

17 January 2014

Mr Chris Pattas
General Manager - Network Operations and Development
Australian Energy Regulator
Level 35, The Tower
360 Elizabeth Street
Melbourne Victoria 3000

Dear Mr Pattas

Better Regulation - Draft regulatory information notices to collect information for category analysis

The Energy Networks Association (ENA) is pleased to have this opportunity to respond to the Australian Energy Regulator's (AER) Explanatory Statement, *Better Regulation - Draft regulatory information notices (RINs) to collect information for category analysis*.

ENA is the national industry association representing the businesses operating Australia's electricity transmission and distribution and gas distribution networks. Member businesses provide energy to virtually every household and business in Australia. ENA members own assets valued at over \$100 billion in energy network infrastructure.

ENA has appreciated the opportunity that the AER's consultation process has afforded us to raise issues of concern to our network service provider (NSP) members. While many of ENA's issues have now been addressed, there are three significant issues that remain unresolved. These are the AER's approach to information requested in the RINs that NSPs cannot provide, the assurance standard for the historical information provided, and the short timeframe in which to respond to a final RIN, if the Category Analysis RIN is linked to the timing of the AER's Economic Benchmarking report (due 30 September 2014). Each of these issues potentially increases the resourcing costs, and the compliance burden, for completing the information requested in the final Category Analysis RINs.

In ENA's submission (see Attachment) we propose that:

- a NSP will only be required to provide information which is within the knowledge of the NSP;
- the wording of the assurance standard be amended to "true and fairly stated" rather than true and accurate" as proposed in the AER's Explanatory Statement; and
- the timeframe for completing the Category Analysis RIN should be extended from the currently proposed 3 months to at least 4 ½ months.

As the AER anticipates a short turn around time before finalising the RINs by end February/early March, we would be pleased to meet with you in the near future to find a mutually beneficial resolution to these issues. To discuss this further you can contact myself on 6272 1500 (or jbradley@ena.asn.au) or Jim Bain on 02 6272 1516 (or jbain@ena.asn.au)

Yours sincerely,

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

John Bradley
Chief Executive Officer

Attachment

ENA Submission on the AER Explanatory Statement Better Regulation - Draft regulatory information notices to collect information for category analysis

Information that NSPs cannot provide

NSPs are willing to provide the AER with robust and meaningful information (where possible), to enable a tool or platform for appropriate benchmarking analysis. ENA recognises that the AER has reduced the potential burden of providing the requested data on NSPs compared with the earlier indicative templates released in August 2012. However, we remain concerned that the AER has not specifically addressed ENA's concern that not all NSPs are able to capture and report all historical information that the AER is requesting for this round of Category Analysis RINs.

ENA raised this issue in the ENA submission to the *Draft expenditure forecast assessment guideline*, in September 2013. Specifically, in Recommendation 24 ENA requested that the AER

"clarify that NSPs will not be required to provide information that they do not have or that could be materially misleading or unreliable."

In the earlier ENA submission we observed that it will not always be possible for a NSP to provide the information that the AER requests in the RINs even with best endeavours to do so.

In order to resolve this issue ENA proposes that NSPs only be required to provide information which is within the knowledge of the NSP. This would be consistent with a decision of the Federal Court which considered the scope of the powers of the Australian Competition and Consumer Commission to compel the provision of information pursuant to section 155 of the Competition and Consumer Act 2010 (Cth). In this case the Federal Court noted that it is true that

"the recipient of a notice can only be required to furnish information which is in his knowledge or control and cannot be required to undertake a general investigation of matters beyond his control".²

In ENA's view the AER's back casting requirements for providing "best estimates" may go beyond such a requirement. Unlike the manipulation or extraction of historical data, which is within the knowledge or control of the NSP, back casting of "best estimates" may involve a NSP in approximating or estimating data or in making arbitrary judgements for the purpose of responding to a RIN. It is not appropriate that NSPs should be required to do whatever is necessary in order to provide a response to the RINs.

Historical information to be true and fairly stated

Similar to the assurance standard applied for the economic benchmarking RINs, the AER proposes that for the Category Analysis RINs NSPs must certify that actual historical data is true and accurate and that estimated information is the best estimate.

¹ ENA submission, *Draft expenditure forecast assessment guideline*, in September 2013, p 38

² *Dunlop Olympic Ltd v Trade Practices Commission* 62 FLR 145, 149 -150.

In requiring that NSPs must certify historical information to be true and accurate, the AER is imposing a different assurance standard than the audit standard, which requires that information is “free from material misstatement and...a fair presentation”.

The term ‘accurate’ does not appear anywhere in the audit standard, and therefore its application in the RIN process is uncertain. If the “true and accurate” assurance is more stringent than the audit assurance standard, then NSPs cannot rely on auditors’ opinions to provide this assurance. Rather than imposing a different standard for RINs ENA proposes that the wording in the statutory declaration be amended to be “true and fairly stated”.

Extension for completion of Category Analysis RINs

The timing for submission of the completed category analysis RINs places an extremely challenging work load on network businesses given that the final RINs will be issued at the end of February 2014 / early March 2014 and SNSPs will be required to be submitted by 31 May 2014, a period of 3 months.

The information requirements for the category analysis RINs are inherently more complex and onerous than for the economic benchmarking RIN– however less time has been allowed.

ENA proposes that the date for submission of Category Analysis RINS should be extended from the currently proposed 3 months to at least 4 ½ months. This is a comparable timeframe for all NSPs to complete their responses as was allowed for the Economic Benchmarking RINs.