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Mr Tyson Self

Assistant Director of Gas

Economic Regulatory Authority (**ERA**)

Perth, Western Australia

By email to: publicsubmissions@erawa.com.au

31 August 2026

Dear Mr Tyson,

Public Consultation: Draft Compulsory Notice Guideline

AGL Energy Limited (**AGL**) welcomes the opportunity to comment on the ERA's draft compulsory notice guideline (**Guideline**), prepared as required by section 68 of the *National Gas Access (Western Australia) Law* (**NGL**). AGL supports the ERA publishing a guideline that sets out the rights and obligations of persons served with a compulsory notice, and recognises that section 42 of the NGL is central to the ERA's ability to perform its functions. AGL's comments are directed to the accuracy of the Guideline and to the fairness and workability of the processes it describes.

A guideline of this kind exists to inform recipients of their rights and obligations. Recipients will act on it under threat of criminal penalty and therefore, it should not attribute obligations that legislation does not impose.

This submission focuses on three key issues: the treatment of redaction, confidentiality protections, and timeframes for consultation and compliance. It also raises a number of additional legal and procedural matters relevant to the operation of the Guideline.

Redaction of irrelevant information

AGL submits that the Guideline should not state that redaction is not permitted where that proposition is not supported by the NGL.

Paragraph 2.1.5 of the draft Guideline provides that where a notice requires a document but only part of that document is relevant, "*the entire document must be provided*", and that *"[w]hile information may be redacted if it is subject to legal professional privilege, relevant laws do not authorise the redaction of the information from a document on the basis that the information is not relevant*". Paragraph 2.1 states in similar terms that documents "*are to be provided in original format, without redactions*".

No provision of the NGL, and no authority, is cited in support of that proposition. A regulator requires statutory authority for the exercise of its powers, and the ERA's authority to compel production is conferred by section 42 of the NGL, which does not prohibit redaction for relevance. A recipient does not require statutory authority to engage in conduct that the NGL does not prohibit. On that basis, redaction for relevance is not prohibited and can be made.

The ERA's proposition is also contradicted by the final sentence in paragraph 2.1.5, which concludes that *"[d]ocuments must not be redacted on the grounds of relevance unless the ERA has agreed in advance*". If the ERA can agree to redaction, then the act of redaction itself cannot be unlawful.

Refusal or failure to comply with a notice, without reasonable excuse, is a criminal offence, as is providing information a person knows to be false or misleading. Section 42 contains no language directed to redaction and the Courts do not construe criminal provisions expansively. Those same sanctions also address the ERA's presumed concern underlying paragraph 2.1.5, that a recipient will use relevance as a cover for withholding adverse material. Information provided by a body corporate must be given in writing signed by a competent officer, and the ERA may apply for an order requiring a person to remedy a breach. An officer who signs a response knowing that responsive material has been concealed behind a relevance claim is personally exposed and that is a considerably stronger safeguard than a redaction prohibition stated in a guideline.

A guideline made under section 68 describes existing rights and obligations, rather than creating new ones. To the extent paragraph 2.1.5 suggests an obligation that is not imposed by section 42, it may create uncertainty as to the legal position of recipients. AGL considers that the guideline should more closely reflect the terms of section 42.

Recommendation

AGL recommends that the second and third sentences of paragraph 2.1.5 be deleted, and replaced with a statement of the ERA's expectations and of the risks and limitations of redaction, in terms to the following effect:

- a document that contains information within the scope of a notice should be produced, and a recipient should not withhold a document merely because parts of it fall outside that scope;
- where a recipient redacts material on the ground that it falls outside the scope of the notice, the redaction should be obvious on the face of the document;
- the ERA may require a recipient to substantiate the basis of any redaction; and
- where the ERA and a recipient cannot agree, the unredacted document may be provided to independent counsel, to confirm whether the redacted material falls within the scope of the notice.

This approach achieves everything the current drafting is designed to achieve. It preserves the ERA's ability to test a relevance claim, it makes any withholding visible, and it avoids the compulsory transfer to the regulator of commercially sensitive material which the ERA does not have the authority to require.

Confidentiality protections

The draft Guideline does not explain the statutory confidentiality protections that apply to information produced to the ERA under compulsory powers. In particular, the NGL contains a confidentiality regime governing the disclosure of information provided in confidence, including procedural safeguards that must be followed before any disclosure occurs. The NGL also requires the regulator to take reasonable measures to protect information obtained by compulsion from unauthorised use or disclosure.

These protections are highly relevant to recipients of notices, particularly where commercially sensitive, customer or counterparty information is involved. The Guideline's discussion of confidentiality is therefore incomplete and may leave recipients with an inaccurate understanding of the protections available once information is provided to the ERA.

Recommendation

AGL recommends that the Guideline include a dedicated section on confidentiality that:

- summarises the statutory protections that apply to information provided under compulsory powers;
- explains how recipients can identify information claimed to be confidential and how the ERA will manage those claims; and
- confirms that the ERA will take reasonable steps to identify and notify affected third parties before disclosing confidential information contained in produced material.

Timeframes

The only commitment in the draft Guideline as to time is that the ERA will provide a recipient "*a reasonable timeframe*" for compliance on a case-by-case basis. While flexibility is important, this gives recipients little guidance as to how compliance periods will be determined, particularly where non-compliance can expose a recipient to criminal consequences.

The draft also treats every notice identically. In practice the burden and the appropriate response period differ greatly between an urgent enforcement matter and a general market or industry wide information request that may span multiple customers and an extended date range. AGL recommends an express two tier framework, with stated minimum periods:

- not less than 28 days for non-urgent notices;
- not less than 28 days for general market or industry wide information requests, which should not be classified as urgent; and
- not less than 14 days for notices the ERA classifies as urgent, with longer periods where a notice covers multiple customers or an extended date range.

Where the ERA considers a matter to be urgent and therefore requires a shorter compliance period, AGL recommends that the notice identify the matter as urgent and explain the basis for that assessment. This would assist recipients to understand the rationale for the timeframe and to make informed submissions where an extension is required.

Paragraph 2.4 of the draft Guideline requires a variation application to be made "*within a reasonable time period prior to the applicable deadline*", which is undefined, but imposes no corresponding obligation on the ERA to decide the application by any date. A recipient may apply for an extension and remain exposed to the original deadline, and to the criminal consequence of missing it, while its application is under consideration. AGL recommends that a variation application suspend the compliance date for the affected categories, and that where the ERA has not determined the application before the original date, that date be automatically extended by the period of the delay.

Further Legal and Procedural Considerations

- **Consultation before issue**. Consultation is at the ERA's election and is directed only to document management systems. The draft stage is where scope problems are most efficient to solve. Unless there is a genuine risk to evidence, urgency or prejudice to an investigation, the ERA should ordinarily engage with the prospective recipient regarding scope, relevance, burden and timing before issuing a notice.

- **Possession, custody or control**. The Guideline should confirm that a notice reaches only documents within the recipient's possession, custody or control, and does not require a recipient to obtain documents from related bodies corporate, contractors, agents, outsourced providers or joint venture participants. The ERA can issue a notice to the person who holds such documents.

- **Form of response**. Specifying the manner of provision is not a power to require a recipient to re-key its records into the ERA's preferred form. That may impose significant additional cost without necessarily improving the quality or utility of the information provided. A preferred format should be expressed as a preference, as long as the information is provided in a readable and usable form.

- **Oral examination**. The Guideline should recognise that oral examinations are a more intrusive form of information gathering and explain the factors the ERA will take into account in deciding whether written information requests, document production, or oral examination are most appropriate in the circumstances.

- **Appendix 1**. Appendix 1 reproduces the NGL provisions as they apply to the AER; AGL recommends that the appendix be reproduced as they read for Western Australia, or carry a note to the effect that the references to the AER are to be read as references to the ERA.

- **Facsimile**. The reference to service by facsimile is statutory, but facsimile is obsolete and invites confusion about valid service; the Guideline can note the statutory position while recording that the ERA will not serve by facsimile in practice.

Conclusion

AGL supports a guideline that gives recipients a clear and accurate account of their obligations and of the protections available to them. The changes proposed above would improve the Guideline in both respects, and in the case of redactions would remove a statement that AGL does not consider to be supported by law.

If you have any questions please do not hesitate to contact Angela Gregory, Group Counsel, Competition Regulation and Strategy, Angela.Gregory@agl.com.au.

Yours sincerely,

[redacted]

Leanne Hanna
Head of Competition Regulation and Strategy