



# **Draft Decision**

## **DNSP applications for waivers from the Electricity Distribution Ring-fencing Guideline - Addendum for SA Power Networks**

November 2017

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## Request for submissions

Interested parties are invited to make written submissions to the Australian Energy Regulator (AER) regarding this addendum to our draft decision by no later than **5pm AEDST on Monday 20 November 2017**.

Submissions should be sent electronically to: [ringfencing@aer.gov.au](mailto:ringfencing@ aer.gov.au)

Alternatively, submissions can be mailed to:

Mr Chris Pattas  
General Manager, Networks  
Australian Energy Regulator  
GPO Box 520  
Melbourne VIC 3001

We prefer that all submissions be publicly available to facilitate an informed and transparent consultative process. Submissions will be treated as public documents unless otherwise requested. Parties wishing to submit confidential information are requested to:

- clearly identify the information that is the subject of the confidentiality claim, and
- provide a non-confidential version of the submission in a form suitable for publication.

All non-confidential submissions will be placed on our website at [www.aer.gov.au](http://www.aer.gov.au). For further information regarding our use and disclosure of information provided to us, see the ACCC/AER Information Policy, June 2014, available on our website.

**Please note that late submissions may not be able to be taken into account in our final decision.** If you have any concerns about meeting the above deadline, please contact us as soon as possible.

Enquiries about this paper, or about lodging submissions, should be directed to [ringfencing@aer.gov.au](mailto:ringfencing@ aer.gov.au).

# 1 Addendum to Waiver Group 2 - Legal / functional separation

This addendum appends our *Draft Decision on DNSP applications for waiver from the Electricity Distribution Ring-fencing Guideline*<sup>1</sup> (18 October 2017) and should be read in conjunction with that document. It relates to a late waiver application from SA Power Networks (**SAPN**), which we received on 30 October 2017. We have decided to issue this addendum as quickly as possible to enable SAPN's application to be considered at the same time as other waiver applications currently under consideration. We aim to have all waiver applications settled, one way or other, by 1 January 2018, when distribution network service providers (**DNSPs**) must be fully compliant with the Electricity Distribution Ring-fencing Guideline (**Guideline**)<sup>2</sup>.

## 1.1 SA Power Networks maintenance and construction contracts

### 1.1.1 Description of waiver application

SAPN is seeking a waiver from its obligations under clause 3.1 (legal separation) of the Guideline. The application is in respect of 20 existing maintenance and construction contracts with large customers, which are considered 'Other Services' within the meaning of the Guideline.<sup>3</sup> SAPN must not provide these services after 1 January 2018, unless it has a waiver to do so. SAPN has requested that the waiver commence as soon as possible and no later than 1 January 2018, and expire on 30 September 2018.<sup>4</sup>

SAPN submitted that it had intended to transfer the 20 construction and maintenance contracts to its affiliate, Enerven Energy Infrastructure Pty Ltd (**Enerven**), before 1 January 2018. However, it has been advised that these transfers could create tax liabilities that would exceed the cost pass-through threshold. SAPN submits it has sought a Private Binding Ruling from the Australian Taxation Office (**ATO**). SAPN submitted it has not yet secured this ruling and it is becoming more likely that a ruling, and SAPN's subsequent requisite negotiations with customers, will not be able to be successfully completed before 1 January 2018.

If the waiver is granted, SAPN submits that it will continue to provide the contracted services until either:

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<sup>1</sup> Available at [https://www.aer.gov.au/system/files/AER%20-%20Ring-fencing%20waiver%20applications%20draft%20decision%20-%20October%202017\\_5.pdf](https://www.aer.gov.au/system/files/AER%20-%20Ring-fencing%20waiver%20applications%20draft%20decision%20-%20October%202017_5.pdf)

<sup>2</sup> Available at <https://www.aer.gov.au/system/files/AER%20-%20Ring-fencing%20Guideline%20Version%202%20-%20Clean%20-%20October%202017.pdf>. Please refer to clause 7.1(a).

<sup>3</sup> We note that SAPN has provided to us the confidential details of these contracts.

<sup>4</sup> Available at [https://www.aer.gov.au/system/files/SAPN%20-%20Ring-fencing%20waiver%20application%20-%2030%20October\\_0.pdf](https://www.aer.gov.au/system/files/SAPN%20-%20Ring-fencing%20waiver%20application%20-%2030%20October_0.pdf)

- the contracts terminate (many of the contracts will expire prior to 30 September 2018, whereby no negotiation and transfer would be required), or
- the ATO has provided SAPN with a favourable ruling, enabling it to commence customer negotiations and transfer the contracts to Enerven without incurring tax liabilities, or
- the ATO has provided SAPN with an unfavourable ruling, at which point, SAPN will consider whether to apply for further waivers or take an alternative course of action.

In its application, SAPN submitted that granting the waiver would prevent it from incurring tax liabilities from transferring the contracts prior to 1 January and would prevent these costs being passed through to consumers. Further, SAPN submitted that not imposing legal separation for these contracts for a short-term period will not in any way advantage an SAPN affiliate, as the contracts were won in competitive markets and for services which are currently being provided. They are therefore not contestable until the existing contracts expire. SAPN submitted that there will be no risk of cross-subsidy because it has a cost allocation methodology in place. It submits that there will be no risk of discrimination in favour of an affiliate because it will still be subject to the functional separation provisions of the Guideline. SAPN also submitted that delivery of the services under contract has already been rebranded as Enerven.

SAPN submitted that granting the waiver will promote efficient operation and use of electricity services for the long-term interests of electricity consumers, specifically in regard to a lower price. It submitted that complying with clause 3.1 of the Guideline in relation to the 20 construction and maintenance contracts would not result in any benefit to consumers.

### 1.1.2 Assessment

On the basis of the information before us, we agree with SAPN's assessment that granting the requested waiver is likely to support the National Electricity Objective and is not likely to result in any potential for cross-subsidy or discrimination. We agree that, if SAPN incurred a significant tax liability for transferring the 20 contracts, these costs could be likely to be passed on to consumers (subject to our acceptance and approval of such a cost pass through application). We note that not granting the waiver would not be likely to result in any benefits to consumers since the contracts are not contestable. This would mean customers would face higher costs, but without any requisite benefits from a more competitive provision of services.

We also note that the proposed waiver duration is short-term and the effect of the waiver is essentially to delay the legal transfer of the contracts to Enerven. This circumstance is therefore very similar to our draft decision to grant waivers to Ausgrid, Endeavour Energy, Energex, Ergon Energy and TasNetworks, which are seeking waivers to accommodate delays in the transfer of contestable services to affiliated service providers.<sup>5</sup>

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<sup>5</sup> Please see our draft decision, p. 35, available at [https://www.aer.gov.au/system/files/AER%20-%20Ring-fencing%20waiver%20applications%20draft%20decision%20-%20October%202017\\_5.pdf](https://www.aer.gov.au/system/files/AER%20-%20Ring-fencing%20waiver%20applications%20draft%20decision%20-%20October%202017_5.pdf)

Our draft decision, therefore, is to grant these waivers on the condition that SAPN transfer the contracts as soon as practicable after receiving a favourable ruling from the ATO.

We welcome submissions on this approach.

## 2 Draft Decision

We propose to grant SAPN a waiver until 30 September 2018 from its obligations under clause 3.1 of the Guideline in respect of 20 'Other Services' construction and maintenance contracts identified to us. We propose to grant this waiver on the condition that, if SAPN receives a favourable ruling from the ATO, SAPN will transfer the contracts to Enerven as soon as practicable.