



Ethnic Communities' Council of NSW Inc.

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10 May 2013

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

Dear Mr Pattas,

RE: Better Regulation: Distribution and Transmission Confidentiality Guidelines

This submission is made on behalf of the Ethnic Communities Council of NSW (ECC) and the Federation of Ethnic Communities Councils of Australia. We welcome the opportunity to comment on the Distribution and Transmission Confidentiality Guidelines.

Since its formation 36 years ago the ECC has been the peak body for culturally and linguistically diverse (CALD) community members and representative organisations in NSW. The ECC's main activities are advocacy, education and community development. It is a member of the Federation of Ethnic Communities Councils of Australia (FECCA).

Background

The Australian Energy Market Commission (AEMC) made a number of important changes to the rules governing electricity distribution pricing regulation in November 2012. As a result of this, the Australian Energy Regulator (AER) is developing a series of guidelines about the new regulatory framework. These are to be finalised by November 2013.

A key aspect of the new regulatory framework is new Distribution & Transmission Confidentiality Guidelines (the confidentiality guidelines). The Confidentiality Guidelines will be binding on the AER and network service providers (NSPs). The confidentiality guidelines must specify the manner in which network service providers (NSPs) may make confidentiality claims.

In March 2013, the AER published an issues paper on the Confidentiality Guidelines. This submission is made in response to that issues paper.

General Points

- Network service providers are natural monopolies and have significant market power in almost every service that they provide. As a consequence, detailed operational and capital costs are not as inherently commercially sensitive as they would be in a competitive market.
- Customers are at a significant information disadvantage in the pricing review process. Exacerbating this information disadvantage, the experience from previous determinations has been that claims of confidentiality by the NSPs over large

amounts of information materially reduced customers' ability to scrutinise and comment effectively on NSP pricing proposals.

- The more that AER pricing decisions are based on confidential information, the less confidence there will be in these pricing decisions. Therefore, in seeking to increase confidence in the pricing regime, the AER should move towards the greatest degree of disclosure possible.
- The AER should, in future determinations, place less weight on confidential information which, by its very nature, cannot be challenged by customers and leaves open questions about the basis of pricing decisions.
- The timing of information disclosure in many cases is as important as the content. The AER should require early and full disclosure of relevant information, making clear that less weight may be placed on information that is released late in the regulatory process.

Question 1: *Manner in which NSPs may make confidentiality claims*

What are stakeholders' views on requiring NSPs to make confidentiality claims using the template in Attachment 1 of the issues paper?

- We support confidentiality claims being made using a standardised approach such as that shown in Attachment 1 of the Issues Paper.
- However, the onus should be on the NSP to make the full case for non-disclosure and, as such, Attachment 1 should be strengthened to summarise:
 - the nature of the information to be kept confidential; and
 - the materiality of the information to the pricing decision.
- The default position should be that the public benefit of disclosure should be assumed to outweigh the detriment disclosure would cause to the NSP, unless a material case has been made to the contrary by the NSP.
- For each claim of confidentiality, the NSPs should be required to describe what detriment to their business would be caused by disclosure, to identify the potential detriment of withholding the information from consumers and to demonstrate to the AER why case for non-disclosure outweighs the detriment of disclosure (third column in Attachment 1 of Issues Paper). The initial onus to present the case for this public benefits test must rest with the NSP as they are the party in possession of the information and an understanding of its implications. The appropriate role for the AER is to then adjudicate on the merits of each confidentiality claim on the basis of a fully justified and supported claim from the NSP.
- The Guidelines should include key milestones and a timeline for assessing confidentiality claims once a claim is made in conformance with Attachment 1.

Question 2: *Categories or lists of confidential information*

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

- Categorisation of confidentiality claims is useful for all parties to understand the general nature of a confidentiality claim. However, categories should be specific and not be a substitute for a fully justified confidentiality claim in each instance (see response to Question 1).

Question 3: *Categories or lists of confidential information*

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

- Some categories of information the AER is considering are very broadly defined in the Issues Paper. More specific definitions and sub-categories may be needed.
- Of particular concern is the broad definition of 'Market Sensitive Cost Inputs'. It should not be acceptable for all supplier-related information to be kept confidential because the utility has chosen to make confidentiality a general condition of its tendering and contracting approach. Given the natural monopoly position of NSPs, the 'market sensitivity' of many NSP cost inputs is questionable. The specific nature of the information should always be the primary test of whether to disclose or not disclose information. The Guidelines should make clear to the NSPs that their general conditions of tendering, contracting, sub-contracting, outsourcing and other commercial arrangements may need revision with respect to confidentiality as a result.

Question 4: Categories or lists of confidential information

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

- With respect to the disclosure of financial models (4.2.1 item 3), inherent in this should also be that the full set of underlying assumptions on which the models are based are also disclosed (eg capital costs, asset lives, failure rates, maintenance cycles, labour productivity, overhead assumptions etc).

Question 5: Website notices

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?

- The proportion of information over which NSPs have claimed confidentiality, as measured in pages, is unlikely to be a particularly useful or sufficient measure of the degree of non-disclosure.
- Of much greater relevance is the materiality of the information that is not disclosed. Attachment 2 would benefit from an additional column requiring NSPs to address whether consumers were engaged on the materiality of the confidential information.

Question 6: Blanket confidentiality claims

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

- We support the AER view that blanket confidentiality claims are generally unwarranted. As a principle, confidentiality claims should be restricted to only those portions of documents which contain genuinely confidential information.
- That NSPs have agreed to keep whole documents confidential with third parties (eg subsidiaries, related parties, suppliers, consultants or others), should not be a sufficient basis for blanket confidentiality claims. The specific nature of the information should always be the primary test of whether to disclose or not disclose information. The Guidelines should make clear to the NSPs that their general conditions of tendering, contracting, sub-contracting, outsourcing and other commercial arrangements may need revision with respect to confidentiality as a result.

Question 7: Third party documents

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

- We support the AER view that third party claims of confidentiality (eg consultants' and auditors' reports) should be treated in the same way as other blanket confidentiality claims, placing the onus on the NSP to verify and substantiate a claim of confidentiality. The specific nature of the information should always be the primary test of whether to disclose or not disclose information. The Guidelines should make clear to the NSPs that their general conditions of engaging third parties may need revision with respect to confidentiality as a result.

Question 8: Scope and coverage

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?

- We support applying the Guidelines more broadly to regulatory information notices and broader AER processes.

Question 9: Compliance costs

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

- The costs of compliance do not appear material, particularly given the financial ramifications of some of the information in question.

Question 10: Limited release of confidential information

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

- Using confidentiality undertakings to allow disclosure or partial disclosure of confidential information to certain stakeholders should always be viewed as a second-best solution to full disclosure. Confidentiality undertakings can severely constrain any subsequent submissions made by consumers to the AER and, in the case of consumer groups, may unreasonably restrict them from discussing matters with the very constituents who are funding their work.

If you have any questions about this submission, please do not hesitate to contact Helen Scott on 02 9319 0288 or 0425 833 892.

Sincerely yours,



Mark Franklin
Executive Officer
Ethnic Communities' Council of NSW Inc.