

20 March 2009

Mr Paul Reid
Assistant Director Monitoring
Economic Regulation Authority
Level 6, 197 St George's Terrace
PERTH WA 6000

Dear Mr Reid

SUPPLEMENTARY SUBMISSION REGARDING DRAFT INCIDENT REPORTING MANUAL

We refer to the request by the Authority for submissions regarding the draft Incident Reporting Manual for Electricity, Gas and Water Licensees dated February 2009 (**Manual**) and our submission on the Manual dated 6 March 2009.

Subsequent to the lodgement of Western Power's submission, the Authority gave notice of an extension of time to make submissions on the Manual. The extension of time expires at 4 pm on 20 March 2009.

Please find following Western Power's supplementary submission on the Manual.

1. Preliminary observations

- 1.1 Western Power's first submission was submitted on 6 March 2009, before Western Power has received the Authority's notice of an extension of time – which was issued on the afternoon of 6 March 2009. Had Western Power received notice of the extension of time before it had lodged its submission, Western Power would not have lodged its submission on that date. Western Power had not at that stage had an opportunity to properly consider the legal issues surrounding the Manual or advice sought in relation to the Manual.
- 1.2 As outlined in our first submission, Western Power acknowledges the Authority's legislative responsibility to monitor and report on the operation of Western Australian licensing schemes and to inform the relevant Minister of any failure by a licensee to comply with its licence conditions. Western Power remains fully committed to operating in an open and transparent electricity market.
- 1.3 Western Power's position is, and has always been, that to the extent the Authority has the power to implement the Manual and require the information sought under it, Western Power will not oppose the Manual. To this end Western Power set out in the first submission the type of information that could be provided.
- 1.4 However, upon now having a greater opportunity to consider the Manual and the Authority's powers, Western Power considers that the Manual goes beyond the Authority's powers and would, therefore, either wholly or in part be invalid.

- 1.5 We note that the Manual fails to clearly articulate:
- (a) the reason for requiring the additional information; and
 - (b) the purpose for which the information will be used.
- 1.6 This failure is significant as for the reasons set out below in 4.13.
- 1.7 Further, the Manual provides no guidance as to what is the penalty (if any) for non-compliance with the reporting procedure outlined therein. Presumably, non-compliance with the reporting procedure will result in a breach of the conditions of the licence and Western Power will be penalised accordingly. The validity of the Manual is therefore very important because the potential penalties for a non-compliance with the manual are, potentially, very severe.
- 2. Functions of the Economic Regulation Authority**
- 2.1 In order to determine the Authority's power to make the Manual, the functions of the Authority must be closely considered.
- 2.2 Section 25 of the *Economic Regulation Authority Act 2003 (ERA Act)* relevantly provides that the functions of the Authority are the functions it is given by or under any other enactment.
- 2.3 For the present purposes, the *Electricity Industry Act 2004 (EI Act)* gives the Authority certain functions in relation to issuing licences including the conditions of the licence.
- 2.4 When looking to the Parliamentary debate regarding the *Electricity Industry Bill 2003*¹ and section 38 of the EI Act, it is clear that the legislative intent was that the Authority's functions under the EI Act would primarily be limited to the administration of the electricity licensing regime and access regime, and to provide advice to the Government on electricity tariffs, electricity market surveillance and wholesale market functions.
- 2.5 Section 26 of the ERA Act provides that, in performing its functions, the Authority must have regard to:
- (a) the need to promote regulatory outcomes that are in the public interest;
 - (b) the long-term interests of consumers in relation to the price, quality and reliability of goods and services provided in relevant markets;
 - (c) the need to encourage investment in relevant markets;
 - (d) the legitimate business interests of investors and service providers in relevant markets;
 - (e) the need to promote competitive and fair market conduct;
 - (f) the need to prevent abuse of monopoly or market power; and

¹ We refer to Hansard, Legislative Assembly, 30 October 2003, Hansard, Legislative Council, 2 December 2003, and the Explanatory Memorandum to the *Electricity Industry Bill 2003*.

- (g) the need to promote transparent decision-making processes that involve public consultation.

2.6 Section 9 of the EI Act provides that the Authority must not grant a licence unless it is satisfied that it would not be contrary to the public interest to do so. In deciding whether the granting of the licence would not be contrary to the public interest, the Authority, among other things, must take into account the following matters:

- (a) environmental considerations;
- (b) social welfare and equity consideration, including community service obligations;
- (c) economic and regional development, including employment and investment growth;
- (d) the interests of customers generally or of a class of customers;
- (e) the interests of any licensee, or applicant for a license, in respect of the area or areas to which the order (licence), if made, would apply;
- (f) the importance of competition in electricity industry markets; and
- (g) the policy objectives of government in relation to the supply of electricity.

2.7 Thus, the Authority must take into account a range of general matters. However, reference to such matters must be viewed in the context of the Authority's functions. It is not open to any statutory authority, including the Authority, to take into account factors that are outside the scope of, and not relevant to, its functions.

3. **Limits on the Authority's power to impose conditions on a licence**

3.1 While section 11(1) of the EI Act provides that a licence may be subject to '*any terms and conditions that are determined by the Authority*':

- (a) the discretion must be used and the power exercised bona fide;
- (b) the discretion must be used and the power exercised with a view to achieving ends or objects not outside the purpose for which the discretion or power is conferred (see *Shrimpton v Commonwealth* (1945) 69 CLR 613; and *Protean (Holdings) Ltd v Environment Protection Authority* (1976) 40 LGRA 189); and
- (c) the conditions imposed on a licence must be reasonable in the circumstances (see section 50 of the *Interpretation Act 1984*).

3.2 In the present circumstances, the Authority has power to grant a licence and impose conditions on the licence for the purpose of regulating certain matters in relation to the construction and operation of generating works, transmission systems and distribution systems, and the selling of electricity to customers (section 4 of the *Electricity Industry Act 2004*).

3.3 In imposing conditions on a licence, the Authority must have regard to the matters discussed above in 3.1. The Authority's power to grant a licence subject to conditions is not unfettered.

4. Reporting requirements in the Manual are beyond power

A. *Head of power relied on to impose reporting conditions*

4.1 The Authority appears to rely on section 11 of the EI Act and clause (m) in Schedule 1 for its head of power. Clause (m) in Schedule 1 relevantly provides that a licence may include provisions:

'requiring the licensee to provide to the Authority, in the manner and form determined by the Authority, specified information on any matter relevant to the operation or enforcement of the licence, the operation of the licensing scheme provided for in Part 2, or the performance of the Authority's functions under that Part'. (our emphasis)

4.2 This is not itself a condition, but a head of power under which the Authority may impose a specific condition requiring the licensee to provide information on any matter **relevant to**:

- (a) the operation or enforcement of the licence;
- (b) the operation of the licensing scheme provided for in Part 2; or
- (c) the performance of the Authority's functions under Part 2.

4.3 Under this head of power, a condition specifying the manner and form that the relevant information is to be provided may also be imposed.

4.4 Two conditions of the current licences (**Conditions**) held by Western Power are made pursuant to the above provisions. We note that in these Conditions the Authority has not imposed the requirements for the specific information required by the Authority.

4.5 In particular, the Conditions generally require Western Power to:

- (a) publish any information, within a specified timeframe, in connection with the licensee or the performance by the licensee of its licence obligations, as directed by the Authority; and
- (b) provide to the Authority, in the manner and form determined by the Authority, specified information on any matter relevant to the operation or enforcement of the licence, the operation of the licensing scheme or the performance of the Authority's functions under the Act. This may relate to information beyond what is already required under the licence.

4.6 Thus, the Conditions simply reflect the head of power under which they have been made; leaving it open to the Authority to later determine the specific information required without complying with the proper processes set out in the EI Act for imposing such requirements.

B. *Validity of reporting conditions*

4.7 There is some doubt as to the validity of these Conditions as they fail to clearly identify the Western Power's obligations under them.

4.8 First, the power to impose such conditions under section 11 and clause (m) of Schedule 1 of the EI Act appears to contemplate that the conditions will be specific and

set out the actual information required by the Authority to determine the matters set out in clause (m) of Schedule 1. The simple restating of the power in the Conditions allows the Authority to impose a 'condition' requiring specific information, without following the procedures set out in the EI Act for imposing conditions.

- 4.9 Secondly, the Conditions fail to identify the information to be published, the timeframe within which the information is to be published and the manner and form the information is to be published.
- 4.10 Thus, it appears as though the Conditions are, in a legal sense, uncertain and unreasonable in that the Authority has left to itself the power from time to time by notice to specify the nature and extent of the information it seeks and has the ability to change the nature and extent of that information at any time during the currency of the licence. This uncertainty could result in the invalidity, and unenforceability, of the Conditions.
- 4.11 However, for the purposes of this submission, Western Power will not pursue the validity of the Conditions and will focus on the Manual. However it is to be noted that if the Conditions are invalid, then whether or not the Authority accepts our comments below, the Manual would too be invalid.

C. Validity of reporting requirements outlined in the Manual

- 4.12 As the Conditions closely reflect the head of power under which they were made (i.e. section 11 and clause (m) of Schedule 1 of the EI Act), the Manual will only be valid to the extent that it requires the Western Power to provide information on matters relevant to:
- (a) the operation or enforcement of the licence;
 - (b) the operation of the licensing scheme provided for in Part 2; or
 - (c) the performance of the Authority's functions under Part 2,
- (together, the **Relevant Matters**).
- 4.13 We note here that the task of determining the validity of the Manual is made difficult as a result of the failure in the Manual to justify the need for the information. This failure in alone is arguably sufficient to invalidate the Manual.
- 4.14 We have considered the contents of the Manual by reference to the Relevant Matters and note that the Manual states that:
- 'It is important to note that a major or significant incident might occur that does not directly result in a non-compliance with licence conditions. The purpose of this Manual is to collect information on these incidents.' (see page 6 of the Manual).
- 4.15 This statement demonstrates that the Manual is intended to require a licensee to provide information that is beyond the Relevant Matters. To the extent that the Manual does go beyond the Relevant Matters, the Manual is invalid.
- 4.16 By way of a particular example, we note that a 'major' incident is classified as an incident that causes serious injury to persons, serious environmental harm or pollution or serious risk to public health, and which must be reported to another regulatory authority. In our submission, the Manual does not adequately restrict the types of

reportable incidents to incidents which fall within the scope of Relevant Matters or generally within the functions of the Authority. Importantly, many 'major' incidents will not fall within the scope of the Relevant Matters or the functions of the Authority, and to the extent that the Manual requires a licensee to report these incidents, the Manual is invalid.

- 4.17 For instance, the requirement to notify an incident under section 72 of the *Environmental Protection Act 1986* by reason of Table 3 Section 6.1 of the Manual. Under section 72, the requirement is to give notice of discharges of waste as a result of certain events. Those events are not necessarily linked to the operation of the licence or any other of the Relevant Matters.
- 4.18 Further, it is important to consider that specialised bodies such as EnergySafety and the Department of Environment and Conservation have been specifically established by legislation to deal with incidents of the type the Manual attempts to deal with. It is unlikely that the legislature would have intended that a licensee's obligations in relation to reporting of a particular incident be effectively doubled for no apparent reason and with no specific legislative authority, particularly when another authority has been specifically established to deal with such incidents.

5. Conclusion

- 5.1 The Manual does go beyond the Relevant Matters and, therefore, wholly or in part is invalid.
- 5.2 To the extent that the Manual requests the reporting of 'major' incidents - being incidents which cause serious injury to persons, serious environmental harm or pollution or serious risk to public health (and which would need to be immediately reported to a regulatory authority (other than the Authority)) - it would be invalid. These matters are not related to the Relevant Matters.
- 5.3 The Manual must be amended to limit itself to the Relevant Matters and must clearly articulate the justification for the information sought under it.
- 5.4 Ensuring the validity of the Manual is important, particularly given that the approach taken by the Authority appears to be that non-compliance with the reporting procedure will result in a breach of the conditions of the licence and Western Power.

If you wish to further discuss Western Power's submissions, please do not hesitate to contact Ms Margaret Pyrchla Manager Compliance on 9326 4535.

Yours sincerely

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