

10 November 2015

Ms Sarah Proudfoot
General Manager – Retail Markets Branch
Australian Energy Regulator
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MELBOURNE VIC 3001

And by email: AERExemptions@aer.gov.au

Dear Ms Proudfoot

Draft AER (Retail) Exempt Selling Guideline – Version 4

Thank you for the opportunity to comment on the *Draft AER (Retail) Exempt Selling Guideline (Version 4)* and the accompanying *Notice of Draft Instrument*.

We have actively participated in the AER's consultations on embedded network regulations (retail and network) in a responsible and constructive manner since work on such issues commenced in 2011.

In relation to this latest proposed version of the Guideline, we appreciate the opportunity to engage with the AER including through the forum held on 20 October 2015. The AER's ongoing engagement with us in relation to practical interpretation and compliance issues is also appreciated.

Broad support

We support the continuation of the 'exemption' framework which recognises, in the case of shopping centre owners and managers, the incidental nature of the sale of energy to their retail tenants.

In this respect, we also broadly support the revised Guideline.

We welcome the improved readability of the Guideline through a numbering system and the revised flow of information and requirements.

We note, for instance, that the *Policy Principles* section of the current Guideline has been moved to *Appendix E: Decision making factors* in the revised Guideline.

We also note that the *Core exemption conditions* both remain at Appendix A-2 and some of the proposed changes to the general exemption conditions (e.g. to Conditions No. 7 and 12 – see our comments below). In addition, two new conditions have been inserted in relation to (20) *Information provision* and (21) *Exemption limited to the sale of electricity through power purchase agreements*.

Retrofitting of premises

Our main comments relate to the proposed changes in relation to the *Retrofitting of Premises* (outlined at section 4 of the *Notice of Draft Instrument*) and summarised at section 2 of the *Draft Instrument* as follows:

Clarify the obligations on exempt sellers who retrofit an embedded network, including decreasing regulation where all customers in the embedded network have agreed to the network conversion (Ref: Notice of Draft Instrument: Amendments to the AER (Retail) Exempt Selling Guideline – September 2015; page 5).

Decreasing the regulatory burden

We welcome the proposal to decrease regulation where all customers have agreed to an embedded network conversion. This is outlined in the following key direction, and reflected in the *Registrable Exemption Class 1 (R1)* at Table 2, which is relevant to embedded networks in larger shopping centres:

If you plan to retrofit an embedded network you will not be eligible for any deemed or registrable class exemptions unless you have the full consent of all the affected residents or tenants. If you are unable to obtain full consent, you will need to apply for an individual exemption (further details are at Appendix A-1, Tables 1 and 2) (Ref: Draft AER Guideline, page 10).

Excerpt: Appendix A-1 (Table 2)

Registrable exemption class	Application	Class criteria	Future sellers
Class R1 Persons selling metered energy to ten or more small commercial/retail customers within the limits of a site that they own, occupy or operate	Bodies corporate, landlords, lessors or management corporations (and similar entities) who sell energy in commercial or retail properties such as shopping centres, office buildings, airports and industrial parks.	Energy is used for premises within the limits of a site owned, occupied or operated by the person, and Each premises is separately metered, and The site has 10 or more commercial or retail premises	Class remains open except for sites where embedded networks are retrofitted after 1 January 2015. Unless the explicit informed consent of all customers is obtained, individual exemptions will be required in this instance.

Customer consent should not be unreasonably withheld

While the AER's above approach to customer consent, including the proposed deregulation, is supported, we believe the AER also needs to enshrine a related and similar principle to ensure that customers cannot unreasonably withhold their consent to an embedded network owner or operator.

We believe that a new principle should be incorporated into the revised Guidelines, and possibly the network exemption guidelines, as follows:

- *A current or potential embedded network customer must not unreasonably withhold their consent for an embedded network conversion or impede an owner in seeking to undertake such a conversion.*

Incorporating a new principle as per the above would ensure that, for instance, a customer (typically a retail/shop tenant) cannot unreasonably withhold their consent to an embedded network conversion as leverage in relation to another unrelated negotiation they may be having with the shopping centre owner or manager (e.g. rent negotiation or renewal of a lease). Similarly, the proposed new principle would avoid circumstances where a shop tenant withholds consent where they have been offered an appropriate energy price and service within the embedded network which would see them as being no worse off, or where they would still have cost-effective access to a retailer of choice. In such circumstances it would not be reasonable for the tenant to prevent the embedded network conversion when the overwhelming majority of tenants are in support of the conversion.

Incorporating this new principle into the proposed R1 exemption framework (excerpt noted above), for instance, could mean that an R1 exemption could also be obtained if the embedded network owner or operator can establish that a customer is unreasonably withholding their consent.

Similarly, in relation to *General Condition No. 12* (Part B, 4.1, page 25) of the network exemption guideline, just like a 'private network operator must not impeded a customer's access to retail competition'...there should be a corresponding requirement that 'a customer must not unreasonably impede a private network operator's ability to undertake an embedded network conversion.

**Grounds for refusal (section 7.4)
Information for individual exemption applications (Appendix B)**

In addition to the above, given that the *Grounds for refusal* of an individual exemption application (at section 7.4 of the proposed revised Guideline) can be based on 'not giving effect to the policy principles' or is 'inconsistent with considerations under the exempt seller related or customer related factors', we believe that the recommended new principle could also be incorporated into Appendix E, to ensure that customers cannot unreasonably withhold their consent to an embedded network conversion.

We have also noted that a new requirement has been inserted (requirement 15 at Appendix B of the proposed revised Guideline) which notes that "We may require you to provide evidence of customers' explicit informed consent for applications involving retrofitted embedded networks". In light of the proposed new principle above, we believe this section could also be amended to provide as follows:

- *We may require you to provide evidence of customers' explicit informed consent for applications involving retrofitted embedded networks. This can include evidence in relation to any customer who the embedded network owner or operator believes is unreasonably withholding their consent.*

Pricing condition clarification (Condition No. 7)

We welcome the proposed clarification in relation to Condition No. 7 (Pricing) which will see the removal of current sub-conditions (5) and (6).

Concessions and rebates (Condition No. 9)

We have no objection to the proposed changes in relation to the claiming of government rebates or concessions.

However, we believe that the proposed changes to General Condition No. 12 (Concessions and Rebates) should include an introduction similar to General Condition No. 16 (Life-support customers) whereby an exempt customer is required to provide an exempt person with confirmation that they are entitled to and eligible for a concession or rebate. While current permanent 'relief-based' rebate schemes generally seem to be targeted at the residential sector, in the event that such schemes extend to the business sector in the future (either permanently or temporarily), we believe that an embedded network operator should only have an obligation to claim and apply a rebate to a customer's bill if they have formally been advised by that customer or tenant. Practically, given the number of tenants in a shopping centre and the number of leases expiring and commencing from time to time, it is not feasible for a landlord to be aware of all available rebates for its tenants without being formally notified of them from time to time by the tenants.

Further opportunities for clarification


We are keen to ensure that the formal conditions within the Guideline can be easily understood, applied and communicated and, further (to reference the AER's general proposition at page 16 in relation to exemption conditions and compliance), that "conditions are designed to protect customers without overburdening exempt sellers..." including in relation to Individual Exemption applications.

We look forward to continue working with the AER on this important issue.

As a final point, we are also keen to work with the AER in relation to any changes to the network exemption guidelines, including those that may arise from the (pending) embedded network rule change from the Australian Energy Market Commission (AEMC).

As always, feel free to contact me on 02 9033 1930 or anardi@scca.org.au.

Yours sincerely,



Angus Nardi
Executive Director