4 April 2024

Ms Anna Collyer
Chair
Australian Energy Market Commission
GPO Box 2603
Sydney NSW 2000

Project Reference Code: RPR0016

Dear Ms Collyer,

Review into the arrangements for failed retailers' electricity and gas contracts

Ergon Energy Corporation Limited (Ergon Energy) and Energex Limited (Energex), both distribution network service providers (DNSPs) operating in Queensland, welcome the opportunity to provide feedback to the Australian Energy Market Commission (AEMC) on the *Review into the arrangements for failed retailers' electricity and gas contracts* Draft Report (draft report).

Ergon Energy and Energex have reviewed the recommendations outlined in the draft report and provide the following comments.

Draft Recommendation 9: Issuing the failed retailer a bill to reduce costs to consumers

Ergon Energy and Energex's experience with failed retailers has found that the Retailer of Last Resort (RoLR) event is often triggered as a result of an insolvency practitioner being appointed to the retailer. The consequence of this is that any funds held by the retailer are subject to distribution according to the *Corporations Act 2001*. After employee entitlements, insolvency practitioner professional fees and secured creditors are paid, the amount available to unsecured creditors is rarely enough to satisfy the remaining debts. On this basis, Ergon Energy and Energex consider there may be limited effectiveness in issuing a bill for RoLR costs in circumstances where the retailer is insolvent.

Draft Recommendation 9: Strengthening the bill framework by making the AER a secured creditor

Ergon Energy and Energex do not support the AEMC's decision in the draft report to not recommend changes that would require retailers to register a security interest in favour of the Australian Energy Regulatory (AER) on the Personal Property Securities Register (PPSR). Ergon Energy and Energex supported the proposition in the directions paper[1] to make the AER a secured creditor by requiring retailers to register a security interest on the PPSR on the basis that secured creditors rank above

[1] AEMC, Review into the arrangement for failed retailers' electricity and gas contracts – Directions Paper

unsecured creditors. Ergon Energy and Energex further suggest the extension of this proposal to DNSPs so that a retailer is required to register a security interest in favour of the DNSPs for network charges. This may increase the likelihood of the DNSP's bill for network charges being repaid and therefore lower the costs recoverable by the DNSPs from customers as part of the cost pass through provisions in the National Electricity Rules (NER).

Draft Recommendation 10: Improper use of the RoLR scheme
Additional guidance is required regarding what constitutes 'reasonable steps to avoid causing a RoLR event' in order to provide certainty to retailers on what constitutes acceptable conduct. Ergon Energy and Energex propose that requiring the retailer to 'take all reasonable steps to avoid causing a RoLR event' could extend to ensuring that network charges and metering charges are paid in a timely manner to avoid the outcome of a DNSP appointing an insolvency practitioner.

Additionally, Ergon Energy and Energex have concerns that the civil penalty regime may discourage some retailers from voluntarily appointing an insolvency practitioner if it may be penalised for triggering a RoLR event under the National Energy Retail Law (NERL). A number of recent RoLR events were triggered as a result of retailers voluntarily appointing an insolvency practitioner. The voluntary aspect of this decision holds significant importance, as it entails a voluntary acknowledgement of insolvency without necessitating creditors to incur substantial costs associated with obtaining court orders for the retailer to be deemed insolvent. If retailers are discouraged from voluntarily appointing insolvency practitioners, the obligation to pursue a failing retailer for insolvency may fall on creditors alone. DNSPs are typical creditors in this situation because they are obligated to continue providing network services despite non-payment by failing retailers.

Ergon Energy and Energex appreciate the opportunity to provide feedback on the draft report and take this opportunity to provide additional insight and feedback that extends beyond the scope of the draft report and the AEMC's recommendations. We believe that it is important to share this additional feedback with the AEMC and consider it will contribute to a more comprehensive review into RoLR arrangements.

Retailers to provide mandatory bank guarantees to DNSPs as part the retailer authorisation entry criteria
Under clause 6B.B2.1 of the NER, a DNSP may request credit support from a retailer if it has failed to pay network charges (subject to specific criteria being met). Ergon Energy and Energex have experienced that by the time a failing retailer has missed consecutive network charge payments they are unable to provide the requested credit support in the form of a bank guarantee. Therefore, Ergon Energy and Energex propose that it be a condition of the entry criteria in section 90 of the NERL, for granting retailer authorisation, that retailers provide a bank guarantee in favour of the relevant DNSP. If a DNSP is able to call on a bank guarantee to pay outstanding network charges it may reduce the costs that the DNSP would claim for its losses.

Targeting specific conduct that is not already a civil penalty provision
Ergon Energy and Energex propose that there should be a civil penalty scheme to deter retailers accruing debts in respect of network charges and metering charges (where there is no ability for the DNSPs or Metering Coordinators to cease providing

services to the retailers). As previously stated, if this cost is not recoverable from the retailer it is recovered from the consumer through the cost pass through mechanism. As the draft report is concerned with lowering prices for consumers, a civil penalties regime could be a deterrent for retailers accruing these costs with the knowledge that the DNSP is unable to cease the supply.

Should the AEMC require additional information or wish to discuss any aspect of this submission, please contact either myself, or Tammara Scott on 0492 137 878.

Yours sincerely,

Alena Chrismas

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Manager Regulatory Affairs

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