

Decision

SPI PowerNet Pty Ltd Application for Waiver from Transmission Ring-Fencing Guidelines

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Contents

Glossary.....	ii
Executive summary	iii
1. Introduction	1
2. Ring-fencing decision requirements	4
3. The ACCC’s analysis and position	8
4. The ACCC’s decision.....	14

Glossary

ACCC	Australian Competition and Consumer Commission
code	National Electricity Code
DNSP	Distribution Network Service Provider
ESCV	Essential Services Commission of Victoria
guidelines	Transmission Ring-Fencing Guidelines
NEM	National Electricity Market
NEMMCO	National Electricity Market Management Company
SA Treasury	South Australia Department of Treasury and Finance
SPE	SP Energy Pty Ltd
SPI	SPI PowerNet Pty Ltd
SPIA Group	SPI Australia Group Pty Ltd
TNSP	Transmission Network Service Provider
VENCorp	Victorian Energy Networks Corporation
VNSC	Victorian Network Switching Centre

Executive summary

SPI's Ring-Fencing Waiver Application

Introduction

As required by the National Electricity Code (code), the Australian Competition and Consumer Commission (ACCC) published its Transmission Ring-Fencing Guidelines (guidelines) on 15 August 2002. The guidelines separate the accounting and functional aspects of ring-fenced services (prescribed services) from other services provided by the Transmission Network Service Providers (TNSPs).

Ring-fencing is designed to assist the introduction of effective competition into markets traditionally supplied by integrated firms which exhibit monopoly characteristics. An integrated firm or group of related businesses is likely to have an incentive to behave anti-competitively. The aim of the guidelines is to separate as far as possible the monopoly powers of TNSPs from the contestable activities of generation and retail supply.

The ACCC may waive any of the TNSP's obligations under the guidelines if it is satisfied that the public benefit is outweighed by the administrative cost to the TNSP of complying with the obligation.

SPI PowerNet's ring-fencing waiver application

SPI submitted a waiver application to the ACCC on 19 October 2004. In its application SPI requested that the ACCC:

- waive SPI's obligations under clause 7.1(a)(ii) of the guidelines; and
- clarify the application of clause 7.6(b) of the guidelines.

In summary, clause 7.1(a)(ii) of the guidelines provides that a TNSP that supplies ring-fenced services (defined in the code as prescribed services – ie, those transmission services which are subject to SPI's revenue cap) must not carry on a related business. Also, clause 7.6(b) prohibits a TNSP from giving preferential treatment to an associate in the course of sharing operational activities.

Submissions from interested parties

VENCorp

VENCorp agrees that the increased transparency provided by the Victorian arrangements mitigates the potential for discriminatory behaviour. However, it proposes that the ACCC be able to review the waiver if VENCorp's role was materially changed.

VENCorp believe there should also be a greater degree of transparency in SPI's:

- connection asset cost allocation methodology, and
- asset replacement program.

Essential Services Commission of Victoria

The ESCV considers that the waiver could inhibit the future development of contestability in transmission. There may also be potential for SPI to favour its affiliated distribution business relative to other distributors in such areas as:

- service restorations in response to unplanned outages, and
- connection asset augmentations.

South Australia Department of Treasury and Finance

The key issue raised in the submission is the need to ensure that the competitive retail and generation sectors are not adversely affected by SPI's proposal.

SPI's response to submissions

SPI states that the Victorian transmission regulatory arrangements provide a high level of transparency, as does the regulatory oversight provided by the ACCC and the ESCV. Combined with the continued legal separation of the transmission and distribution businesses, SPI believes this will ensure that there is no differentiation of services provided to distribution businesses.

The ACCC's analysis

The test for waiver of ring-fencing requirements

The test under clause 11 of the guidelines requires the ACCC to assess:

- the public benefits of compliance with the obligations in the guidelines, and
- the administrative costs of compliance with the obligations in the guidelines.

In relation to the above assessment, if the ACCC is satisfied that the administrative cost outweighs the public benefit, the waiver should be granted.

Administrative costs

The ACCC must identify the administrative costs resulting from compliance with clause 7.1(a)(ii) that will be avoided if the requirement is waived. The costs must be attributable solely to the ring-fencing requirement.

Public benefits

The ACCC must consider those benefits to the public that arise out of continued compliance that will be lost if the waiver is granted. However, clause 11 does not require the ACCC to take into account additional benefits that will flow from the grant of the waiver.

Application for waiver to clause 7.1(a)(ii)

After consideration of the submissions and application, the ACCC is of the view that:

- The administrative costs resulting from compliance with clause 7.1(a)(ii) that will be avoided if the requirement is waived are material.

- The public benefits lost in association with waiving the ring-fencing requirement to comply with clause 7.1(a)(ii) are minimal, as key obligations in the guidelines will continue to apply.

The ACCC is therefore satisfied that the administrative costs of compliance outweigh the public benefits of compliance and accordingly grants a waiver to clause 7.1(a)(ii).

Request for clarification of clause 7.6(b)

The ACCC is of the view that the intention of the provision is to ensure that a TNSP that shares operational activities with an associate must not, in doing so, give preferential treatment to an associate.

ACCC's Conclusion

The ACCC has identified that a material change in the role of VENCORP and Victorian distribution businesses in planning and directing augmentation of the Victorian transmission system may have an affect on the levels of downstream competition. Therefore, the ACCC considers it necessary to provide for both a review of this waiver and the additional requirements that are imposed, in the event of such a change.

SPI's transmission service activities relating to ring-fenced services will remain subject to all other aspects of the guidelines. The ACCC generally considers the requirement of legal separation a necessary aspect of the regulatory framework where transmission businesses are engaged in generation, retail and/or distribution activities. This ensures the maintenance of effective competition in the National Electricity Market (NEM) through the separation of retail and generation activities from the monopoly business of the TNSP.

ACCC's decision

The ACCC's decision is to:

1. Issue a notice under clause 11 of the Transmission Ring-Fencing Guidelines (guidelines) to waive SPI PowerNet Pty Ltd's requirement to comply with ring-fencing obligations under clause 7.1(a)(ii).
2. Issue a notice under clause 9 of the guidelines to impose the following obligations on SPI PowerNet Pty Ltd:
 - (a) any related business carried on by SPI PowerNet Pty Ltd (through joint management, staffing or otherwise) must continue to be owned by a legal entity other than SPI PowerNet Pty Ltd;
 - (b) for the purposes of the guidelines (other than clause 7.1(a)(ii)) the owner of a related business referred to in paragraph (a) is, for the avoidance of doubt, taken to be an associate of SPI PowerNet Pty Ltd that takes part in that related business.
3. The ACCC may, by notice in writing to SPI PowerNet Pty Ltd, review this waiver and the additional obligations if SPI PowerNet Pty Ltd takes over:

- (a) the responsibilities of VENCORP with respect to planning and directing the augmentation of the shared network; or
- (b) the responsibilities of Victorian Distribution Businesses with respect to planning and directing the augmentation of transmission connection assets.

Following this review, the ACCC may affirm, vary or revoke this waiver and the additional obligations imposed in this decision.

This decision takes effect from 3 March 2005.

1. Introduction

1.1 Background

Part G of chapter 6 of the National Electricity Code (code) requires the Australian Competition and Consumer Commission (ACCC) to develop ring-fencing guidelines.

On 15 August 2002, the ACCC published its Statement of Principles for the Regulation of Transmission Revenues: Transmission Ring-Fencing Guidelines (guidelines).

The guidelines separate the accounting and functional aspects of ring-fenced services from those of other services provided by the Transmission Network Service Providers (TNSPs). The guidelines define ring-fenced services as prescribed services. In chapter 10 of the code 'prescribed services' are defined as transmission services provided by transmission network assets or associated connection assets to which the revenue cap applies. Under clause 6.20.1 of the code, all TNSPs must comply with the guidelines.

The guidelines require a TNSP to establish arrangements to segregate (i.e. ring-fence) its business of providing ring-fenced services from provision of other services. The aim is to separate as far as possible the monopoly powers of TNSPs from the contestable activities of generation and retail supply. Under the guidelines, a TNSP must be a legal entity and, in general, not engage in electricity generation, distribution or retail. The decision¹ that accompanied the guidelines notes that legal separation is required as accounting separation alone is not sufficient to address the implications of vertical integration and information asymmetry.

1.2 Application for waiver

SPI PowerNet Pty Ltd (SPI) advised the ACCC it was seeking a waiver on 6 October 2004. A supporting submission from SPI was received on 19 October 2004. In its application SPI requested that the ACCC:

- waive SPI's obligations under clause 7.1(a)(ii) of the guidelines
- clarify the application of clause 7.6(b) of the guidelines.

1.3 Public consultation process

The ACCC has committed to follow a consultation process as extensive as the code consultation process set out in clause 8.9 of the code.

Notification of the application and a request for submissions was made on 8 October 2004. SPI submitted to the ACCC a supporting submission to its application on 19 October 2004. The following interested parties made submissions:

- Victorian Energy Networks Corporation (VENCorp)
- Essential Services Commission of Victoria (ESCV)

¹ ACCC Statement of Principles for the Regulation of Transmission Revenues: Transmission Ring-Fencing Guidelines, 15 August 2002.

- South Australian Department of Treasury and Finance (SA Treasury).

SPI responded to the issues raised in the above submissions in its letter to the ACCC, dated 2 December 2004. The ACCC produced a draft decision outlining its analysis and views of SPI's application. Following the release of the draft decision on 21 December 2004, the applicant and interested parties were provided with the opportunity to make written submissions in relation to the draft decision. No submissions were received on the draft decision. The ACCC's final decision draws on SPI's application for waiver, the submissions received from interested parties, and the ACCC's draft decision. Copies of the abovementioned documents are available on the ACCC's website².

1.4 Overview of the purpose of ring-fencing

Ring-fencing is designed to assist the introduction of effective competition into markets traditionally supplied by integrated firms which exhibit monopoly characteristics. An integrated firm or group of related businesses is likely to have an incentive to behave anti-competitively. This may include the following types of behaviour:

- providing preferential treatment to upstream and downstream operations or related entities
- discriminatory conduct
- sharing of confidential information between operations or related businesses.

Ring-fencing imposes obligations upon integrated firms to limit the ability of TNSPs to extend their monopoly powers into the contestable parts of the electricity industry. The guidelines provide minimum ring-fencing obligations under clause 7 which TNSPs must comply with.

1.5 Victorian transmission arrangements

The majority of NEM jurisdictions have one TNSP that owns and operates the bulk of the transmission network within that jurisdiction. The separation of the shared network asset owner (SPI) from the investment decision maker (VENCorp) is unique within the NEM. This situation arose from the disaggregation of the Victorian electricity industry in 1994.

SPI owns, operates and maintains the transmission network in Victoria, including the operation of high voltage lines and associated switching and transformation facilities. SPI receives revenue from its transmission assets by providing connection services to upstream and downstream customers, and bulk transmission services to VENCorp.

VENCorp is the sole provider of shared transmission services in Victoria, and is responsible for planning and directing the augmentation of the shared network (which excludes the connection facilities utilised by generators and distributors). VENCorp purchases bulk transmission capacity from SPI under contractual arrangements and provides transmission use of system services to distribution network service providers (DNSPs) and direct-connect customers. It operates on a full cost recovery but no

² <http://www.accc.gov.au>

operating surplus basis, recovering its costs through transmission use of system charges to these customers.

VENCorp has no oversight of planning, upgrading and replacement of connection assets or any formal role in SPI's asset replacement program. In Victoria, DNSPs are responsible for the planning of the connection assets.

SPI operates its transmission network through the Victorian Network Switching Centre (VNSC). The VNSC is the control room that operates the switching gear used to control the energy flow in the electricity grid.

2. Ring-fencing decision requirements

2.1 Procedures for waiving ring-fencing obligations

Clause 7 of the guidelines details the minimum ring-fencing obligations imposed on TNSPs operating within the NEM. A TNSP has the right to seek a waiver from any of its obligations under clause 7. Clause 11 of the guidelines provides the test for the waiver by the ACCC of the requirements. This clause states that:

The ACCC may, by notice to the *TNSP*, waive any of the *TNSP's* obligations under clause 7 provided that the ACCC is satisfied that the benefit, or any likely benefit, to the public is outweighed by the administrative cost to the *TNSP* and its *associates* of complying with the obligation.

Note: In deciding whether to waive any of the *TNSP's* obligations under clause 7, the ACCC may consider any additional obligations that can be imposed under clause 9.

The application of this test to SPI's waiver application will be discussed in chapter 3 of this decision.

2.2 SPI's submission

The obligation that SPI seeks a waiver from is clause 7.1(a)(ii). This clause provides as follows:

A *TNSP* that supplies *ring-fenced services*:

- (i) must be a legal entity incorporated under the *Corporations Act*, a statutory corporation or an entity established by royal charter; and
- (ii) subject to clause 7.1(b), must not carry on a related business. To avoid doubt, if the *TNSP* is a member of a partnership, joint venture or other unincorporated association, the *TNSP* is carrying on the activities of the partnership, joint venture or unincorporated association.

The guidelines define a 'related business' as the activities of generation, distribution and retail.

SPI has also requested that the ACCC clarify the effect of clause 7.6(b) of the guidelines. This clause provides as follows:

A *TNSP* that provides *ring-fenced services* must:

...

- (b) ensure that preferential treatment is not given to an *associate* that takes part in a *related business*, through sharing of *operational activities*.

SPI proposes to identify and, if appropriate, implement measures that will result in a more efficient delivery of SPI's regulated network services. The crux of SPI's submission is that the proposal will benefit the public by eliminating the duplication of resources and systems.³

In conclusion, SPI submit that there is no public benefit in enforcing compliance with the ring-fencing obligations it has sought waiver from.

³ SPI, Application for Waiver of Ring-Fencing Obligations, 19 October 2004, p. 9.

2.3 Submissions from interested parties

VENCorp

VENCorp identifies a number of issues which it suggests the ACCC should take into account when considering the application. In its submission VENCorp states that the transmission governance arrangements in Victoria essentially provide for a commercial relationship to exist between VENCorp and SPI. Accordingly, VENCorp does not have a formal role in supervising or overseeing SPI's conduct, per se.

In general VENCorp agrees with SPI that the increased transparency provided by the Victorian transmission regulatory arrangements mitigates the potential for discriminatory behaviour. However, VENCorp proposes the ACCC should include a condition in the waiver which allows the ACCC to review the terms on which the waiver is granted if VENCorp's role in the Victorian electricity industry was materially changed.

VENCorp supports the need for a greater degree of transparency in:

- Connection asset cost allocation methodology. VENCorp suggests the ACCC should require SPI to publish details of the methodology used to determine transmission connection charges.
- SPI's asset replacement program. VENCorp suggests SPI should increase the amount of information publicly available on the program.

VENCorp suggests that there would be merit in giving consideration to the means by which anticipated cost savings are to be transferred to customers.

Overall, VENCorp notes it does not have any strong objections to SPI's application.

Essential Services Commission of Victoria

The ESCV identifies a number of issues it believes the ACCC should consider in its analysis. The ESCV suggested that if the waiver was granted, in the future it could inhibit the development of contestability in transmission (such as market trading of financial transmission rights). The ESCV believe there is a reasonable basis for expecting significant change in the market and regulatory environment for the future supply of electricity transmission services.

The ESCV contends that consideration will need to be given to the potential for SPI's transmission business to favour its affiliated distribution business relative to other distributors in the provision of transmission services. The ESCV considers such discriminatory conduct could occur in the following situations:

- service restorations in response to unplanned outages
- connection asset augmentations.

The ESCV submits that SPI's interpretation of the test is not entirely clear, particularly regarding the relevant costs and benefits. The ESCV added that the public benefits to be considered under the waiver test should be the 'net public benefits' expected to arise

from approving the waiver. This involves assessing any resulting efficiencies from allowing the waiver set against any resulting wider public benefits or detriments.

South Australia Department of Treasury and Finance

The key issue raised in the submission received from SA Treasury is the need to ensure that the competitive retail and generation sectors are not adversely affected by SPI's proposal to carry on its transmission and distribution business as a single entity. The submission also notes that there is a broader issue relating to the extent to which the claimed efficiency benefits will actually be reflected in improved price, service and safety benefits for customers.

2.4 SPI's response to submissions

SPI responded to the issues raised in the public submissions in its letter dated 2 December 2004.

SPI's response to issues raised by VENCORP

- SPI agrees that the Victorian transmission regulatory arrangements provide a high level of transparency. The regulatory oversight provided by the ACCC and the ESCV (through licensing obligations) also provides enhanced transparency. Continued legal separation of the transmission and distribution businesses will ensure that there is no differentiation of services provided to other distribution businesses.
- In SPI's view, if there was a material change to the role of VENCORP its functions would transfer to another independent body ensuring continuity of governance. Additionally, SPI's Undertaking⁴ addresses this issue. However, SPI believes that if a condition to review the waiver is applied to take account of these circumstances, the review should only be necessary if it is clear that there are legitimate concerns of increased potential for SPI to favour the related distribution business.
- SPI already provides its connection charging methodology to customers and provides VENCORP with a spreadsheet construction of the charges. Therefore, it believes its transmission charging methodology is transparent.
- SPI already shares its asset management plans with customers. The majority of SPI's terminal stations provide connection services to more than one distribution business which requires SPI to consult on its asset management proposals openly with the distribution networks.
- Further to the above point, as distributors commonly share terminal stations, any augmentations will usually require the participation of more than one business. Distributors jointly prepare an annual Transmission Connection Planning Report to the ESCV which provides transparency and accountability in this area.

⁴ Undertaking to the ACCC given under section 87B by SP Energy Pty Ltd and SPI PowerNet Pty Ltd, 19 July 2004.

- With regard to the transfer of savings to customers, SPI expects that they would be transferred in accordance with regular carry-over arrangements.

SPI's response to issues raised by the ESCV

- In SPI's view, the regulated status of transmission is likely to be reinforced. The recent policy direction given by the Ministerial Council on Energy provides no indication of a shift towards contestability in the future.
- The potential for SPI to engage in discriminatory conduct is mitigated by the operational arrangements in place in terminal stations. Operational control of the connections to the distribution network is managed by the distribution businesses themselves.
- Regarding the possibility of the ESCV seeking to include connection assets in the DNSP S-factor scheme from 2006, SPI considers such incentives could equally be placed on the TNSP. The establishment of a connection asset availability incentive scheme is under consideration.
- SPI has no plan to form a single legal entity combining transmission and distribution, which addresses this particular concern.

SPI's response to issues raised by SA Treasury

- The waiver will not affect the relationship between the transmission business and competitive market businesses in the retail and generation sectors.

3. The ACCC's analysis and position

3.1 The test for waiver of ring-fencing requirements

The test for waiver

The test under clause 11 of the guidelines requires the ACCC to assess:

- the public benefits of compliance with the obligations in the guidelines, and
- the administrative costs of compliance with the obligations in the guidelines.

In relation to the above assessment, if the ACCC is satisfied that the administrative cost outweighs the public benefit, the waiver should be granted.

Administrative costs

SPI proposes that the term 'administrative costs' in the context of clause 7.1(a)(ii) can be interpreted broadly as the costs that would be incurred by SPI in complying with clause 7.1(a)(ii) relative to the costs foregone from waiving the requirement. SPI lists in its application types of costs savings which could be realised if the waiver is granted.

The ACCC considers that the application in clause 11 requires the ACCC to identify those administrative costs resulting from compliance with clause 7.1(a)(ii) that will be avoided if the requirement is waived. The costs must be attributable solely to the ring-fencing requirement.

The ACCC considers when assessing the administrative costs, the following costs from SPI's application can be taken into account:

- Costs associated with separate business units providing similar corporate services to each of the transmission and distribution businesses. For example administrative support, human resource management, legal services, information technology and office accommodation.
- Costs associated with licensing obligations and other regulatory compliance obligations.
- Costs associated with separate arrangements for supply/purchasing arrangements.
- Other costs relating to administrative functions, such as staff, and the duplication of resources and systems.

Public benefits

Clause 11 requires the ACCC to consider only the likely public benefits that will be lost if the waiver is granted.

The ACCC does not share SPI's interpretation of how the test is to be applied. SPI believes the ACCC should also take into account the benefits to the public that will arise from granting the waiver. For example, in SPI's view there are substantial cost savings and potential synergies that could be achieved if the waiver is granted. The ESCV considers that the public benefits to be assessed under the waiver test should be

the ‘net public benefits’ expected to arise from approving the waiver. This involves assessing any resulting efficiencies from allowing the waiver set against any resulting wider public benefits or detriments.

The ACCC considers that the test does not require the ACCC to take into account additional benefits that will flow from granting the waiver.

The ACCC considers the key potential benefits to full separation of the transmission and distribution businesses, which relate to the maintenance of a competitive NEM, are that it may reduce the TNSP’s opportunity to:

- discriminate in favour of a related business
- give preferential treatment to a related business
- share confidential information with a related business
- shift costs within the integrated businesses.

Therefore, the ACCC is to assess the likely public benefits of maintaining the requirements of clause 7.1(a)(ii) of the guidelines (as described above) that will be lost if the waiver is granted.

3.2 Application for waiver of clause 7.1(a)(ii)

SPI has applied for a waiver of clause 7.1(a)(ii) to enable it to combine the operations of its transmission business with the distribution business owned by the SPI Australia Group Pty Ltd (SPIA Group). SPI believes that there is sufficient ambiguity in the interpretation of clause 7.1(a)(ii) to require a waiver of this requirement in order to put its compliance with the guidelines beyond doubt.

The effect of a waiver of clause 7.1(a)(ii)

The effect of a waiver of clause 7.1(a)(ii) is that a TNSP may no longer have an associate carrying on a related business (this will occur where the TNSP carries on both the transmission and distribution business following the waiver). There are other obligations in the guidelines which depend on clause 7.1(a)(ii) applying. Specifically, clauses 7.6, 7.7 and 7.8 all relate to the relationship between the TNSP and an associate that carries on a related business. If, following the waiver of clause 7.1(a)(ii), SPI no longer has an associate carrying on a related business, these obligations will cease to have any effect.

Consequently, in applying the test for waiver the ACCC must also consider the loss of any public benefits flowing from the redundancy of these additional obligations.

The guidelines provide a framework within which the ACCC can consider imposing additional obligations in conjunction with an application for waiver. These additional obligations may be imposed by the ACCC under clause 9 of the guidelines. This clause states that:

The ACCC may, by notice to the TNSP, require the TNSP to comply with obligations in addition to those contained in clause 7 provided that the ACCC is satisfied that the administrative cost to

the *TNSP* and its *associates* of complying with the additional obligations is, or is likely to be, outweighed by the benefit to the public.

The ACCC considers that due to the flow-on effects of waiving compliance with clause 7.1(a)(ii), it is necessary to impose additional obligations on SPI.

The ACCC considers the obligation for a TNSP to be a separate legal entity ought to be reimposed on SPI through clause 9, as the public benefit of compliance outweighs the administrative costs of compliance. Legal separation between a TNSP's transmission and other services (i.e. distribution, generation and retail) is required as accounting separation alone does not effectively prevent anti-competitive behaviour such as preferential treatment towards an affiliated business or discrimination against a competing network user.

The ACCC generally considers the requirement of legal separation a necessary aspect of transmission ring-fencing, particularly in effectively separating any generation or retail activities from the monopoly businesses.

The public benefits in complying with clauses 7.6, 7.7 and 7.8 clearly outweigh the costs of compliance associated with those requirements. Therefore, the ACCC considers that for the purposes of the guidelines (other than s 7.1(a)(ii)), the owner of a related business referred to in paragraph (a) is, for the avoidance of doubt, taken to be an associate of SPI that takes part in that related business.

Re-imposing the requirement for legal separation is not intended to prevent SPI from combining the operations of its transmission business with the distribution business owned by the SPIA Group. Clause 7.1(a)(ii) has been waived to the extent that it prevented this. However, the requirement for legal (but not operational) separation will remain.

The ACCC notes the unique transmission regulatory arrangements that apply to the ownership and governance of the transmission system and its services in Victoria is a relevant factor in the consideration of the likely public benefits of compliance that will be lost if the waiver is granted.

3.3 Request for clarification of clause 7.6(b)

SPI has also requested that the ACCC clarify the effect of clause 7.6(b) of the guidelines.

SPI suggests that two different interpretations of this clause may be taken:

1. A TNSP must not give preferential treatment to an associate by sharing operational activities
2. A TNSP must not give preferential treatment to an associate in the course of sharing operational activities.

SPI asks the ACCC to consider its interpretation, and:

1. If the ACCC agrees with the first interpretation of the clause, SPI will require a waiver from compliance with this provision; or

2. If the ACCC agrees with the second interpretation of the clause, SPI have asked for guidance from the ACCC on what would constitute ‘preferential treatment’.

The ACCC is of the view that the intention of the provision is to ensure that a TNSP that shares operational activities with an associate must not, in doing so, give preferential treatment to an associate. The ACCC does not consider that it is necessary to provide guidance on the meaning of the words ‘preferential treatment’ for the purposes of this decision.

The ACCC notes that a determination of what constitutes preferential treatment will be decided on specific facts, rather than generalised situations.

3.4 ACCC’s analysis and position

The ACCC considers that granting a waiver with appropriate obligations under clause 9 of the guidelines will not affect SPI’s pre-existing obligations. The following obligations are relevant:

- accounting obligations (i.e. separation of regulatory accounts) under the code
- provision of information obligations under the code
- obligations in SPI’s court-enforceable undertaking given under s87B of the *Trade Practices Act 1974 (Act)*⁵
- compliance audit and reporting requirements administered by both the ACCC and the ESCV
- network agreement obligations
- the requirement under clause 6.5.7 of the code to publish transmission charges.

The ACCC notes that SPI’s current practices provide transparency to customers regarding its connection charging methodology and asset management plans. However, SPI does not have a regulatory obligation to provide this transparency. Opportunities will arise for SPI to act in a manner which discriminates in favour of its affiliated distribution business regarding the connection charging methodology used and asset management. However, this type of behaviour would be prohibited (at least with respect to prescribed services) by clause 7.2(b) of the guidelines. The key purpose of clause 7.2(b) is to ensure that a TNSP does not preferentially deal with itself and any related utility in such a way as to discriminate against other market participants.

The ACCC considers that the issue of ensuring transparency in these areas is a broader regulatory issue that should be addressed through other regulatory measures. Further, any lack of transparency in TNSPs’ asset replacement programs and connection charging methodology are pre-existing issues arising because the code does not contemplate the merging of transmission and distribution businesses.

Further to this issue, the ACCC notes that SPI’s transmission licence requires it to provide transmission services on fair and reasonable terms.

⁵ Undertaking to the ACCC given under section 87B by SP Energy Pty Ltd and SPI PowerNet Pty Ltd, 19 July 2004.

The ESCV raises the issue of accounting separation in its submission. The ACCC agrees that this is an important issue. This is particularly important for the effective operation of the regulatory incentive schemes applied to TNSPs and DNSPs. The ability of the ACCC and the ESCV to obtain a high quality of information is important. This information is required in determining the allowances for efficient expenditure, in administering regulatory incentives and in ensuring that the transmission and distribution businesses can be fairly compared to other TNSPs and DNSPs respectively.

The ACCC considers that its regulatory accounting requirements for TNSPs coupled with the ESCV licence requirements for regulatory accounts, adequately address this issue. Any public benefits lost in association with waiving the ring-fencing requirement to comply with clause 7.1(a)(ii) are minimal, as the key obligations in the guidelines will continue to apply.

The ACCC considers that it would generally be difficult for SPI to favour its affiliated distribution business through prioritising supply restoration following unplanned outages. The ACCC notes that situations may arise where the joint operation of transmission and distribution assets could result in faster supply restoration on distribution networks, regardless of the fact that SPI does not have operational control over these distribution connection points. The ACCC considers that depending on the factual circumstances either clause 7.2(b) or clause 7.6(b) would prohibit such behaviour, with respect to the provision of prescribed services.

ACCC conclusion

Having considered this application and taken into account responses from interested parties, the ACCC is of the view that:

- the administrative costs resulting from compliance with clause 7.1(a)(ii) (that will be avoided if the requirement is waived) are based on reasonable estimates.
- The public benefits lost as a result of waiving clause 7.1(a)(ii) are minimal, as key obligations in the guidelines will continue to apply.
- Additional obligations, as described above, will be imposed on SPI to preserve the existing public benefit of compliance.

The ACCC is satisfied that the administrative costs of compliance with clause 7.1(a)(ii), identified above, will outweigh the public benefits of compliance. On that basis the ACCC will grant a waiver to clause 7.1(a)(ii) for SPI.

It is important to note that SPI's transmission service activities relating to ring-fenced services will remain subject to all other aspects of the guidelines. Further SPI will continue to be subject to separate regulatory regimes for its transmission and distribution activities. Therefore assets, costs and accounting records will need to be separately identifiable. The guidelines must be read in conjunction with the ACCC's Information Requirement Guidelines for TNSPs. The ACCC anticipates that these requirements and the future consolidation of transmission and distribution under one regulator will enhance the existing regulatory compliance regimes.

The ACCC generally considers the requirement of legal separation a necessary aspect of the regulatory framework where transmission businesses are engaged in generation,

retail and/or distribution activities. This ensures the maintenance of effective competition in the NEM through the separation of retail and generation activities from the monopoly business of the TNSP. Legal separation also reinforces the ACCC's commitment to eliminate cross-subsidies, enforce stringent accounting separation and to address any incentives to undertake anti-competitive behaviour.

Review of waiver

The ACCC has identified that a material change in the role of VENCORP in the Victorian electricity industry may have an effect on the levels of downstream competition and may substantially alter the factors considered in the current analysis.

The Victorian transmission planning arrangements are a major constraint on SPI, as SPI has noted. There is public benefit in ensuring that, if any material change to these arrangements occurs, the ACCC may review the obligations imposed on SPI.

The ACCC considers the administrative cost to SPI of a review of the waiver by the ACCC, is outweighed by the benefit to the public of ensuring that any consequences of a material change to the Victorian transmission regulatory arrangements are addressed. Therefore, the ACCC considers it necessary to provide for a review of this waiver and the additional requirements that will be imposed on SPI if the ACCC believes there has been a material change to the role of VENCORP in transmission network planning arrangements or the role of Victorian distribution businesses in connection asset planning.

4. The ACCC's decision

The ACCC's decision is to:

1. Issue a notice under clause 11 of the Transmission Ring-Fencing Guidelines to waive SPI PowerNet Pty Ltd's requirement to comply with ring-fencing obligations under clause 7.1(a)(ii).
2. Issue a notice under clause 9 of the Guidelines to impose the following obligations on SPI PowerNet Pty Ltd:
 - (a) any related business carried on by SPI PowerNet Pty Ltd (through joint management, staffing or otherwise) must continue to be owned by a legal entity other than SPI PowerNet Pty Ltd
 - (b) for the purposes of the Guidelines (other than clause 7.1(a)(ii)) the owner of a related business referred to in paragraph (a) is, for the avoidance of doubt, taken to be an associate of SPI PowerNet Pty Ltd that takes part in that related business.
3. The ACCC may, by notice in writing to SPI PowerNet Pty Ltd, review this waiver and the additional obligations if SPI PowerNet Pty Ltd takes over:
 - (a) the responsibilities of VENCORP with respect to planning and directing the augmentation of the shared network; or
 - (b) the responsibilities of Victorian Distribution Businesses with respect to planning and directing the augmentation of transmission connection assets.

Following this review, the ACCC may affirm, vary or revoke this waiver and the additional obligations imposed in this decision.

This decision takes effect from 3 March 2005.