

10 May 2013

Chris Pattas
General Manager – Network Operations and Development
Australian Energy Regulator
GPO Box 520
Melbourne Vic 3001

Dear Mr Pattas

RE: NSW DNSPs' Submission on the Distribution and Transmission Confidentiality Guidelines – Issues Paper

The NSW Distribution Network Service Providers, Ausgrid, Endeavour Energy and Essential Energy (the NSW DNSPs) welcome the opportunity to engage with the Australian Energy Regulator (AER) in developing confidentiality guidelines (the guidelines).

The AER notes that in developing confidentiality guidelines it is seeking to strike an appropriate balance between the need to protect information because it is sensitive in nature, and the need to disclose such information for an open and transparent regulatory process that allows stakeholders to engage effectively. The NSW DNSPs support this overarching aim.

We consider appropriately drafted guidelines could achieve this balance, particularly if they:

- Provide network service providers (NSPs) with guidance on the nature of material which will generally be accepted as confidential;
- Clarify the process for establishing confidentiality claims; and
- Facilitate a more collaborative approach towards managing protection and disclosure of information.

Whilst the NSW DNSPs broadly support the outcomes the AER is seeking to achieve by developing confidentiality guidelines, we share the same concerns as the Energy Networks Association (ENA) regarding the AER's proposed approach. The NSW DNSPs are keen to work constructively with the AER together with other members of the ENA to develop guidelines which are workable, fair and consistent with the statutory framework for the protection of confidential information under the National Electricity Law.

The NSW DNSPs urge the AER to reconsider its approach and adopt the alternative approach proposed by the ENA, which is noted in Part A of this submission. The ENA's alternative approach largely builds on the AER's existing approach; however, it focuses more on the use of categories of confidential information and working collaboratively with NSPs to manage issues surrounding information protection and disclosure.

We consider that the alternative approach provides more guidance to NSPs than the approach proposed by the AER. In addition, it provides further clarification to NSPs on the process for handling information and encourages greater use of limited disclosure and aggregation of information. The use of these options is broadly supported by NSPs and has been successful in other industries.

We consider that the alternative approach would better enable the AER to strike an appropriate balance between protecting information and disclosing it to allow stakeholders to engage effectively.

Our response to the AER's Issues Paper is provided in the following two parts:

- Part A - which is focused on outlining our key concerns and demonstrating how an alternative approach towards developing confidentiality guidelines may better achieve the outcomes the AER is seeking; and
- Part B - which contains our responses to the questions contained in the Issues Paper.

If you have any queries or wish to discuss further please contact Mike Martinson, Group Manager Regulation at Networks NSW on (02) 9249-3120 or via email at michael.martinson@endeavourenergy.com.au.

Yours sincerely,



Justin De Lorenzo
Group Chief Financial Officer
Networks NSW

Attachments: Part A – Detailed Responses to the Issues Paper

Part B – Responses to AER Issues Paper Questions

Part A: Response to the Issues Paper

Purpose and objectives of the guidelines

The AER is tasked with striking an appropriate balance between protecting sensitive information and maintaining the integrity of the public consultation process in relation to regulatory proposals. It is our understanding that in the past the AER has felt constrained in carrying out this task due to a lack of reasoning and justification provided by NSPs when making claims of confidentiality.

To address this issue the Australian Energy Market Commission (AEMC) established a requirement for the AER to develop confidentiality guidelines. In reaching this decision, the AEMC determined that the purpose of the guidelines is to assist the AER when it receives confidentiality claims.¹

The AEMC recognised that there will almost always be information included as part of a NSP's initial or revised regulatory proposal which is legitimately claimed to be commercially sensitive and confidential.² The AEMC envisaged that by establishing guidelines which clarified the manner in which NSPs are to make confidentiality claims, NSPs would have a better understanding of the AER's requirements. By doing this, it was anticipated that NSPs would therefore be more accountable when making confidentiality claims, thus reducing both the number of unsubstantiated confidentiality claims and administrative burden on the AER in assessing confidentiality claims.³

Therefore the overarching purpose of the confidentiality guidelines is to better enable the AER to strike an appropriate balance between disclosing information and protecting information. The NSW DNSPs support this aim.

Key Concerns

Whilst the NSW DNSPs are broadly supportive of the approach outlined in section 4.1 of the AER's Issues Paper, there are a number of aspects which we do not agree with and would urge the AER to reconsider. Our concerns primarily relate to:

- Potential inconsistency between the manner in which the AER is proposing to make confidentiality claims and the statutory framework for confidentiality;
- The AER proposing to reject a proposal in its entirety if confidentiality claims do not comply with the AER's proposed template;
- The AER's focus on the types of documents which might be disclosed rather than on the nature of information that it considers should be protected; and
- The AER's preference not to classify claims for confidentiality into categories.

Each of these concerns is discussed in further detail below. We note that they are largely similar to the concerns and issues raised by the Energy Network Association (ENA). Consequently, the NSW DNSPs support the comments and key points made by the ENA in response to the Issues Paper.

Presumption in favour of disclosure is inconsistent with the statutory framework

The NSW DNSPs share ENA's concern that the manner in which the AER is proposing confidentiality claims are to be made may be inconsistent with the statutory framework for providing confidential information. We are concerned by a number of statements in the Issues Paper which seem to indicate a presumption in favour of disclosing information identified as confidential, unless the NSP's confidentiality claim establishes detriment in accordance with the public interest test under section 28ZB of the National Electricity Law (NEL).

¹ AEMC, *Draft Rule Determination: Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p169.

² Ibid, p167.

³ Ibid, pp 169 -170.

The NSW DNSPs consider that adopting a default position in favour of disclosure is inconsistent with the confidentiality framework enshrined by *Competition and Consumer Act 2010* (Cth) (s 44AAF) and the NEL. Such an approach fails to recognise the fundamental right for NSPs to provide information in confidence and the AER's role in protecting such information from unauthorised disclosure.⁴

Under the current framework for providing confidential information, a DNSP is required to provide an indication of the parts of its proposal (if any) that it claims to be confidential and wants suppressed from publication on that ground.⁵ Once information is identified as confidential, the AER must take all reasonable measures to protect that information from unauthorised use or disclosure.⁶ The NEL also places a number of restrictions on the AER from releasing information unless specific circumstances have been met or a proper process has been followed.⁷

Whilst the AER has the discretionary power to disclose information provided in confidence, this is subject to it determining that the public benefit of doing so outweighs any detriment to the person that provided the information.⁸ Therefore, whether the AER exercises its discretionary powers to disclose confidential information should depend on the **merits and consequences of each confidentiality claim** rather than as a default approach. This is because current confidentiality arrangements were designed to balance the need for stakeholders to have access to the information upon which regulatory decisions are made and the need to protect confidential information.

Detriment and public benefit test do not align with the statutory framework

As noted in the ENA's submission, neither the *Competition and Consumer Act 2010* (Cth) (s 44AAF) or the NEL, require as a prerequisite, that a NSP establish that it would suffer detriment from disclosure; nor does it require the NSP to undertake a public benefit test in order for the protective regime to apply. Whilst it might be prudent for NSPs to indicate the specific detriment that might be caused from disclosing information for which confidentiality is being claimed, it should not be a prerequisite to claiming confidentiality. Further, it is not a matter for NSPs to assess the public interest in disclosure when making a claim of confidentiality.⁹ This is a task statutorily imposed upon the AER, which it cannot not delegate or derogate from.

The AER's task is to assess whether there is a genuine basis for the confidentiality claim and whether there is value in disclosing the document to maintain the integrity of the public consultation process. Where the AER does form the view that there is public benefit in disclosing the information it must either seek the agreement of the NSP to disclose the information or follow the process under section 28ZB of the NEL.

Rejecting proposals for non-compliance with the confidentiality guidelines is inappropriate and beyond scope

The AER has suggested that compliance with the guidelines will be relevant to the AER's assessment of whether a regulatory proposal is compliant. The NSW DNSPs consider that this is beyond the proper scope of the guidelines and is not what was intended when the AEMC included the guidelines in the National Electricity Rules (Rules). Further, we consider that this does not align with the policy

⁴ NEL, s 28Z.

⁵ National Electricity Rules (NER) clause 6.8.2(c)(6).

⁶ *Competition and Consumer Act 2010*(Cth), s 44AAF(1); National Electricity Law, s 18.

⁷ The AER is permitted to disclose information to the Australian Competition and Consumer Commission (ACCC), the Australian Energy Market Commission (AEMC), the Australian Energy Market Operator (AEMO), or any other consultant engaged by those bodies. It is also permitted to disclose information in connection with the exercise of its statutory obligations, where it has received written consent, in connection with court or tribunal proceedings or to afford a party procedural fairness. See *Competition and Consumer Act 2010*(Cth), s 44AAF; National Electricity Law, s18 and ss 28W-28Y.

⁸ National Electricity Law, s 28ZB.

⁹ AER, *Better Regulation: Distribution and transmission confidentiality guidelines, Issues Paper*, March 2013, pp 14, 16 and 23.

intent for establishing the guidelines. Rather, the guidelines should provide for a sound practice of claiming confidentiality, which is focused on the nature of information under consideration and aligns with the statutory framework for confidentiality.

The NSW DNSPs consider that the guidelines should be about scoping out the type of information (i.e. the ground of confidentiality) which will be accepted under the guidelines as an appropriate claim of confidentiality rather than the procedural aspects of the way in which confidentiality is claimed. This view is supported by clause 6.8.2(c)(6), which refers to a DNSP identifying the parts of its regulatory proposal which it claims to be confidential and wants suppressed from publication on that ground, in accordance with the distribution confidentiality guideline. It is important to note that this provision does not require that a regulatory proposal claim confidential information in accordance with the procedural aspects of the guidelines.

The focus of the guidelines needs to be realigned to better reflect the statutory framework and policy intent for establishing guidelines

The NSW DNSPs support the overarching purpose of the confidentiality guidelines, which is to better enable the AER to strike an appropriate balance between disclosing information and protecting information. However, as noted above, we have a number of concerns regarding the AER's proposed approach for achieving this aim. We believe that appropriately drafted guidelines could achieve the outcomes the AER is seeking, particularly if they are focused on:

- Providing NSPs with guidance on the nature of material which will generally be accepted as confidential – this would assist in addressing the issue of confidentiality claims being made unnecessarily;
- Clarifying the process for making confidentiality claims – this would provide NSPs with a better understanding of the AER's requirements, which in turn should streamline the process for making confidentiality claims and ease the administrative burden on the AER in assessing claims; and
- Facilitating a more collaborative approach towards managing protection and disclosure of information – this would avoid the AER having to rely on formal information disclosure powers, which can be resource intensive for both the AER and NSPs and contains rigid timeframes.

The NSW DNSPs do not consider that the approach the AER is currently taking towards developing confidentiality achieves these outcomes. As noted in the ENA's submission, the AER's preference to focus on types of document rather than categories of confidential information is not helpful to NSPs. It does not provide NSPs with any clear guidance on the nature of material which will generally be considered as confidential.

We consider focusing on developing categories of confidential information is more appropriate than seeking to identify types of confidential documents, as ultimately whether a claim for confidentiality will be made or not will depend on the content of the material rather than the document type.

Alternative manner for making confidentiality claims

The NSW DNSPs support the alternative manner for making confidentiality outlined in the ENA's submission. We note that the ENA's alternative largely reflects the manner proposed by the AER; however, it removes the obligation for NSPs to demonstrate detriment in accordance with the 28ZB test and instead focuses on the use of categories of confidential information.

Under the ENA's proposed approach, a NSP intending to make a claim of confidentiality would complete a template which required it to:

- Identify the relevant sections of the document for which confidentiality was being claimed (i.e. by page number, paragraph, and highlighting in yellow or shading);

- Indicate whether the material for which confidentiality is being claimed falls within one of the recognised categories of confidentiality information, and if so which one;¹⁰
- Provide brief reasons for why the information falls within a confidential information category and should not be disclosed. In providing reasons for why the information should be considered confidential, it may be prudent for the NSP to indicate whether there will be any detriment from disclosing information; however, this will not be a mandatory requirement for making a claim of confidentiality, nor will a claim be rejected for failing to indicate any detriment from disclosure; and
- Indicate whether a public version of the document has been provided. Where a public version has not been provided the NSP will provide its reasons for not doing so. This approach recognises that in some instances it may not be appropriate or reasonably practical for the NSP to provide a public version.

The NSW DNSPs consider that this approach provides the NSP with greater clarity and certainty than the approach proposed by the AER. Further, under the ENA's approach NSPs are still required to identify the relevant parts of a document over which they seek to claim confidentiality and must also provide reasons to substantiate their claim of confidentiality. Therefore, the ENA's proposed template will still achieve the policy intent for establishing guidelines, which is to make NSPs more accountable and disciplined for their confidentiality claims and to assist the AER in striking the appropriate balance between protecting information and disclosure. However, unlike the AER's approach, the ENA's approach aligns with the statutory framework and is more flexible.

Alternative approach towards confidential information handling processes

The NSW DNSPs urge the AER to adopt an information process which places greater emphasis on working collaboratively with NSPs to manage issues surrounding information protection and disclosure. We share the ENA's view that the AER's current two stage information handling process does not facilitate sufficient collaboration. To address this issue, we would urge the AER to adopt the ENA's alternative information handling process, which we note largely builds upon the AER's existing process.

The NSW DNSPs consider that the ENA's alternative information handling process will place the AER in a better position to strike an appropriate balance between protecting information and disclosing it. The proposed process places greater emphasis on the AER and NSP working collaboratively together to resolve information protection and disclosure issues. Further, the proposed process provides the NSP and AER with more flexibility to reach an outcome which benefits both parties than under the AER's current two stage process. The proposed process also encourages greater use of limited disclosure and aggregation. This could be used to improve stakeholder engagement by allowing information which should be protected to be disclosed on a limited basis to stakeholder representatives.

¹⁰ It is important to note that any categories of confidential information established in the guidelines should not be considered to be an exhaustive list, as there are a wide range of reasons for which information may be confidential. This is consistent with the AEMC's position on this matter in its draft determination of the economic regulation of network service providers rule change 2012. See page 168.

Part B: Responses to the questions raised in the Issues Paper

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 NSW DNSPs support the ENA's response to this question, and in particular support the ENA's alternative template for making confidentiality claims.

Like the ENA, we are concerned that the proposed manner for making confidentiality claims (AER's template) does not align with the statutory framework. The AER's guidelines must operate within the context of the statutory framework for the provision of confidential information and not derogate away from that framework which provides a right to the person providing information to the AER to do so on a confidential basis.

The NSW DNSPs support the use of a template, but we do not support the template proposed by the AER, nor the AER's underlying approach towards developing confidentiality guidelines that are directed at making the ability to claim confidentiality contingent upon certain procedural requirements, such as completion of the template, being met. We are also concerned that the proposed use of the template appears to indicate that the AER's default position is to disclose confidential information unless the NSP demonstrates at the outset that it will suffer a detriment which outweighs the public benefit from disclosure.¹¹ *If a NSP provides this information and in accordance with the proposed template, the AER has indicated that this will reduce the likelihood that it will exercise its disclosure powers.*¹²

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 NSW DNSPs support the ENA's response to this question.

The NSW DNSPs support the use of categories of confidentiality as providing a more appropriate focus for the confidentiality guidelines than the current approach proposed by the AER.

Focusing on developing categories of confidential information is more appropriate than seeking to identify types of confidential document, as ultimately whether a confidentiality claim is made or not will depend on the content of the material in a document rather than the document type. Further, the establishment of categories of confidential information will provide NSPs with clear understanding on the nature of information which the AER will generally consider to be confidential. This in turn, should reduce the number of unnecessary

¹¹ AER Better Regulation: Distribution and transmission confidentiality guidelines, Issues Paper, March 2013, p 13 and Attachment 1.

¹² Ibid.

confidential claims received by the AER and should facilitate more open and transparent regulatory decision making.

As noted by the ENA, the establishment of categories of information would:

- Streamline the process for making confidentiality claims;
- Provide NSPs with guidance and clarity on the nature of information which will generally be considered confidential, thus reducing the number of unnecessary or excessive confidentiality claims;
- Would alleviate the administrative burden on the AER in assessing confidentiality claims by identifying the basis for which confidentiality is being claimed, enabling the AER to easily assess whether the confidentiality claim is genuine and whether the information is of a nature that should be subject to public scrutiny; and
- Be more straightforward than the AER's proposed approach.

We consider that the template proposed by the ENA reflects this approach and strikes an appropriate balance between the legitimate rights of NSPs to maintain confidentiality of certain information, and the rights of other stakeholders to access confidential information in circumstances where that information should be subject to scrutiny. Further, the proposed manner for making confidentiality claims proposed by the ENA better aligns with the statutory framework and is consistent with the approach envisaged by the AEMC in its draft and final determination of the economic regulation of network service providers rule change proposal.

However, the NSW DNSPs consider that any category of confidential information included in the guidelines should not be considered as an exhaustive list, but rather included to provide NSPs with guidance. As noted by the AEMC, there may be other categories of confidentiality claims for information not listed, which legislation would still require the AER to protect from being disclosed.¹³

Question 3

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

The NSW DNSPs support the ENA's response to this question.

We note that the categories proposed by the AER broadly align with the original categories proposed by the ENA in its response to the AEMC's Directions Paper on the AER's rule change proposal.¹⁴ However, as noted by the ENA, the AER has not included all the categories originally proposed by the ENA. We note that in assessing the ENA's response to the confidentiality issues raised in the Directions Paper, the AEMC accepted the categories of information proposed by the ENA as legitimate reasons for claiming confidentiality.¹⁵ In accepting that the categories proposed by the ENA were legitimate reasons for claiming

¹³ See, AEMC, *Draft Rule Determination: Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p 168 and *Competition and Consumer Act 2010(Cth)*, s 44AAF.

¹⁴ ENA, *Response to the AEMC Directions Paper – Economic Regulation of Network Service Providers*, 16 April 2012, p 71.

¹⁵ AEMC, *Draft Rule Determination: Draft National Electricity Amendment (Economic Regulation of Network Service Providers) Rule 2012*, p 168.

confidentiality the AEMC also cautioned against treating the ENA's proposed list as exhaustive.¹⁶

Consequently, the NSW DNSPs are unsure if the failure to include a confidential contractual terms category; information provided by a third party on a confidential basis category; and proprietary information of a NSP or a third party category in the AER's Issues Paper was an oversight or intentional. We would urge the AER to include these categories in its guidelines. Alternatively, we would ask the AER to articulate its reasons for why these categories do not constitute a legitimate basis for claiming confidentiality.

Question 4

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

As noted in our response to Question 1, the AER's focus should not be on the types of information (i.e. documents, reports, or models) that it should disclose; rather the focus should be on the content of the information over which the NSP is seeking to claim confidentiality.

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 NSW DNSPs support the ENA's response to this question. We do not consider that identifying how many pages of the regulatory proposal are confidential would assist stakeholders in engaging in the regulatory process.

Blanket confidentiality claims

Question 6

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

The NSW DNSPs agree with the underlying principle of the AER's position on blanket confidentiality claims. However, we consider that the guidelines should recognise that there may be circumstances in which it is appropriate for the whole of a document to be the subject of a confidentiality claim. For instance, a NSP may seek to claim confidentiality over a whole document in such circumstances where the document becomes meaningless once the confidential information has been redacted or where there is potential for the information to be misconstrued.

¹⁶ Ibid.

Consequently, the NSW DNSPs object to any course of action whereby a regulatory proposal is rejected because it does not adhere to an aspect of the confidentiality guidelines such as a restriction on blanket claims. This is contrary to the purpose of the guidelines (which is to scope out the type of information that will be accepted as confidential) and effectively limits the ability of a DNSP to submit information subject to a confidentiality claim, which is contrary to the NEL. We note that clause 6.8.2(c) refers to a regulatory proposal identifying the parts of the regulatory proposal which are claimed to be confidential and which it wants suppressed from publication on that ground in accordance with the distribution confidentiality guideline. This clearly supports the role of the guidelines as scoping out the type of information, i.e. the grounds that will be accepted as confidential rather than imposing procedural requirements upon such claims.

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 NSW DNSPs agree with the AER, that NSPs should take some responsibility for making confidentiality claims in respect of reports by third parties, which are submitted as part of or supporting the regulatory proposal. However, the guidelines should also recognise that some third party claims may arise from a claim over proprietary or other information which is of value to the third party and which a NSP would not be in a position to verify or defend.

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?

Provided the confidentiality guidelines are reasonable and appropriate, as a general principle the NSW DNSPs are comfortable with the AER applying the confidentiality guidelines, as a policy, to all information the AER receives from NSPs and gas service providers.

Compliance costs

Question 9

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

The NSW DNSPs support the ENA's response to this question.

As noted in our submission, the AER's proposed approach could be modified in a way which facilitates appropriate disclosure of information whilst minimise administrative costs. We consider that the adoption of the alternative manner for making confidentiality claims, as well as an alternative process for handling information will facilitate a more collaborative approach

to managing information protection and disclosure issues. This, in turn, should reduce the administrative burden placed on NSPs in making claims and the AER in assessing claims.

Greater use of limited disclosure or aggregation of information could provide a means for the AER to strike an appropriate balance between protecting information and disclosing it to allow stakeholders to engage effectively.

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?

The NSW DNSPs support the ENA response to this question. As noted by the ENA, NSPs broadly support the role of the AER in facilitating the disclosure of information to third parties to enable consumer groups to engage effectively in the regulatory decision making process. However, the NSW DNSPs are of the firm view that the limited release of information should be made according to the terms and conditions determined by the NSP. This is to ensure that any disclosure of protected information is suited to the nature of the material being disclosed and minimises the detriment suffered by the NSP from disclosure.

