



14 May 2013

(sent via email to confidentiality@aer.gov.au)

Mr Chris Pattas
General Manager–Network Operations and Development
Australian Energy Regulator
GPO Box 520
MELBOURNE VIC 3001

Dear Mr Pattas

RE: Better Regulation: Distribution and Transmission Confidentiality Guidelines Submission

I am making this submission on behalf of 34 Councils participating in the SSROC Street Lighting Improvement Program. These Councils encompass approximately 226,000 street lights or 94% of all the lights in Ausgrid's distribution area.

SSROC has supported the need for reform of electricity pricing in a submission to the Australian Energy Markets Commission (AEMC) and welcomes the opportunity to now participate in the Better Regulation reform process that has resulted from the AEMC's November 2012 decision.

A key aspect of the new regulatory framework is new Distribution & Transmission Confidentiality Guidelines (the Confidentiality Guidelines). The Confidentiality Guidelines will be binding on the AER and network service providers (NSPs). The confidentiality guidelines must specify the manner in which network service providers (NSPs) may make confidentiality claims.

This submission is made in response to an issues paper the AER published on the Confidentiality Guidelines in March 2013.

SSROC and Councils' view is that street lighting is an essential but monopoly public service which Councils are responsible for providing to the community and, as such, there should be absolute transparency on the costing models that a decision on efficient costs is to be based on. This is particularly pertinent in the context of the large number of EnergyAustralia street lighting pricing assumptions that were ultimately found to be in error by the AER during the last review.

SSROC believes that substantially higher levels of disclosure must be mandated by the AER as part of the Guidelines to help restore confidence in the pricing process. With respect to public lighting specifically, SSROC urges the AER to mandate the disclosure of a complete street lighting cost model along with all key

Lvl 2, Suite 2E, Hurstville House
34 MacMahon Street
Hurstville

PO Box 536
Hurstville NSW 1481

Ph: 9330 6455
Fx: 9330 6456
Email: ssroc@ssroc.nsw.gov.au
Web: www.ssroc.nsw.gov.au

financial and technical assumptions at the outset of the pricing review so that these can then be validated and revised in an open process.

General Comments on Confidentiality Guidelines Issues Paper

- Councils and other consumers are at a significant information disadvantage in the pricing review process. Exacerbating this information disadvantage, SSROC's experience in participating in the 2009-2014 pricing determination was that Councils' ability to respond adequately to pricing submissions was highly constrained by non-disclosure of key street lighting costing information by Ausgrid's predecessor, EnergyAustralia. As per previous submissions to the AER, EnergyAustralia withheld much of the underlying street lighting pricing model from Council review throughout the last pricing review, appeal and subsequent redetermination. The only partial street lighting pricing model provided by EnergyAustralia for Councils was issued on 4 March 2010, some 596 days after first being formally requested by SSROC on 16 July 2008. This partial model was a spreadsheet covering only OPEX costs and had been stripped of asset quantities, key cost details and assumptions leaving it of limited value for Councils at a particularly late stage in the pricing process.
- Network service providers are natural monopolies and have significant market power in almost every service that they provide. As a consequence, detailed operational and capital costs are not as inherently commercially sensitive as they would be in a competitive market.
- The more that AER pricing decisions are based on confidential information, the less public confidence there will be in these pricing decisions. Therefore, in seeking to increase confidence in the pricing regime, the AER should move towards the greatest degree of disclosure possible.
- The increased emphasis on benchmarking by the AER requires far higher levels of disclosure in order for there to be consumer confidence in benchmarking results.
- The AER should, in future determinations, place less weight on confidential information which, by its very nature, cannot be challenged by customers and leaves open questions about the basis of pricing decisions.
- The timing of information disclosure in many cases is as important as the content. The AER should require early and full disclosure of relevant information, making clear that less weight may be placed on information that is released late in the regulatory process.

Question 1: *Manner in which NSPs may make confidentiality claims*

What are stakeholders' views on requiring NSPs to make confidentiality claims using the template in Attachment 1 of the issues paper?

- SSROC supports confidentiality claims being made using a standardised approach such as that shown in Attachment 1 of the Issues Paper.
- However, the onus should be on the NSP to make the full case for non-disclosure and, as such, Attachment 1 should be strengthened to summarise:
 - the nature of the information to be kept confidential; and
 - the materiality of the information to the pricing decision.
- The default position should be that the public benefit of disclosure should be assumed to outweigh the detriment disclosure would cause to the NSP, unless a material case has been made to the contrary by the NSP.

- For each claim of confidentiality, the NSPs should be required to describe what detriment to their business would be caused by disclosure, to identify the potential detriment of withholding the information from consumers and to demonstrate to the AER why non-disclosure outweighs the detriment of disclosure (third column in Attachment 1 of Issues Paper). The appropriate role for the AER is to then adjudicate on the merits of each confidentiality claim on the basis of a fully justified and supported claim from the NSP.
- In publishing information about confidentiality claims made using Attachment 1, the AER should make a high-level statement about the materiality of information that has been withheld, highlighting those items of greater importance.
- The Guidelines should include key milestones and a timeline for assessing confidentiality claims once a claim is made in conformance with Attachment 1.

Question 2: *Categories or lists of confidential information*

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

- Categorisation of confidentiality claims is useful for all parties to understand the general nature of a confidentiality claim. However, categories should be specific and not be a substitute for a fully justified confidentiality claim in each instance (see response to Question 1).

Question 3: *Categories or lists of confidential information*

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

- Some categories of information the AER is considering are very broadly defined in the Issues Paper. More specific definitions and sub-categories may be needed.
- Of particular concern is the broad definition of 'Market Sensitive Cost Inputs'. It should not be acceptable for all supplier-related information to be kept confidential because the utility has chosen to make confidentiality a general condition of its tendering and contracting approach. Given the natural monopoly position of NSPs, the 'market sensitivity' of many NSP cost inputs is highly questionable. The specific nature of the information should always be the primary test of whether to disclose or not disclose information. The Guidelines should make clear to the NSPs that their general conditions of tendering, contracting, sub-contracting, outsourcing and other commercial arrangements may need revision with respect to confidentiality as a result.

Question 4: *Categories or lists of confidential information*

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

Councils in the SSROC SLI Program are currently in the ludicrous position where luminaire pricing and reliability information coming out of the US Department of Energy's Municipal Solid State Lighting Consortium (which both SSROC and Ausgrid are members of) is more comprehensive, current and useful than cost and reliability disclosure provided by Ausgrid to Councils. By way of example, I note the recent report published in Forbes Magazine¹ about installed LED luminaire lighting costs in the City of Los Angeles as well as detailed luminaire reliability figures. The City of Los Angeles is a prominent MSSLC participant and has regularly shared such information with participants as have others. That such information is not currently disclosed here highlights the urgent attention needed to greater levels of disclosure in the next AER pricing determination. This is particularly important during the current

¹ <http://www.forbes.com/sites/justingerdes/2013/01/25/los-angeles-saves-millions-with-led-street-light-deployment/>

period of rapid technological change in public lighting (eg with the introduction of solid state lighting and advanced controls systems). In this context, specific items in section 4.2 that should be disclosed include:

- **Financial modelling assumptions** - With respect to the disclosure of financial models (4.2.1 item 3), inherent in this should also be that the full set of underlying assumptions on which the financial models are based are also disclosed (eg capital costs, asset lives, failure rates, maintenance cycles, labour productivity, overhead assumptions).
- **Street lighting maintenance data** - Under the NSW Public Lighting Code Section 9.1, “A Service Provider must provide to each of its Customers a) an annual performance report....; and b) any other reports and documents relevant to that Customer....which the Service Provider’s Customer may reasonably require.”

Street lighting maintenance data (eg failure rates and trend data by luminaire and lamp type) is reasonably required by Councils as they ultimately must choose which luminaires to accept as Standard Luminaires and maintenance costs are one of the single largest components of total street lighting costs. Indeed, it is hard to conceive how Councils could make an informed decision about lighting choice without reliability information and, in particular, sufficient information to assess whether the lighting is performing above or below the reliability levels assumed by the AER in setting pricing.

Councils have in previous pricing decisions found their communities bearing much of the financial burden for Ausgrid’s past technology choices including the resulting high maintenance costs for any poorly performing technologies. This has placed a burden on Councils to attempt to keep themselves informed of any problems with particular lighting types and an obligation for Ausgrid to disclose material information such as maintenance data.

- **Related party transactions**
- **Non-regulated activities** (in sufficient detail to allow for the administration of Shared Assets Guidelines)

Question 5: Website notices

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 proportion of information over which NSPs have claimed confidentiality, as measured in pages, is unlikely to be a particularly useful or sufficient measure of the degree of non-disclosure. Of much greater relevance is the materiality of the information that is not disclosed.
- In this context, Attachment 2 would benefit from an additional column requiring NSPs to address the nature of the information withheld and whether or not consumers were engaged on the materiality of the confidential information withheld.

Question 6: Blanket confidentiality claims

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

- SSROC supports the AER view that blanket confidentiality claims are generally unwarranted. As a principle, confidentiality claims should be restricted to only those portions of documents which contain genuinely confidential information.
- That NSPs have agreed to keep whole documents confidential with third parties (eg subsidiaries, related parties, suppliers, consultants or others), should not be a sufficient basis for blanket confidentiality claims. The specific nature of the information should always be the primary test of

whether to disclose or not disclose information. The Guidelines should make clear to the NSPs that their general conditions of tendering, contracting, sub-contracting, outsourcing and other commercial arrangements may need revision with respect to confidentiality as a result.

Question 7: *Third party documents*

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

- SSROC supports the AER view that third party claims of confidentiality (eg consultants' and auditors' reports) should be treated in the same way as other blanket confidentiality claims, placing the onus on the NSP to verify and substantiate a claim of confidentiality. The specific nature of the information should always be the primary test of whether to disclose or not disclose information. The Guidelines should make clear to the NSPs that their general conditions of engaging third parties may need revision with respect to confidentiality as a result.

Question 8: *Scope and coverage*

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?

- SSROC supports applying the Guidelines more broadly to regulatory information notices and broader AER processes.

Question 9: *Compliance costs*

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

- The costs of compliance do not appear material, particularly given the financial ramifications of some of the information in question.

Question 10: *Limited release of confidential information*

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

- Using confidentiality undertakings to allow disclosure or partial disclosure of confidential information to certain stakeholders should always be viewed as a second-best solution to full disclosure. SSROC's experience is that confidentiality undertakings can severely constrain any subsequent submissions made by Councils to the AER and, in the case of a peak body like SSROC, may unreasonably restrict us from discussing matters with the very constituents who are funding our work.

Should you have any questions about this submission, please feel free to contact me on 02 9330 6455 or at an@ssroc.nsw.gov.au.

Yours sincerely



Alan Northey
General Manager
Southern Sydney Regional Organisation of Councils