



11 September 2014

Mr Chris Spangaro
AEMC Senior Director
Australian Energy Market Commission
PO Box A2249
Sydney South NSW 1235

Via online lodgement.

Dear Mr Spangaro,

Draft Rule determination—Retailer price variation in market retail contracts (RRC0001)

Origin Energy (Origin) welcomes this opportunity to respond to the Australian Energy Commission's (the Commission) draft Rule determination on Retailer price variation in market retail contracts.

CUAC and CALC's proposed rule

Origin welcomes the decision by the Commission not to proceed with the joint Consumer Utilities Advocacy Centre (CUAC) and Consumer Action Law Centre (CALC) (the Rule proponents) proposal to prevent retailers from changing prices during the duration of a fixed term contract. The proposed rule was not, in Origin's view, in the best interest of consumers. Rather than helping consumers, the proposed Rule would have had the detrimental impact of limiting the products that retailers could offer them, thereby constraining market innovation and competition.

The Rule change proposal incorrectly asserts that retailers have full control over all their input costs. This is not the case, particularly for factors like network tariffs and government policies. By prohibiting price changes for fixed term contracts, retailers would need to anticipate and accommodate into price offerings any expected or perceived future cost fluctuations. This additional risk premium could lead to higher prices for longer term fixed price contracts or a reduction in the term of fixed price contracts. Neither of these outcomes would be in the best interest of the consumers.

Origin does not share the Rule proponent's implicit assumption that consumers do not make sensible and informed decisions about their energy use according to the value they place on it. We find that customers take many different approaches to researching and assessing energy market offers. Some customers choose to take the time to shop around while others make relatively quick assessments. Even to the extent that a behavioural bias (such as consumer disengagement or predilection for the status quo) may be present in customer decision making, it does not necessarily follow that those decisions are not valid choices or representative of the consumer's preference. Placing constraints on competitive market offers seems contrary to the direction of reform in the National Energy Market, which is towards creating:

“opportunities for consumers to make informed choices about the way they use electricity based on the benefits that end use services provide. Ultimately, consumers will be in the best position to decide what works for them.”¹

¹ For example see the AEMC's *Power of Choice* review: <http://www.aemc.gov.au/Major-Pages/Power-of-choice>.

Merits of AEMC decision to make a more preferable rule

Although section 244 of the *National Energy Retail Law (South Australia) Act 2011* (the Act) clearly gives the Commission the discretion to make a “more preferable rule”, any such preferable Rule ought to be limited to addressing the problem initially identified by the rule proponents. If the Commission determines - as it has done in this case - that the original problem identified by the Rule proponents does not have merit, then it does not follow that there remains a problem for the Commission to make a more preferable Rule to address.

In this instance, the Commission is proposing a more preferable Rule that addresses a different problem to that identified by the original Rule proponents. CUAC and CALC’s Rule proposal was aimed at stopping price variations under fixed term market contracts on the basis that certain risks in the energy market are more efficiently borne by retailers, rather than consumers, based on retailers’ ability to hedge for these risks in their market contract prices. In its draft decision, the Commission disagrees with the Rule proponent’s analysis and finds that there is insufficient evidence to back up their claims about the impact of price variations on consumer conduct in the market.²

Yet in conducting this analysis, the Commission appears to have reframed the problem as being about consumer’s lacking knowledge of the terms and conditions of their market retail contracts.³ The more preferable draft Rule is therefore aimed at providing “greater transparency and better information in the marketing of *market retail contracts* and on entry into such contracts” in order to “improve consumers’ knowledge of the terms and conditions of their contracts.”⁴ The Rule proponents have already rejected these issues as being mischaracterisations of the underlying problem they were seeking to address in their Rule change request and note that “even if consumers are aware that fixed period contracts allowed for price variation, they are less likely to engage because such contracts offered them very limited benefit.”⁵

In Origin’s view, section 244 of the Act should not be exercised to address a problem that is different to what the original Rule proponents have identified. Doing so can set a poor precedent by undermining regulatory certainty around the robustness of the Rule change process. Stakeholders could find themselves providing substantive comments at the initial consultation stage, only to find out the Commission has redefined the problem at the draft stage and proposed a solution that addresses that completely different problem. The danger is the Commission could find itself in the position of indirectly proposing its own Rule change proposals.

Origin is not opposed *per se* to the Commission exercising its discretion to make a more preferable Rule under the Act. Where a Rule change request has demonstrated that a legitimate problem exists, but consultation with stakeholders has highlighted problems with the proposed solution, the Commission’s ability to make a more preferable Rule is a more constructive alternative to rejecting the entire Rule proposal. Rather than exercising its discretion to make a more preferable Rule, if the Commission has identified a legitimate but separate problem to that raised by the Rule proponent, it ought to advise the relevant body or individual that they should consider bringing a new Rule proposal forward that addresses the new issues. A separate Rule change process would provide market participants and other interested parties with the appropriate due process to assess and determine the merits of the identified problem and whether it warrants a Rule change response. In Origin’s view, this would have been the best course of action with respect to this Rule change.

² AEMC, Draft Rule, pp. 19-20, 23-24, 26-27, 34, 40-41, 49-53.

³ AEMC, Draft Rule, p. 37

⁴ AEMC, Draft rule, p. 55. Emphasis in original.

⁵ CUAC & CALC, *Supplementary Submission*, 29 April 2014, pp.1-2.

The Commission's more preferable rule

Flowing on from our concerns about whether a more preferable rule ought to have been applied in the circumstances, Origin notes that the draft Rule is confusing in its drafting and risks introducing uncertainty to otherwise clear obligations around obtaining explicit informed consent from customers. Because the complete Rule change process has not been followed, it is unclear exactly what problem this change seeks to address, nor has there been a thorough enough examination of whether the current Rules require sufficient information be provided to customers when they enter into market contracts.

On the contrary, in Origin's view the current Rules around the requirements for explicit informed consent are sufficient and clear and can be sensibly adapted to the variety of market contracts available now and which may be available in future. Introducing notions of variations to benefits, and trying to determine when a benefit is different to a price, simply creates confusion where there was none. This is highlighted in the Commission's marked-up draft of Rule 64(1)(a), which states that information must be disclosed to the customer concerning "all applicable prices, charges and benefits to the customer (to the extent both are not otherwise part of prices)".

In addition, the Australian Consumer Law already has appropriate and robust obligations on retailers to ensure sufficient information is given to customers about their market retail contract; in particular, the prohibition on misleading and deceptive conduct. In Origin's view, these protections and the existing National Energy Retail Rules are sufficient to ensure that customers are properly informed about the terms and conditions of the market retail contracts.

Finally, if the Rule change is to proceed, Origin notes that the drafting of rule 46A(2) would need to be changed from "the variation of tariffs, charges and benefits" to replace the "and" with "or".

Further information

Origin would be pleased to discuss any matters raised within this response with the Commission. Please contact Timothy Wilson (Retail Regulatory Analyst) in the first instance on (03) 8665 7155.

Yours sincerely

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