

Ref: C2079100

16 November 2016

Mr Chris Pattas
Australian Energy Regulator
GPO Box 520
Melbourne VIC 3001

Dear Mr Pattas

Ring-Fencing Guideline Exposure Draft

Essential Energy appreciates the opportunity to comment on the Ring-Fencing Guideline Exposure Draft (exposure draft or Guideline). As requested, we have focussed our response on what we see as being critical issues that will affect the operation of the Guideline. Nonetheless, we have also included minor wording changes as part of our suggestions in a marked up version of the exposure draft attached at appendix A to this letter.

The items in the exposure draft with which we see operational concerns are:

- > Some of the defined terms have a confusing interaction with elements of the Guideline and the National Electricity Rules (NER)
- > The definition of a 'regional office' lacks clarity and, in its current form, would lead to extreme inefficiencies in Essential Energy's ability to undertake minor customer services in many areas
- > We do not believe that other regulated businesses should be required to be in a separate legal entity to that of the DNSP
- > The branding clause currently poses workability issues when applied in conjunction with a 'regional office' exemption for staff and physical separation
- > The process and timings around waiver applications, decisions, variations and revocations.

Each of these items is discussed in more detail below.

Some defined terms have a confusing interaction with elements of the Guideline and the NER

The Guideline is difficult to interpret without an accompanying diagram and there seems to be some miswording that leads to circular problems.

- > For example, the definition of **other services** and **other electricity services** are very close. From our interpretation of the definition we believe that **other electricity services** are a subset of **other services** – a diagram would confirm this understanding.
- > **Affiliated entity** includes the part of the DNSP that provides **other distribution services** and /or **other electricity services** in relation to clauses 4.1. and 4.3. This is an unusual approach as parts of the DNSP can be considered an affiliate in terms of these clauses.
- > A DNSP can undertake **distribution services** without requiring a separate **legal entity** under clause 3.1 and **distribution services** is defined to include **other distribution services**. Clause 4.2.3, however, requires **direct control services** to be separately branded from **other distribution services**. We are uncertain why we would need to have separate brand for **direct control**

services where we choose not to operate **other distribution services** through a separate **legal entity** - we believe that the Guideline should allow a DNSP to be able to provide **distribution services** under the one **legal entity** and under the one brand.

Given the complexity of the various interactions of the elements of the Guideline, we suggest that an updated diagram, like that presented at the workshop in Sydney on 27 October 2016, be included as part of the Guideline.

The definition of a 'regional office' lacks clarity and would lead to extreme inefficiencies

Firstly, our interpretation of an **office** is that it would include a depot location. We suggest clarifying this point and have suggested appropriate wording changes in Appendix A. On this basis, we see the proposed definition of a **regional office** as being ill-defined and too broad. In its current form, it would lead to major inefficiencies or loss of services for customers in regional areas.

The definition also lacks clarity as to how exactly the data is to be sourced and calculated. It is difficult to gather accurate, up-to-date population statistics, particularly when an arbitrary 100km radius is placed around each point on a map. Additionally, the population of other DNSP network areas will impact our ability to operate. For example, our Bulahdelah depot is within 100kms of Newcastle. Newcastle is in Ausgrid's network area and has a population in excess of 280,000 people. The proposed definition of a **regional office** would therefore exclude Essential Energy's Bulahdelah depot, despite the fact it has just 6,220 customer premises attached to it. This example is repeated many times over across our network area.

Instead, we suggest an alternative definition based on actual data that is already reported to the AER and can, therefore, be validated and produced at any point in time. That is, the number of customer premises linked to each depot location. This approach provides meaningful data on customers rather than population size, easily rules out specific depot / office locations and can easily be replicated as required. The threshold we have suggested is 30,000 customer premises which also roughly equates to cities in our network area that have populations over 50,000, and therefore we believe is consistent with the AER's intended approach expressed in the exposure draft.

One alternative we did consider was the use of Local Government Areas (LGAs). However, there is a delay in obtaining population statistics for LGAs – the Australian Bureau of Statistics website currently has actual population numbers for 2014 and only projected numbers for 2015. There is no data for 2016. LGAs also vary in size (both area and population) and do not fully align with our depot locations. They have also been subject to amalgamations in recent years and this may continue in the future, leading to the population number in the Guideline becoming less meaningful over time.

Other regulated businesses are required to be in a separate legal entity to that of the DNSP

The exposure draft requires DNSP owned businesses operating in other regulated markets to be in a separate legal entity from that part of the DNSP that provides direct control services. We suggest that where a DNSP business is separately regulated, that the AER should be able to rely on that regulator validating the adequacy and appropriateness of the associated business costs. As such, the inclusion of that business within the DNSP's CAM that is submitted to the AER should negate the requirement for that business to be within a separate legal entity.

In its present form, the exposure draft requires Essential Energy's water business, that it operates on behalf of the NSW government, to be in a separate legal entity. The water business is fully impaired, does not give rise to any discrimination issues in the electricity sector that the exposure draft intends to capture and any potential cross-subsidisation is effectively managed through Essential Energy's existing CAM. We would argue that requiring legal separation of the water business provides neither water or electricity industry customers with any increased benefits for the costs that would be involved.

Whilst the exposure draft does allow Essential Energy to apply for a waiver for the requirement to legally separate the water business, waivers are not enduring under the exposure draft, nor are they guaranteed to be successful. Waivers also require time and effort (cost) on both Essential Energy's and the AER's behalf. As such, we would argue that the current requirement to include separately regulated entities within a separate legal entity is completely disproportionate to any actual or potential harm to the electricity markets the exposure draft is seeking to protect.

Automatic exemption provides the lowest cost solution and presents no risk to any emerging electricity services markets. On these grounds, it is the most sensible solution. The potential for automatic exemption on these grounds was discussed at the AER workshop on 27 October. We do not recall any stakeholders raising a concern with such an exemption and would therefore suggest it be included in the final Guideline.

The workability of the branding clause when applied in conjunction with a 'regional office'

Clause 4.2.3 indicates that **direct control services** must be independently and separately branded from other services the DNSP provides. However, it is unclear how this clause is intended to work in conjunction with the definition of a **regional office** where separate locations and staff are exempted from the requirements of clauses 4.2.1 and 4.2.2.

In its current form the exposure draft allows staff and locations to be shared for **regional offices**, however, clause 4.2.3 requires separate branding and disallows cross-promotion. This would imply that impacted staff, trucks and buildings, in **regional office** locations would require two different brandings, but given clause 4.2.3 disallows cross promotion, the two brands could not be displayed together. For example, uniforms, trucks and buildings could not simply be badged with both logos.

In the absence of further clarification, this aspect of the exposure draft is unworkable for Essential Energy - clause 4.2.3 works completely against the exemptions for **regional offices** allowed for in clauses 4.2.1 and 4.2.2. We suggest that the Guideline be amended to provide an exemption from the requirement for separate branding for **regional offices** (including depots) and their associated staff. This is the most efficient and reasonable outcome for customers.

The process and timings around waiver applications, decisions and variations and revocations

On a general note, more guidance and clarity is required in relation to the waiver process. We have addressed the most serious concerns around the process and timings below.

1. A timeline for the AER's processing of waiver applications is needed

Clause 5.3 does not contain a timeline for the consideration and determination of waiver applications by the AER. This is of real concern to Essential Energy as it gives the AER unlimited time in which to consider a waiver. This open ended approach further increases the uncertainty associated with a waiver process.

We suggest that the Guideline include a maximum timeline of 40 business days for the AER to consider and determine waiver applications. This is consistent with the timeline for consideration of pass through events in the NER.

2. A timeline for DNSP submissions of expiring waiver applications is required

We also suggest that the Guideline include a timeline by which DNSPs should submit applications in the lead up to their next regulatory determination, for existing waivers due to expire at the end of their current regulatory period. This should tie in with the timelines outlined above and in point 4 below.

For example, if a DNSP is allowed 6 months to reach full compliance following the refusal of a waiver and the AER is allowed a maximum of 40 business days in which to consider a waiver application, then the DNSP must submit waiver applications for its upcoming regulatory determination period that are due to expire at the end of the existing determination period at least 8 months out from the end of its existing determination period.

3. A clearer process and timeline is required for interim waivers

It is not clear why and in which circumstances the AER would grant an interim waiver. The term is not defined in the exposure draft and, given interim waivers are exempted from requiring to meet any of the conditions that would satisfy a need for ring-fencing, i.e. clause 5.3.2(a), we can only assume this is a 'stop gap' measure that would be employed by the AER, say part way through a DNSPs regulatory period.

We have concerns with clause 5.3.4(c) which automatically deems an interim waiver to be refused should the AER not have made a further decision on that interim waiver. We believe that this places an onus on DNSPs to try and progress interim waiver decisions whilst, at the same time,

allowing the AER to take no action in relation to such items to the detriment of the DNSP. Instead, the presumption should be that the interim waiver is presumed to be granted should the AER not have made a further decision by the expiry date. This is consistent with the pass through event rules in the NER and is in line with the current proposed reforms to Part IIIA of the *Competition and Consumer ACT 2010*.

4. The timelines by which a DNSP must comply with the various obligations of the Guideline following an unsuccessful waiver application should also be included

Clause 5.3 contains no timeframes by which the DNSP must comply with the Guideline following an unsuccessful waiver application. It is reasonable and efficient for a DNSP to assume that a waiver application will be successful and to not begin to undertake measures to comply with the Guideline. As such, following an unsuccessful application, the DNSP must then be allowed a reasonable amount of time to comply with the obligations.

Given this clause will only apply following the transitional arrangements under clause 7, we do not see the timeline for compliance needing to be as long as that offered under clause 7. As such, we suggest complete compliance with the Guideline no longer than six months following the notification of an unsuccessful waiver. This should be seen as the maximum compliance timeline.

5. The minimum timeline for variation or revocation of a waiver is unreasonable

Clauses 5.5 and 5.6 both contain a minimum notification timeframe of 40 days. In the absence of any timelines around compliance with the Guideline obligations following this notification period, we can only comment that the 40 day timeframe is unworkable.

- For example, a previously defined "regional office" that loses its exemption from staff and location sharing would likely have customer work booked out beyond 40 days. Does this mean the work is required to be rebooked and reallocated to another location? Is this in the best interests of the customer?
- Alternatively, we may have an existing waiver application in place that allowed our Water business to operate within the Essential Energy entity but this is suddenly revoked. It would take far longer than 40 days to adjust access within the building, order new uniforms and rebrand the business.

As in point 4 above, we can only reiterate that the Guideline should include the timeframes by which the DNSP must comply with the necessary obligations of the Guideline following the variation or revocation of a waiver.

6. Clarity is required around how a **regional office** can lose its **regional office** status under Clause 5.6

The Guideline should indicate the circumstances through which a **regional office** could have its status revoked. Given the Guideline includes a definition for a **regional office**, we cannot envisage any circumstances in which such a status would require revocation. If this is the case, all references to revocation of a regional office should be deleted.

Alternatively, the AER should outline the process by which a regional office can be revoked, including the DNSP's right to appeal such a decision within the Guideline.

We thank you for the opportunity to comment on the exposure draft. Should you have any questions on this submission, please don't hesitate to contact Natalie Lindsay on (02) 6589 8419.

Yours sincerely



Gary Humphreys
Deputy Chief Executive Officer

Appendix A – Marked up version of the exposure draft



DRAFT

Ring-Fencing Guideline

Electricity Distribution

November 2016

EXPOSURE DRAFT – WITHOUT PREJUDICE

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1 Nature and authority

1.1 Application of this guideline

1.1.1 Background and summary

This Electricity Distribution Ring-fencing Guideline (**Guideline**) is made under clause 6.17.2 of the National Electricity Rules (**NER**).

Under clause 6.17.1 of the **NER**, this **Guideline** is binding on all **Distribution Network Service Providers (DNSPs)**. For the avoidance of doubt, any references in this **guideline** to **transmission services** do not bind **Transmission Network Service Providers** who are not also **DNSPs**.

The objective of this **Guideline** is to:

- promote the **National Electricity Objective** by providing for the accounting and functional separation of the provision of **direct control services** by **DNSPs** from the provision of **other services** by them, or by their **affiliated entities**.
- promote competition in the provision of **electricity services**.

This **Guideline** imposes obligations on **DNSPs** targeted at, among other things:

- cross-subsidisation, with provisions that aim to prevent a **DNSP** from providing **other services** that could be cross-subsidised by its **distribution services**; and
- discrimination, with provisions that aim to:
 - prevent a **DNSP** conferring a competitive advantage on **affiliated entities** which might provide **other distribution services** and / or which provide **other electricity services**; and
 - ensure a **DNSP** keeps information it acquires or generates confidential, and handles that information appropriately.

1.1.2 Commencement

This **Guideline** commences on 1 December 2016.

1.2 Confidentiality

The **AER** will assess confidentiality claims by **DNSPs** arising under this **Guideline** in accordance with the **Distribution Confidentiality Guidelines**, the **Competition and Consumer Act 2010** and the National Electricity Law (**NEL**).

1.3 Interpretation

In this **Guideline**, unless the contrary intention appears:

- a term in bold type that is expressly defined in clause 1.4 of this **Guideline** has the meaning set out in that clause.
- a term in bold type that is not expressly defined in clause 1.4 of this **Guideline** has the same meaning it has in the **NEL** or the **NER**.
- For the purposes of the application of this **Guideline** in the Northern Territory, the reference to 'national electricity system' in s 7 of the **NEL** must be taken to mean a reference to a 'local electricity system' or to all 'local electricity systems', as the case requires.
- The words 'shall' and 'must' indicate mandatory requirements.
- The singular includes the plural, and vice versa.
- A reference to any legislation, legislative instrument or other instrument is a reference to that legislation or instrument as in force from time to time.
- Explanations in this **Guideline** about why certain information is required are provided for guidance only. They do not limit in any way the **AER's** objectives, functions or powers.

1.4 Definitions

In this **Guideline**:

- **affiliated entity**, in relation to a **DNSP**, means a **legal entity**:
 - (a) which is a direct or indirect shareholder in the **DNSP** or otherwise has a direct or indirect legal or equitable interest in the **DNSP**;
 - (b) in which the **DNSP** is a direct or indirect shareholder or otherwise has a direct or indirect legal or equitable interest;
 - (c) in which a **legal entity** referred to in paragraph (a) or (b) is a direct or indirect shareholder or otherwise has a direct or indirect legal or equitable interest.

and includes, in clauses 4.1 and 4.3 of this **Guideline**, the part of the **DNSP** that provides **Other Distribution Services** and / or **Other Electricity Services**.
- **electricity information** means information about electricity networks, electricity customers or **electricity services**, excluding:
 - (a) aggregated financial information;
 - (b) other service performance information;

that does not relate to an identifiable customer or class of customer.
- **existing service** means a type of service that the **DNSP** was providing on 1 December 2016.
- **information register** means the register established and maintained by a **DNSP** under clause 4.3.5.

- **law** means any law, rule, regulation or other legal obligation (however described and whether statutory or otherwise).
- **legal entity** means a natural person, a body corporate (including a statutory corporation or public authority), a partnership, or a trustee of a trust.
- **NEL** means, for the purposes of the application of this **Guideline** in a **participating jurisdiction**, the National Electricity Law set out in the schedule to the *National Electricity (South Australia) Act 1996* (SA), as applied by the participating jurisdiction and subject to any modification made to the National Electricity Law by that jurisdiction.
- **NER** means, for the purposes of the application of this **Guideline** in a **participating jurisdiction**, the rules called the National Electricity Rules made under Part 7 of the National Electricity Law, subject to any modification made to the National Electricity Rules by that jurisdiction.
- **non-distribution services** means:
 - (a) **transmission services**; and
 - (b) **other services**.
- **office** means:
 - (a) a building (which may be a depot);
 - (b) an entire floor of a building; or
 - (c) a part of a building that has separate and secure access requirements such that **staff** from elsewhere in the building do not have unescorted access to it.
- **officer** means a director or company secretary of the **legal entity**, and any other person:
 - (a) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the **legal entity**; or
 - (b) who has the capacity to affect significantly the **legal entity's** financial standing;
- **other distribution services** means **distribution services** other than **direct control services**.
 [Note: this includes **negotiated distribution services** and **distribution services** that are not classified.]
- **other electricity services** means services for the supply of electricity or that are necessary or incidental to the supply of electricity, other than:
 - (a) **transmission services**; or
 - (b) **distribution services**.
- **other services** means services other than:
 - (a) **transmission services**; or
 - (b) **distribution services**.

- **regional office** means an **office** that ~~has services less than 5030,000 customer premises people living within a 100 kilometre radius of it.~~
- **staff**, of an entity (such as a DNSP), includes:
 - (a) employees of the entity;
 - (b) direct or indirect contractors to the entity (whether the contractors are individuals or corporate or other entities);
 - (c) employees of direct or indirect contractors to the entity; and
 - (d) individuals (including secondees) otherwise made available to the entity by another party.
- **staff position**, ~~in relation~~ means a position within the organisational staffing structure of a DNSP, or an affiliated entity, that involves the performance of particular roles, functions or duties.

1.5 Process for revisions

The **AER** may amend or replace this **Guideline** from time to time to meet changing needs, in accordance with clause 6.17.2 of the **NER** and the **distribution consultation procedures**.

2 Relationship with other regulatory instruments

This **Guideline** should be read in conjunction with:

- (a) The decision in the **AER's distribution determination** on the classification of the **distribution services** to be provided by a **DNSP** in a **regulatory control period**, in accordance with clauses 6.2 and 6.12.1(1) of the **NER**;
- (b) Clause 6.15 of the **NER**, the **Cost Allocation Guidelines** and the **AER-approved Cost Allocation Method (CAM)**;
- (c) Clause 6.4.4 of the **NER** and the **Shared Asset Guideline**;
- (d) A **regulatory information instrument** served on a **DNSP** by the **AER**, or made by the **AER**, under section 28F of the **NEL**.

Together, these instruments achieve the desired ring-fencing outcomes in the long term interest of consumers.

The **AER's** service classification decisions determine the nature of the economic regulation, if any, applicable to a **DNSP's distribution services**. The classification of a **distribution service** (for example, as a **direct control service** or as a **negotiated distribution service**) affects the application of obligations in clauses 3 and 4 of this **Guideline**. For the purposes of this **Guideline**, distribution services that are not classified are categorised as **other distribution services**.

The **Cost Allocation Guideline** and a **DNSP's CAM** relate to the allocation and attribution of its costs between its **distribution services**. They complement the obligations in clause 3.2.2 of this **Guideline**, which relate to the allocation and attribution of a **DNSP's** costs between **distribution services** and **non-distribution services**.

The **Shared Asset Guideline** enables the adjustment of a **DNSP's** revenues that it can recover from its **standard control services** where the assets used to provide those services were acquired in order to provide **standard control services** but are then subsequently used to also provide **other distribution services** or **other services**. The shared asset mechanism therefore modifies the effect of the **CAM**.

A **regulatory information instrument** can require a **DNSP** to provide information to the **AER** and to have this information certified and audited, subject to the requirements of the **NEL**. This can include information that is subject to ring-fencing obligations under this **Guideline**.

3 Prevention of cross subsidies

3.1 Legal separation

This section should include an exemption for separately regulated businesses that are included in the DNSPs CAM eg. Essential Energy's water business.

- (a) A **DNSP** must be a **legal entity**.
- (b) Subject to this clause 3.1, a **DNSP** may provide **distribution services** and **transmission services**, but must not provide **other services**.
- (c) This clause 3.1 does not prevent:
 - i. an **affiliated entity** of a **DNSP** from providing **other services**;
 - ii. a **DNSP** and a **Transmission Network Service Provider** from being the same legal entity;
- (d) This clause 3.1 does not prevent a **DNSP**:
 - i. granting another **legal entity** the non-exclusive right to use assets of the **DNSP** in providing **other distribution services** or **other services**, where those assets are also used by the **DNSP** to provide **distribution services** or **other services** but doing so does not materially prejudice the provision of **direct control services** by the **DNSP**;
 - ii. providing corporate services (such as general administration, accounting, payroll, human resources, legal, or information technology support services) to an **affiliated entity** of the **DNSP**;
 - iii. providing **staff**, and / or **offices** to an **affiliated entity** where doing so is not prohibited by clause 4.2 (including by reason of a waiver granted by the AER in respect of clause 4.2);
 - iv. providing **electricity information** to another party where doing so is not prohibited by clause 4.3;
 - 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;
 - vi. providing any **other services** authorised in accordance with the waiver process set out in clause 5 of this **Guideline**.

as long as the **DNSP** complies with clause 3.2 in relation to those arrangements.

- (e) A **DNSP** can apply for a waiver of the obligations set out in this clause 3.1.

3.2 Establish and maintain accounts

3.2.1 Separate accounts

- (a) A **DNSP** must establish and maintain appropriate internal accounting procedures to ensure that it can demonstrate the extent and nature of transactions between the **DNSP** and its **affiliated entities**.

[Note: The **AER** may include a requirement in a **regulatory information instrument** for a **DNSP** to:

- i. provide its internal accounting procedures to the **AER**;
- ii. report on transactions between the **DNSP** and its **affiliated entities**.]

- (b) A **DNSP** cannot apply for a waiver of the obligations set out in this clause 3.2.1.

3.2.2 Cost allocation and attribution

- (a) A **DNSP** must allocate or attribute costs to **distribution services** in a manner that is consistent with the **Cost Allocation Principles** and its approved **CAM**, as if the **Cost Allocation Principles** and **CAM** otherwise applied to the allocation and attribution of costs between **distribution services** and **non-distribution services**.
- (b) A **DNSP** must only allocate or attribute costs to **distribution services** in accordance with clause 3.2.2(a), and must not allocate or attribute other costs to the **distribution services** it provides.
- (c) A **DNSP** must establish, maintain and keep records that demonstrate how it meets the obligations in clauses 3.2.2(a) and 3.2.2(b).

[Note: A **regulatory information instrument** may include a requirement that a **DNSP** provide those records to the **AER** established, maintained and kept in accordance with clause 3.2.2(a) and (b) and / or otherwise demonstrate to the **AER** how it meets those obligations.

- (d) A **DNSP** cannot apply for a waiver of the obligations set out in this clause 3.2.2.

4 Functional Separation

4.1 Obligation to not discriminate

(a) For the purposes of this clause 4.1:

- i. an **affiliated entity** includes a customer, or potential customer, of the **affiliated entity**;
- ii. a competitor of an **affiliated entity** includes a customer, or potential customer, of the competitor of the **affiliated entity**;
- iii. dealing, or offering to deal, includes dealing or offering to deal in relation to the provision of goods or services, or the grant of rights, by the DNSP or to the DNSP.

(b) A **DNSP** must not discriminate (either directly or indirectly) between an **affiliated entity** and a competitor (including a potential new competitor) of the **affiliated entity** in connection with the provision of:

- i. **direct control services** by the **DNSP** (whether to itself or to any other party); and / or
- ii. **other distribution services** or **other electricity services** by any other party.

(c) Without limiting its scope, clause 4.1(b)(a) requires a **DNSP** to:

- i. deal or offer to deal with an **affiliated entity** as if the **affiliated entity** is not connected with the **DNSP** rather than being an **affiliated entity** of the **DNSP**;
- ii. in like circumstances, deal or offer to deal with an **affiliated entity** and a competitor of the **affiliated entity** on substantially the same terms and conditions;
- iii. in like circumstances, provide substantially the same quality, reliability and timeliness of service to an **affiliated entity** and a competitor of the **affiliated entity**;
- iv. not disclose to an **affiliated entity** information the **DNSP** has obtained through its dealings with a competitor of the **affiliated entity** where the disclosure would, or would be likely to, provide an advantage to the **affiliated entity**;

(d) A **DNSP** cannot apply for a waiver of the obligations set out in this clause 4.1.

4.2 Offices, staff, branding and promotions

4.2.1 Physical separation/co-location

(a) Subject to this clause 4.2.1, in providing **direct control services**, a **DNSP** must use **offices** that are separate from:

- i. any **office** from which it provides **other distribution services** or **other electricity services**; and

- ii. any **office** from which an **affiliated entity** provides **other distribution services** or **other electricity services**.

(b) Clause 4.2.1(a) does not apply in respect of:

- i. office accommodation for **staff** who, in the course of their duties:
 - a. do not have access to **electricity information**;
 - b. have access to **electricity information** but do not have, in performing the roles, functions or duties of their **staff position**, any opportunity to use that **electricity information** to engage in conduct that is contrary to the **DNSP's** obligations under clause 4.1; or
 - c. only have access to **electricity information** to the extent necessary to perform services that are not **electricity services** (such as general administration, accounting, payroll, human resources, legal, or information technology support services).
- ii. providing assistance to another **DNSP** in response to an event (such as an emergency) that is beyond the other **DNSP's** reasonable control;
- iii. **regional offices**, except to the extent that this exemption has been revoked under clause 5.6;
- iv. any arrangements authorised in accordance with the waiver process set out in clause 5 of this **Guideline**.

4.2.2 Staff sharing

(a) Subject to this clause 4.2.2, a **DNSP** must ensure that its **staff** involved in the provision or marketing of **direct control services** are not also involved in:

- i. the provision or marketing of **other distribution services** or **other electricity services** by the **DNSP**; or
- ii. the provision or marketing of **other distribution services** or **other electricity services** by an **affiliated entity**.

(b) Clause 4.2.2(a) does not apply in respect of:

- i. a member of **staff** who, in the course of their duties:
 - a. does not have access to **electricity information**;
 - b. has access to **electricity information** but does not have, in performing the roles, functions or duties of their **staff position**, any opportunity to use that **electricity information** to engage in conduct that is contrary to the **DNSP's** obligations under clause 4.1; or
 - c. only has access to **electricity information** to the extent necessary to perform services that are not **electricity services** (such as general administration, accounting, payroll, human resources, legal, or information technology support services);

- ii. providing assistance to another **DNSP** in response to an event (such as an emergency) that is beyond the other **DNSP's** reasonable control;
 - iii. staff located at **regional offices**, except to the extent that this exemption has been revoked under clause 5.6;
 - iv. any arrangements authorised in accordance with the waiver process set out in clause 5 of this **Guideline**.
- (c) The incentives and other benefits (financial or otherwise) a **DNSP** provides to its **staff** must not give its **staff** an incentive to act in manner that is contrary to the **DNSP's** obligations under this **guideline**.
- (d) Clause 4.2.2(a) does not apply to a member of the **staff** of a **DNSP** where the member of **staff** is an **officer** of both the **DNSP** and an **affiliated entity**.

4.2.3 Branding and cross-promotion

(a) A **DNSP**:

- i. must use independent and separate branding for its **direct control services** from:
 - a. the branding that it uses for its other distribution services and / or other electricity services;
 - a. the branding of an affiliated entity;
 - b.

~~the branding that it 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, or that the **DNSP** is providing both **direct control services** and services that are not **direct control services**;
- v. ~~(b) must not advertise or promote its **direct control services** and its services that are not **direct control services** together (including by way of cross-advertisement or cross-promotion); and~~
- ii.
- iii. (e) must not advertise or promote services provided by an **affiliated entity**.

- (b) Clause 4.2.3(a) does not apply in respect of **regional offices**, except to the extent that this exemption has been revoked under clause 5.6. [Placeholder –suggestion to include an exemption for regional offices in relation to the branding obligation. The obligation to separately brand does not appear to be distinct from the obligation to maintain separate offices and staff for direct control services as

distinct from other services. There should be an exemption in clause 4.2.3 for regional offices.]

4.2.4 Office and staff registers

A DNSP must establish, maintain and keep a written register that identifies:

- (a) the classes of offices to which it has not applied clause 4.2.1(a) by reason of clause 4.2.1(b)(i);
- (b) the **staff positions** to which it has not applied clause 4.2.2(a) by reason of clauses 4.2.2(b)(i) or 4.2.2(d), including a description of the roles, functions and duties of each **staff position**.

and must make the register publicly available on its website.

4.2.5 Waiver

A DNSP can apply for a waiver of the obligations set out in this clause 4.2.

4.3 Information access and disclosure

4.3.1 Meaning of confidential information

For the purposes of this clause 4.3, '**confidential information**' means **electricity information**, acquired or generated by a DNSP in connection with its provision of **direct control services**, that is not already publicly available, and includes **electricity information**:

- (a) that the DNSP derives from that information; or
- (b) provided to the DNSP by or in relation to a customer or prospective customer of **direct control services**;

[Note: aggregated financial information, or other service performance information, that does not relate to an identifiable customer, or class of customer, is excluded from the definition of **confidential information**.]

4.3.2 Protection of confidential information

Subject to this clause 4.3, a DNSP must:

- (a) keep **confidential information** confidential; and
- (b) only use **confidential information** for the purpose for which it was acquired or generated.

4.3.3 Disclosure of information

A **DNSP** must not disclose **confidential information** to any person, including an **affiliated entity**, unless:

- (a) the **DNSP** has first obtained the explicit informed consent of the relevant customer, prospective customer, to whom the **confidential information** relates;
- (b) the disclosure is required by, or for the purpose of complying with any law,
- (c) the disclosure is necessary to enable the **DNSP** to provide its **distribution services**, its **transmission services** or its **other services**, (including by acquiring services from other parties);
- (d) the **DNSP** complies with clause 4.3.4 in relation to that **confidential information**.

4.3.4 Sharing of information

- (a) Subject to clauses 4.3.4(b) and 4.3.4(c), where a **DNSP** acquires or generates **electricity information** in connection with providing **direct control services**, and shares that information (including information derived from that information) with an **affiliated entity**, it must provide access to that information (including the derived information) to third parties on an equal basis.
- (b) A **DNSP** is only required to provide information to a third party where:
 - i. the third party has requested that it be included on the **information register** in respect of that information; and
 - ii. the third party is competing, or is seeking to compete, with the **DNSP** or an **affiliated entity** of the **DNSP** in relation to **distribution services** or **other electricity services**.
- (c) A **DNSP** is not required to provide information to a third party where the **DNSP** has disclosed the information to an **affiliated entity** in the circumstances set out in clauses 4.3.3(a) to (c).
- (d) Without limiting clause 4.3.4(a), a **DNSP** must establish an information sharing protocol that sets how and when it will make the information referred to in clause 4.3.4(a) available to third parties, and must make that protocol publicly available.
- (e) Where a **DNSP** discloses information referred to clause 4.3.4(a) to any other party (including an **affiliated entity**) it must do so on terms and conditions that require the other party to comply with this clause 4.3 in relation to that information.

4.3.5 Information register

- (a) A **DNSP** must establish, maintain and keep a written register of all other parties (including **affiliated entities**) who request access to information identified in clause 4.3.4(a).

- (b) A third party may request that the **DNSP** include it on the **information register** in relation to some or all of the information that the **DNSP** is required to provide under clause 4.3.4, and the **DNSP** must comply with that request.

4.3.6 No waiver

A **DNSP** cannot apply for a waiver of the obligations set out in this clause 4.3.

4.4 Service providers

A **DNSP** must ensure that any 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 of this **Guideline**.

5 Waivers

5.1 Granting a waiver

The **AER** will not grant a waiver of an obligation under this **Guideline** other than in accordance with this clause 5.

5.2 DNSP's application for a waiver

A **DNSP** may apply in writing to the **AER** for a waiver of its obligations under clauses 3.1 and 4.2 of this **Guideline** for itself, or for itself and one or more other **DNSPs** who are **affiliated entities** of the **DNSP**. An application for a waiver must contain all information and materials necessary to support the **DNSP's** application, including:

- (a) the obligation in respect of which the **DNSP** is seeking a waiver;
- (b) the reasons why the **DNSP** is seeking the waiver;
- (c) details of the service, or services, in relation to which the **DNSP** is requesting the waiver;
- (d) details of the requested commencement date for the waiver, the requested expiry date (if any), and the reasons for requesting those dates;
- (e) details of the costs associated with the **DNSP** complying with the obligation if the waiver of the obligation were refused;
- (f) the **regulatory control period(s)** to which the waiver would apply;
- (g) any additional measures the **DNSP** proposes to undertake if the waiver were granted; and
- (h) the reasons why the **DNSP** considers the waiver should be granted with reference to the matters set out in clause 5.3.2, including the benefits, or likely benefits, of the grant of the waiver to electricity consumers.

5.3 AER's consideration of a waiver application

5.3.1 Requirement to consider a waiver

The **AER** must consider an application made under clause 5.2 within 40 days of receipt of the application, and may, subject to this clause 5.3:

- (c) grant the waiver subject to any conditions the **AER** considers appropriate; or
- (d) grant the waiver as an interim waiver; or
- (e) refuse to grant the waiver.

[Drafting Note: We have suggested a time limit (by which the AER must consider a requested waiver) in line with the pass through rules in rule 6.6.1 of the National Electricity Rules. This will require the implementation of transitional provisions in clause 7 also.]

5.3.2 The AER's assessment of the waiver application

In assessing a waiver application and deciding whether to grant a waiver (subject to any conditions) or refuse to grant a waiver, the **AER**:

- (a) subject to clause 5.3.4(a), must have regard to:
 - i. the **National Electricity Objective**;
 - ii. the potential for cross-subsidisation and discrimination if the waiver is granted or refused; and
 - iii. whether the benefit, or likely benefit, to electricity consumers of the **DNSP** complying with the obligation (including any likely benefit from increased competition) would be outweighed by the cost to the **DNSP** of complying with that obligation.
- (b) may:
 - i. reject the application if it considers that the application has been made on trivial or vexatious grounds;
 - ii. have regard to any other matter it considers relevant;
 - iii. request any further information from the **DNSP** it considers appropriate;
 - iv. invite public submissions on the application;
 - v. otherwise conduct such consultation as it considers appropriate with any person.

5.3.3 Form of waiver

The **AER** may grant a waiver that applies:

- (a) to one or more **DNSPs** for whom the waiver has been sought.
- (b) for the **DNSP's** current **regulatory control period**, the next **regulatory control period** or both; and
- (c) subject to such conditions as the **AER** considers appropriate.

5.3.4 Interim waiver

- (a) Clause 5.3.2(a) does not apply in relation to a waiver that is expressed to be an interim waiver.
- (b) An interim waiver granted under clause 5.3.1(b) ceases to have effect:
 - i. when the AER makes a further decision under clauses 5.3.1(a) or 5.3.1(c) to grant or refuse to grant the waiver; or
 - ii. on the expiry date (if any) specified by the AER when granting the interim waiver; whichever occurs first.
- (c) If the AER grants an interim waiver that has an expiry date, and the AER has not made a further decision under clauses 5.3.1(a) or 5.3.1(c) in respect of the waiver

application, the AER is deemed to have made a decision to ~~refuse to grant~~ the waiver. **[Drafting Note: We do not think there should be a presumption that the AER will refuse to grant the waiver if it has not made a further decision by the expiry date. We suggest adopting a similar procedure to that in the 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. We note that moving away from a deemed refusal is in line with the current proposed reforms to Part IIIA of the Competition and Consumer Act 2010.]**

5.4 Publication of waiver etc

- i. The AER ~~may~~must publish its reasons for granting or refusing to grant a waiver, subject to addressing any confidentiality concerns;
- ii. The AER ~~may~~must publish the terms and conditions of any waiver that is granted, subject to any confidentiality concerns. **[Drafting Note: In the interests of transparency and accountability, we consider it important that the AER provide reasons for its decisions, subject to protecting any confidential information. Furthermore, if the AER is considering refusing to grant a waiver, Essential Energy would like the opportunity to engage with the AER before it makes its decision.]**

5.5 Reviewing a waiver

- (a) Subject to this clause 5.5, the AER may, in its absolute discretion and at any time, vary or revoke a DNSP's waiver(including varying the terms and / or conditions of a DNSP's waiver), as long as it has given the DNSP at least 40 business days' notice that it is considering doing so.
- (b) In deciding whether to revoke a waiver or vary the conditions of a waiver, the AER:
 - i. must have regard to the matters specified in clause 5.3.2(a);
 - ii. may do the things, or otherwise have regard to matters, specified in clause 5.3.2(b);
[Drafting Note: We consider the allowance of 40 days' notice to be too short. Essential Energy requests that further clarity be provided regarding how this will operate in practice, including what is to happen during the 40 day period, how long after the 40 day period the AER will notify the DNSP of its decision, and how long after that the DNSP will have to transition to any new arrangements. It is important that the AER issue guidelines regarding waiver applications to provide guidance and clarity to DNSPs.]

5.6 Reviewing a regional office exemption

- (a) Subject to this clause 5.6, the AER may, in its absolute discretion and at any time, vary or revoke a DNSP's exemption from the staff and / or office sharing restrictions conferred by clauses 4.2.1(b)(iiiiv) and 4.2.2(b)(iiiiv) of this **Guideline**, as long as it has given the DNSP at least 40 business days' notice that it is considering doing so.;
- (b) In deciding whether to revoke an exemption, the AER:

- i. must have regard to the matters specified in clause 5.3.2(a);
- ii. may do the things, or otherwise have regard to matters, specified in clause 5.3.2(b). **Drafting Note: As above.**

6 Compliance and enforcement

6.1 Maintaining compliance

A **DNSP** must establish and maintain appropriate internal procedures to ensure it complies with its obligations under this **Guideline**. The **AER** may require the **DNSP** to demonstrate the adequacy of these procedures upon reasonable notice. However, any statement made or assurance given by the **AER** concerning the adequacy of the **DNSP**'s compliance procedures does not affect the **DNSP**'s obligations under this **Guideline**.

6.2 Compliance reporting

6.2.1 Annual compliance report

- (a) A **DNSP** must prepare an annual ring-fencing compliance report each **regulatory year** in accordance with this clause 6.2.1, and submit it to the **AER** in accordance with clause 6.2.2.
- (b) The annual compliance report must identify and describe, in respect of the **regulatory year** to which the report relates:
 - i. the measures the **DNSP** has taken to ensure compliance with its obligations under this **Guideline**;
 - ii. any breaches of this **Guideline** by the **DNSP**, or which otherwise relate to the **DNSP**; and
 - iii. all other services provided by the **DNSP** in accordance with clause 3.1 ~~Error!~~
~~Reference source not found.~~;
 - iv the nature of all transactions between the **DNSP** and an **affiliated entity**.
- (c) The annual compliance report must be accompanied by an assessment of compliance by a suitably qualified independent authority.
- (d) Annual compliance reports ~~may~~must be made publicly available by the **AER**.

6.2.2 Timing of annual compliance reporting

- (a) Subject to clause 6.2.2(b), a **DNSP** must submit its annual compliance report to the **AER** within 4 months of the end of the **regulatory year** to which the compliance report relates.
- (b) A **DNSP** is not required to submit an annual compliance report in accordance with clause 6.2.1 for its **regulatory year** in which this **Guideline** commences.

6.2.3 Reporting by the AER

The **AER** may publish reports from time to time about **DNSPs**' compliance with this **Guideline** on the basis of information provided to it under this clause 6.2.

6.3 Compliance breaches

A **DNSP** must notify the **AER** in writing within five business days of becoming aware of a material breach of its obligations under this **Guideline**. The **AER** may seek enforcement of this **Guideline** by a court in the event of any breach of this **Guideline** by a **DNSP**, in accordance with the **NEL**.

6.4 Complaints and investigations

The **AER** may, at any time, require a **DNSP** to provide a written response to a complaint or concern the **AER** raises with the **DNSP** about its compliance with this **Guideline**, including where the **AER** has previously required the **DNSP** to provide one or more written responses to the relevant complaint or concern.

Clause 7 Transitional arrangements

7.1. Despite clause 1.1.2:

- (a) a DNSP must fully comply with clauses 3.1 and 4.2 in respect of their **existing services** as soon as reasonably practicable, having regard to the likely costs of having to fully comply with those clauses any sooner, but no later than 1 January 2018.
- (b) where a **distribution determination** applicable to a **DNSP** results in a change in the classification of a **distribution service** provided by the **DNSP**, and that change materially affects the **DNSP's** compliance with this **Guideline**, the **DNSP** must ensure that it complies with the **Guideline** within 12 months of the commencement date of the **distribution determination**.

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 1 December 2016.

7.4. Clause 7.3 does not apply:

- (a) to any **transitional guidelines** in force in Victoria or (for the avoidance of doubt) the Northern Territory; and
- (b) to the extent that the **transitional guidelines** apply to gas distribution.