



14 May 2013

By email: confidentiality@aer.gov.au

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

Jemena Limited
ABN 95 052 167 405

321 Ferntree Gully Road
Mount Waverley VIC 3149
Locked Bag 7000
Mount Waverley VIC 3149
T +61 3 8544 9000
F +61 3 8544 9888
www.jemena.com.au

Dear Mr Pattas

Distribution and transmission confidentiality guidelines – Jemena submission on the issues paper

Jemena Limited (**Jemena**) welcomes the opportunity to respond to the Australian Energy Regulator's (**AER**) issues paper consultation on the distribution and transmission confidentiality guidelines (**Guidelines**).

Jemena owns two regulated network businesses: Jemena Gas Networks (NSW) Limited (**JGN**) and Jemena Electricity Networks (Vic) Limited (**JEN**). Jemena also has ownership interests in the United Energy electricity distribution business in Victoria (34%) and the ActewAGL electricity distribution partnership in the ACT (50%). Accordingly, Jemena has a significant interest in the content of these Guidelines.

Guidelines should assist streamlining the confidentiality claims process

Jemena notes that the release of confidential information to the AER to enable it to undertake its regulatory functions is an important feature of the existing frameworks that provides substantial public benefit. Additionally, Jemena supports the publication of non-confidential information to support transparency and assist stakeholder's education and understanding of the make-up of network prices as much as possible.

Simultaneously, the selective use of confidentiality remains important, particularly where disclosure of that information could directly or indirectly¹ result in increased pressure on network prices and corresponding detriment to Jemena customers. Jemena therefore supports Guidelines that streamline the process for AER consideration of confidential information while reflecting, and aligning, with the confidentiality framework enshrined in the Competition and Consumer Act and the National Electricity Law.²

Jemena considers that the AER's approach in the issues paper could be enhanced by:

- the use of categories - this would significantly improve the Guidelines ability to facilitate streamlining of both Network Service Provider (**NSP**) submission of confidentiality claims and AER assessment of those claims
- extending and detailing the collaborative approach in stage one of the AER's two stage process by:

¹ For example, by prejudicing a businesses commercial interests leading to higher costs faced by the business.

² Competition and Consumer Act 2010(Cth), s 44AAF(1); National Electricity Law, s 18.

- adding clear steps prior to instigating the AER's formal disclosure powers
- clarifying that the NSP provision of detriment information or information that would assist the AER's public benefits tests is optional
- including a reporting mechanism by which the AER reports the number of instances where it has disclosed confidential information without NSP consent.

These are discussed in more detail below. Jemena also endorses the submission by the Energy Networks Association (**ENA**) and has provided responses to the AER's individual questions in **Attachment 1**.

The use of categories

Jemena supports the use of categories that would assist the process of making and assessing confidentiality claims. Jemena considers that the use of categories would be consistent with the collaborative approach sought in the issues paper by providing clarity of the common areas in which confidentiality is usually deemed appropriate.

As part of its submission, the ENA has provided a list of additional categories which would cover most instances of where a confidentiality claim would be made. Jemena endorses this list but notes, consistent with the view of the Australian Energy Market Commission³, that no list of categories should be considered exhaustive.

Extending and clarifying the collaborative approach

Jemena supports the AER sentiment to deal with confidentiality issues in a collaborative fashion. To this extent, there would be merit in the Guidelines providing greater detail within stage one to clarify the steps before the formal process is instigated in stage two. In particular, the Guidelines should include as separate steps the initial assessment of the claim, and an opportunity for the NSP to provide additional information prior to instigating the formal disclosure process. Jemena supports the ENA's proposed four step enhanced approach which details an alternative process that emphasises additional collaboration.

Jemena is concerned that a requirement on NSPs to provide detriment or public benefit test information is inconsistent with a collaborative approach. It should be clear that the public benefit/detriment test is one that the AER applies and the NSP can choose to provide supporting information if it wishes. It is in the interests of NSPs to provide persuasive evidence to the AER beyond the minimum legislative requirements when seeking confidentiality. Assisting the AER assessment of confidentiality claims benefits the NSP by increasing the likelihood of avoiding the more costly and administratively intensive formal disclosure process. However, it may not be efficient for the NSP to undertake detailed analysis of public benefit/detriment in every case, especially where the case for confidentiality is relatively evident. Providing the option for NSPs to provide as much information to support the claim as they deem necessary, and then a four step process as mentioned above for the AER to seek further information would result in a more streamlined and efficient process. Consistent with this view, Jemena supports the revised template for provision of confidentiality claims as suggested by the ENA.

³ AEMC, *Economic Regulation of network service providers*, Final rule determination, 29 November 2012, p. 155.

Reporting

The Guidelines present an opportunity to increase transparency and accountability of the process around confidentiality claims and appropriate disclosure. NSPs have obligations to report their own breaches of confidentiality. Jemena takes these obligations very seriously. Jemena considers there would be transparency and accountability benefits if the Guidelines provided a process where the AER annually reports the number of instances it has disclosed NSP's confidential information. This means there would be an incentive on both the AER and NSPs to minimise confidentiality breaches.

If you wish to discuss the submission please contact me on (03) 8544 9053 or at robert.mcmillan@jemena.com.au

Yours sincerely

A handwritten signature in blue ink, appearing to read 'R McMillan', written in a cursive style.

Robert McMillan
General Manager Regulation
Jemena Limited

Attachment 1. Jemena response to AER questions.

AER question	Jemena response
Manner in which NSPs may make confidentiality claims	
1. What are stakeholders' views on requiring NSPs to make confidentiality claims using the template in attachment 1?	<ul style="list-style-type: none"> • Jemena supports a template approach to streamline the process. • The AER should consider the template provided by the ENA which incorporates the use of categories and the optional provision of detriment and public benefits test information. This template would provide stakeholders with additional clarity regarding the type of information for which confidentiality claims are normally approved and align with the statutory framework for making confidentiality claims.
Categories or lists of information	
2. Should the confidentiality guidelines specify categories of information by which NSPS must classify any claims of confidentiality?	<ul style="list-style-type: none"> • Yes. Rather than increase the administrative burden on NSPs, Jemena considers that the use of categories would be consistent with the collaborative approach sought in the issues paper and streamline the process of seeking and approving confidentiality claims. • The use of categories would provide NSPs with guidance and clarity of the types of information most commonly accepted as confidential. NSPs would then be able to tailor their confidentiality claims and any supporting reasoning in the most efficient and most understandable manner for the AER to assess.
3. In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should protect?	<ul style="list-style-type: none"> • Yes. Jemena supports the full list of categories provided by the ENA.⁴ In addition, it should be recognised that the list is not exhaustive and that there should be an 'other' category that can capture valid confidentiality claims. This was noted by the Australian Energy Market Commission in their final/draft rule determination.⁵ Once allocated to a category, it would then be up to the NSP to provide any supporting information to the AER under the collaborative approach to enable efficient AER consideration and minimise likelihood of instigating the formal disclosure process.
4. In addition to the proposed items listed in section 4.2, are there any other items stakeholders consider we should disclose?	<ul style="list-style-type: none"> • While the AER may seek to disclose certain information under its information disclosure powers, it should retain flexibility in the guidelines to allow valid confidentiality claims that may arise in as yet unknown circumstances. This would also be consistent with the statutory framework for making confidentiality claims.

⁴ ENA, *Response to the AER Distribution and Transmission Confidentiality Guidelines Issues Paper*, Section 4.

⁵ AEMC, *Economic Regulation of network service providers*, Final rule determination, 29 November 2012, p. 155.

AER question	Jemena response
Website notices	
<p>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?</p>	<ul style="list-style-type: none"> • While there would be some administrative burden to filling in the template, Jemena is not averse to assisting the AER should it be deemed more efficient for NSPs to do so. However, Jemena notes: <ul style="list-style-type: none"> - As the guidelines are binding and therefore essentially part of the National Electricity Rules (NER), the AER would effectively be delegating the NER obligation to provide the proportion of confidential information placed upon it.⁶ Therefore, the provision of the information should be optional for NSPs. - The NER obligation itself is difficult to discharge in any meaningful and understandable way. In particular, identifying how many pages of the regulatory proposal contain one or more pieces of confidential information does not necessarily reflect the degree that confidentiality claims might inhibit stakeholder understanding of that regulatory proposal nor be true reflection of the proportion of information subject to confidentiality claims. If the AER chooses to discharge this obligation by a page count, publication of this information should be accompanied by a clear warning about the limitations of interpreting the information or undertaking any direct comparisons between NSPs based upon it. - There would be some additional administrative burden on NSPs to provide page count information. Given the limitations of what the information can reveal to stakeholders, it is not clear whether there would be a corresponding benefit to outweigh the cost.
Blanket confidentiality claims	
<p>6. What are stakeholders' views on our proposed measures for dealing with blanket confidentiality claims in the confidentiality guidelines?</p>	<ul style="list-style-type: none"> • There may be valid reasons why a whole document may be considered confidential. While Jemena agrees that excessive blanket confidentiality claims should be discouraged, the AER should retain flexibility to apply this where appropriate and especially where the NSP can make a compelling case. This would also be consistent with the statutory framework for making confidentiality claims

⁶ NER, rule 6.9.2A.

AER question	Jemena response
Third party documents	
7. What are stakeholders' views on our position that NSPs should verify all third party confidentiality claims that are included in their submission?	<ul style="list-style-type: none"> Jemena considers that, subject to appropriate categories being introduced, a consistent approach between third party confidentiality claims and those of the NSP is appropriate. For example, there are certain instances where third party proprietary information needs to be protected. This is captured under the ENA's list of categories.⁷
Scope and coverage	
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?	<ul style="list-style-type: none"> Provided the final guidelines are workable, and have been developed with industry and stakeholder support, then there is likely to be benefit from it being applied more widely. While the guidelines would not be binding under the NER or National Gas Rules, Jemena, as the owner of both regulated gas and electricity networks, would seek to apply a consistent approach to its confidentiality claims based on the guidelines where it considers these are reasonable.
Compliance costs	
9. What are stakeholders' views on ensuring appropriate disclosure of information whilst minimising administrative costs?	<ul style="list-style-type: none"> Any increase in administrative costs due to the guidelines should be considered against the benefit achieved. Jemena considers that the main benefit from the guidelines is the ability to streamline the existing process for making confidentiality claims and AER consideration of those. Jemena considers that: <ul style="list-style-type: none"> The use of categories would assist a streamlined process and increase the benefit. The requirement to provide a public benefits test would have an uncertain and potentially significant (and, at times, redundant) administrative burden on NSPs. It would provide a more appropriate balance for this to be optional noting that NSPs have incentive to provide supporting information. There would be some additional administrative burden on NSPs to provide page count information to which, given the limitation of the what the information would reveal to stakeholders, it is not clear there would be a corresponding benefit.

⁷ ENA, *Response to the AER Distribution and Transmission Confidentiality Guidelines Issues Paper*, Section 4.

AER question	Jemena response
Limited release of confidential information	
10. Should we facilitate NSPs disclosing information to certain stakeholders for the purpose of making a submission to the AER?	<ul style="list-style-type: none"> • There would be benefit in the AER facilitating the disclosure of information to third parties where this would assist those parties to make relevant submissions. As indicated in the issues paper, any release of confidential information would need to occur within appropriate confidentiality undertakings and at the NSP's discretion.