

14 November 2024

Ms Stephanie Jolly
Executive General Manager, Consumers, Policy and Markets
Australian Energy Regulator

Email: AERringfencing@aer.gov.au

Dear Ms Jolly,

RE: RING FENCING GUIDELINE AND APPLICATION TO NEGOTIATED SERVICES

Thank you for inviting ElectraNet to provide a submission in response to the AER's Issues Paper "Updating the guideline to include negotiated transmission services" (**Issues Paper**).

The Issues Paper arises from the AER's earlier proposal that the AEMC amend the National Electricity Rules (**rules**) to enable the AER to make a Ring-Fencing guideline (**guideline**) in respect of negotiated transmission services.

For the reasons set out in this submission, we consider that it would be premature for the AER to make any amendment to the guideline. Indeed, we are concerned that the existing guideline is not fit for purpose.

More particularly, we are concerned that:

- The problem the AER seeks to address with the guideline is not clearly articulated
- It is not clear that ring fencing measures, whether those in the current guideline or those being considered for future, are capable of addressing the underlying problem as we surmise it to be
- There is a risk of perverse outcomes, in particular:
 - it seems that, at least to some extent, the problem is that the Rules give Primary TNSPs certain time advantages over other parties by design. If this problem is addressed by removing that time advantage, the result would be that the connections process would be slower, rather than faster, which would be detrimental to consumers
 - another part of the problem appears to be that TNSPs have access to information that is not available to potential competitors. We note that much of the relevant information is held by the connecting party, which is free to share it, or not, as it sees fit. The perverse outcome in this respect is that chapter 4 of the Guideline makes it more difficult, rather than less, to share information with others seeking to connect to the network, including large loads.

We are also concerned at the speed with which change is proposed and the process being followed. We note that, in its final determination, the AEMC said that the AER

has indicated that it would undertake a rigorous consultation and will carefully weigh up the costs and benefits of any ring-fencing requirements as part of its process to review and amend the Guidelines.

ElectraNet.com.au

A 52–55 East Terrace, Adelaide
P PO Box 7096, Hutt Street Post Office, Adelaide, South Australia, 5000
T +61 8 8404 7966 or 1800 243 853 (Toll Free) F +61 8 8404 7956
E enquiry@electranet.com.au

This was an important aspect of the AEMC's decision and is reflected in the AER's proposed approach as described in the Issues Paper.

ElectraNet welcomes the AER's commitment to conducting a rigorous cost benefit assessment before making changes to the guideline.

However, in our view the time available between the publication of the Issues Paper and the February 2025 deadline for a revised guideline is insufficient to allow the type of rigorous assessment both the AER and the AEMC consider necessary. Without clearly articulating the problem and carefully assessing options to address it, the AER risks implementing measures that would harm the competitive process at a time when timely and efficient connections are more important than ever. At the same time, we remind the AER of the confidential information ElectraNet provided previously concerning the volume of connection applications, which is small. It is important not to over-regulate this part of the sector.

Therefore, we encourage the AER to avoid making fast changes with likely adverse impacts and instead to conduct a thorough Impact Assessment process to identify the problems it seeks to resolve and identify the best way to resolve them. ElectraNet looks forward to working with the AER on this process.

The attachment provides further discussion in relation to the above and responds to certain aspects of the Issues paper.

Should you wish to discuss this submission please contact me on [REDACTED] or [REDACTED]

Yours sincerely,

[REDACTED]
Jeremy Tustin
Head of Regulation and Corporate Affairs

Attachment

This attachment describes what ElectraNet would consider to be an appropriate approach to revising the Guideline. It then considers whether the current Guideline is fit for its intended purpose.

An appropriate approach to revising the Ring-Fencing Guideline

In ElectraNet's view it would be appropriate for AER's *weighing up the costs and benefits of any ring-fencing requirements* to satisfy the Australian Government's expectations of analyses of this type. Guidance as to what is expected can be found in the Australian Governments *Guide to Impact Analysis*.¹ The Government expects that this guideline should be followed for all policy proposals that are expected to drive a change in behaviour.²

The Guide to Impact Analysis sets out 6 principles for designing and assessing policies (emphasis in the original):³

1. Policy makers should **clearly demonstrate a public policy problem necessitating Australian Government intervention**, and should examine a range of genuine and viable options, including non- regulatory options, to address the problem.
2. **Each proposal must include a clear set of objectives**. These are used to select the best option and to shape evaluation.
3. **Regulation should not be the default option**: the policy option offering the greatest net benefit for Australia — regulatory or non- regulatory — should always be the recommended option.
4. Policy makers should **consult in a genuine and timely way** with affected businesses, community organisations and individuals, as well as other stakeholders, to ensure proposed changes deliver the best possible outcomes for Australia.
5. **The information upon which policy makers base their decisions must be published at the earliest opportunity**.
6. The most **significant policy proposals must undergo a post-implementation review**, reflecting on the extent to which the stated objectives have been achieved, to ensure settings remain focused on delivering the best possible outcomes for Australia.

In ElectraNet's view, principles 1, 2, 3, and 5 are applicable in the current context. Principle 4, relating to consultation is replaced by the transmission consultation procedures. Principle 6, relating to post implementation review is beyond the scope of this submission.

The remainder of this submission explores these four key principles in the context of ring fencing, including but not limited to the current review.

Useful guidance to conducting cost benefit analyses can also be found in the AER's own *Cost Benefit Assessment Guidelines* and the related *RIT-T Guidelines*.

Principle 1 – What problem is ring fencing intended to address?

The first question in developing a robust policy intervention is to define the problem.

Defining the problem involves identifying who is affected by the problem and quantifying the costs they are incurring due to the problem. This forms the upper bound on the benefit that can be achieved by intervention.

¹ [Australian Government Guide to Policy Impact Analysis | The Office of Impact Analysis](#)

² Ibid, p.5

³ Ibid, p.6

Defining the problem is analogous to defining the identified need in a RIT-T. As the AER says in the RIT-T guidelines, an identified need must be expressed “*as the achievement of an objective or end, and not simply the means to achieve the objective or end*”. Further, the objective “*should be expressed as a proposal to electricity consumers*.” The identified need must be “*clearly stated and defined...*”

Various documents relating to ring fencing have been prepared in recent years including explanatory statements, rule determinations and the guidelines themselves. None are particularly clear as to the problem ring fencing is intended to resolve.

In the issues paper the AER says that the “*aim of ring fencing is to promote competitive markets by seeking to ensure a level playing field for providers in markets for contestable services, in the long-term interests of consumers.*”⁴

The notion of levelling the playing field is discussed in relation to principle 3 below.

The issues paper also refers to two ‘key harms’, which have been widely discussed previously, namely cross subsidy and discrimination

We note that these ‘key harms’ are not expressed as the achievement of an objective or end’ nor as a ‘proposal to electricity consumers.’ There are ways that cross subsidy and discrimination could lead to harm to electricity consumers, but these are not discussed in the issues paper nor the various documents that precede it.

In the final rule determination, the AEMC said that the current arrangements create

a risk that a primary TNSP could rely on their monopoly position over the provision of non-contestable connection services to discriminate in favour of themselves or an affiliate in the contestable connections market

This builds on the two key harms discussed previously and links through to the impact on the contestable connections market. However, it still does not link all the way to an impact on electricity consumers.

In our view, an appropriate ‘problem statement’ for the current context would be as follows:

There is a risk that a TNSP could rely on its position as sole provider of negotiated transmission services to prevent or hinder competition in the market for contestable electricity services, thereby causing delay in the energy transition and/ or increasing the cost of electricity to a level that is not consistent with the long term interests of electricity consumers.

This is not to say that the ‘key harms’ are not relevant to the discussion. They are discussed below.

It must be noted that the problem statement above does not refer to ring fencing. This is consistent with the AER’s approach to RIT-Ts. In the RIT-T guidelines the AER says that it is:

essential that RIT–T proponents express the identified need as the achievement of an objective or end, and not simply the means to achieve the objective or end.

This is essential to satisfy the requirement in the Impact Assessment Guideline and RIT-T guideline that the analysis should be independent of any particular policy option.

It is also important to note that the focus of the problem statement is potential harm *consumers* rather than *competitors*. This acknowledges, as the High Court did in the *Queensland Wire* case, that the “*object...is to protect consumers*” and that “*competition is a means to an end.*”⁵ This must

⁴ Issues paper, p.7

⁵ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* (1987) 167 CLR 177 at 191

be considered when the AER reviews the feedback it has received, and may continue to receive from connecting parties and from competitors and would be competitors to TNSPs.

The Guide to Impact Assessment also calls upon those proposing regulatory intervention to identify the data that are available to analyse and quantify the problem. To date this has not been done other than that the AER has conducted a survey but declined to share the results.

It would appear that there are no data available related to the problem that ring fencing is intended to solve.

In relation to the 'problem' to be addressed, we are aware that some connection parties have expressed concerns that, while they are permitted to obtain contestable connection services from parties other than the primary TNSP, it is more costly and more time consuming to do so.

The details of these concerns have not been shared with us, even in anonymous form. However, we suspect that the additional time and cost referred to in these complaints relates to the time and cost involved in having the primary TNSP negotiate Network Operating Agreements (NOA), review detailed designs and accept any 3rd party assets into its fleet for the purposes of providing ongoing operation, maintenance and control services. This additional time reflects the way the Rules are intended to operate.

In the final determination of the Transmission Connection and Planning Arrangements (TCAPA) Rule Change, the AEMC determined that detailed design services should be contestable for certain components of Identified User Shared Assets. In doing so, it also required that detailed designs prepared by third parties must be consistent with the primary TNSPs functional specification (clause 5.3.4(b1)(1)). The primary TNSP has an obligation to satisfy itself that this is the case and doing so takes time and cost. This framework was subsequently extended to the newly created Designated Network Asset (DNA) in the Dedicated Connection Asset rule change.

In contrast, in a situation where the primary TNSP prepares the detailed design itself, there is no need for a NOA, the 'review step' or the asset acceptance steps, making the process inherently faster, and therefore cheaper.

In the TCAPA final determination the AEMC discussed the risk that a primary TNSP would use this situation to 'pressure' connecting parties into awarding contracts for contestable services to the primary TNSP. It addressed this risk in developing the relevant negotiating principles, which it moved from an AER Guideline into the Rules themselves, and specified timeframes to be met in relevant processes.⁶

The rule changes provide the option for a proponent to choose a 3rd party provider but without unduly restricting access to the alternative streamlined process available with the primary TNSP. It recognized the possibility that 3rd party providers, themselves likely to be large, sophisticated, even multinational businesses, may have access to efficiencies which the primary TNSP may not and that these efficiencies may outweigh the timing efficiencies forgone in choosing the 3rd party provider.

We note that the Issues Paper describes the aim of ring fencing in terms of 'levelling the playing field'. While this is intuitively appealing, this outcome could be achieved by taking steps to slow the connection process. We would be concerned with any intervention that took this approach because, while it might help third parties compete with Primary TNSPs, it would inevitably delay connections, which would clearly be to the detriment of consumers.

Question 2 – What are the objectives of policy intervention?

According to the Guide to Impact Analysis, the purpose of defining objectives is to explain why the problem that has been identified gives rise to a legitimate reason for government intervention,

⁶ TCAPA final determination p. 182

including demonstrating that government intervention can be successful. The objectives, outcomes and goals of intervention must be identified clearly enough to allow them to be weighed against each other and against the cost of intervention.

In our view the key harms must be further developed before they form a robust basis for intervention. Insofar as discrimination is concerned, the objective might be to:⁷

Prevent TNSPs from setting the price of negotiated services and/ or the conditions on which negotiated services are offered in a way that is likely to cause detriment to electricity consumers by causing the cost of connection services to be inefficiently high or by causing undue delay in the energy transition.

Expressing the objectives in this way highlights that discrimination itself is not necessarily an appropriate target of policy intervention in this context. It is possible that discriminatory conduct would lead to increased cost of electricity, but this is not automatic. Without a robust link between discriminatory conduct and the long term interests of consumers, probably with respect to the price of electricity, the case for intervention is not made out.

This detailed description of the policy objective is also helpful in identifying policy options as discussed below.

Question 3 – what policy options are to be considered?

Every good Impact Analysis will canvass a range of viable options...three is the minimum requirement⁸

The purpose of policy options is to achieve, or contribute to, the objectives. The purpose of identifying them in an Impact analysis is to ensure that the approach that is chosen strikes the best balance between delivering benefits and imposing costs.

It is beyond the scope of a submission to the issues paper to provide an exhaustive list of regulatory options, and this can't be done properly without a clearly defined regulatory problem and objectives. However, it is immediately clear that there are various options to addressing the problem statement and objectives identified above. These include:

- Conduct rules that would explicitly prevent discriminatory pricing
- Conduct rules that would explicitly prevent discriminatory terms of service competition
- Information disclosure requirements relating to price and terms of service to identify that discriminatory conduct is not occurring
- Prohibitions, such as those already in place, on cross subsidy, which enables competition on an artificially lower cost basis
- Rate cards or similar describing the terms and conditions on which services will be provided
- Transparency approaches including:
 - Rate cards in which the service provider must publish the terms and conditions on which negotiated transmission services will be provided
 - Reporting of actual service outcomes.⁹

⁷ The AER has already concluded that any concern that might arise from cross subsidy is adequately addressed by our existing cost allocation methodology. We agree with this conclusion and hence have not proposed an objective attached to cross subsidy.

⁸ Guide to Impact Analysis, op. cit. p.20

⁹ It may seem appropriate to require that elapsed time be reported. It must be noted that delays in the time taken to process applications can be caused by a lack of information in the application, which is within the control of the applicant, and beyond that of the TNSP, or by a range of other factors.

This is not an exhaustive list, and we understand techniques used in the telecommunications sector may be applicable in this context.

It is also beyond the scope of this submission to evaluate which, if any, of the above options is an appropriate response to the regulatory problem in question. However, it is appropriate that the AER do so before making any further intervention.

Insofar as the AER might be inclined to increase reporting requirements as a result of this review, it would be worthwhile considering the information requirements already in S5.10 of the Rules and whether any gaps exist. If gaps are found, it may be most appropriate to amend S5.10 to ensure that information requirements are all in one place.

It is also helpful to reflect on some of the options in the existing Guideline and discussed in the Issues Paper. In particular, interventions to separate branding or marketing staff seem incapable of addressing the problem described above. This is clear from the fact that a renewable connection to the transmission network requires access to finance in the order of \$300-\$800m, while a battery connection will be in the order of tens of millions of dollars. The application fee for a connection alone is approximately \$1m. Even a smaller renewable generator or storage provider will ultimately need to participate in the wholesale electricity market and to meet the associated obligations including for credit support. Parties with this level of sophistication are unlikely to be confused by common branding.

We are also concerned that imposing a requirement for separate staff would remove any possibility connecting parties might otherwise have to work with a single point of contact in relation to negotiated and contestable services. While we can see that a primary TNSP's ability to offer a single point of contact might place others at a competitive disadvantage when all else is held constant, 'correcting' this by forcing separate teams would add to the cost of connection. Even if this supported competition, it would do so at higher costs than necessary, leading to a detriment to consumers.

Principle 5 – the data to be relied upon should be published as soon as possible

ElectraNet is aware that the AER has heard concerns from connecting parties that it is more costly and time consuming to use anyone other than the primary TNSP to provide contestable services.

To date, despite numerous requests, the AER has provided no detail regarding those concerns. We note that in the Rule Change request, the AER explained that parties with concerns may be reluctant to raise them for fear of reprisals.

While we acknowledge that there are circumstances in which an aggrieved party might not want to raise a complaint, in our view this is unlikely to be the case here. Parties seeking to connect to the high voltage transmission network are, by their very nature, engaged in multimillion dollar projects and seeking to join, or increase their participation in the National Electricity Market, which is a highly dynamic and complex market. Unlike the third parties involved with Distribution Network Service Providers, which include relatively small businesses such as electricians installing solar systems, ElectraNet's counter parties are invariably large, well resources, sophisticated businesses in their own right.

Further, even if there is a cause to protect the identity and specific details of individual concerns, we see no reason why the concerns cannot be articulated sufficiently to clarify, for instance, whether they are consistent with the Rules framework in the way anticipated above.

In this respect ElectraNet notes that clause 5.3.8(a1) of the Rules may also be relevant to the concerns that have been raised with the AER. That provision, known as the *Use of Information Rule*, provides that a TNSP must not use information it receives in providing non-contestable services to tender for or negotiate contestable services. In effect, it prevents the TNSP from taking a head start on contestable works. However, the same provision makes it clear that this is as the

connecting party's option. With consent from the connecting party the TNSP is free to use the relevant information as the connecting party sees fit.

As noted above, we are concerned that the complaints that have been made to the AER are simply instances of the existing Rules at work, yet they are being held out as evidence of wrong doing in support of regulatory intervention.

In these circumstances it is imperative that the AER release the data upon which it has relied, and intends to rely, in developing any future change to the guideline. Concerns about reprisal can be addressed by rendering the data anonymous before publication.

Whether the current guideline is fit for purpose

ElectraNet has now had practical experience with version 4 of the guideline. We are concerned that the way chapter 4 deals with information sharing is problematic.

As noted above, the regulatory problem addressed by the guideline is not clear, though we understand that the underlying concern is that Primary TNSPs are able to influence connecting parties to award contestable services to them in return for concessional treatment in relation to negotiated services. We understand that this is described as 'terms of service' competition in the telecommunications sector. ElectraNet does not do this and has no objection to well-designed measures intended to prevent it if it is occurring elsewhere.

However, we do not see how the information restrictions in chapter 4 of the guideline relate to this problem. In summary, chapter 4 says that information ElectraNet obtains in its capacity as Primary TNSP must not be used to ElectraNet's advantage in contestable parts of the sector.

ElectraNet has reviewed the information it holds and has only identified very limited types of information that would, if used, put it at an advantage over potential competitors. In saying this, we note that the Use of Information Rule expressly provides for connecting parties to consent to the Primary TNSP using information provided in support of the application for negotiated services to also develop proposals for contestable services – this is explicit in the Rules.

As we have communicated to the AER separately, though, we have identified circumstances in which chapter 4 hinders us in providing information to load customers to assist with their planning. This seems to create a perverse outcome in which the Guideline is working directly contrary to the long term interests of consumers.

While we understand that the Issues Paper is intended to focus on questions relating to negotiated services, we encourage the AER to take the opportunity it presents to properly identify the regulatory problem(s) ring fencing has been used to resolve, to quantify that problem(s) and to consider whether the current approach is actually the best way of addressing those problems.