

20 September 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 draft confidentiality guidelines

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

The revised *National Electricity Rules* require the AER to develop distribution and transmission confidentiality guidelines. The AER's draft guidelines 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 regulatory proposals.

The draft guidelines reflect the AER's goal of achieving an appropriate balance between protecting particular information because of its commercially sensitive nature, and the need to disclose information for an open and transparent regulatory decision making process that allows all stakeholders to engage effectively. ActewAGL Distribution supports this objective in principle, but has some concerns about how the guidelines will be applied by the AER.

ActewAGL Distribution is a member of the Energy Networks Association (ENA) and has contributed to and supports the ENA's submission in response to the AER's draft confidentiality guidelines. In addition, ActewAGL Distribution has the following key points to make.

Information handling process

ActewAGL Distribution supports the AER's intention to establish a more collaborative process for information disclosure as opposed to regularly relying on existing formal information disclosure powers. ActewAGL Distribution supports the AER's proposed approach to make pre-lodgement discussions (stage one) the focus of its approach to dealing with confidential information, and will endeavour to work with the AER at that stage to agree on what information requires protection and what information should be disclosed. However, it is unlikely that all areas of possible disagreement over confidentiality claims will be known in advance of lodgement of the regulatory proposal, particularly as they relate to stakeholder interest in various issues.

Under the AER's proposed approach, stage two of the information handling process requires the NSP to submit a confidentiality template with its regulatory proposal. Once this is submitted, the AER will assess the confidentiality claims contained in the template and, where it disagrees with a claim, the AER can adopt its formal information disclosure powers.² It is ActewAGL Distribution's view that

¹ AER, 2013, *Better Regulation: Draft Confidentiality Guideline*, August.

² NEL, s. 28ZB

prior to applying its formal information disclosure powers, the AER should initiate follow up discussions with the NSP to ascertain further details about the confidentiality claim. ActewAGL Distribution supports the ENA's position that this additional and less formal step in the process would greatly assist in understanding and resolving disagreements over confidentiality claims, resulting in a more constructive and efficient process.

Confidentiality template

ActewAGL Distribution supports the revised confidentiality template proposed by the AER in the draft guidelines and welcomes the AER's decision to remove the requirement that NSPs undertake a public benefit test to support their confidentiality claims.

ActewAGL Distribution notes the AER's intention to publish the confidentiality claim template on its website as soon as possible after it has been received.³ In its response to the AER's issues paper, ActewAGL Distribution argued that the information contained in the template should be provided to the AER on a confidential basis as this would ensure an open 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.

Whilst cognisant of the AER's arguments for increasing transparency and confidence in the decision making process, ActewAGL Distribution remains of the view that there may be valid confidentiality claims that can only be confirmed by providing information to the AER that is of a sensitive nature that must not be publicly disclosed. Consequently, ActewAGL Distribution proposes that any confidential information provided in support of confidentiality claims be presented to the AER in discussions with the AER or as a confidential attachment to the confidentiality template.

Categories or lists of confidential information

ActewAGL Distribution welcomes the decision by the AER to include categories of confidential information in the draft guidelines and considers that this, along with the list of documents that the AER has published in its explanatory statement⁴ will provide clarity to NSPs regarding the type of information the AER will consider protecting and disclosing. However, as stated in its response to the AER's Issues paper, it is ActewAGL's firm view that this list should be considered a guide only rather than 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. In this regard, ActewAGL Distribution also supports the proposal by the AER to assess claims on a case by case basis, and to protect information relating to confidential contractual terms and information provided by third parties "because of the information's content."⁵

Confidentiality undertaking

The AER proposes to make greater use of its ability to disclose information for the purposes of affording natural justice to a person affected by a decision of the AER. To facilitate this, the AER has included in its explanatory statement a confidentiality undertaking template. This would need to be submitted by a stakeholder wanting access to an NSP's confidential information, would specify the information being sought and include a cover note explaining why it wants access to the information. In assessing the stakeholder's application, the AER would seek the views of the NSP before making its decision whether or not to grant access to all or some of the confidential information requested.

³ AER, *Better Regulation Explanatory Statement Draft Confidentiality Guideline*, p.23

⁴ AER, *Better Regulation Explanatory Statement Draft Confidentiality Guideline*, p.34

⁵ AER, *Better Regulation Explanatory Statement Draft Confidentiality Guideline*, p. 14

ActewAGL Distribution is generally supportive of the AER's approach to facilitate limited disclosure of confidential information where a stakeholder can demonstrate that it could be affected by the information claimed to be confidential. However, ActewAGL Distribution is concerned that the undertaking proposed by the AER does not include sufficient safeguards for protecting an NSP's confidential information.

In this regard, the ENA has proposed a number of enhancements to the AER template including requiring the undertaking to be executed by an individual rather than an organisation, and requiring the recipient to have in place appropriate and proven security measures to safeguard the information. ActewAGL Distribution believes that the revised template proposed by the ENA will provide an appropriate basis on which to facilitate limited information disclosure to affected stakeholders, and that NSPs and stakeholders should be able to negotiate suitable amendments to the undertaking where appropriate. This approach will facilitate a better flow of information between NSPs and interested stakeholders, thereby reducing the need for the AER to use its formal information disclosure powers.

If you would like to discuss any aspect of this submission, please contact Shona Alexander, Principal Regulatory Advisor on (02) 6270 7929.

Yours sincerely



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