



HopgoodGanim
19742014

15 August 2014

Mr John Skinner
AER Networks
By email: NSWACTelectricity.aer.gov.au

Our ref: 1484062 - Peter Burge
Your ref: 53504

BRISBANE

Level 8, Waterfront Place
1 Eagle Street
Brisbane Qld 4000 Australia

PO Box 7822, Waterfront Place
Brisbane Qld 4001 Australia

ABN: 54 105 489 661

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Dear Mr Skinner

Submission in Response to Initial Disclosure Notice from AER

We refer to the "Initial Disclosure Notice: authorised release of public lighting information" (IDN) issued by the Australian Energy Regulator (AER) [REDACTED] dated 15 July 2014. On behalf of our client we thank you for the opportunity to make these submissions.

The IDN is issued pursuant to section 28ZB of the *National Electricity (NSW) Law* (NEL) and relates to the proposed disclosure by the AER of the information contained in Appendix C to the IDN (the **Relevant Information**).

In accordance with section 28ZB(3) of the NEL, the AER must provide [REDACTED] with an opportunity to "make representations to the AER not to disclose the [Relevant Information]".

Our client has asked that we make these submissions to you on its behalf in accordance with section 28ZB(3)(a)(iii) of the NEL.

As we understand the process for determination of disclosure under section 28ZB of the NEL, this is Step 3 of 4 Steps as set out in Appendix B to the IDN; should the AER decide to disclose the Relevant Information notwithstanding any submissions by [REDACTED] to the contrary, [REDACTED] will be given a final disclosure notice (FDN).

1. Application of the Principles of Natural Justice

We respectfully submit that given the Relevant Information directly concerns the confidential business information of [REDACTED] and that its disclosure is likely to severely disadvantage it in any future tender for the supply of bulk lamp replacement services provided to AusGrid (the **bulk lamp replacement services**), [REDACTED] be given reasons for any decision by the AER to issue an FDN.

Further we note that notwithstanding that the Relevant Information directly concerns the confidential business information of [REDACTED] and not AusGrid, AusGrid had preliminary discussions with the AER about the disclosure of the Relevant Information before the IDN was issued. Therefore we respectfully submit that should the AER reject the submissions of [REDACTED] as set out in this letter, [REDACTED], like AusGrid, should be given a further opportunity to make submissions to the AER

BRISBANE

T +61 7 3024 0000
F +61 7 3024 0300

PERTH

T +61 8 9211 8111
F +61 8 9221 9100

www.hopgoodganim.com.au



before any FDN is issued.

We note that the above submissions are keeping with the principles of natural justice. In this regard, section 28Y of the NEL explicitly recognises the application of the principles of natural justice to decisions of the AER with respect to the disclosure of the information provided to it.

2. Submissions

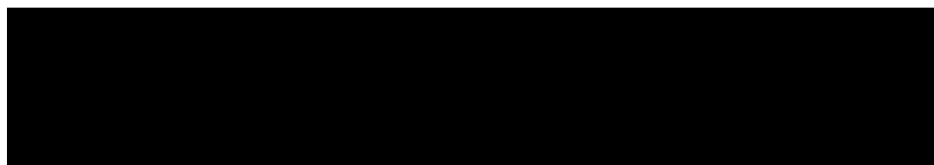
█ submits that the AER should not publish the Relevant Information because it is confidential to █ and █ has not waived that confidentiality. For the reasons outlined below, disclosure of the Relevant Information is likely to cause unnecessary commercial and financial detriment to █, but will not achieve any legitimate public policy objective. In particular:

2.1 Disclosure of the Relevant Information is not reasonably necessary for the AER to perform or exercise its functions or powers under the NEL or the National Electricity Rules (**NER**), the national electricity objective or any other legitimate policy objective.

- (a) The AER is currently engaged in the process of the NSW Pricing Determination Process. This exercise includes setting the prices for alternative control services in accordance with its powers under Chapter 6 of the NER.
- (b) In NSW the operation, maintenance, repair and replacement of public lighting assets by the distribution network service providers such as AusGrid (**DNSPs**) have been determined by the AER to be alternative control services (**public lighting services**). Setting the prices for alternative control services requires the AER to exercise its information gathering powers under Division 4 of the NEL in order to obtain information on costs incurred in supplying, in this case, public lighting services.
- (c) To exercise its information gathering powers under Division 4 the AER must consider that it is reasonably necessary in order for it to perform or exercise its functions or powers under the NEL or the NER (section 28F of the NEL). Moreover the AER must exercise its power in a manner that will or is likely to contribute to achievement of the national electricity objective set out on section 7 of the NEL.
- (d) For the reasons set out below █ submits that the disclosure of the Relevant Information is not reasonably necessary for the AER to perform or exercise its functions or powers under the NEL or the NER, and nor will it to contribute to achievement of the national electricity objective set out on section 7 of the NEL.

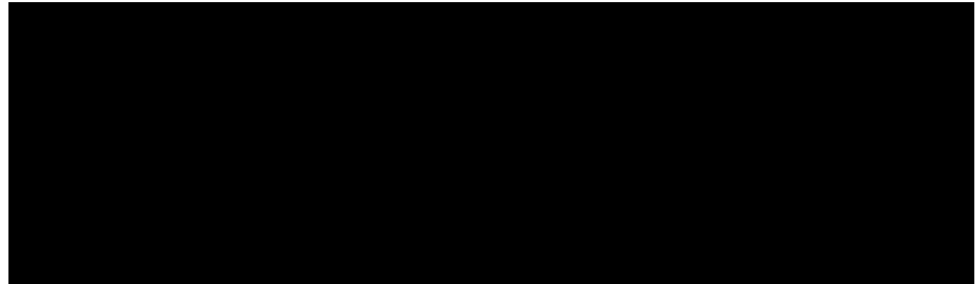
- (1) As we understand it, the purpose for which the AER wishes to disclose the Relevant Information is to ensure that the cost model for the provision of public street lighting is transparent, and to allow local councils to compare the absolute and comparative costs of DNSPs' public lighting services offerings. In particular the AER is concerned to ensure that all and only the DSNPs' relevant costs have been properly allocated, and that the appropriate weighted average cost of capital has been applied by the DSNPs (the Policy Purpose).

- (2)





(3)



(4) Moreover these prices are not subject to regulation by the AER and will simply be passed through by AusGrid to its customers without mark-up. As noted above the Policy Purpose behind disclosure of the Relevant Information is the disclosure of pricing/costing information relating to the regulated alternative control service (the public street lighting service), and not the bulk lamp replacement services. The bulk lamp replacement service is simply an input into the regulated service, and the price of the bulk lamp replacement service is set by competition, there is no public benefit to disclosing the specifics of the pricing of the bulk lamp replacement services – the AER cannot regulate the price of such an inputs.

(5) Pursuant to section 28(G)(2)(e) of the NEL, one of the factors which the AER is required to consider when determining whether it is necessary to issue a notice to a related provided, is whether the market for the relevant contributed service is genuinely competitive. As outlined below the market for the bulk lamp replacement services for bulk lamp replacement services is clearly competitive

(e) Given all of that, [REDACTED] respectfully submits that the exercise by the AER of its information gathering powers in these circumstances is not reasonably necessary either for the AER to perform or exercise its functions or powers under the NEL or the NER; the achievement of the Policy Purpose, and nor will it contribute to achieving the national electricity objective. Indeed the costs of such third party suppliers are costs outside of section 7A of the NEL.

(f) Further in [REDACTED] respectful submission it would not be in accordance with the Policy Purpose if the disclosure of the Relevant Information was to either:

- (1) enable competitors of [REDACTED] to access the confidential information of [REDACTED] in relation to the supply of the bulk lamp replacement services;
- (2) to interfere in the confidential procurement/tendering process in which [REDACTED] engages with AusGrid; or
- (3) any competitor of [REDACTED] to gain any commercial advantage over, or to cause any detriment to [REDACTED]

(each an **Improper Purpose**).

(g) In [REDACTED] respectful submission the only reason for, and the likely effect of disclosing the Relevant Information is an Improper Purpose.

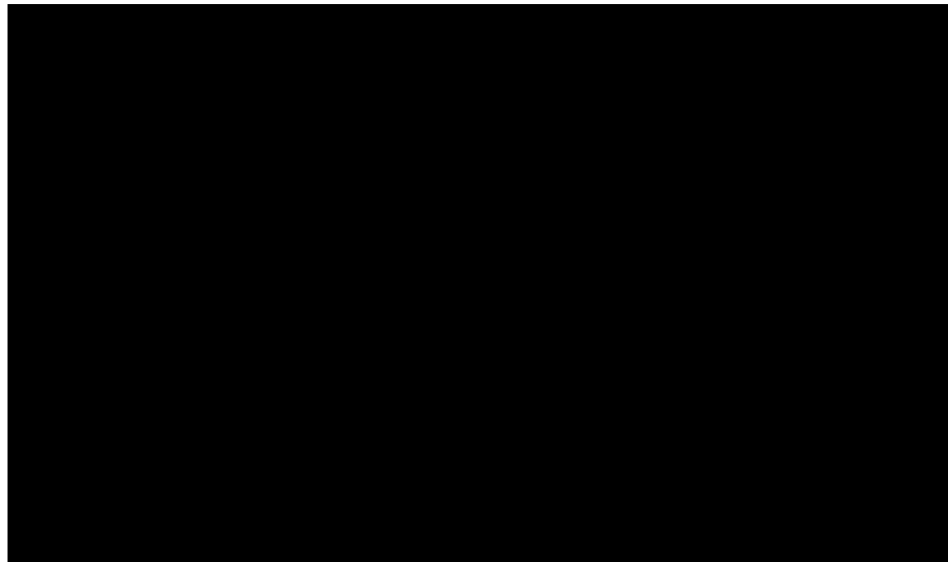
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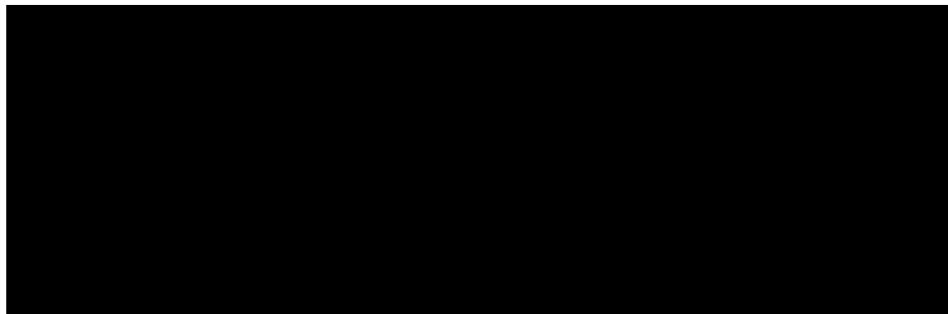


- (a) Given the Policy Purpose and the competition in the market for bulk lamp replacement services, there is no public benefit that would be gained by the disclosure of the Relevant Information that would outweigh the detriment likely to be suffered by [REDACTED] as a result of the disclosure. In particular we note that:

(1)



(2)

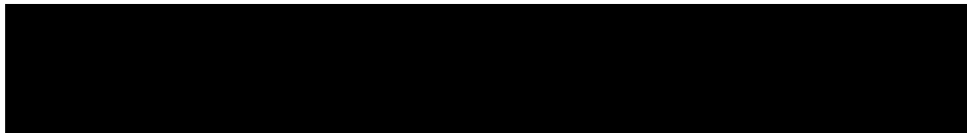


- (b) Given all of the above, the likely harm to both [REDACTED] and competition the market for bulk lamp replacement services, resulting from the disclosure of Relevant Information, would seem to outweigh any public benefit arising from that disclosure.

2.3 Breach of section 28ZA of the NEL

- (a) Section 28ZA of the NEL prohibits the AER from disclosing confidential information if that information or the manner in which it is disclosed could lead to the identification of [REDACTED]

(b)



2.4 Principle of Proportionality

- (a) We note that the example given in Section 28ZA of the NEL states that information which is confidential can be combined or arranged with other information provided



that the manner in which it is released will not lead to the identification of the person to whom the information relates.

- (b) The price for bulk lamp replacement services represent but one small input into the price of the alternative regulated services. Its relevance to the overall pricing structure of the regulated service should not be overstated.
- (c) For all of the reasons outlined above, [REDACTED] does not believe that the Relevant Information should or needs to be disclosed in order for the AER to achieve any legitimate public policy objective. Further to do so may well be a breach of Section 28ZA of the NEL. However should the AER be mindful to do so, and bearing in mind the principle of proportionality and the Policy Purpose of disclosure of the relevant information, the AER can achieve it's the Policy Purpose by simply publishing the aggregated costs to AER of inputs into its public street lighting service provided by third parties, without delineating the cost of the provision of each such input.
- (d) Accordingly the price of third party inputs into the public lighting services (including bulk lamp replacement service) could be aggregated and published as a single lump sum where:
 - (1) those input services are provided on an arm's length basis;
 - (2) the prices for which services are set as a result of competitive tender; and
 - (3) those individual inputs represent but one small input into the price of the alternative regulated services; and
 - (4) those inputs are not subject to regulation by the AER and will simply be passed through by AusGrid's to its customers.

2.5 Disclosure of Redacted material

- (a) In the further alternative, should the AER determine that notwithstanding those submissions outlined above, it will disclosure the Relevant Information, [REDACTED] should be given the opportunity to seek that some of the documents containing Relevant information be redacted, so that only that information which is specifically required by third parties in order to achieve the Policy Purpose should be disclosed.

2.6 Disclosure for a Policy Purpose subject to Undertakings

- (a) In the further alternative still, should the AER determine that notwithstanding the submissions of [REDACTED] outlined above, [REDACTED] respectfully submits that the AER should only disclose the Relevant Information in accordance with the following protocol (or something of similar effect):
- (b) The Relevant Information should only be disclosed by the AER if the AER is satisfied on reasonable grounds that the recipient is a council which intends to use the Relevant Information only for a Legitimate Purpose.
- (c) The council provides an undertaking to the AER and [REDACTED] to the effect that it will keep the Relevant Information strictly confidential, and use the Relevant Information for the Legitimate Purpose and not for an Improper Purpose.
- (d) the Relevant Information is made available for inspection by the council, whether by way of access to a physical copy, through a web-based solution, or over the phone,

15 August 2014



but in any event that no copies of the Relevant Information be provided to those councils.

If you would like to discuss this matter further, please contact the writer on the below details.

Yours faithfully

HopgoodGanim

Contact: Peter Burge
Special Counsel
T 07 3024 0468
F 07 3024 0568
E p.burge@hopgoodganim.com.au