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Mr Alan Tregilgas
Utilities Commissioner
Utilities Commission
3rd Floor, 38 Cavenagh Street
Darwin NT 0800

Dear Alan

**Re: Review of NT Electricity Ring-fencing Code – Revised Draft Code
October 2008 (Revised Draft Code)**

In response to your request for submissions under paragraph 1.9 of the Revised Draft Code, please find enclosed Power and Water's submission with regard to the Commission's proposed amendments to the Ring-fencing Code.

The purpose of this submission is to identify issues, further to those raised in Power and Water's July 2008 submission, that Power and Water considers the Commission should have regard to in finalising its amendments to the revised Ring-fencing Code.

There are a number of amendments to the Proposed Draft Code that Power and Water supports and accepts, principally:

- the removal of default third-party contract provisions;
- the removal of confidential information provisions; and
- the amendment to the third-party customer mandated terms and conditions.

Power and Water notes, however, that it is the Commission's intention to seek legislative amendments allowing it to gather and release confidential information, where it perceives there is a public benefit in doing so. Power and Water acknowledges the Commission's power to seek these legislative changes, and asks the Commission to consider a formal consultation process.

Power and Water also has a concern regarding the Commission's revised standards for documentation of service agreements between related parties. Clarity is required regarding what services the Commission is referring to, to what level of detail the terms and conditions are to be disclosed and whether or not it is the intention of the Commission to require Power and Water to standardise contractual terms and conditions.

GPO Box 1921 Darwin NT 0801



Please contact Mr Jeff Hunnam, A/Manager Regulation, Pricing and Economic Analysis on (08) 8985 8414 should you have any further queries in relation to this submission.

Yours sincerely



Andrew Macrides
Managing Director

25 November 2008



POWER AND WATER CORPORATION

**SUBMISSION TO THE UTILITIES COMMISSION
ON THE REVIEW OF THE ELECTRICITY
RING-FENCING CODE**

REVISED DRAFT CODE – OCTOBER 2008

NOVEMBER 2008

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1 Introduction

1.1 Background

The Commission's "Review of NT Electricity Ring-fencing Code Revised Draft Code" (Revised Draft Code) in October 2008 follows the release of the consultation paper "Review of NT Electricity Ring-fencing Code Proposed Draft Code" (Proposed Draft Code) by the Commission in May 2008.

Power and Water responded to the Proposed Draft Code in July 2008 highlighting its concerns with some aspects of the proposed changes. Broadly, Power and Water's main points in its submission were that:

1. The current Code should not be amended until the Northern Territory Government has decided on the broader electricity industry reform program. Power and Water made this comment because:
 - It was concerned that amendments made by the Commission to the existing Code may not be consistent with the Government's reform objectives or policy decisions as the reform process evolves. In addition to this, Power and Water was concerned that the nature of other regulatory reforms that the Government may choose to adopt, including national arrangements, had not yet been established and that there was a strong possibility that Power and Water may be forced to develop complicated business processes to comply with burdensome ring-fencing provisions that are subsequently replaced by a national regime;
 - It was further concerned that the specific ring-fencing requirements that the Commission was imposing – in particular default contract provisions – had little precedent elsewhere and would be unlikely to be sustained in a Government led reform package.
2. The Commission was potentially acting beyond its powers in extending the Code to mandate terms and conditions on which Electricity Entities must contract with third-party customers, and in deeming outsourced service providers to be bound by the Code as though they were the Electricity Entity to whom they provide services. While Power and Water could understand the Commission's rationale for these proposals, they would nonetheless have been extremely difficult for Power and Water to administer on an ongoing basis;
3. Power and Water had first principle concerns that the Commission was using the Code review to make policy changes that pushed beyond the bounds of conventional ring-fencing, and would be burdensome for Power and Water to meet. For example:
 - Power and Water was concerned about the Commission's proposals to allow it (the Commission) to release confidential information provided to it if, in its opinion, there would be a net public benefit. Power and Water was concerned that the extent of discretion provided to the Commission in this case was inappropriate, not

bounded by appropriate protocols and did not provide Power and Water with sufficient confidence in relation to the processes for protecting confidential information provided to the Commission;

- Power and Water had received advice that the Commission's decision to use its powers under Regulation 2 of the Utilities Commission Regulations to revoke the existing Code and promulgate the Proposed Draft Code, was potentially beyond power. Power and Water's advice suggested that the Commission was potentially moving beyond its role as a regulator of ring-fencing issues and instead was aiming to undertake regulatory reform in areas outside the traditional ambit of ring-fencing. In particular, two areas were considered beyond the Commission's power, namely:
 - extending the Code to mandate terms and conditions on which Electricity Entities must contract with third-party customers and deeming outsourced service providers to be bound by the Code; and
 - amendments which allowed the Commission to release confidential information if it considered the information to yield a net public benefit
- Power and Water was concerned, and remains concerned following the release of the latest Draft Code, that amendments relating to nominated goods or services, particularly clause 4.1(a) of the Proposed Draft Code, would require significant internal work in order to meet these requirements and were open to significant interpretation. Power and Water sought clarification on the bounds of these amendments;
- Power and Water noted that it would be procedurally accurate for the service classifications in the Proposed Draft Code to be consistent with the Commission's "*Price Control Mechanism Final Decision Paper*" released in May 2008, which establishes the regulatory framework for the 2009 Networks Regulatory Reset.

One of Power and Water's key points in its submission was that there was no strong reason to change the current Code, in particular because:

- There are no other retailers operating in the Northern Territory;
- There have been no serious instances of non-compliance by Power and Water with the current Code since its introduction in 2001. Power and Water has identified and brought to the Commission's attention the only two technical incidents of non-compliance, together with prompt corrective action in relation to these incidents; and
- There have been no formal complaints from retailers, potential retailers, or other entities in relation to the existing ring-fencing provisions. The findings of the Allen Consulting Group in its review of Power and Water's cost allocation policies and practices related to policy matters and not ring-fencing matters.

As a consequence, Power and Water queried whether there is, in an absolute sense, any “problem” to be solved by the Commission's promulgation of the Proposed Draft Code.

The Commission's Revised Draft Code responds to some of the issues raised by Power and Water and not others. While Power and Water's views on those issues have not changed since this time, it has further refined these following a review of the Revised Draft Code released by the Commission. This submission does not therefore aim to repeat previous points made to the Commission unless these require further clarification or unless the Commission has not addressed the points raised in Power and Water's previous submission.

1.2 Purpose of this submission

The purpose of this submission is to identify issues, further to those raised in Power and Water's July 2008 submission, that Power and Water considers the Commission should have regard for in finalising its amendments.

The remainder of this submission is structured as follows:

- Section 2 sets out those amendments in the Revised Draft Code that are supported by Power and Water;
- Section 3 outlines Power and Water's two principal areas of concern regarding the drafting of the Revised Draft Code. These are:
 - The Commission's decision to seek legislative amendments to allow it discretion to release information that Power and Water might consider to be confidential; and
 - The requirements on Power and Water to document terms and conditions for those services provided between related parties.
- In addition, this section also sets out concerns regarding arrangements between business lines in the Revised Draft Code. Specifically:
 - Generation – Retailer arrangements;
 - Network – Retailer arrangements; and
 - Retailer – Customer arrangements.

2 Amendments Supported by Power and Water

Power and Water supports the retention of a number of amendments made by the Commission in the Revised Draft Code. These are set out below.

2.1 Removal of Default Third-Party Contract Provisions

The following clauses, which were included in the Proposed Draft Code, have been removed by the Commission from the Revised Draft Code:

- Clause 4, which specifically related to Default Terms and Conditions;
- Clause 5 of Schedule 1, in relation to Arm's Length Contracting Principles; and
- Clause 6 of Schedule 1, in relation to Default Terms and Conditions Principles.

Power and Water supports the Commission's decision to remove these provisions.

2.2 Removal of Confidential Information Provisions

Power and Water supports the Commission's removal from the Revised Draft Code of the provisions allowing the Commission to release confidential information provided to it if, in the opinion of the Commission, there is a net public benefit. In particular, Power and Water welcomes the removal of clause 3.4(j), which had regard to the publication of contracts.

Power and Water does not however support the Commission's intention to recommend to the Regulatory Minister a legislative mechanism to release confidential information where the Commission believes there is a public benefit in doing so. This is covered further in section 3.1.

2.3 Third-Party Customer Mandated Terms and Conditions

Power and Water, in section 4 of its July 2008 submission, proposed that clause 10 be amended to provide that, even where an Electricity Entity sub-contracts or outsources any of its business functions in relation to a Prescribed Business, the Electricity Entity is still required to comply with the Code in relation to the sub-contracted or outsourced business functions. Power and Water supports the Commission's amendments to clause 10.2 (now clause 9.2) to give effect to this.

3 Areas of Concern

There are two principal areas where Power and Water remains concerned about the drafting of the Revised Draft Code. These are:

- The Commission's decision to seek legislative amendments to allow it discretion to release information that Power and Water might consider to be confidential; and
- The requirements on Power and Water to document terms and conditions for those services provided between related parties.

These are considered below.

3.1 Confidentiality Provisions

Power and Water previously submitted that the Commission's proposed amendments to the Code in relation to confidentiality were inappropriate, and were potentially inconsistent with section 26(1) of the *Utilities Commission Act* (the Act).

Power and Water noted that the Act already defines confidential information, and sets out the circumstances in which confidential information can be disclosed. Those circumstances are not as broad as that proposed by the Commission to be included in the previous version of the Draft Code.

The Commission has removed all provisions relating to confidentiality in the Revised Draft Code, and has noted that it will seek to have a provision inserted into the Act. This provision would allow the Commission to disclose confidential information if it was of the opinion that the public benefit of the disclosure outweighs the detriment that might be suffered as a consequence of the disclosure.

While Power and Water does not object to the creation of legislation to achieve the Commission's objectives in this regard, there is a risk that the ultimate mechanism will be impractical and cause perverse outcomes. While Power and Water accepts that the Commission may take a different view in relation to information that Power and Water considers is confidential, Power and Water considers it practical to have a formal consultation process between the Commission and the Electricity Entity prior to the publication of confidential material.

Power and Water requests the ability to discuss this further with the Commission with a view to refining the Commission's request for an amendment to the Act.

3.2 Concerns Regarding Arrangements between Business Lines

Power and Water has practical concerns relating to the interpretation of the proposed amendments to the Code as they relate to arrangements between business lines within Power and Water. These concerns are set out below.

3.2.1 Definitional Ambiguity

Definitions of the Services being Regulated

The Revised Ring-fencing Code makes clear the Commission's intention that Power and Water document the terms and conditions on which one licenced business unit of Power and Water supplies goods and services to another licenced business unit of Power and Water. The Commission notes in the discussion in the Revised Draft Code that:

- this is already included in Power and Water's licence on the grounds that it is "conducive to the promotion of a competitive market"; and
- the Commission has previously secured from Power and Water an undertaking that it would reduce such terms and conditions to writing.

On this basis, the Commission has considered that there is no greater burden imposed by the draft Code than that already set out in the licence.

For clarity, clause 25 of Power and Water's licences require that "*the licensee must enter into, and comply with, an agreement, on terms approved by the Utilities Commission, with each electricity entity holding a retail licence or network licence which provides services to the licensee's customers as to the coordination of the provision of services to those customers, including arrangements whereby the retailer has responsibility for taking up any customer complaints about the quality of services being supplied with the licensee*".

This requirement that Power and Water must have in place an agreement between its business units is materially different from a requirement that Power and Water must put into writing the terms and conditions in relation to the provision of each service that could be provided to a third-party. The latter is significantly more onerous and requires extensive clarification in order that Power and Water may comply. Prima facie, Power and Water does not accept that the existence of the former is justification for the imposition of the latter.

Of particular interest to Power and Water is the extent to which services must be defined in the application of the Revised Draft Code. As the following sections make clear, there are large numbers of very different services provided by the business units of Power and Water to each-other. While some of these can be standardised, and may in fact eventually be required to be standardised through the Government's reform program and possible introduction of full retail competition, others cannot be standardised.

At present, the Commission has nominated in Schedule 3 of the Revised Draft Code, a high level overview of Nominated Goods and Services,

particularly "Wholesale Electricity Generation Services" and "Network Access Services". This definition is not detailed enough for Power and Water to comply with, as the categories "Wholesale Electricity Generation Services" and "Network Access Services" encompass a range of services that have little or no comparability and quite different terms and conditions.

In particular, it is not clear whether:

- "Wholesale Electricity Generation Services" include ancillary services or back-up generation, or might include sculpted offerings to retailers that enter the market; and
- "Network Access Service" includes those services that might be defined as "Business 2 Business" (B2B) services that network companies provide to retailers on behalf of customers.

These issues are discussed further in the following sections.

Status of the "Terms and Conditions"

Power and Water understands that the intention of requiring Power and Water to commit its terms and conditions for certain services is to provide potential market entrants with information about the nature of the services they might expect to receive, and at what price and service quality level, from Power and Water.

Power and Water therefore seeks clarification in relation to the legal status of these terms and conditions once they have been provided to new entrants. Specifically, it seeks guidance on whether the Commission intends that these agreements be "executable contracts" or merely "high level terms" – the former being standard form contracts that Power and Water is obliged to sign, the latter being indicative term sheets that provide guidance as to the nature of negotiations that may occur. In the event that the Commission is seeking the former, Power and Water would incur a significantly larger compliance burden preparing these than it otherwise would.

3.2.2 Potential Application of the Code to B2B Services

Power and Water is concerned that the Commission is either inadvertently or inappropriately introducing a B2B Service Order Procedures Scheme in the Northern Territory in the absence of full retail competition and without any competing retailers. It is doing this by virtue of the application of the Code to *Network Access Services*, which includes those network services that are to be classified by the Commission as alternative control services.

A requirement to provide standard form contracts setting out the prices and terms and conditions for the provision of these services is an onerous task. Nationally, service order management requirements are established through the:

- B2B Procedures: Service Order Process (Service Order Process), which contains the primary obligations of Network Service Providers with

respect to service order management. These obviously do not apply in the Northern Territory; and

- State legislation, which the Northern Territory does not have. These generally set out in greater detail than the Service Order Process the individual requirements for timing of service orders and their application to certain customer groups.

The first of these, the Service Order Process, is a market-wide solution that defines standard process and transaction data requirements for retailers to:

- Request defined services from Service Providers;
- Receive confirmation that the work will or will not be undertaken (or attempted); and
- Receive advice that the work has or has not been completed as requested.

There are nine service types set out in the Service Order Process, each of which must be delivered in line with:

- Business Documents – these are the B2B transactions sent between the retailer and the Service Provider including:
 - A Service Order Request, which is either sent by a retailer to a Service Provider in response to a customer request, or directly at the retailer's own request (for example, in the case of a de-energisation for debt);
 - A Service Order Response, which is sent by the Service Provider upon successful, or unsuccessful, completion of the work, or to notify of its status; and
 - A Service Order Appointment Notification, which is sent by the Service Provider in certain circumstances to notify of the timeframe for service activity completion;
- Business Signals – these are requirements that the technical delivery mechanism used by a Service Provider must support:
 - A Business Receipt, which indicates that a Business Document has been received and its contents indicate if it is readable by the recipient; and
 - A Business Acceptance/Rejection, which represents formal acceptance or rejection of the appropriate Business Document by the recipient based on the application of business rules;
- Timing – which requires that each stage of the Service Order Process must be completed within prescribed Timing Requirements. These include:
 - Minimum notice periods; and
 - Timeframes for completion.

None of these requirements exist in the Northern Territory which means that the arrangements for the delivery of B2B type services are currently provided under bi-laterally negotiated arrangements. In reality, these arrangements do not set out the range of terms and conditions anything like the detail that is required by the Service Order Process, and to do so would be a significant and onerous task that would not be offset by any benefits to any other party.

Power and Water therefore seeks reassurance that the Code does not apply to B2B services, and, in the event that this is the Commission's intention, seeks guidance as to the level of detail required to be set out in these arrangements.

3.2.3 Difficulties in Standardising Generation Services

Power and Water remains concerned that the Commission is regulating the commercial arrangements between its generation business and retail customers of the generation business. This is concerning because:

- (a) there is no precedent for such an arrangement anywhere in Australia; and
- (b) Power and Water does not consider that it is possible to establish standard form terms and conditions that could be provided by Power and Water to a third-party retailer.

While Power and Water could provide its service level agreements between Retail and Generation to the Commission, it is doubtful that these agreements would provide any useful information to a new entrant as to the likely terms and conditions of supply. This is because there are a multitude of factors that are taken into consideration by any generator in determining the price of supply and these factors will differ between generation customers. These differences will affect the pricing outcomes amongst generation customers. Power and Water therefore seeks clarification from the Commission as to the nature of the services that these terms and conditions would need to be tailored towards providing.

