

Ergon Energy Ref.: JD/TF/AC
AER Ref.: 50521/D13/75279



20 September 2013

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Chris Pattas
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Dear Mr Pattas

Draft Confidentiality Guideline and Explanatory Statement

Ergon Energy Corporation Limited (Ergon Energy) welcomes the opportunity to provide comment to the Australian Energy Regulator (AER) on its *Better Regulation – Draft Confidentiality Guideline* (the Draft Guideline) and associated *Better Regulation – Explanatory Statement, Draft Confidentiality Guideline* (the Explanatory Statement). This submission, which is available for publication, is made by Ergon Energy in its capacity as a Distribution Network Service Provider operating in Queensland. Ergon Energy is available to discuss this submission or provide further detail regarding the issues raised, should the AER require.

As a member of the Energy Networks Association (ENA), the peak national body for Australia's energy networks, Ergon Energy has contributed to the ENA's submission on the Draft Guideline and Explanatory Statement and fully supports the issues raised therein. In particular, Ergon Energy is supportive of the general approach taken by the AER in the Draft Guideline and Explanatory Statement, aimed at striking an appropriate balance between the protection and disclosure of information relevant to a Network Service Provider's (NSP) regulatory proposal. However, Ergon Energy has a number of specific concerns that are discussed in more detail below.

Guidance on the assessment of confidentiality claims

Ergon Energy has some concerns in relation to the guidance provided by the AER regarding their information disclosure powers. Our primary concern is the premise that the AER determines whether or not a claim of confidentiality is properly made. Ergon Energy's view is that it is not for the AER to determine whether the information is confidential or not. Information is confidential if:

- It is provided to the AER under compulsion of law; or
- The person providing the information says it's confidential at the time it is provided.¹

In Ergon Energy's view, once confidentiality is declared the only question for the AER is whether it has the power to disclose that information, notwithstanding the fact that it is confidential. There are several grounds upon which the AER may disclose confidential information and these are set out in sections 28W to 28ZB of the *National Electricity Law* (NEL). In this regard it is noted in the Explanatory Statement² that the power used most often by the AER is the power in section 28ZB of the NEL. This power allows the AER to disclose confidential information on the basis that disclosure

¹ *Competition and Consumer Act 2010*, section 44AF(1).

² p 24.

of the information would not cause detriment or that any detriment would be outweighed by the public benefit. The AER further indicated that their intent is to “make greater use of their ability to disclose information for the purposes of according natural justice to a person affected by a decision of the AER.”³

Ergon Energy is concerned about the first of these powers, that is, the power to disclose would not cause detriment or that any detriment would be outweighed by public benefit. It appears that the AER is expressing policy as to what it considers should be in the public domain. Throughout the Explanatory Statement the AER confirms that there are documents that “should be in the public domain” and provides an example list of documents for public disclosure.⁴ Ergon Energy does not object to this policy statement, provided it is not applied inflexibly. However, Ergon Energy considers that it is important that the AER’s view that certain types of information would normally be made public does not become a presumption in favour of release. Ergon Energy also notes that the AER has not indicated whether the publication of such information would cause detriment to the NSP. Ergon Energy considers that there has been little discussion by the AER about how they might assess the merits of any confidential claim case before it. From Ergon Energy’s perspective this is important.

Confidentiality Undertaking Template

Ergon Energy notes that the template undertaking does not require the recipient of the confidential information to destroy or otherwise dispose of the information once the process is completed. Ergon Energy considers that this obligation should be included in the undertaking.

Furthermore, the undertaking requires that the recipient of the confidential information obtain the AER’s written approval prior to disclosing, publishing or communicating the information.⁵ Ergon Energy considers that it is the NSP’s consent (as the owner of the confidential information) that should be obtained. Therefore, we request that this also be referenced in the undertaking.

Personal Information

Ergon Energy considers that personal information should not be categorised as a confidentiality category with a definition of personal information. Personal information is already defined in the *Privacy Act 1988* (Cth).⁶ Any discussion about the definition, disclosure or non-disclosure of personal information must be done in accordance with the current Information Privacy Principles and the impending Australian Privacy Principles of the *Privacy Act 1988* (Cth).

Ergon Energy looks forward to providing continued assistance to the AER in the development of the Confidentiality Guideline. Should you require additional information or wish to discuss any aspect of this submission, please do not hesitate to contact either myself on (07) 4092 9813 or Trudy Fraser on (07) 3851 6787.

Yours sincerely



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³ p 25, *National Electricity Law*, s28Y(c).

⁴ Pp 8, 13, 16 and Attachment 3.

⁵ Refer to clause (b)(ii).

⁶ Section 6.