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17 April 2018

Mr John Pierce
Chairman
Australian Energy Market Commission
Level 5, 201 Elizabeth St
Sydney NSW 2000

Submitted electronically

Dear Mr Pierce,

Re: Preventing discounts on inflated base rates

Red Energy (Red) and Lumo Energy (Lumo) welcome the opportunity to respond to the Australian Energy Market Commission (the Commission) on the Preventing discounts on inflated base rates rule consultation paper (the consultation paper).

The rule change proposal

In general, Red and Lumo do not support the inclusion of rules in the National Energy Retail Rules (NERR) that regulate the type or form of offers retailers can make to customers under Market Retail Contracts. That being said, we agree that the scenario described in the consultation paper cannot be in the interests of consumers. As such, we are comfortable with the Commission making a rule that prohibits retailers from discounting off base prices higher than their own standing offer, however it must be assured that the drafting of the rule will not limit the ability of retailers to offer products that may be in the best interests of customers. We consider the proposed rule highlighted in the consultation paper achieves this outcome.

The indicative rule

We support the drafting of the Rule, including the slightly amended drafting regarding dual fuel offers discussed at the stakeholder workshop on 7 April 2018. As noted above, we welcome the slight deviation from the rule proposed as it will ensure the rule will not inhibit beneficial offers that might be developed in future. This is particularly important given the energy market is in a period of intense evolution, both from a regulatory and technological perspective. To give a practical example, a retailer would be prohibited under the proposed rule from offering a Market Retail Contract to a customer with battery storage and almost entirely independent from the grid that comprised a low daily charge but with a high usage charge. This would appear to be an unintended consequence.

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Equivalency

While in general, the intent of the Commission in the consultation paper is clear as to whether or not a market offer is equivalent to a standing offer, Box 4.3[1] appears to take a different view. In this example, it is noted that a market offer in which GreenPower is available but not included would be sufficiently different to a standing offer in which GreenPower was unavailable. We do not consider this is a material difference, and would welcome some further clarity from the Commission in the final decision as to what would and wouldn't represent a material difference for the purposes of equivalency.

A civil penalty provision for the RPIG

Red and Lumo do not support any recommendation that would result in civil penalties being attached to the Australian Energy Regulator's Retail Pricing Information Guidelines (RPIG). The consultation paper states the Commission intends to do this by recommending sections 25 and 37 of the National Energy Retail Law (NERL) be included in the schedule of civil penalty provisions in the National Energy Retail Regulations. We are not opposed to robust compliance obligations being placed on retailers, in particular where non-compliance might significantly impact consumers or decrease trust in the market.

While not stated directly in the consultation paper, it appears the Commission intends to propose sections 25 and 37 of the NERL be included as civil penalties because s4 of the NERL does not allow a guideline itself to be made a civil penalty obligation. This preclusion sets an important governance protection into the regulatory framework.

Allowing the AER to make changes to the RPIG, and thus make changes to the civil penalty obligations does not appear in line with this governance principle. Guidelines generally, but in particular the RPIG, are not drafted in a manner that makes them equivalent to the strict compliance requirements contained in the NERL and the NERR.

Of particular concern is that the RPIG does much more than provide guidance to retailers in the presentation of standing and market offers. The AER is currently consulting on Version 5 of the RPIG, with the draft guideline 24 pages long, containing more than 110 elements. It is unclear which of these elements specifically relate to sections 25 and 37 of the NERL, and therefore would be subject to a civil penalty provision. This is unacceptable, and cannot provide retailers procedural fairness.

Governance under the National Energy Retail Law

The separation of responsibilities is a hallmark of the National Energy Customer Framework (NECF). Neither the AER, nor the Commission alone has the power to make a rule subject to a civil penalty. This provides energy businesses a level of confidence that due process will be undertaken, but also ensures that only very specific obligations are made civil penalties. This principle is highlighted in the indicative rule drafting in the consultation paper, in which the AEMC only considers it appropriate to propose a specific element of the rule be made a civil penalty. Providing the AER alone the discretion to not only change the civil penalty obligations, but for them to be attached to something as broad as the RPIG, is clearly not in the spirit of the NECF governance arrangements.

[1] AEMC, Preventing discounts on inflated energy rates, consultation paper, 20 March 2018, Sydney, pg 25

While we are aware that the reporting requirements detailed in the AER's Compliance Procedures and Guidelines are already subject to civil penalties, we contend that this guideline is of a different nature to the RPIG. The reporting requirements are very precise, clear, and directly relatable to the NERL provision under which the civil penalty is conferred. Changing the reporting requirements does change a retailers obligations and ultimately the reach of the civil penalty, but in a fundamentally different manner than the RPIG might. We have not seen any evidence of the AER making changes to the reporting requirements that appear inconsistent with the specific intent of the NERL as drafted. The RPIG is about to be into its 5th iteration, with version 5 and the obligations contained within unrecognisable from version 1 as envisaged when the NERL was enacted. While change is appropriate in an evolving retail landscape, that difference alone should make the RPIG incompatible with a civil penalty.

Implementation

Red and Lumo are not impacted by the indicative rule drafting discussed in the consultation paper. That being said, and noting the proponent's desire to implement any rule as soon as possible, we suggest 1 July 2018 to be a logical start date. This allows retailers who might be impacted by the drafting of the rule a short amount of time prior to its implementation, but also mirrors the date most retailers implement annual price resets, minimising any potential impacts.

About Red and Lumo

We are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we retail gas and electricity in Victoria, New South Wales and South Australia and electricity in Queensland to approximately 1.1 million customers.

Red and Lumo thank the Commission for the opportunity to respond to this consultation, and are particularly appreciative of the efforts made by the Commission and its staff to widely consult on this rule change in the expedited process. Should you have any further enquiries regarding this submission, please call Ben Barnes, Regulatory Manager on 0404 819 143.

Yours sincerely

Ramy Soussou
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