

14 May 2013

Mr Chris Pattas
General Manager – Network Operations and Development
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

By email to: confidentiality@aer.gov.au

Dear Mr Pattas

Distribution and transmission confidentiality guidelines issues paper

ActewAGL Distribution welcomes the opportunity to provide this submission in response to the AER's Distribution and transmission confidentiality guidelines issues paper.¹

The revised *National Electricity Rules* require the AER to develop distribution and transmission confidentiality guidelines. The guidelines must specify the manner in which network service providers (NSPs) may make confidentiality claims, and will be binding on the AER and NSPs in relation to all regulatory proposals and proposed pricing methodologies.

ActewAGL Distribution is supportive of the AER's intention to establish a more collaborative process for information disclosure as opposed to regularly relying on existing formal information disclosure powers.² As noted by the AER, the objective of the guidelines will be to achieve an appropriate balance between protecting particular information because of its sensitive nature and the need to disclose information for an open and transparent regulatory decision making process that allows all stakeholders to engage effectively.

The focus of the guidelines should be to streamline the process for making confidentiality claims, making it more predictable for all stakeholders by providing NSPs with a clear understanding of the nature of information that the AER will generally protect or disclose. The guidelines should also aim to minimise the administrative burden on NSPs and compliance costs, which will ultimately be borne by customers.

ActewAGL Distribution is a member of the Energy Networks Association (ENA) and has contributed to and supports the ENA's comprehensive submission in response to the AER's confidentiality guidelines issues paper. ActewAGL Distribution, like the ENA, supports many of the goals identified by the AER in the issues paper, but has the following comments to make in relation to the AER's proposed approach.

Detriment and Public Benefit Test

Under the current confidentiality framework, an NSP is required to identify the components of its proposal that it claims to be confidential and does not want disclosed.³ The AER must then take all reasonable measures to protect the identified information from unauthorised use or disclosure.⁴ The AER has proposed in the issues paper that, when making a confidentiality claim over information, an

¹ AER, 2013, *Better Regulation: Distribution and transmission confidentiality guidelines*, March.

² NEL, ss. 28W – 28ZB

³ NER cl 6.5.2(c)(6)

⁴ Competition and Consumer Act 2010 (Cth) s 44AAF(1), National Electricity Law, s.18

NSP would be required to explain how disclosure of that information would cause detriment and why the public benefit in disclosing the information does not outweigh this detriment.

ActewAGL Distribution believes that requiring an NSP making a confidentiality claim to undertake an analysis of the detriment against public benefit of disclosure is inconsistent with the confidentiality framework already established under the *National Electricity Law* and *Competition and Consumer Act 2010 (Cth)*.⁵ Neither law requires analysis of this kind in order for sensitive information to be protected. Currently, such a test is applied by the AER at its discretion when considering whether to disclose information under s 28ZB of the National Electricity Rules.

ActewAGL Distribution's view is that the proposed requirement should remain discretionary and be applied by the AER only on a case by case basis where it considers it in the public interest to do so. Where it is practical for the NSP to provide an analysis of the detriment against public benefit, then it could do so in order to support its confidentiality claim. This should not, however, become a formal requirement of the NSP's confidentiality claim which, if not met, would result in the information being disclosed by the AER.

ActewAGL Distribution is also concerned that a requirement to undertake such analysis would result in additional complexity, creating a significant administrative burden for NSPs instead of delivering the streamlined process promised by the AER.

Categories or lists of confidential information

In the interests of providing clarity to NSPs, the AER has proposed a list of items that the AER would consider protecting and disclosing. ActewAGL Distribution supports the intention of the AER to provide this level of clarity to NSPs in the guidelines, but would be concerned if the AER were to consider this a definitive and exhaustive list of confidential and non-confidential items. Of more importance than the type of document is the nature of the information contained in the document. ActewAGL Distribution would prefer to be able to reserve the right to claim confidentiality over any document based on its content. Any list provided in the guidelines should be considered only a guide to the types of information the AER will protect or disclose.

The AER is also considering establishing categories of confidential information. As with lists, it is unlikely that there are categories of information that would consistently be subject to protection or disclosure, and the AER is concerned that classifying confidentiality claims into categories would create an additional administrative burden on NSPs. ActewAGL Distribution believes that this approach would provide greater certainty to NSPs on how to make confidentiality claims and how these would be treated. As with lists, ActewAGL Distribution would caution against making any list of categories exhaustive and definitive.

The AER has proposed five items on its list of confidential information. These are information affecting the security of the network, market sensitive cost inputs, market intelligence, strategic information and personal information. Whilst this list should not be considered definitive, ActewAGL Distribution supports the ENA's proposal to add three additional categories of confidential items. These are:

- confidential contractual terms - the disclosure of which would put the NSP in breach of contract, and may relate to unregulated parts of the business;
- information provided by a third party on a confidential basis - the disclosure of which would adversely affect the interests of that third party or the public interest; and
- proprietary information of the NSP or a third party (eg. sophisticated models developed at significant expense to the NSP or third party).

⁵ *Competition and Consumer Act 2010 (Cth)*, s.44AAF; *National Electricity Law*, s.18.

ActewAGL Distribution also proposes a further category of “details of competitive tender processes and outcomes” aimed at ensuring that information on who submitted proposals to provide certain services and the basis of selection of the successful tenderers remains confidential.

ActewAGL Distribution notes the list of information that the AER intends to disclose⁶ and considers that it would be appropriate for the AER to remain flexible and assess each claim for confidentiality on a case by case basis to take account of NSPs’ individual circumstances.

Confidentiality claim template

ActewAGL Distribution supports the adoption of a template for making confidentiality claims and believes that this would streamline the application process for NSPs and alleviate the administrative burden on the AER in assessing claims. ActewAGL Distribution does not, however, support the AER’s proposal for this template to require an analysis of the detriment or public benefit of disclosure. Where practical, an NSP can provide this information in support of its confidentiality claim, but it should not be a necessary pre-requisite to compliance with the guidelines. ActewAGL Distribution endorses the enhanced template and information handling process proposed by the ENA, which focuses rather on categories of information, and places greater emphasis on working collaboratively with NSPs to manage issues surrounding information protection and disclosure.

ActewAGL Distribution notes that the AER intends to publish the template in Attachment 2 to the issues paper, which sets out the proportion of the submission that is subject to confidentiality claims. However, the AER has not specified whether the confidentiality claim template (in Attachment 1) and the NSP’s reasons for seeking confidentiality would be kept confidential or disclosed to the public. ActewAGL Distribution’s view is that this information should be provided to the AER on a confidential basis. This would ensure an open and honest flow of communication between the NSP and the AER, and support the AER’s and industry’s goal of achieving a more collaborative approach to information disclosure.

If you would like to discuss any aspect of this submission, please contact Chris Bell, Manager Regulatory Affairs on (02) 6248 3180.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'David Graham', with a stylized, flowing script.

David Graham
Director Regulatory Affairs and Pricing

⁶ AER 2013, p18