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10 May 2013

Chris Pattas
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GPO Box 520
Melbourne VIC 3001

Dear Sir

Issues Paper: Distribution and Transmission Confidentiality Guidelines

Thank-you for the opportunity to provide input to the *Distribution and Transmission Confidentiality Guidelines* Issues Paper, released in March 2013 (the “Issues Paper”).

Aurora Energy Pty Ltd, ABN 85 082 464 622 (Aurora) is an incorporated, State Government owned fully integrated energy and network business, with complementary activities in telecommunications and energy-related technologies. Aurora provides electricity generation, retail and distribution services to more than 270,000 customers in the Tasmanian jurisdiction. In this document, reference to Aurora should be taken as reference to Aurora in its capacity as the provider of distribution network services licensed by the Regulator under the *Electricity Supply Industry Act 1995* (Tas).

The Issues Paper notes that the AER is seeking to achieve a balance between protecting certain 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. Aurora agrees with these principles and, accordingly, during the most recent distribution determination process limited its claims of confidentiality over information provided to the AER.

Aurora is concerned that the content of the Confidentiality Guidelines create a tension between the regulation of some or all parts of the services provided by the business and obligations imposed on the business by other considerations, including that:

- the outlined Confidentiality Guidelines contradict the confidentiality requirements placed on companies, company officers, employees and auditors under section 1317AE of the *Corporations Act 2001* (Cth);
- the Confidentiality Guidelines weaken the controls and procedures adopted by companies to ensure confidential information is handled appropriately and in a manner acceptable to ASIC which, in turn, may affect market integrity and efficiency;
- the Confidentiality Guidelines pose serious risks to companies including the risk that:

- commercially sensitive information provided by third party goods and services providers such as pricing of inputs will be released;
- a company will be legally exposed if obligations under confidentiality agreements with advisors and other service providers a company engages to assist with corporate transactions (including investment banks, lawyers, accountants, tax advisors) are breached; and
- the Confidentiality Guidelines challenge existing compliance obligations to ensure personal information is handled in a manner consistent with the relevant privacy and personal information protection legislation.

Additionally, the questions for stakeholder comment posed throughout the Issues Paper do not extend to the application of the Confidentiality Guidelines to information produced by Aurora or by third parties for and on behalf of Aurora (that is, external consultants) in response to a direction by the AER to produce such information.

The AER has not indicated its interest in understanding and assessing the financial and other impacts the Confidentiality Guidelines would have on its stakeholders has requested feedback on any alternative approaches. Aurora would welcome further consultation on:

- the likely compliance cost such as overcoming information barriers, ensuring appropriate IT controls and physical document management;
- the likely effect on competition; and
- other impacts, costs and benefits such as how the introduction of the Confidentiality Guidelines will impact on companies engagement and communication with third parties, change a company's internal policies, practices and controls for handling confidential information and ensure that its employees understand and comply with its policies on handling confidential information.

The attachment to this letter provides Aurora's answers to the questions posed in the Issues Paper and a discussion of other issues that Aurora considers to be relevant.

If you have any questions, please address them to the contact named above.

Yours faithfully



Anton Voss

General Manager Commercial, Regulatory and Strategy
Distribution Business
Aurora Energy

ATTACHMENT TO AURORA SUBMISSION TO *DISTRIBUTION AND TRANSMISSION CONFIDENTIALITY GUIDELINES ISSUES PAPER*

This attachment to Aurora's submission to the *Distribution and Transmission Confidentiality Guidelines Issues Paper*, released in March 2013 (the "Issues Paper") provides Aurora's answers to the questions posed by the AER and a discussion of other issues that Aurora considers to be relevant.

In this document, reference to Aurora should be taken as reference to Aurora Energy Pty Ltd, ABN 85 082 464 622 in its capacity as the provider of distribution network services on mainland Tasmania, licensed by the Regulator under the *Electricity Supply Industry Act 1995* (Tas).

The Ability of the AER to Disclose Confidential Information

The requirements upon the AER surrounding the use and disclosure of information provided to it are prescribed in the National Electricity Law in Division 6 of Part 3, and at section 18, with the latter section having the effect of incorporating section 44AAF of the *Competition and Consumer Act 2010* (Cwth) into the National Electricity Law.

Of relevance here is that section 44AAF(1) provides that:

The AER must take all reasonable measures to protect from unauthorised use or disclosure information:

- (a) given to it in confidence in, or in connection with, the performance of its functions or the exercise of its powers; or
- (b) that is obtained by compulsion in the exercise of its powers.

Further clarification on this point is provided in section 28W of the NEL, which authorises the AER to:

disclose information given to it in confidence in, or in connection with, the performance or exercise of its functions or powers under this Law or the Rules subject to and in accordance with—

- (a) this Division; or
- (b) section 146.

The division referred to is Division 6 of Part 3, which authorises the AER to disclose information given to it in confidence under the following circumstances:

- if the AER has obtained the written consent of the party or parties that provided the information – section 28X;
- for the purposes of court or civil proceedings, or to accord natural justice to a party – section 28Y;
- if the information given to it in confidence is part of a larger document containing other information, the document may be disclosed with the information given in confidence omitted – section 28Z;
- if the information does not identify anyone – section 28ZA;
- if the information given in confidence is already in the public domain – section 29ZB; or

- if the detriment of disclosure does not outweigh the public benefit – 28ZB.

Given the structure of section 28W, the AER is not authorised to disclose information given to it in confidence under any other circumstances.

The NEL does not prescribe a form in which a party providing information to the AER should identify that some or all of that information is given in confidence. Rules 6.14A and 6A.16A of the NER, however, provides that the AER must make and publish “Distribution Confidentiality Guidelines” and “Transmission Confidentiality Guidelines” to specify the ways in which NSPs should make claims of confidentiality over information provided in regulatory proposals, revenue proposals and pricing methodologies.

It should be noted that neither NEL nor the NER provide the AER with the ability to reject a claim of confidentiality over information provided. The NER provides only the form of a claim of confidentiality for a limited range of information, and the NEL provides avenues for the AER to disclose (not necessarily publish) information despite any claim of confidentiality over that information.

In consequence, the AER does not have the ability to reject a “blanket claim” of confidentiality. Nor is the AER entitled to reject a claim of confidentiality on the basis of an incomplete or non-compliant claim of confidentiality made by the party providing the information. If a party provides information to the AER in confidence, the AER is obliged to accept that claim. In the event that the AER wishes to follow the path of disclosure on the grounds that the detriment of the disclosure does not outweigh the benefits, section 28ZB of the NEL prescribes a process to be followed.

Responses to Questions

This section of the attachment to Aurora’s submission to the Issues Paper provides Aurora’s responses to the questions posed by the AER in the Issues Paper.

For ease of identification, the questions posed by the AER are presented in boxed text.

Manner in which NSPs may make confidentiality claims

Question 1

What are stakeholders’ views on requiring NSPs to make confidentiality claims using the template in Attachment 1?

Aurora observes that the process described in this section indicates that the AER is intending to use the schedule in Attachment 1 of the Issues Paper to meet the requirements of sections 28X and 28Z of the NEL, and to perform a pre-assessment for the purposes of section 28ZB.

Aurora has no objections to the use of the schedule to satisfy the requirements of sections 28X and 28Z of the NEL. The requirement to address the “28ZB” test for every piece of information over which confidentiality is claimed is, however, unnecessarily onerous. At the very least, information that falls within the scope of

the five categories provided in section 4.2 of the Issues Paper should not need explanation as to how the 28ZB test dictates non-disclosure.

Categories or lists of confidential information

Question 2

Should the confidentiality guidelines specify categories of information by which NSPs must classify any claims of confidentiality?

Following on from the response to question 1, the classification of confidential information should reduce the need for onerous discussion of why each piece of confidential information should not be disclosed under section 28ZB of the NEL.

In consequence, Aurora considers that there should be categories of information by which NSPs should classify claims of confidentiality. The AER need then only follow up, formally or informally as required, claims of confidentiality that do not fall into a prescribed category or which appear to be inappropriately classified. Given that the AER is not empowered to reject a claim of confidentiality over information, the formal route should be followed only when there is a disagreement over classification.

Question 3

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should protect?

Aurora considers that the AER is obliged under law to protect from inappropriate disclosure all information provided to it that is identified as confidential by the party providing that information.

For the purposes of categorisation, Aurora suggests that the following categories may also be appropriate for inclusion in the list:

- detailed information about assets;
- information that may compromise the security of the network or a third party;
- information about a third party contract, arrangement, business or understanding that a NSP is not at liberty to disclose;
- intellectual property created by, or belonging to, a NSP (as opposed to the results of the application of that intellectual property) or a third party;
- working documents.

In relation to the last point, during the recent distribution determination for Aurora, Aurora was required to provide responses to AER questions in a very short time. As a result, the information provided, whilst correct, was not provided in a format that would be useful to parties other than the AER had it been published. Aurora considers that, in the event that the AER was planning on publishing such

information, the NSP should be given the opportunity to create a more “publishable” version of the information.

Question 4

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should disclose?

Aurora considers that the AER may not disclose information except in accordance with the provisions of the NEL. In consequence, any categorisation of data is immaterial if the information has been provided to the AER in confidence, and routine disclosure of a particular type of information is not consistent with legislative requirements.

Website notices

Question 5

What are stakeholders' views on requiring NSPs to use the template in Attachment 2 to determine the proportion of information over which they have claimed confidentiality?

Section 4.3 provides that the AER must publish on its website the proportion of material in a NSP's regulatory proposal, revenue proposal or proposed pricing methodology that is subject to a claim of confidentiality. Aurora considers that the template is adequate for the purpose.

Blanket confidentiality

Question 6

What are stakeholders' views on our proposed measures for dealing with blanket confidentiality claims in the confidentiality guidelines?

The AER is not provided with the power to reject claims of confidentiality under the NEL or NER. In consequence, if a party providing information claims that some or all of the information is confidential, the AER must accept that claim at face value, and the information may not be disclosed except in accordance with the relevant laws.

Third party documents

Question 7

What are stakeholders' views on our position that NSPs should verify all third party confidentiality claims that are included in their submission?

Section 4.5 of the Issues Paper notes that NSPs often include in their submissions information they have obtained from a third party and that often the third party makes a blanket confidentiality claim over this information.

Aurora's position is that the requirement for NSPs to provide the same reasoning for third party documents as for any other blanket confidentiality claim is inappropriate for the following reasons:

- unless a third party is engaged to provide a service to the NSP in direct response to a request by the AER for information, these third parties are engaged by NSPs to provide services for commercial purposes;
- NSPs may not be in a position to make a representation to the AER regarding a third party's confidentiality claims – that is, such disclosure would constitute a breach of confidentiality and expose the NSP to legal action, reputational damage and loss of contractual relationship with a trusted service provider ; and
- this requirement may be detrimental to the way in which a third party is instructed, the content of reports and the form of output.

Aurora considers that the AER has information gathering powers provided under the National Electricity Law to interact directly with a third party and to make a direct assessment of the validity of that party's claims of confidentiality in respect of information provided to the AER by a NSP.

Aurora does not consider that it is appropriate to devolve this responsibility to an NSP, not the least because an NSP does not have the ability to make a representation to the AER about the confidentiality of documentation or information provided by a third party beyond a statement of the position of the third party in respect of such claims.

Scope and coverage

Question 8

Should we apply the confidentiality guidelines, as a policy, to all information we receive from NSPs and gas service providers? If not, what information handling procedures should we use to deal with this information?

The information handling procedures used to deal with information received from NSPs and gas service providers should be dealt with in a manner that is consistent

with the applicable laws. Aurora notes that the provisions of the NEL as to how the AER should deal with confidential information are not limited to pricing proposals.

Compliance costs

Question 9

What are stakeholders' views on ensuring appropriate disclosure of information whilst minimising administrative costs?

The administrative costs related to disclosure of information relate, primarily, to the information that is deemed by the information provider to be confidential. These administrative costs will be borne by the AER and the parties providing information. To minimise administrative costs, the AER must ensure that the processes over which it has control are efficient for both groups.

In relation to the authorised modes of disclosure given in the NEL, those contained in sections 28X (prior written consent), 28ZAB (public domain), 28Y (court or tribunal proceedings) and 28ZA (non-identification) are administratively relatively straightforward, with the administration costs of the latter two being borne by the AER.

The disclosure of redacted information (section 28Z of the NEL) places the majority of administrative costs upon the party making the redaction. Aurora's responses to questions 1, 2 and 3 are relevant to this question, also.

The most administratively onerous authorised mode of disclosure is that of section 28ZB of the NEL. The costs associated with this will be borne by both the AER and the party upon whom the required notice(s) are served. It is necessary, therefore, that the AER consider the regulatory cost (which is ultimately borne by the consumers of electricity) of regular use of this avenue for the disclosure of information provided in confidence against the philosophical desire for complete transparency of information provided by parties to the AER.

A further source of administrative burden is associated with the approach to making a claim of confidentiality over information provided to the AER. The AER has control of this in respect of the information relating to regulatory proposals, revenue proposals and pricing methodologies through the confidentiality guidelines that it must produce under rule 6.14A and 6A.16A of the NER. It is the AER's responsibility, therefore, to streamline and simplify as much as possible the process such that compliance with the NER is achieved. There is no clear prescription of form for making claims of confidentiality over information provided to the AER that does not relate to regulatory proposals, revenue proposals and pricing methodologies. It is to be expected that the parties making the claims will choose the most administrative expeditious method.

Limited release of confidential information

Question 10

Should we facilitate NSPs disclosing information to certain stakeholders for the purpose of making a submission to the AER?

Section 4.8 of the Issues Paper provides that other regulators have, in the past, facilitated the release of confidential information to third parties for the purpose of making a submission. The confidential information is only disclosed once the third party has provided an undertaking to keep the confidential information confidential.

Aurora understands that the AER is considering a similar approach in relation to facilitating the release of a NSPs confidential information to stakeholders.

Aurora supports this approach provided that:

- NSPs must be consulted following an approach by a third party to the AER for the purpose of facilitating a submission to the AER;
- NSPs must have the discretion to reject the release of confidential information; and
- the undertaking provided by the stakeholders clearly specifies, and the NSP agrees to, the purpose for which the recipient may use the confidential information.