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Australian Energy Regulator  
GPO Box 520  
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Via email: [Ringfencingguideline2016@aer.gov.au](mailto:Ringfencingguideline2016@aer.gov.au)

Dear Chris

**Re: Ring-fencing Guideline – Exposure draft**

AusNet Electricity Services Pty Ltd (**AusNet Services**) welcomes the opportunity to make a submission in response to the Australian Energy Regulator's (**AER**) Exposure Draft of its proposed Electricity Distribution Ring-fencing Guideline (**Exposure Draft**). We also appreciate the opportunities provided to date, to meaningfully engage with the AER in the development of the guideline, including through the release of this further draft.

Given the short time frame to respond, we have not sought to re-open any policy issues or drafting issues which have already been raised in our previous submissions. Instead, this response seeks to assist the AER in identifying aspects of the Exposure Draft, which inadvertently may:

- adversely impact on the DNSP's ability to efficiently deliver its core-regulated services; or
- otherwise results in ambiguity or other difficulties in its practical application.

The Explanatory Statement that will accompany the final guideline may resolve some of our concerns regarding the complexity of the guideline. In our view, the preferred approach to remedy any ambiguity or unintended consequences is through drafting clarification. However, we would encourage the AER to incorporate in the Explanatory Statement worked examples which clearly identify the harms intended to be avoided by the various provisions of the Guideline.

***The definition of “other distribution services” in the Exposure Draft does not work and must be amended to ensure that those distribution services, which only a DNSP can provide, remain integrated with the DNSP's provision of direct control services***

The focus of the Exposure Draft has shifted from the Draft Guideline. In the Draft Guideline, the AER was focused on separating out “network services” from any other services. In response to

the AER's Draft Guideline, we submitted that network services was too narrow, and was inconsistent with the full suite of distribution services DNSPs' are regulated to provide.<sup>1</sup>

The AER's Exposure Draft now seeks to separate out "direct control services" from all "other distribution services". "Other distribution services" is defined in the Exposure Draft as:

**Other distribution services** mean **distribution services** other than **direct control services**. [Note: this includes **negotiated distribution services** and **distribution services** that are not classified]

The effect of this definition is to treat all "other distribution services" as services which are capable of being competitively provided to customers. But this is not the case. Many of the distribution services which this Exposure Draft requires to be separated out from direct control services cannot, by regulation, be provided by another person.

**Box 1: Case study - Distribution services provided by a DNSP to connect a new generator into its network**

A prospective generator approaches the DNSP for connection to the HV distribution network. Analysis shows that the existing network, developed to serve the load in the area, would need to be augmented to provide the necessary capacity required by the generator.

The DNSP determines the cost to augment the network, and the incremental O&M cost for the network, if any. The generator proponent agrees to pay these costs and the DNSP upgrades the network.

The network continues to provide direct control services to load customers and a new negotiated service is provided to the generator.

**In these circumstances, no party other than the DNSP can provide either the direct control service or the negotiated network service.**

Further, the generator is located some distance away from the nearest point on the network, and hence requires a length of HV distribution circuit to be installed, which would be treated as connection assets. The DNSP would build these assets or if the proponent preferred the assets could be built by the proponent, subject to the DNSP's standards, and gift them to the DNSP to deliver the connection services. Specifically, the DNSP will determine incremental O&M and any future asset renewal costs and negotiate a connection service agreement with the proponent.

**Again, in Victoria, it is the case that no party other than the DNSP can provide the connection service.**

Other examples where a DNSP is the only person capable of providing a distribution service, which is not a direct control service, includes network modification services, the provision of facilities access to third parties such as telecommunications service providers and the provision of distribution services to another DNSP at the request of a DNSP can only be provided by that DNSP to whom that request was made.

The misnomer that all "other distribution services" are services subject to competitive provision and therefore should be treated as such in the guideline (and separated out from direct control services) is mistakenly reinforced by the concept of "affiliated entity". The meaning of "affiliated entity" provides that that part of a DNSP that provides "other distribution services and/or other electricity services" should be treated as a separate entity for the purposes of levelling the playing field between that affiliate entity and its competitors in clauses 4.1 and 4.3.

Couching "other distribution services" by the affiliate entity, as though it is subject to competitive supply, is, as demonstrated above, inconsistent with the regulatory framework for key distribution services (that are not direct control services), including:

- **Network services** and **connection services** – There are distribution "network service" categories other than direct control services, which fall with the proposed meaning of "other distribution services".

<sup>1</sup> AusNet Services submission on Draft Guideline, 28 September 2016, pp 3-5.

These are services which are provided by the DNSP and negotiated with, and directly funded by, the proponent. This is affirmed by the definition of “network services” and “network” which references the network which is owned, operated and controlled by the relevant network service provider.<sup>2</sup> For example, the DNSP augments its distribution network specifically to meet the requirements of an individual customer. Negotiation and agreement with the customer on how the required service level for the network services should be provided, and what the customer must fund, both for the augmentation and on-going operation of that new network, can only be provided by the DNSP, and this should recognizably be the DNSP. Other examples include reserve capacity or feeders for large load customers requiring higher levels of reliability, such as hospitals.

Connection services typically have similar commercial considerations as for negotiated network services, discussed above. For example, in Victoria, in accordance with their licenses, DNSPs are required to offer connection services within their distribution area. These services are not provided in a competitive environment, because the DNSP is licensed exclusively to service prescribed distribution areas. This is distinct to the contestability provisions that apply for the *works* required to establish the services, whereby customers may choose who builds the infrastructure, however once established these works would revert to DNSP operation and ownership for the delivery of the connection services themselves.

- **Other distribution services referred to in clause 3.1(d) –**
  - Providing access to network assets for other services also falls within the meaning of an “other distribution service”. Since the DNSP owns and operates the assets, no party other than the DNSP would have the knowledge of the assets or capability to support other services without compromising the delivery of network services. Agreements with 3<sup>rd</sup> parties for access must be with the DNSP, and this should recognisably be the DNSP.
  - The guideline explicitly does not prevent the DNSP providing assistance to another DNSP (see clause 3.1(d)). However the provision of such support would again be an “other distribution service” (such services generally being in connection with a distribution system, albeit another DNSP’s distribution system), and therefore, requiring separate branding. This is the case, even though DNSPs are delivering a support-service, where in the case of emergency support, would involve the re-prioritisation of resources dedicated for its network to assist a requesting DNSP. It would achieve no useful purpose to treat the DNSP as an affiliate of itself when providing such assistance, involving separate or no branding. The costs and inconvenience of having separately branded apparel, plant and materials and vehicles in these circumstances would not deliver any benefit.
- **Markets of DNSPs –** In addition, the guidelines would place unnecessary obstacles on DNSPs competing with each other. Should regulatory frameworks evolve for example to, facilitate contestable network services associated with say, embedded generators, similar to the way contestable transmission connection services are provided, the guidelines should not impose restrictions on the way a DNSP may bid for or provide, such contestable network services.

Accordingly, we recommend that the AER amend the definition of “other distribution services” to carve out the above services – which are all services that only a DNSP can provide. This will ensure that the DNSP, insofar as it is performing its core regulatory functions in respect of its network, is kept whole.

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<sup>2</sup> Network services are defined under Chapter 10 of the NER as “*transmission service or distribution service* associated with the conveyance, and controlling the conveyance, of electricity through the *network*”. “*Network*” is defined as “the apparatus, equipment, plant and buildings used to convey, and control the conveyance of electricity to customers (whether wholesale or retail) excluding any *connection assets*. In relation a *Network Service Provider*, a *network* owned, operated or controlled by that *Network Service Provider*.”

**Proposed amendment to definition of “other distribution service”**

**other distribution services** means **distribution services** other than:

- a) **direct control services**;
- b) **network services**;
- c) **connection services**; or
- d) any of the services referred to in clause 3.1(d).

[**Note:** this includes all other **negotiated distribution services** and **distribution services** that are not classified.]

For completeness, the proposed amendments to “other distribution services” will not impact the separating out of any end customer-facing distribution services. For example, metering (to the extent such service is not a direct control service) will remain as an “other distribution services” as it is a unclassified distribution service.

***The restrictions on branding and cross-promotion is likely to lead to customer confusion and unnecessary costs***

AusNet Services understands, and accepts, the concerns with cross-branding or promotion in connection with electricity related services provided by a DNSP or an ‘affiliated entity’ that are ‘ring fenced’ from other services provided by a DNSP.

As the ring fencing requirements are imposed on the DNSP, it is the DNSP (and ultimately customers of direct control services) who will bear the burden and costs of compliance with these unproductive consequences, not its affiliated entities.

Specifically, the DNSP would have to develop new and distinct branding, including a different website, contact details and customer communication materials, policies and procedures just for its direct control services. Other, core regulated, distribution services, such as requests by customers for network modifications, negotiated embedded generator or load network augmentation/connection requests, and the services permitted by section 3.1(d) could not share this brand or common communication channels, such as websites and mail-outs.

This is likely to give rise to confusion for retail or end-user customers, who will need to be directed to a new brand and website to obtain information about direct control services and other standard materials will need to be changed, including information on retail bills pointing to, on its face, a newly branded DNSP. The costs would also be borne by those customers.

This issue is further compounded by the inherent difficulty in trying to identify a precise demarcation between direct control services and other, core, regulated distribution services, and those services permitted by clause 3.1(d).

For example, would a free service of an outage map or outage updates be “direct control services” or “other distribution services”? On one view, as they are not directly attributed to a tariff, they might be characterized as an “other distribution service”. In which case, compliance with the version of clause 4.2.3 proposed in the Exposure Draft would result in a domestic customer having to go to a website or other communication channel to find out about outage and restoration times that is separate to the website, and is separately branded, to the DNSP details that are included, in for example, the bill from its retailer.

In addition, that bill or other communication from the direct control service branded business of the DNSP could not provide any information, including contact information about the other, core, regulated services provided by the DNSP or those specified in clause 3.1(d) – as that would constitute cross promotion. We believe, this is one of a myriad of absurd and unintended

outcomes that could result from the currently proposed drafting, once the DNSPs commence try to, precisely, categorise all of their, essential (including free) service offerings to customers.

The impracticalities of a DNSP branding “direct control services” separately to “other distribution services” which only a DNSP can provide are explored below.

**Box 2: Case study - Examples of changes which AusNet Services would need to implement to give effect to the cross- branding and promotion restrictions in the Exposure Draft**

In the case of AusNet Services, which is a corporate wide brand, the requirements in clause 4.2.3 would require a separate, new brand for purely direct control services provided by the DNSP. The remaining information about AusNet Services’ other distribution services, such as, network and connection services, must avoid any potential inference that AusNet Services’ (albeit under a new brand) also provides direct control services.

In our view, it impossible for us to prevent that inference from being drawn. As noted above, the provision of network services, connection services as well as facilities access, are all services inextricably associated with the same geographic network which is used by the DNSP to provide direct control services. That is why only the DNSP can provide such services.

Similarly, for attendances in the field, we will need to change the logos on our vehicles and clothing depending on the category of distribution service being provided. This will lead to unnecessary and costly duplication of branding collateral. For example, if the same team of network engineers is inspecting distribution lines in an area, as it is inspecting a nearby connection asset, this guideline would require that same team to drive different branded vehicles and wear different branded clothing – therefore involving two trips instead of one. In our view, white labelling of vehicles, clothing and company IDs is not an answer in the line of business which we do, where authorised access to electricity infrastructure is required and safety issues are paramount.

The same observations apply with respect to assistance, as permitted with under clause 3.1(d)(v). In an emergency the responsiveness and effectiveness of assistance could be adversely impacted by for example, a field officer having to return to a depot to pick up a white-labelled vehicle and/or change into different PPE. In a more extreme example, a DNSP may not be able to use the equipment necessary to arrest the emergency, as for example, the necessary vehicle or requirement has its branding for direct control services branding, and therefore, it cannot be used at all to assist.

The above examples make clear that would not be at all practical to separate out network-specific services which only the DNSP, as the owner, operator and controller of the network, can provide.

Accordingly, we submit that it is necessary that “other distribution services” must be amended to avoid a DNSP having to meaninglessly re-brand and separate other core-regulatory services from direct control services.

In addition, we also propose minor amendments to clause 4.2.3 to provide greater clarity around the situations when separate branding is required, linking this provision back to the substantive separation requirements contained in other sections – that is the separating out direct control services from other distribution services and/or other electricity service (rather than, *any* services, at large). This will ensure that, for example, in AusNet Services’ case, the DNSP would not have to be separately branded to its sister gas and transmission businesses (which, for us would be treated as affiliate entities).

**Proposed amendment to clause 4.3.2**

A DNSP:

- (a) must use independent and separate branding for its **direct control services from**
  - † the branding that it **or an affiliated entity** uses for ~~its~~ **other distribution services** and / or **other electricity services**.‡

ii — ~~the branding of an affiliated entity;~~

such that a reasonable person would not infer from the branding that the **DNSP** and the **affiliated entity** are related **in connection with the provision of**, or that the DNSP is providing both **direct control services** and, ~~services that are not direct control services other distribution services and/or electricity services.~~

- (b) must not advertise or promote its **direct control services** and its services that are ~~not other distribution services and/or electricity services~~ **direct control services** together (including by way of cross-advertisement or cross-promotion).
- (c) must not advertise or promote **other distribution services and/or electricity services** ~~services~~ provided by an **affiliated entity**.

*There are a number of other aspects of the Exposure Draft that are not reasonable and which we consider should be amended*

**1) Commencement of the guideline and reporting obligations**

Clause 1.1.2 of the Exposure Draft provides that it commences on 1 December 2016. Some obligations are expressed stated as having a later commencement date – specifically DNSPs must ensure full compliance of clauses 3.1 and 4.2 by no later than 1 January 2018 (clause 7.1).

We interpret then that the Exposure Draft requires compliance with all other requirements by 1 December 2016. This would require DNSPs to establish new staff protocols and procedures, conduct training and implement compliance and monitoring systems to be in a position to comply with the guideline. It could not be reasonably expected that a DNSP can achieve all of the preparatory work to comply in one month.

In addition, this means that, for Victorian DNSPs which have a regulatory year ending 30 December, that it must, by virtue of clause 6.2.2(b), be in a position to report on its compliance or otherwise from 1 January 2017 for a first reporting date on 30 April 2017. That is, it has one month to get into compliance with clauses 3.2, 4.1, 4.3-4.4.

In our view, this is not a realistic timeframe for full compliance, particularly given that a final guideline is yet to be issue.

We note that under clause 11.86.8 of the NER, the AER must publish Distribution Ring-Fencing Guidelines by 1 December 2016. The requirement to *publish* does not require that the guideline *commence* from that same date. It merely means that the guideline is published on the AER's website. It is usual for new instruments, following their finalization, to provide appropriate lead time to enable affected parties to prepare for the new regime.

Accordingly, a more appropriate commencement date would be 30 April 2017. This would mean that:

- all DNSPs have four months to, at a minimum, bring themselves into compliance with clause 3.2, 4.1, 4.3-4.4; and
- for Victorian DNSPs, the first compliance report will be due on 30 April 2018 representing a full year from implementation.<sup>3</sup>

**Proposed amendment to delay the commencement date**

**existing service** means a type of service that the **DNSP** was providing on **30 April 2017** ~~1-December~~

<sup>3</sup> For DNSPs with regulatory years ending 30 June, the above amendments will not result in a reporting change, since its first compliance report is not due until 30 September 2017 in respect of its new regulatory year starting 1 July 2017.

2016.

### 1.1.2 Commencement

This Guideline commences on 30 April 2017 ~~1-December-2016~~.

7.3 Subject to clause 7.4, the **transitional guidelines** (referred to in clause 11.14.5 of the NER) in force in the **participating jurisdictions** are revoked on 30 April 2017 ~~1-December-2016~~.

## 2) Expand clause 3.1(d)(v) in accordance with the regulatory framework for provision of services to other DNSPs

Clause 3.1(d)(v) provides that a DNSP is not prevented from “providing assistance to another DNSP in response to an event (such as an emergency) that is beyond the other DNSP’s reasonable control”.

DNSPs typically provide a broader set of support services than emergency assistance. For example, in Victoria, it is a condition of DNSPs’ electricity distribution licenses<sup>4</sup> that the licensee provides assistance to the other DNSP at the request of that DNSP. This includes offers to provide services to facilitate the distribution of electricity by the other DNSP and to allow the distributor to use the licensee’s assets within the licensee’s distribution area.

The provision of these services is not limited by any requirement that the request must arise only from circumstances beyond that other DNSP’s control. Therefore, we consider that clause 3.1(d)(v) needs to be amended to pick up any other services which are required to be offered to another DNSP by a law or regulation of a participating jurisdiction.

### Proposed amendment to expand scope of clause 3.1(d)(v)

This clause 3.1 does not prevent a **DNSP**: ...

v. otherwise providing assistance to another **DNSP** in response to an event (such as an emergency) that is beyond the other **DNSP**’s reasonable control **or as required by any law or regulatory requirement of a participating jurisdiction**;

## 3) Clarifying the intended operation of clause 4.1

Some aspects of clause 4.1(b) are unclear and ambiguous. We suggest that the AER give further consideration to developing a more simply articulated obligation, which is capable of being applied by DNSPs and easily understood by all stakeholders. This may include amending aspects of the provision to address any ambiguity, or otherwise deleting such aspects which do not provide any meaningful benefit.

In particular:

- With respect to subclause (b)(i), we do not clearly understand the intended meaning of the phrase, “...whether to itself”, or what harm that phrase purports to address.
- With respect to subclause (b)(i) and (ii), we recommend that the phrase “other party” be replaced with the expression “other legal person” or words of similar intent or meaning, that would avoid any misunderstanding that those words capture an “affiliated entity” that is not a separate legal person to the DNSP.

We also submit that for the reasons explained above, a DNSP should not be treated as an affiliated entity of itself in connection with the other identified distribution services which we have recommended be excluded from that definition.

<sup>4</sup> SPI Electricity Pty Ltd, Electricity Distribution Licence, clause 9.

Finally, we believe the intent of 4.1(c) is to provide a non-exhaustive list of the ways a DNSP must behave to ensure it does not engage in the discrimination prohibited by clause 4.1(b). Consequently, we submit that clause 4.1(c) be amended as follows (or otherwise, to achieve the same effect).

**Proposed amendment to delay the commencement date**

- (c) Without limiting its scope, clause 4.1(b) requires a **DNSP** to, in connection with the provision of:
- i. **direct control services** by the **DNSP** (whether to itself or to any other legal person); or
  - ii. **other distribution services** or **other electricity services** by any other legal person:
- ...

We submit that this amendment would avoid any confusion, or arguments, as to whether clause 4.1(c) expands the scope of clause 4.1(b), rather than providing meaningful, non-exhaustive examples of the non-discriminatory behaviour that a DNSP must exhibit to ensure it does not engage in the discrimination prohibited by clause 4.1(b).

**4) Amending the service provider restraint in clause 4.4**

The commercial reality is that no party has complete control over any other contracting party. That is, a DNSP cannot, without qualification, ensure that a provider does not engage in any other conduct. There are also commercial considerations as to the amount of monetary and other resources that a DNSP should have to expend to attempt to achieve such an outcome.

A more appropriate, and practical approach, would be to require an appropriate contractual commitment from the other party and an obligation that the DNSP does not encourage or incentivise, either directly or indirectly, that the provider of services engages in conduct contrary to clause 4.3.2. Accordingly, AusNet Services adopts comments and mark-ups provided by the ENA in this respect.

**Proposed amendment to expand scope of clause 4.4**

If a ~~A~~ **DNSP** ~~must ensure that~~ engages any provider of services in accordance with clause 4.3.3, it must, in relation to the provision of those services:

- (a) ensure that the contract of engagement of those services requires the provider of services to observe the provisions of clause 4.3.2 as if it had the obligations of the DNSP under clause 4.3.2; and
- (b) not encourage or incentivise, either directly or indirectly, the provider of services to ~~the DNSP~~ **does not** engage in conduct which, if the **DNSP** engaged in the conduct itself, would be contrary to the **DNSP's** obligations under clause 4.3.2 of this **Guideline**.

**5) Amending the waiver process in clause 5**

We also recommend changes to the waiver process. In particular:

- The presumption that the AER will refuse to grant the waiver if it has not made a further decision by the expiry date should be reversed. We suggest adopting a similar procedure to that in the cost pass-through rules such that if the AER has not made a further decision by the expiry date, the AER is deemed to have made a decision to grant the waiver.
- Consistent with best-practice regulation, we consider that any decision made by the AER granting or refusing a waiver, and which therefore, impacts the rights of the DNSP, must be accompanied by reasons. Therefore, we consider that clause 5.4(i) should be amended to replace the word “may” with “must”.



- The timeframes for compliance following any revocation of waiver should be extended. We consider that 40 days is too short a period, and that the period should be 90 days or any shorter period as agreed by the DNSP.

We would be happy to meet with AER staff to further discuss this letter. If you have any queries in relation to this submission, please contact Kelvin Gebert, our Regulatory Frameworks Manager.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Tom Hallam', written in a cursive style.

Tom Hallam  
**General Manager – Regulation and Network Strategy**