

1 May 2007

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Australian Energy Regulator  
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Dear Steve & Michelle,

## FIRST PROPOSED GUIDELINES

The AER has issued the first proposed guidelines and accompanying explanatory statements for the following guidelines associated with revenue regulation for electricity transmission businesses.

1. Post-tax revenue model
2. Roll-forward model
3. Efficiency benefit sharing scheme
4. Service Target Performance incentive scheme
5. Submission guidelines
6. Cost allocation guidelines

All of these first proposed guidelines were required by the NER to be issued by the AER by 1 January 2007 and are required to be finalised by 30 September 2007. These guidelines are important documents for all electricity transmission businesses, most particularly because the NER requires transmission businesses to comply with the guidelines.

While ETNOF appreciates the short amount of time the AER had to prepare these first proposed guidelines, ETNOF considers that substantial revisions are required to many of the guidelines in order for them to perform the role ETNOF understands was intended by the Rules – namely to enhance the certainty and efficiency of the process for a revenue determination.

A submission on each of the guidelines has been prepared highlighting ETNOF's concerns with the first proposed guidelines. ETNOF businesses would be happy to provide additional information and discuss our material concerns with the guidelines with AER staff to facilitate an effective outcome.

However, prior to finalising the guidelines, the ETNOF businesses request the AER to conduct a further round of consultation, at a minimum with the businesses subject to revenue determinations, if not more broadly should procedural fairness require it. As our view is that substantial revisions are required to the guidelines ETNOF considers further consultation on the guidelines is essential to producing documents that genuinely enhance the process of revenue determinations.

I would be happy to discuss this matter further with you in person and look forward to your agreement to additional consultation with transmission businesses on this important aspect of revenue determinations.

Yours sincerely,



Gordon Jardine  
**CHAIRMAN**

**ELECTRICITY TRANSMISSION NETWORK** owners

# Submission Guidelines

Submission in Response

1 May 2007



## Submission Guidelines

### Response to AER's First Proposed Guidelines

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## 1. Introduction and Overview

This submission is made by the Electricity Transmission Network Owners Forum, which comprises ElectraNet Pty Limited, Powerlink Queensland, SP AusNet, Transend Networks Pty Ltd and TransGrid ("ETNOF"). Collectively, this group own and operate over 40,000 km of high voltage transmission lines and have assets in service with a current regulatory value in excess of \$9.1 billion. ETNOF welcomes the opportunity to respond to the Australian Energy Regulator's ("AER") First Proposed Electricity Transmission Network Service Providers Submission Guidelines ("Submission Guidelines").<sup>1</sup> Several responses are also made to the accompanying Explanatory Statement and Issues Paper ("Issues Paper").<sup>2</sup>

While ETNOF appreciates the short timeframe within which the AER was required to develop the Submission Guidelines, ETNOF considers that substantial revisions are required to permit the Guidelines to perform the role intended by the Rules.

A fundamental element of the new transmission regulatory regime is that TNSPs propose the elements of the new revenue cap (the Revenue Proposal), and the AER is required to assess whether that Proposal meets the requirements of the National Electricity Rules ("Rules"). One of the key objectives of this regime, in turn, was to provide TNSPs with the incentive to submit a fulsome, well-articulated and compliant proposal (including that expenditure forecasts reasonably reflect the costs of a prudent operator), and so improve the efficiency of the regulatory process.

The Submission Guidelines are expected to play a key role in this new regime, namely to provide Transmission Network Service Providers ("TNSPs") with greater certainty as to what the AER would require as part of its Revenue Proposal in order to maximise the opportunity for TNSPs to submit a proposal that would meet the requirements of the Rules. ETNOF considers that substantial revision to the Submission Guidelines are required to meet this objective and thereby enhance the regulatory process.

As a consequence, ETNOF strongly considers that a second round of consultation on the Submission Guidelines should be undertaken. ETNOF notes that there is substantial time still available between the receipt of these comments and the required date for finalising the Guidelines, which provides the opportunity for the AER to issue a second draft that takes account of submissions received on this draft. Moreover, ETNOF is willing to assist the AER to address the matters raised in this submission, or to provide other assistance the AER considers would aid in bringing this process to a successful completion.

ETNOF's principle concern with the Submission Guidelines is that they either provide insufficient guidance about the AER's views and requirements on important matters, or do not demonstrate what the AER considers are the merits or relevance of requirements in the context of the new regulatory regime for transmission revenues. In particular:

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<sup>1</sup> AER, 2007, First Proposed Electricity Transmission Network Service Providers Submission Guidelines, Version No: 01, January 2007.

<sup>2</sup> AER, 2007, First Proposed Electricity Transmission Network Service Providers Submission Guidelines Explanatory Statement and Issues Paper, January 2007.

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- *Information requirements* – the Guidelines leave many information requirements to be decided by the AER at a future time (and presumably after the Revenue Proposal has been submitted);
- *Audit of forecasts* – the Guidelines require TNSPs to have their expenditure forecasts audited. The scope, role and purpose of the audit has not been explained adequately, including its role in supporting the application of the criteria for expenditure forecasts;
- *Information on past capital expenditure* – the Guidelines contemplate the TNSPs providing substantial information on past capital expenditure, which is excessive under the new *ex ante* regime; and
- *Guidance on what the Rules require* – little guidance is provided on what the AER considers is required for a Revenue Proposal to meet the substantive requirements of Chapter 6A of the Rules. ETNOF considers that the efficiency of the regime would be improved substantially if the Submission Guidelines provided examples of what the AER considers would satisfy the various clauses in Chapter 6A. TNSPs would then have the option of adopting (equivalent to the 'safe harbour' provisions that appear in the tax law) these as part of their Revenue Proposal.

These matters are discussed in more detail in section 2 of this submission.

ETNOF also has a number of further 'high-level principle' concerns with the Submission Guidelines, including:

- *Lack of clarity of obligations created* – the Submission Guidelines do not distinguish clearly when the AER intends to create new obligations from the other text. This provides TNSPs with little certainty about what they are required by the Rules to comply with. A drafting convention is proposed to address this issue.
- *Inappropriate extension of requirements on Directors* – the Submission Guidelines propose that Directors certify the reasonableness of all aspects of a TNSP's forecasts, which is a substantial extension to the requirements of the Rules. ETNOF considers that this extension may be unlawful and will impose a substantial additional burden on TNSPs with no apparent offsetting benefit.
- *Insufficient flexibility in the Templates* – there is uncertainty as to which headings in the templates are intended to be 'mandatory' and which are intended to be 'discretionary'. This issue needs to be clarified in a manner that permits the different drivers of cost (i.e. differences in reliability standards) across TNSPs to be accommodated. It is proposed this be addressed through 'safe-harbour' provisions. In addition, directions and detailed definitions in the Templates should be transferred to the Submission Guidelines.
- *Confusing requirements about service levels* – the Submission Guidelines' requirements with respect to service levels are unclear. The AER needs to be clear about the service-related information to be provided as part of a Revenue Proposal.
- *Inadequate treatment of confidential information* – the Submission Guidelines deem that large tracts of information submitted as part of a Revenue Proposal be non-confidential. These requirements are out of step with the equivalent information disclosure provisions in the Rules, may require that information about specific users be divulged, and do not recognise matters that the Rules contemplate being kept confidential (namely the averaging period for the risk free rate). The Guidelines should specify a list of Revenue Proposal elements that are deemed to be non-confidential

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(after a public interest test has been done), and then permit a TNSP to make a claim for confidentiality of other material (again, to be subject to a public interest test).

These matters are described in more detail in section 3 of this submission. In addition, ETNOF has comments on numerous matters of detail on the contents of the Submission Guidelines, which are described in section 4.

## 2. Degree of guidance about what would comply with the Rules

### 2.1 *Intended role of the Submission Guidelines*

ETNOF's principal concern with the Submission Guidelines is that they provide insufficient detail as to what the AER would determine to comply with the Rules, and as such would fail to perform the task intended under the new regulatory regime for transmission revenues and reduce the likelihood that a TNSP could submit a compliant Revenue Proposal.

A fundamental feature of the new regulatory regime for transmission revenues is that TNSPs are provided with the opportunity to submit a Revenue Proposal and the AER is then required to assess whether that proposal meets the relevant criteria, as set out in the Rules. Importantly, the AER's role is not to determine what it considers would best meet those criteria, but rather to focus on the TNSP's proposal and to test the analysis, information and other material submitted therein. For example, in the case of expenditure forecasts, the AER is required to assess whether the TNSP's proposal reasonably reflects the costs that a prudent operator would incur.

A key objective of the new regulatory regime is to improve the efficiency of the regulatory process (and outcome) in the context where TNSPs are the experts at running their respective businesses and where regulatory failure may carry with it substantial adverse consequences. In particular, by providing TNSPs with the opportunity to make a proposal and have this proposal assessed by the AER (rather than merely treated as one information point), TNSPs would have a strong incentive to make as fulsome, well-articulated and compliant a Revenue Proposal as practicable, as noted by the AEMC as follows:<sup>3</sup>

*The Rule continues to provide the TNSPs with the opportunity of presenting a fully developed and supported Revenue Proposal to the AER, including in relation to the purposes for which the forecast expenditure is required and the assumptions and analysis on which the forecasts are based.*

*The requirement that TNSPs submit forecasts that comply with the AER's submission guidelines and cost allocation methodology will ensure that they provide detailed submissions in support of their forecasts, reducing substantially the risks of regulatory error associated with the regulator's information disadvantage and providing the basis for informed and meaningful participation in the decision-making process by other stakeholders. The decision-making process set out in the Revenue Rule will also reduce the incentive for TNSPs to submit forecasts which represent ambit claims. Such exaggerated forecasts would be likely to fail to satisfy the decision criteria to be applied by the AER and therefore to run the risk of being rejected and replaced by the AER with a less favourable forecast.*

This statement also makes clear the important role that the Submission Guidelines perform. For TNSPs to provide a Revenue Proposal that can be determined to meet the

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<sup>3</sup> Australian Energy Market Commission, 2006, Determination – Rule as Made, November, pp.52-53.

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requirements of the Rules, guidance is required as to what would be determined to meet the Rules. That is, for the new regime to work as intended, there is an imperative for the AER to provide guidance upfront as to what would be permitted or required by the Rules. Specifically in relation the Submission Guidelines, the AEMC also commented as follows:<sup>4</sup>

*The Commission has maintained the view that the preparation of submission guidelines by the AER will assist in improving the clarity of information requirements at the outset of the revenue cap determination process, resulting in a more efficient and effective regulatory regime.*

ETNOF also notes that the AEMC acknowledged that TNSPs would face the practical hurdle of having to provide the AER with sufficient information for it to be satisfied that a Revenue Proposal meets the requirements of the Rules.<sup>5</sup>

*The Commission has not thought it appropriate for the Rules to impose a legal burden of proof in the manner that is commonly understood. The advice of Williams SC and Higgins makes it clear that no "burden of proof" arises. Of course the TNSP faces a practical hurdle that if it fails to provide sufficient information to enable the AER to be "satisfied" as to whether the proposal meets the decision rules its proposal will be rejected. [p.52]*

It would be unreasonable in the extreme – and counter to the intent of the new regulatory regime – if a TNSP was adjudged to have provided insufficient information in its Revenue Proposal as a result of the Submission Guidelines providing insufficient guidance.

A second important feature of the new regulatory regime is the use of an *ex ante* regime for capital expenditure, which is a change from the *ex post* regime that applied previously (or, more specifically, prior to the new Statement of Regulatory Principles). The analysis required of capital expenditure at a revenue review between an *ex ante* and *ex post* regime differ markedly. Notwithstanding this fundamental shift, however, neither the Submission Guidelines, Templates nor accompanying Explanatory and Issues Paper show little recognition of this change in the regime and the consequences for information collection.

Against that background, ETNOF considers that the Submission Guidelines are vague or noncommittal in many areas about the information to be presented as part of a Revenue Proposal. The Guidelines contemplate audits of a TNSPs' forecasts, which ETNOF considers has not been subject to a proper analysis of its merits. In addition, the Guidelines contemplate substantial information being provided about historical capital expenditure, which does not distinguish between the requirements for an *ex ante* and *ex post* review and is much more than required under an *ex ante* regime. Moreover, the Guidelines provide little guidance on what the AER considers would be required for the various elements of a Revenue Proposal to meet the substantive requirements in the Rules. ETNOF's views on these matters are set out in more detail below.

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<sup>4</sup> Australian Energy Market Commission, 2006, Determination – Rule as Made, November, p.114.

<sup>5</sup> Australian Energy Market Commission, 2006, Determination – Rule as Made, November, p.52.

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#### 2.2 *Clarity of requirements*

The Submission Guidelines include a number of clauses that describe material or actions on the part of TNSPs that the AER may or may not demand, albeit with little guidance as to when such requirements may be imposed. By way of example, in chapter 2 alone, the Submission Guidelines contemplate that:

- the TNSPs be required to give the AER full and detailed documentation of accounting policies if so requested by the AER (clause 2.2(a));
- the AER may require ad hoc information to be provided (clause 2.6); and
- the AER may require that an audit be performed (clause 2.8(b)).

ETNOF questions whether the AER has the ability through the power it has been granted to issue binding guidelines to provide itself with the ability to make a decision on a matter in the future. More importantly, however, merely setting out the positions the AER may or may not reach provides little in the way of certainty to TNSPs about what is required.

ETNOF considers that the clauses in the Submission Guideline that provide information or actions the AER may require be deleted, and be replaced either with a definitive requirement (if the benefits of the additional requirement exceed the costs imposed) or be excluded from the Guidelines. Moreover, these requirements should only relate to information that the AER reasonably requires to fulfil its function, which is to assess whether a TNSP's Revenue Proposal complies with the criteria in the Rules. The AER has ample power to gain relevant information should it require it at a later date, or to perform a different regulatory function, through other parts of the regulatory regime (namely the NEL and NER). Therefore removing mention of matters from the Guidelines will not affect the AER's ability to get information where this is required and passes the relevant statutory tests.

#### 2.3 *Requirement for an audit of forecasts*

Turning to what the Submission Guidelines should contain, ETNOF is concerned that the requirement for TNSPs to have their expenditure forecasts subject to an 'audit' has not been subject to a full analysis of its merits.

The requirement for TNSPs to obtain an 'audit' on their expenditure forecasts will impose a dollar cost on TNSPs. In addition, an audit requirement will impose a substantial time cost, as a period would need to be allowed for the audit to be undertaken after the expenditure forecasts have been finalised, but prior to the Revenue Proposal being submitted (which, as the AER should understand, is when time – and particularly that of senior staff who are involved in preparing the Proposal – is at a premium).

Against this, ETNOF is not convinced that the requirement for an audit is likely to materially improve the chances that a TNSP's Revenue Proposal would be found to satisfy the requirements of the Rules, or to materially reduce the amount of analysis the AER would subsequently undertake or commission on the TNSP's Proposal. By its nature, the scope of the audit on expenditure forecasts would be limited to assessing the *process* that was adopted by the TNSP when deriving its forecasts and whether the TNSP has correctly described how the assumptions made have been translated into the forecasts. Accordingly, the AER would still need to rely upon technical advisers for assessing the veracity of the *assumptions* and (where relevant) *forecasting methodologies* the TNSPs adopted, which is likely to be the more substantive of the tasks. Indeed, there is a likelihood that the AER's technical advisers would consider it necessary to understand



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precisely how the forecasts were developed (and whether the TNSP's description is accurate), and hence duplicate part or all of the task that was intended for the auditors.

ETNOF is not against a requirement for TNSPs to have their forecasts subject to independent verification prior to submitting a Revenue Proposal, or during the AER's assessment of the Revenue Proposal, provided the benefits outweigh the costs. However, a requirement for independent verification of a Revenue Proposal – whether that be an audit subject to some other form of verification – to generate benefits in excess of the costs, the AER would need to demonstrate that such a requirement would materially increase the likelihood that the AER would accept a Revenue Proposal and/or materially reduce any subsequent analysis the AER commissions or performs. This condition would only be met if the AER made a commitment in the Submission Guidelines to adopt, or to place substantial weight upon, the conclusions of that independent verification. ETNOF considers that the question whether independent verification of expenditure forecasts should be required, the form and the timing of that verification, should be subject to further consultation.

Lastly, if the requirement for an audit or other type of independent verification process is to be retained, it is imperative for the scope and timing of this requirement to be set out clearly in the Submission Guidelines and not identified as something the AER may or may not impose. As well as imposing a cost, additional (and unexpected) requirements for independent verification (such as an audit) can have a substantial effect on the time it takes to prepare a Revenue Proposal, and hence need to be factored into a TNSP's planning for the revenue review from the outset.

#### **2.4 Information about expenditure forecasts – *ex ante* vs. *ex post***

As noted above, one of the important differences between the new regulatory regime and what had applied previously is how capital expenditure is treated. Under the previous regulatory regime (referred to as the *ex post* regime), TNSPs were shielded from the financial consequences of spending more or less than required provided the *ex post* prudence test could be satisfied. As a result, the ACCC undertook a detailed test of the prudence of past expenditure, but there was a less detailed analysis of future requirements. In contrast, under the new regulatory regime TNSPs are exposed to the benefits or costs of spending more or less than was forecast (subject to the operation of the contingent project regime). This provides TNSPs with an incentive to minimise their expenditure, and the capacity for the AER to test the prudence of past expenditure has been removed. However, TNSPs stand to make windfall gains or losses if expenditure forecasts prove to be incorrect, and so a greater analysis of those forecasts is justified.

However, ETNOF is concerned that the fundamentally different analysis required by the *ex ante* regime compared to the *ex post* regime has not been reflected in the Submission Guidelines or accompanying material. Rather, the Guidelines propose the continued provision of very detailed information about past capital expenditure, even though it is of little consequence to the revenue review as the Rules simply require actual past capital expenditure to be included in a TNSP's regulatory asset base. The requirement for detailed information to be provided imposes a cost on TNSPs that is unjustified. It also suggests that the AER may not have yet considered fully the requirements of the new regime.

ETNOF recommends that the requirement for information on past capital expenditure be subject to a thorough review by the AER, and subject to further consultation with interested parties. ETNOF accepts that there may be a need for past capital expenditure to be divided into asset classes that are relevant for calculating regulatory depreciation as required for the roll-forward model. Beyond that, the relevance of the information should be explained in terms of how it is required for the revenue review and justified (in light of

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the requirements of the Rules). ETNOF could not foresee how information on specific past capital expenditure projects could be justified in this regard except for those TNSPs that are yet to be subject to an ex post review, in which case it should be a transitional matter and the Guidelines should recognise it as such.

#### **2.5 Degree of 'guidance' provided on substantive issues**

ETNOF considers that an important role that the Submission Guidelines could perform is to provide proactive guidance about what the AER would accept for the various elements of a Revenue Proposal as complying with Chapter 6A. This has been missed in the current draft of the Guidelines. Such guidance will improve the efficiency of the regulatory process, as well as enhancing certainty for the TNSPs.

It is clear that the form of this guidance requires some thought. The fact that the Rules contemplate the TNSPs making a proposal on many matters means that a view from the AER of a single outcome that it would accept would be inappropriate, and is also likely to exceed the AER's powers under its guideline making powers. However, it would be possible – and appropriate – for the AER to provide examples of proposals that it considers would meet the requirements of the different elements of a Revenue Proposal. This guidance would be equivalent to the 'safe harbour' provisions that are common in the tax law. Examples of the matters upon which 'safe harbours' could be specified include:

- *regulatory depreciation* – while TNSPs may propose a range of depreciation methodologies, the Submission Guidelines could note that straight line depreciation would be accepted automatically;
- *expenditure headings or categories/classes* – it is recommended below that the 'mandatory headings' for the Templates be recast as 'safe harbour' headings or categories/classes, with one 'safe harbour' being to use the headings a TNSP used in its previous revenue cap review (see section 3.3);
- *self insurance requirements* – as discussed further below, the prescriptive requirements for a self insurance premium to be accepted could be more appropriately expressed as a 'safe harbour' provision;
- *demand forecasts* – the Guidelines could specify that the process and method for forecasting demand that is set out in clause 5.6.1 and Schedule 5.7 of the Rules would be accepted automatically;
- *debt risk premium* – a method of obtaining the debt risk premium from empirical observations could be specified, such as the use of the Bloomberg service; and
- *cost of corporate tax (tax asset value)* – the Submission Guidelines could specify that 'rolling forward' the asset value for taxation purposes (tax asset value) from what was used in the previous regulatory period (albeit using taxation depreciation etc) would be accepted automatically.

As noted above, while it is appropriate for the Guidelines to provide guidance, ETNOF considers that it would be inappropriate for the AER to prescribe tightly what it will and will not accept for elements of a Revenue Proposal where the Rules contemplate that TNSPs would make a proposal. Rather, ETNOF considers that 'safe harbour' provisions are an appropriate form for the prescriptive guidance that the Guidelines should contain. This reconciles the intention in the Rules for TNSPs to make a proposal with the desirability of creating certainty. Consistent with this, ETNOF considers the AER's prescriptive guidance

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on what is required for a self insurance premium to be accepted would be more appropriately restated as a 'safe harbour' provision.

### 3. Other high-level principle issues

#### 3.1 *Clarity of obligations created*

A number of clauses in the Submission Guidelines either:

- repeat the requirements for the various elements of a Revenue Proposal that are already set out clearly in the Rules; or
- repeat the prescriptive requirements for a Revenue Proposal that are already set out in Schedule 6A.1.

ETNOF emphasises that, despite their name, the Submission Guidelines will be binding on TNSPs with respect to their Revenue Proposals.<sup>6</sup> Given that the Submission Guidelines will be binding, the creation of certainty about the TNSP's legal obligations – and good regulatory practice – require the AER to identify clearly when it is intending to impose a new obligation from where it is intending only to add explanation around that requirement.

ETNOF notes that the outcome it seeks could be met by the AER's adoption of a drafting practice that separates and clearly identifies the clauses that are intended to create obligations. A device that could be used is to place the formal requirements in a box, clearly labelled as such. This would then distinguish the new obligations on TNSPs from where the AER is only adding explanatory statements, or setting out 'safe harbour' provisions for elements of the Revenue Proposal where relevant.

#### 3.2 *Extension of requirements on Directors*

The Rules require a TNSP's directors to certify the reasonableness of key assumptions underpinning the capital and operating expenditure forecasts.<sup>7</sup> This requirement in the Rules – while not costless in terms of the additional effort required for directors to gain the required level of assurance – is appropriate, given that it relates to strategic matters of the type that are normally considered by boards, rather than detailed implementation matters, which are normally delegated to the management.

The Submission Guidelines appear to propose that the requirements on directors be expanded considerably, namely to provide an assurance that all aspects of the forecasts of expenditure are reasonable. While the actual clause in the Guideline is ambiguous as to the AER's requirements,<sup>8</sup> the definition of a director's responsibility statement, reference to the sign-off on key assumptions as being only 'part of the Director's Responsibility Statement'<sup>9</sup> and example statement that is provided as Appendix B would imply a substantial increase in the matters for which directors would be required to provide formal sign-off.

ETNOF considers that the extension of the requirements on directors in this manner is both inappropriate and beyond the AER's powers. Requiring directors to sign-off on all aspects of the Revenue Proposal will increase substantially the time and effort required to prepare the proposal, with little apparent benefit to the efficiency of the overall process. In

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<sup>6</sup> NER, clauses 6A4.1(b)(2), 6A6.6(b)(1), 6A6.7(b)(1) and 6A10.1(c).

<sup>7</sup> NER, clauses S6A.1.1(5) and S6A.1.2(6).

<sup>8</sup> Submission Guidelines, clause 2.10(a), (b).

<sup>9</sup> Submission Guidelines, clauses 4.3.3(a)(5) and 4.3.4(a)(6).

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particular, ETNOF is not persuaded that the AER will derive sufficient comfort from the fact that a TNSP's directors have signed-off its Revenue Proposal to reduce the level of analysis it subsequently commissions or performs on the Revenue Proposal. The only way in which extending the director's responsibility statement could be found to provide a net benefit is for this future workload to be reduced in this way. In addition, ETNOF considers that the AER's requirement in this regard is likely to be beyond its power. The AER's powers with respect to the Submission Guidelines are limited to the matters out in clause 6A.10.2, none of which would justify this requirement.

#### **3.3 Degree of flexibility in, and role of, the templates**

A central part of the Submission Guidelines is a set of templates (in spreadsheet form) that TNSPs are required to complete and include with their Revenue Proposals. The most important component of the templates is information on a TNSP's expenditure forecasts. As such it is important that the requirements for completion of the templates accommodate differences across TNSPs, including (for example) the effect that different regulatory requirements for reliability have on the 'reasons' for capital expenditure.

The AER appears to intend to take account of the differences across the TNSPs by distinguishing between 'mandatory' and 'discretionary' headings; however, the Guidelines themselves are not clear as to what is intended to be mandatory and what is intended to be discretionary. It would be more appropriate for the guidance as to how expenditure should be categorised below the level of the headings and contents of the individual workbooks set out in Appendix A to the Guidelines to be defined in terms of a 'safe-harbour' headings. A TNSP would then have the option to adopt these headings, or justify a different choice. For capital expenditure, these 'headings' would include the breakdown of the reasons for expenditure and breakdowns by asset and input types. Further explanation of ETNOF's proposals with respect to 'safe harbour' provisions is set out in section 2.5. ETNOF also considers that a 'safe harbour' that should be included for expenditure headings is the set of headings the relevant TNSP used in its previous revenue cap review.

In addition, the templates themselves include a number of directions and detailed definitions which, given their placement in sheets in a spreadsheet, are not immediately apparent and transparent. ETNOF considers that any detailed definitions that are to be retained and the instructions for completing the templates should be included within the Guideline itself, and identified as obligations on TNSPs (and hence subject to scrutiny). The previous Post Tax Revenue Model – which included a spreadsheet model and accompanying set of instructions – is a good model to follow with respect to these expenditure templates.

ETNOF also notes that a number of the matters that are given effect in the templates are the subject of parallel consultations where final positions have not been reached and upon which ETNOF and its members have commented separately. These include the Efficiency Benefit Sharing Scheme and Performance Incentive Scheme. ETNOF expects that the Templates (and related areas in the Submission Guidelines) will be updated prior to being finalised to reflect the AER's final conclusions on those matters.

Lastly, ETNOF notes that TNSPs have, for some time now, commented that the previous Information Guidelines were not very well focussed on their principal objective – which is to inform revenue reviews – and that the new Information Guidelines have yet to be issued. It is imperative that the new Information Guidelines align with their objective and impose requirements that are consistent with the requirements of the Submission Guidelines. Failure to amend the Information Guidelines following these consultations and to align the different Guidelines will raise the costs to TNSPs of complying with those

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instruments, and result in inconsistent information being provided under the different guidelines.

#### **3.4 Treatment of confidential information**

The Submission Guidelines proceed from the assumption that all information in a Revenue Proposal should be treated as confidential, and as such deems all information to be non-confidential unless that information is specifically listed.<sup>10</sup> The result is that large tracts of information in a Revenue Proposal is deemed to be non-confidential, without being subject to any form of weighing up of the costs and benefits of that disclosure.

The result of across-the-board deeming that information is non-confidential is that certain information, where there could be substantial harm from disclosure, may be required to be disclosed. For example, TNSPs may be required to disclose their assumptions about future equipment costs or contractor rates, and adversely affect the prices TNSPs have to pay in the next regulatory period (to the detriment of efficiency and final customers). Similarly, disclosure of all of the assumptions behind capital expenditure and demand forecasts may disclose the plans of major network users (large customers), and adversely affect those parties. Moreover, the Guidelines as drafted do not even contemplate that the averaging period for the risk free rate may be kept confidential, even though this is specifically contemplated in the Rules and was inserted because of the concern that the disclosure of this information could raise the borrowing costs of certain TNSPs.<sup>11</sup>

In addition, the AER's treatment of confidentiality is out of step with how equivalent information is treated in the Rules. In particular, information received pursuant to the Information Guidelines is deemed to be protected, unless specifically stated otherwise.<sup>12</sup> As a large part of the information required under the Submission Guidelines is either similar or identical to that required under the Information Guidelines, there is no basis for such a vastly different treatment of confidentiality.

ETNOF considers that the most appropriate treatment of confidentiality in the Submission Guidelines would be for the Guidelines to specify a list of the elements of a Revenue Proposal that are deemed to be non-confidential (i.e. after a public interest test has been done), and then to permit a TNSP to make a claim for confidentiality for other material where the TNSP considers it is warranted. This latter claim should then be subject to a public interest test that replicates the test that applies already to information that is provided pursuant to the Information Guidelines.<sup>13</sup> ETNOF notes that, to date, there has been little problem with the current arrangements, suggesting that there is little reason to change fundamentally from the existing process for identifying confidential information (but, as noted above, abundant reason not to change).

#### **3.5 Definition of services**

The Submission Guidelines contain requirements for a TNSP's Revenue Proposal to contain:<sup>14</sup>

- (b) the quality, reliability and security of supply of each transmission service provided by the TNSP; and
- (c) the reliability, safety and security of supply of the transmission system provided by the TNSP in the supply of prescribed transmission services.

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<sup>10</sup> Submission Guidelines, clause 4.6.

<sup>11</sup> NER, clause 6A6.2(c)(i).

<sup>12</sup> NER, clause 6A.18.1.

<sup>13</sup> NER, clauses 6A18.3, 6A18.3.

<sup>14</sup> Submission Guidelines, clause 4.3.22.

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Even putting aside what seems to be opaque drafting, it is not clear to ETNOF exactly what this clause is seeking to obtain, or how it refers to the review of a TNSP's revenue cap. The AER needs to be clear about the service-related information to be provided as part of a Revenue Proposal.

In addition, the accompanying Issues Paper demonstrates a lack of understanding on the part of the AER as to the scope of application of a TNSP's Negotiation Framework.<sup>15</sup> For the avoidance of doubt, the Framework applies to the negotiation of Negotiable Services, and the dispute resolution process ceases to apply to any services that are 'provided on a genuinely contestable basis'.<sup>16</sup> It does not apply in relation to non-regulated services.

#### 4. Comments on matters of detail

This section sets out ETNOF's observations on the detailed drafting of clauses in the Submission Guidelines. However, as noted in section 0, ETNOF's positions as described above imply that substantial re-drafting of the Guideline is warranted. It will be important, therefore, for the AER to provide interested parties with the opportunity to comment on a further draft of the Submission Guidelines that reflects the AER's position on these high-level issues.

- *Clause 2.5* – the prescribed definition of materiality is not clear and it will be difficult to see how the clause will be applied in practice (apart from leaving an inappropriately wide discretion on the AER). Moreover, it is difficult to see how the one definition of materiality could be appropriate in all circumstances. ETNOF considers that the notion of an overall definition of materiality be removed, and that a more refined definition be adopted where it is required.
- *Clause 2.7* – the requirement in (b) for the TNSPs to have accounting systems that allow verification of a Revenue Proposal will be difficult to comply with, given that much of a Proposal relates to future events. Accordingly, if this clause is to be retained, it must be limited to applying to the collection of information about the past. In addition, requirement (c) which allows for the AER to request more detailed information should be qualified to occur during evaluation of a Revenue Proposal and not delay acceptance of the proposal if it meets the other requirements.
- *Clause 2.8* – the reference in (d) about 'whether each and every allocation of shared costs is in accordance with the TNSP's approved Cost Allocation Methodology' is inconsistent with the Cost Allocation Guidelines, which require the use of a 'sample'.
- *Clause 2.11* – the reference to 'all possible information' in (a) is too open-ended and impossible to meet in practice. In addition, is the contact person in (c) the one who information *must* be sent to?
- *Clause 4.3.23* – the provision of information on ratings and ages of network assets in the form of a map is impracticable. An alternative, more simple means of providing this information should be considered. In addition, it is not clear from the Guidelines as to the degree of disaggregation that is required, and ETNOF would also question how relevant information on asset 'ages' is to the AER's tasks.
- *Clause 5.1(a)* – the reference to 'price and other terms and conditions' is not consistent with the Rules. Any references in the Rules to 'terms and conditions' are in clauses 6A.9.1(9), (10) and (11) and are limited to 'terms and conditions of access' (emphasis added). The wording should be modified to correctly reflect the rules as

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<sup>15</sup> AER, Issues Paper, Op. Cit., p.1.

<sup>16</sup> NER, clause 6A.30.5(e).

## Submission Guidelines

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follows: '...as to the price at which the service is to be provided and the terms and conditions of access for the service'.

- *Clause 5.2(g)* – the reference to 'terms and conditions' is not consistent with the Rules. Any references in the Rules to 'terms and conditions' are in clauses 6A.9.1(9), (10) and (11) and are limited to 'terms and conditions of access' (emphasis added). The wording should be modified to include 'of access' after 'terms and conditions' in this sub-clause.
- *Clause 5.3(c)* – refers to clause 6A.9.5(f) of the Rules, which does not appear in the current version of the Rules.

#### **4.1 AER Issues Paper**

- *Summary section* – as noted above, the AER has confused the different treatments of prescribed, negotiated and non-regulated transmission services.
- *Section 3.1* – the Issues Paper incorrectly characterises the AER's role as to 'set efficient capital and operating expenditure allowances'. In contrast, the AER's role is to consider whether the proposal that is presented to it is compliant with the Rules, and if so, to accept the Revenue Proposal.