

16 November 2016

Mr Chris Pattas  
General Manager, Network Pricing, Policy and Compliance Branch  
Australian Energy Regulator AER  
GPO Box 520  
Melbourne Vic 3001

Via email: [Ringfencingguideline2016@aer.gov.au](mailto:Ringfencingguideline2016@aer.gov.au)

Dear Mr Pattas

**RE: AER DRAFT ELECTRICITY RING-FENCING GUIDELINE – EXPOSURE DRAFT**

Endeavour Energy welcomes the opportunity to provide feedback on the Australian Energy Regulator's (AER's) Draft Electricity Ring-Fencing Guideline Exposure Draft (Exposure Draft). Endeavour Energy supports the implementation of nationally consistent ring-fencing arrangements that enhance confidence in contestable markets by protecting against anti-competitive behaviour to promote the long term interests of customers.

We note the Exposure Draft makes several changes to the approach outlined in the Draft Guideline and Explanatory Statement released in August 2016 (Draft Guideline). For example, legal separation has been broadened to facilitate the various business models that can deliver the required separation in the most efficient manner. Staff, office and information sharing has also been improved to allow for the suitable utilisation of current resources to leverage economies of scope and scale. Further, a pragmatic transitional period has been incorporated to ensure DNSPs can implement the legal, functional and branding requirements. Finally, waivers have been incorporated to take account of the various jurisdictional and regional differences faced by DNSPs.

Broadly speaking, we consider the Exposure Draft better achieves the National Electricity Objective compared to the Draft Guideline as it:

- Provides greater clarity with defined terms;
- Includes more targeted and proportionate regulatory obligations; and
- Provides a pragmatic transition period to allow sufficient time for DNSPs to re-structure its operations to ensure compliance with most of the Ring-Fencing requirements.

Having said this, some ambiguity still exists within the Exposure Draft, particularly in the information sharing and disclosure clauses. A key issue is the definitions of 'electricity information', 'confidential information' and the interaction of the clauses that outline the information that must be shared with all parties on an equal basis. Specifically, the definition of electricity information is broad, such that potentially publicly available and / or common knowledge is captured. We recommend that these clauses be amended to clarify the operation of the non-disclosure and information sharing obligations. See attachment A for more detailed information and proposed drafting solutions.

We are also concerned with the requirement that DNSPs must ensure third party service providers comply with the Ring-Fencing Guideline. In essence, in its current form, this clause requires the DNSP to regulate the conduct of service providers to ensure they comply with the Ring-Fencing Guideline. We consider such an obligation to be impossible to comply with in practice. For example, non-regulated service providers such as ICT and similar contracted third parties, have no knowledge of, or incentive to comply with, their client's regulatory obligations.

It appears the policy intent of this clause is to restrict a DNSP from outsourcing its Ring-Fencing requirements. Endeavour Energy recommends a best endeavours approach is adopted to give effect to this policy intent, without imposing compliance obligations on DNSPs.

As noted above, Endeavour Energy welcomes the change to staff and office sharing. However we are of the view that the requirement to establish, maintain and keep a written record of shared offices and staff positions is overly onerous, with no benefit to electricity consumers. Particularly, the obligations to describe the roles, functions and duties of each shared position, and make this publicly available on Endeavour Energy's website.


We also note that this obligation was first introduced in the Exposure Draft and has no transitional arrangements. This effectively provides 8 working days for DNSPs to comply with this new clause. As a general principal, we request sufficient lead time to enable Endeavour Energy to comply with all new ring-fencing obligations. In this regard, we support Energy Networks Australia's proposed Ring-Fencing Guideline commencement date of 30 April 2017. We note that the National Electricity Rules require the Ring-Fencing Guideline to be published by 1 December 2016, but provides for a later start date.

We are also of the view that the Final Guideline Explanatory Statement should provide further guidance on the specific practical application of staff and office sharing clauses. This includes worked case studies and insights achieved as part of the reporting and compliance process.

Finally, in reviewing the Exposure Draft we have identified some drafting issues, errors and omissions that should be amended. These are detailed in attachment A.

If you have any queries or wish to discuss this matter further please contact Jon Hocking, Manager of Network Regulation at Endeavour Energy on (02) 9583 4386 or via email at [jon.hocking@endeavourenergy.com.au](mailto:jon.hocking@endeavourenergy.com.au).

Yours sincerely



Rod Howard  
**Acting Chief Executive Officer**

## **FURTHER INFORMATION AND PROPOSED DRAFTING SOLUTIONS TO THE AER DRAFT ELECTRICITY RING-FENCING EXPOSURE DRAFT**

### **Definition of 'electricity information'**

We consider that the way in which 'electricity information' has been defined creates some ambiguity regarding the status of identifiable customers or class of customer when that definition operates in conjunction with the definition of 'confidential information' in clause 4.3.1.

The note to clause 4.3.1 indicates that 'electricity information' is intended to mean information about electricity networks, electricity customers or electricity services but excludes aggregated financial or service performance information which does not relate to an identifiable customer or class of customer.

However, while this interpretation appears to be the intention, it is not clear and is likely to create ambiguities in the long run.

This issue could be resolved by breaking up the definition so that it reads:

'electricity information' means information about electricity networks, electricity customers or electricity services. However, it excludes:

- (a) aggregated financial information; or
- (b) other service performance information that does not relate to an identifiable customer or class of customer; or
- (c) Information that is publicly available or common knowledge.

### **Information sharing and disclosure clauses**

As we understand it, clause 4.3.3 sets out four independent circumstances where confidential information can be disclosed to another person. However, the clause requires the inclusion of the word 'or' to separate each individual section to clarify if indeed they are intended to operate as four independent circumstances in which a DNSP can disclose confidential information to another person.

Further, clause 4.3.4(a) appears to refer to the concept of 'confidential information' without using that term directly. It refers to electricity information acquired or generated by a DNSP 'in connection with providing direct control services' (which is consistent with the definition of 'confidential information' in clause 4.3.1). The clause could be amended to refer to confidential information directly to avoid the potential for two definitions of confidential information to be implicitly created.

A related issue is the interaction of clauses 4.3.3 and 4.3.4. Specifically clause 4.3.3(a) allows confidential information to be shared where the explicit informed consent of the customer has been obtained. However, this is a separate avenue for providing information, rather than a precondition under which information is to be provided on an equal access basis to affiliated entities and other third parties.

Clause 4.3.4(c) then states that if information has been provided to an affiliated entity in accordance with clause 4.3.3(a)-(c) (this includes where the customer has consented), then there is no requirement to provide access to a third party on an equal basis.

An alternative is that clause 4.3.3(a) is removed from clause 4.3.3 and inserted at the beginning of clause 4.3.4. This would mean that there are three circumstances in which information can be shared – where it is required by law, it is necessary to enable the DNSP to carry out its functions, or where the DNSP complies with its obligations to provide information on an equal opportunity basis (currently clauses 4.3.3(b)-(d)).

The current clause 4.3.3(a) could then be inserted at the beginning of clause 4.3.4(b). This would have the effect that information was not to be disclosed to a third party (other than in the circumstances in clauses 4.3.3(b)-(c)) other than where the customer has given their informed consent. We consider that this approach is more closely aligned with the policy objectives of the Exposure Draft.

#### **Other drafting issues**

In reviewing the Revised Guideline, there are a number of other drafting issues or errors that we have noted. These are:

- **Clause 1.4:** in the definition of 'staff position', the words 'in relation' should be deleted.
- **Clause 4.1(c):** we assume that the cross-reference to clause 4.1(a) should instead be to clause 4.1(b).
- **Clause 4.1(c)(i):** the concluding phrase 'rather than being an **affiliated entity** of the DNSP' could be deleted to simplify the clause.
- **Clause 4.2.2(c):** 'guideline' should be capitalised.
- **Clause 4.2.3:** the opening reference to 'DNSP' should appear in bold.
- **Clause 5.2:** it is unclear what is meant by the phrase 'for itself or for one or more **other DNSPs who are affiliated entities** of the **DNSP**'.
- **Clause 6.2.1(b)iii:** 'Error! Reference source not found' should be removed.