



SUBMISSION

Prepared for submission to:

Australian Energy Regulator (AER)

GPO Box 520

Melbourne VIC 3001

Distribution and Transmission Confidentiality Guidelines – Issues Paper

Prepared by:

Etrog Consulting Pty Ltd

Melbourne

Australia

+61 403 444141

dprins@etrogconsulting.com.au

www.etrogconsulting.com.au

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Author: David Prins

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1. INTRODUCTION

This submission is a response from Etrog Consulting Pty Ltd (Etrog Consulting) to the AER's Issues Paper on *Distribution and transmission confidentiality guidelines*, which was published for stakeholder comment on 18 March 2013 as part of the Better Regulation program of work. This follows changes to the National Electricity Rules and the National Gas Rules that were published by the Australian Energy Market Commission on 29 November 2012. The AER's approach to regulation under the new framework will be set out in a series of guidelines to be published by the end of November 2013.¹

Etrog Consulting is a specialist consultancy in energy and utilities, focusing on regulatory policy and the interplay between regulation and competition in energy and water industries and markets. The director of Etrog Consulting, David Prins, who is the author of this submission, has 23 years consulting experience in this field.

Etrog Consulting is not currently engaged by any client on the subject of this submission. The views put forward in this submission are the views of Etrog Consulting and its author, and are not intended to represent the views of any client of Etrog Consulting.

Subject to any other client commitments or conflicts, we will be happy to discuss our views further with the AER or with any other stakeholders or interested parties that read this submission. Our comments in this submission could apply equally to all information that the AER receives from electricity Network Service Providers (NSPs) and gas service providers.

2. OVERALL APPROACH

We support the statement of the AER in the Issues Paper that it will be looking to achieve a balance between protecting certain information because of its sensitive nature and the need to disclose information for an open and transparent regulatory decision-making process that allows all stakeholders to engage effectively.

We note that decision-making processes include the AER's acceptance of pricing proposals from NSPs in the years between price determinations. The spreadsheets that underlie those annual pricing proposals should be available to stakeholders to enable them to verify the AER's annual pricing decisions.

¹ Further details on the consultation processes and other guidelines work streams are available at www.aer.gov.au/node/18824.

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We also would like to point out that as well being used in decision-making processes, information that is not confidential can usefully be used for research purposes and to assist interested parties in making efficient investment decisions, in accord with the National Electricity Objective and the National Gas Objective. Unnecessarily withholding information on the grounds of confidentiality when that is not appropriate may thwart the realisation of a wide range of benefits in support of these Objectives, as well as being detrimental to the conduct of regulatory decision-making processes.

We support the AER working with NSPs to reach a common understanding of the types of information that the AER will generally protect or disclose, provided that this process of reaching common understanding is also open and transparent and includes consultation with a range of stakeholders. We support the use of guidelines that allow the AER to resolve most confidentiality claims quickly and minimises the need for the AER to resort to formal disclosure powers. We expect an outcome of this will be that NSPs and other stakeholders will have more certainty regarding what will be published and available for use in the public domain, and what will not be published.

3. PRINCIPLES FOR ESTABLISHING WHAT IS CONFIDENTIAL

We support the principles set out in the Issues Paper that the confidentiality guidelines aim to make NSPs accountable for their confidentiality claims. Consistent with current procedures, they aim to require NSPs to provide clear and logical reasons as to why the AER should protect information. These reasons will need to focus on how disclosing the information will cause detriment to the NSP, and whether the public benefit in disclosing information outweighs that detriment.

4. APPLICATION OF THE GUIDELINES

We note the current two-stage process for determining whether to protect or disclose information. Stage two of the process is very formal, resource intensive and places an additional administrative burden on NSPs, third parties and the AER, and that the AER would prefer to avoid stage two. Therefore, the AER is aiming for the confidentiality guidelines to strengthen its existing stage one processes. The confidentiality guidelines would put in place a set of clear and well understood procedures that outline the way in which NSPs may make confidentiality claims in their submissions. Also, the AER aims for the confidentiality guidelines to provide NSPs with a clear understanding of information that the AER will generally protect and disclose. In turn, the confidentiality guidelines may reduce the need for the AER to use the stage two information disclosure powers.

The AER's experience to date has been that it has been unable to resolve all confidentiality issues at stage one, so we must question what aspects of the new guidelines will be crucial to reducing the need for the AER to use the stage two information disclosure powers.

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It seems to us that the crucial element is that all NSPs' regulatory proposals, revenue proposals and proposed pricing methodologies must comply with the confidentiality guidelines. If not, the AER may reject an NSP's proposal and require it to resubmit it, in compliance with the confidentiality guidelines.

We suggest that the AER might usefully consider further how the guidelines will reduce the need for the AER to use the stage two information disclosure powers, and ensure that the guidelines do include all the elements that are crucial to achieving that objective.

5. WHAT MIGHT CONSTITUTE CONFIDENTIAL INFORMATION

The Issues Paper states that the AER intends the confidentiality guidelines to include a list of items which will provide guidance to NSPs.

The AER's current list of items it is considering protecting includes:

1. Information affecting the security of the network – information which if made public may jeopardise security of the network or a NSP's ability to effectively plan and operate its network.
2. Market sensitive cost inputs – information such as supplier prices and internal labour costs and information which would affect the NSPs ability to obtain competitive prices in future infrastructure transactions, such as tender processes.
3. Market intelligence – information which may provide an advantage to a NSP's competitors for non-regulated or contestable activities.
4. Strategic information – information such as the acquisition of land and easements, where the release of this information might adversely impact the NSPs ability to negotiate a fair market price for these items.
5. Personal information – information about an individual whose identity is apparent, or can reasonably be ascertained from the information which raises privacy considerations.

We support in principle:

- Item 1: information which if made public may jeopardise security of the network or a NSP's ability to effectively plan and operate its network;
- Item 2: information which would affect the NSPs ability to obtain competitive prices in future infrastructure transactions;
- Item 4: information that might adversely impact the NSPs ability to negotiate a fair market price for the acquisition of land and easements; and

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- Item 5: information about an individual whose identity is apparent, or can reasonably be ascertained from the information which raises privacy considerations.

We have reservations about item 3: information which may provide an advantage to a NSP's competitors for non-regulated or contestable activities. We fear that this may be too broad.

We support the statements of the AER on page 10 of the Issues Paper:

Unlike businesses in competitive markets, network service providers are natural monopolies or have significant market power. This can mean that information on an NSP's operations, such as most of its detailed supply costs, will not typically be as commercially sensitive as for businesses in a competitive market. In a competitive market, such details could undermine competitive rivalry and fair market conduct. Exceptions to this view would mainly relate to information which may compromise an NSP's commercial tender processes or affect its ability to obtain a competitive input price.

Our concern arises because the same information may support monopoly and contestable services. The broadest interpretation of item 3 could mean that such fundamental data items such as historic and forecast numbers of customers on each tariff, amounts of energy consumed and maximum demands, could be taken to be data that would enhance a competitor's ability to compete against the NSP for the provision of a very wide range of services. Almost all the information published by the AER could be used by competitors to NSPs.

We suggest that the AER might reconsider the inclusion of item 3 in the list of items it is considering protecting.

6. ITEMS THAT THE AER SHOULD DISCLOSE

Regarding question 4 in the Issues Paper, as stated above, decision-making processes include the AER's acceptance of pricing proposals from NSPs in the years between price determinations. The spreadsheets that underlie those annual pricing proposals should be available to stakeholders to enable them to verify the AER's annual pricing decisions.

7. COMPLIANCE COSTS

Question 9 in the Issues Paper asks for stakeholders' views on ensuring appropriate disclosure of information whilst minimising administrative costs. The Issues Paper suggests that over the course of a reset, compliance with the confidentiality guidelines may result in additional administrative resources for NSPs.

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As stated above, in the current two-stage process for determining whether to protect or disclose information, stage two of the process is very formal, resource intensive and places an additional administrative burden on NSPs, third parties and the AER. We suggest that reducing the need for the AER to use the stage two information disclosure powers will go a long way to offsetting any additional compliance burden on the NSPs. If implemented effectively, the overall effect on the NSPs of introducing the new guidelines may be to reduce the administrative burden, while providing benefits for stakeholders at large.