

Attention: Sugi Sivarajan
Acting Senior Regulatory Manager of Regulatory Operations
Essential Services Commission
Level 8, 570 Bourke Street
MELBOURNE VIC 3000

By email only: licences@esc.vic.gov.au

3 March 2022

Dear Sir/Madam

YOUR REFERENCE: C/22/1408 & C/22/1498
PROPOSED VARIATION OF MOMENTUM ENERGY PTY LTD'S ELECTRICITY AND GAS RETAIL LICENCES

We refer to Ms Sheppard's letters dated 31 January 2022.

We thank you for the opportunity to review and provide comment on the proposals to vary both our electricity licence ("**Momentum Electricity Licence**") and our gas licence ("**Momentum Gas Licence**"). We have some specific concerns about aspects of the variations which are set out in this letter.

In particular, we object to the dilution introduced by the proposed variations of our existing rights under our current licences with respect to any subsequent variation or a revocation of these licences. This is detailed below in more detail.

1. Proposed variation of Momentum Electricity Licence

1A. Dilution of existing rights with respect to a variation of licence terms

Under our present Momentum Electricity Licence, per clause 22, any variation may only be effected in accordance with section 29 of the *Electricity Industry Act 2000* (Vic) ("**EIA**").

Section 29 of the EIA provides:

29 Variation or revocation of licence

- (1) A licence or the Commission licence conditions may be varied—
- (a) in accordance with the procedures specified in the Commission licence conditions; or
 - (b) by agreement between the Commission and the licensee; or
 - (c) by a notice in accordance with subsection (2) served on the licensee.

...

- (2) The Commission must not vary a licence or the Commission licence conditions by a notice unless—
- (a) the Commission is satisfied that the variation is necessary—

- (i) *having regard to the objectives of the Commission under this Act and under the Essential Services Commission Act 2001; or*
- (ii) *to give effect to Division 7; and*
- (b) ***the Commission has given the licensee an opportunity to make representations on the matter.*** [emphasis added]

No procedures are set out in the Momentum Electricity Licence such as to satisfy s29(1)(a) above.

As such, subject to a variation being bilaterally agreed, the Commission may only vary the licence in accordance with s29(2). Such a course of action would require, inter alia, affording Momentum the opportunity to make representations on the matter.

In the proposed new licence terms, clause 4 of the Template Electricity Retail Licence For Consultation ("**Template Electricity Licence**") sets out a process specifically for the purpose of satisfying s29(1)(a), whereby if:

"... the Commission is of the opinion that a proposed variation to the Licence is consistent with its Objectives and:

- i is of an administrative or trivial nature; or*
- ii required urgently;*

*the Commission may issue a notice to the Licensee varying this Licence accordingly."*¹

Any notice so issued must include:

- (a) the terms of the variation;
- (b) the purpose of the variation;
- (c) confirmation that the Commission is of the opinion that the variation is consistent with its Objectives and otherwise satisfies the abovereferenced criteria; and
- (d) the date upon which the variation will take effect².

No process is incorporated however for allowing the licensee to make representations on the proposed variation, notwithstanding that the decision by the Commission to make the variation can be unilaterally made and pursuant to very broad grounds of discretion. This represents a material dilution of our existing rights under our current licence.

1B. Dilution of existing rights with respect to a revocation of licence

A similar dilution of existing rights also arises under the new revocation clause contained within the Template Electricity Licence.

Under our Momentum Electricity Licence, clause 3 sets out the conditions under which Momentum's licence may be revoked by the Commission.

Pertinently, a unilateral notice of revocation may be given by the Commission only if:

¹ Clause 4.2 of the Template Electricity Licence.

² Ibid., clause 4.3.

- “(a) the Licensee does not comply with an enforcement order or an undertaking; and
 (b) the Commission is satisfied that revocation of this licence is necessary having regard to the objectives, ...”³

Revocation for non-compliance with certain enforcement orders or undertakings only requires 5 business days’ notice of revocation to be given. In all other circumstances, 20 business days’ notice must be provided⁴.

If Momentum complies with the relevant enforcement order or undertaking within the notice period, then the licence does not end at the expiration of the notice period⁵. In other words, Momentum is afforded a rectification period, which in many cases would be 20 business days, in order to avoid revocation taking effect. This is not a discretionary stay of revocation; if Momentum subsequently satisfies compliance, the licence will not end.

In the Template Electricity Licence, the powers granted to the Commission pursuant to which Momentum’s licence may be revoked have been widened, in that:

1. there is an increased number of events which entitle the Commission to issue a notice of revocation⁶;
2. the notice period for advising of the revocation has been reduced in certain circumstances. Although 20 business days remains the default period, 5 business days’ notice may be given in cases of various breaches or a failure to comply with an enforcement action and also “*where in the Commission’s opinion it is appropriate that the Licence be revoked in a shorter time frame having regard to its Objectives and the events or circumstances that gave rise to the notice being issued*”⁷; and
3. there is no provision entitling Momentum to avoid revocation if it subsequently remedies the breach of non-compliance⁸. The Commission may, “*at its discretion*” withdraw the notice if it “*considers that it is otherwise appropriate*” to do so, but this is a decision wholly within the ambit of the Commission.

Thus, Momentum:

- may receive a revocation notice for a broader range of issues;
- may receive a shorter notice period of such revocation than it otherwise would have under its existing licence as a result of the Commission making an internal decision which, inter alia, may give undue weight to expedition of the matter; and
- is not granted a right to avoid revocation by implementing remediation of any issues and instead is solely reliant upon a discretionary power granted to the Commission.

This represents another significant dilution of Momentum’s rights.

³ Clause 3.4 of Momentum Electricity Licence.

⁴ Ibid., clauses 3.5 & 3.6.

⁵ Ibid., clause 3.7.

⁶ Clause 6.2 of the Template Electricity Licence.

⁷ Ibid., clause 6.3(ii)(1).

⁸ Ibid., clause 6.4.

2. Proposed variation of Momentum Gas Licence

The same issues discussed above at 1A similarly apply to the proposed new Template Gas Retail Licence For Consultation (“**Template Gas Licence**”).

Under our present Momentum Gas Licence, per clause 26, any variation of our licence may only be effected in accordance with section 38 of the *Gas Industry Act 2000* (Vic) (“**GIA**”).

Section 38 of the GIA provides:

38 Variation or revocation of licence

- (1) *A licence or the Commission licence conditions may be varied—*
- (a) *in accordance with the procedures specified in the Commission licence conditions; or*
 - (b) *by agreement between the Commission and the licensee; or*
 - (c) *by a notice in accordance with subsection (2) served on the licensee.*
- (2) *The Commission must not vary a licence or the Commission licence conditions by a notice unless—*
- (a) *the Commission is satisfied that the variation is necessary—*
 - (i) *having regard to the objectives of the Commission under this Act and under the Essential Services Commission Act 2001; or*
 - (ii) *to give effect to Division 5; and*
 - (b) ***the Commission has given the licensee an opportunity to make representations on the matter.*** [emphasis added]

No procedure which satisfies s38(1)(a) GIA is included in the Momentum Gas Licence. As such, ignoring any bilateral agreement to vary, the Commission may only vary the licence in accordance with s38(2). As with the Momentum Electricity Licence, this requires the giving of an opportunity to Momentum to make representations with respect to the variation.

In the proposed new licence terms, clause 4 of the Template Gas Licence sets out a process specifically for the purpose of satisfying s38(1)(a), whereby if:

“... the Commission is of the opinion that a proposed variation to the Licence is consistent with its Objectives and:

- i is of an administrative or trivial nature; or*
- ii required urgently;*

the Commission may issue a notice to the Licensee varying this Licence accordingly.”⁹

Any notice so issued must include:

- (a) the terms of the variation;
- (b) the purpose of the variation;

⁹ Clause 4.2 of the Template Gas Licence.

- (c) confirmation that the Commission is of the opinion that the variation is consistent with its Objectives and otherwise satisfies the abovereferenced criteria; and
- (d) the date upon which the variation will take effect¹⁰.

As with the Template Electricity Licence, this proposed process in the Template Gas Licence would therefore eliminate the obligation on the Commission to grant Momentum the opportunity to make representations in regards to any variation of its licence. This is a right which Momentum would strongly urge it should be permitted to retain.

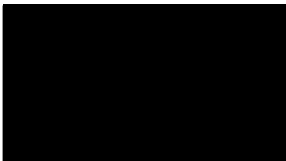
Concluding remarks

For the reasons elucidated above, Momentum submits that the Template Electricity Licence and Template Gas Licence strip away rights otherwise afforded to Momentum under its existing licences. Accordingly, Momentum does not offer its consent to the variations, and further submits that such variations go beyond the scope of being “predominantly administrative in nature” as they are described in the letters of 31 January 2022.

Momentum respectfully asks that the Commission takes these submissions into account and considers alternative variations which may achieve the Commission’s goals of improving consistency in licence terms but without diluting the rights of existing licence holders.

Please feel free to contact me further at [REDACTED] [@momentum.com.au](mailto:[REDACTED]@momentum.com.au) should you wish to discuss further.

Yours sincerely,

A large black rectangular redaction box covering the signature of the sender.

General Counsel, Momentum Energy

¹⁰ Ibid., clause 4.3.