



Major Energy Users Inc.

Australian Energy Regulator

Better Regulation Program

MEU Response to

Distribution and transmission confidentiality guidelines

Submission by

The Major Energy Users Inc

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1. Introduction and overview

The Major Energy Users Inc (MEU) welcomes the opportunity to provide comments on the AER Issues Paper on distribution and transmission confidentiality guidelines. The confidentiality guidelines will specify the manner in which network service providers (NSPs) may make confidentiality claims, and the guidelines will be binding on the AER and NSPs in relation to initial and revised regulatory proposals, revenue proposals and proposed pricing methodologies. The AER will also consider applying the guidelines as policy to all information the AER receives.

As an overarching observation, there is already considerable information asymmetry acting to the detriment of consumers. Making information confidential merely exacerbates this asymmetry. When consumers make submissions to regulators, it has been made abundantly clear that regulators see that information provided which is classified as confidential would be given “less weight” than information which is publicly available because the former cannot be challenged. The AER should consider whether this same regulatory approach should be made clear to NSPs when they provide information to the regulator.

1.1 Some realities

NSPs are regulated because they are monopolies and have monopoly powers and rights. By definition, a monopoly has no competition in the provision of its services. The prime purpose of confidentiality is to ensure that a provider’s competitors cannot gain a benefit from accessing the provider’s information. If there are no competitors, this driver for confidentiality does not apply

The MEU considers that having no competition means that there is no need to consider that any of the information held by a network should be considered confidential. On this basis alone, the MEU is of the view that all information held by an NSP should be available for public scrutiny and that the onus must be on the NSP to prove beyond doubt that any information it holds should be considered confidential.

The purpose of the incentive regulatory practices used in the Australian energy markets is to provide the pressures of competition to the service providers. Part of the regulatory process is that the regulator collects useful data from the NSPs as to their performance. Access to the financial performance of each NSP provides a data set that can indicate whether all network services are approaching the efficient frontier in their performance¹.

¹ All benchmarking data collected by the AER should be made publicly available so that consumers can see the performance of each network

Currently this data is considered to be confidential and prevents this being used to drive to more efficient outcomes.

Having this data publicly available provides useful information to both consumers and to other NSPs as to whether they are operating efficiently. The current practice of considering this information to be confidential prevents the data from being used to provide some commercial pressure on NSPs to become more efficient.

It has been proposed that releasing confidential information might be to the detriment of the NSPs. The MEU acknowledges that release of confidential information might well result in the NSP being allowed less revenue for providing its services (and thereby reducing its profitability), but equally the reduced revenue might also reflect what are efficient costs for the service provision. If an NSP is not prepared to provide the accurate and comprehensive information sought by the consumers who pay for the monopoly service, the NSP has the option to exit the market and sell to another who would be prepared to provide this information on the services they provide.

At its most fundamental, owning a monopoly service provides many benefits. The alternative to competition driving the most efficient costs is for all data held to be made publicly available – the more data that is made publicly available, the less opportunity a monopoly has to “game” the regulator.

The AER has identified that a shortcoming of the previous rules was that there was little customer engagement by the NSPs, with them focusing their efforts into convincing the regulator to increase allowed revenue. The new rules require increased engagement between the NSPs and the consumers they serve. Without access to comprehensive data and the continuation of the current restrictions on release of information (through the commercial in confidence requirements established by the NSPs) useful customer engagement will not occur, reducing the effectiveness of this new requirement in the rules.

1.2 What information might be confidential?

Whilst being of the view that all information should be publicly disclosed, the MEU accepts that there might be instances where disclosure might not be appropriate.

NSPs currently make confidential all information on related party transactions and unregulated revenue from the use of shared assets. There is no reason that all why such information should be kept confidential and every reason to ensure that the maximum disclosure is provided. The current NSP practices actively prevent informed consumer comment on issues where the NSPs are

able to increase their profitability through financial engineering and using assets which are fully recompensed by consumers

Currently confidential information is imposed more widely than might really be needed. For example, if there are tenders for work and the tendering process is carried out on a competitive basis, releasing actual prices and conditions of tenders might well be considered to be confidential as the release of such information could harm the tenderers. The MEU can see that such information should be kept confidential.

However, despite this there are aspects of the tender process that are not confidential, such as:

- Names of the firms which tendered for the work (this provides some evidence that there was truly a competitive tender process)
- Who the successful tenderer was (this allows identification if the successful tenderer is a related party)
- What oncosts the network will add to the price of the tendered work
- Reports from third parties

The release of such information will not affect third parties but will provide increased confidence as to the processes used and costs the NSP is seeking to be included in its cost structure. When tenders are called, the NSP should ensure that tenderers are made fully aware of what information will be kept confidential and what will be released publicly. This avoids the potential that a confidentiality requirement imposed by a tenderer does not prevent the release of information by the NSP.

One “game” that NSPs use to preclude having to give the regulator detailed costing data is when a successful tenderer for works considers that its costing information is confidential and then imposes this confidentiality requirement on the NSP. This “game” has been used particularly in cases where the contractor is a related party.

To overcome this, the regulator should impose on every NSP a requirement that a condition of contract for outsourced work will be that the contractor must provide detailed information to the NSP which will be then given to the regulator for public release.

In some of these cases, some aggregation² of the data might be appropriate to provide protection to third parties that might otherwise be affected, but such aggregation has to be limited to ensure that the data is still useful and not aggregated to a point where little benefit can be gained from its provision. As part of such aggregation, it should be made clear as to what has been

² Such as is done by the ABS when developing its data

aggregated and to what extent so that consumers can recognise (or not) its usefulness

If information is to be kept confidential, then the reasons for its confidentiality should be made clear to all so that consumers “get to know what they don’t know” and why this is the case.

1.3 Preferred access to confidential data

Proposals have been made that some consumer advocates be permitted access to information where a decision has been made to keep certain information confidential – such access being granted on the advocates providing an undertaking to keep such information confidential.

Such an approach is not the preferred approach where all information would be made available.

The approach of preferential disclosure has some appeal but does raise some concerns, such as:

- How does the advocate manage the tension between using the confidential information provided in submissions which are to be publicly available?
- What penalties would apply if confidential information was inadvertently released?
- How is the confidential information to be imparted to the advocates?

On balance, the MEU considers that there should be an option for specified consumer advocates to be allowed access to confidential information.

If there is to be preferential access to confidential information to some consumer advocates, the confidentiality guideline needs to address this issue and provide rules as to how this is to be facilitated and controls on how the access can be used.

1.4 A summary of the MEU overview

The MEU supports the motives behind the preparation of the guidelines as well as the need to achieve a balance between information disclosure and the protection of sensitive information.

The MEU looks forward to a balanced approach to information disclosure and confidentiality claims, the need to minimise information disclosure processes in a time fashion, the provision of certainty to NSPs and consumers and the minimisation of formal disclosure procedures being implemented. Most importantly, the achievements of the above should assist the AER in ensuring

that the economic regulation reviews will be conducted to meet the long term interests of consumers.

This submission follows the structure of the AER Issues Paper and provides specific comments on each of the questions raised.

2. MEU Experience with information disclosure

The MEU notes the statement from the AER, viz.:-

“Our experience with confidentiality claims to date has been mixed. We agree with NSPs regarding many confidentiality claims. However, some NSPs claim confidentiality over entire documents or entire submissions. These claims may not explain why the AER should protect the information. For example, these claims are often as simple as “In Confidence” without any explanation of how disclosure would cause detriment which is not outweighed by the public benefit.” (Page 11).

The MEU shares the AER concerns. As also disclosed in the Issues Paper, an MEU affiliate (The Energy Users Coalition of Victoria) had expressed concerns regarding the lack of disclosure of a material document by APA GasNet’s access arrangement proposal (Page 11). The EUCV was critical of the AER for allowing such a situation to occur.

The MEU considers that not only should vital documents be disclosed (such as that referred to in the AER Issues Paper concerning the EUCV concerns), but the material should be made available in a timely manner to allow for proper scrutiny. At an extreme, release of truckloads of information by NSPs (see for example Table 1 of Issues Paper), with a window for public scrutiny limited to 2 or 3 weeks, is of limited value and goes against the spirit of proper transparency and disclosure for public review.

3. The AER’s current information handling process

In section 3 of the Issues Paper the AER sets out its current two stage information handling process. Despite what appears on the surface to be a clear cut process for information disclosure consumers have experienced for themselves the failure of this process, as witnessed by the foregoing example of APA GasNet cited by the AER.

The key question that arises is whether strengthening the AER’s existing stage one processes will address the problem of timely disclosure of

information³, as well as the possibility of regulatory ‘gaming’ by NSPs. With regard to the latter, if the AER were to exercise its disclosure powers and should merits review be sought by the NSP, will there be sufficient time (the ACT has 20 business days to reach a determination) should there be literally large amounts of documentation involved. How robust will be any ACT decision and with what degree of confidence can consumers give to this example of possible ‘gaming’ and the available time for both the AER and consumers to review disclosed material.

Clearly moving to strengthen stage one processes may be helpful, but the question is the extent and effectiveness of the ‘strengthening’.

4. Developing the confidentiality guidelines

The MEU addresses the specific questions raised in the Issues Paper.

4.1 Manner in which NSPs may make confidentiality claims

Question 1

What are stakeholders’ views on requiring NSPs to make confidentiality claims using the template in Attachment 1?

The MEU considers that the template contained in Attachment 1 is appropriate, subject to indication being provided (perhaps in a new separate column) on the materiality of significance (in terms of revenue, costs etc) of the confidentiality claims.

4.2 Categories or lists of confidential information

Question 2

Should the confidentiality guidelines specify categories of information by which NSPs must classify any claims of confidentiality?

The MEU agrees with the AER’s “on balance” view not to require NSPs to classify any claims of confidentiality. The MEU does, however, consider that claims for confidentiality should be minimised and follow the concepts outlined in section 1.2 above.

³ Consumers have noted that in some cases, NSPs have released what was previously considered to be “confidential” but the release of the information was provided so late in the process as to have little value to consumers.

Question 3

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should protect?

The MEU has no additional item to include in section 4.2 but considers that a list of protected information should be considered to be definitive and not a minimum.

There is concern at the breadth of coverage for some of the categories and the MEU considers that the AER needs to assess more deeply as to whether all elements categorised in an item included in the list should receive such a “blanket” coverage.

4.3 Information the AER should disclose

Question 4

In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should disclose?

The MEU is of the view that all information that consumers might need to provide useful input should be disclosed and that, as a matter of principle, except for the information specifically identified as that which should be kept confidential (see response to Q 3) should be available.

The MEU considers that providing a list of what is not confidential should not be classified as being definitive and should be considered to be typical but not all encompassing.

In addition to the items listed, the MEU considers that following additional items must be disclosed:-

- related party transactions/arrangements
- demand management projects/arrangements
- non-regulatory activities
- information on data acquired for benchmarking

4.3.1 Related party transactions/arrangements

NSPs have established related party corporate vehicles and undertaken significant related party transactions or arrangements as part of their

regulated activities. Much more information on these is needed to ensure that the contractual arrangements are not a vehicle for transferring unnecessary or inappropriate costs into the regulated activities or creating a veil to prevent access to information needed to allow a proper regulatory review.

For example, in the last Victorian electricity distribution review, the AER pointed out, in its draft decision, that related party transactions were growing in significance and represented a significant proportion of opex costs.

Gas pipeline companies have long established corporate vehicles to operate networks and such arrangements represent significant proportions of total costs and there appears to be an increase in similar activities by electricity network service providers.

4.3.2 Demand management projects/arrangements

Demand management projects can be significant and to obviate the need for network investments – it is therefore very relevant that such information be disclosed.

There is evidence that such projects arranged between TNSPs and large energy users have not been disclosed because of TNSPs' requirements that they be 'commercial in confidence' even though the related users do not see the need for such classification.

4.3.3 Non-regulatory activities

There should be disclosure of significant non-regulatory activities that have relevant impact on shared capital/assets. This guideline should be related to the shared asset guideline being concurrently developed by the AER.

4.3.4 Benchmarking

Under the benchmarking guidelines the AER will acquire a considerable amount of useful benchmarking data, especially in the costs related to the category analysis. The MEU has a major concern that the access by consumers to such information will be limited under the confidentiality guidelines and minimise the value of the data to consumer commentary on issues.

The MEU considers that access to this benchmarking data will provide considerable support to consumer engagement with the NSPs but also in regard to consumer involvement in revenue reset processes.

5. Website notices

Question 5

What are stakeholders' views on requiring NSPs to use the template in Attachment 2 to determine the proportion of information over which they have claimed confidentiality?

The MEU considers that NSPs should use the template in Attachment 2 to show the proportion of information over which they have claimed confidentiality. Consumers consider that Attachment 2 would benefit greatly from the inclusion of a number of columns to indicate the subject matter, the cost categories of the information, and the significance of the claimed confidentiality information in terms of costs or revenues.

This would assist the AER, consumers and NSPs to quickly review what information has been made confidential, why this has occurred and the materiality of the information claimed to be confidential.

6. Blanket confidentiality claims

Question 6

What are stakeholders' views on our proposed measures for dealing with blanket confidentiality claims in the confidentiality guidelines?

The MEU supports the proposed AER requirement that NSPs making blanket confidentiality claims provide reasons why the AER should protect each individual aspect of the relevant document.

As noted above, however, claiming blanket confidentiality and then releasing some of the information often results in the information being made available well after when it would have been most useful. The MEU considers that the AER also needs to address the timeliness relating to this later release of information, because late release often has the same impact as if the information had remained confidential.

7. Third party documents

Question 7

What are stakeholders' views on our position that NSPs should verify all third party confidentiality claims that are included in their submission?

The MEU supports the proposed AER requirement (see comments in section 1.2).

8. Scope and coverage

Question 8

Should we apply the confidentiality guidelines, as a policy, to all information we receive from NSPs and gas service providers? If not, what information handling procedures should we use to deal with this information?

As a matter of principle, the MEU considers that all information provided by a monopoly should be publicly available unless its divulgence provides a commercial risk to a third party that is operating in a truly competitive environment.

The MEU generally supports the proposed AER requirement.

9. Compliance costs

Question 9

What are stakeholders' views on ensuring appropriate disclosure of information whilst minimising administrative costs?

The MEU is aware of the need to minimise compliance costs balance with the need to ensure appropriate transparency and disclosure of information, especially in the light of the fact that NSPs are monopoly businesses and there should be relatively fewer confidentiality requirements than companies operating in competitive markets. The MEU's suggestions above for materiality and cost categorisation information should minimise administrative costs. For example, if claimed confidentiality information represented only limited cost impacts, then there would minimal need to contest NSPs claims.

10. Limited release of information

Question 10

Should we facilitate NSPs disclosing information to certain stakeholders for the purpose of making a submission to the AER?

In regard to the issue of facilitating access of certain consumer advocates to confidential information, we refer to the comments made in section 1.3 above.

The MEU supports the AER proposal. This sort of procedure is already in operation in energy matters that come before the Australian Competition Tribunal.