical corollary of this approach is that the need for guidelines can only be assessed objectively when the Rules themselves are generally known.

Should you wish to discuss or clarify any of our comments, please contact Chris Harvey, Manager Regulatory Development, on (02) 9921 2601.

Yours faithfully,

Dr Robert Wiles  
General Manager Regulation and Policy

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<sup>3</sup> AER Final Report *Confidentiality Guidelines for Dispute Resolution under clause 8.2 of the National Electricity Rules* July 2006, page 2

<sup>4</sup> AER *Confidentiality Guidelines for Dispute Resolution under clause 8.2 of the National Electricity Rules* July 2006, page 1