

9 March 2022

Sugi Sivarajan
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Essential Services Commission
Level 8, 570 Bourke Street
Melbourne Victoria 3000

Variation of Blue NRG Pty Ltd's Electricity Retail Licence

Dear Sugi Sivarajan,

We refer to the letter dated 31 January 2022 from Sarah Sheppard, Executive Director of the Essential Services Commission (**Commission**) regarding the variation of Blue NRG Pty Ltd's electricity retail licence.

Blue NRG Pty Ltd (**we** or **us**) has no problem with most of the consequent changes to the licence which would occur under the proposed Template Electricity Retail Licence (**Template Licence**). However, pursuant to the following submissions we wish to humbly request amendments to the following conditions of the Template Licence:

- 6.2(iii); and
- 6.2(v).

Clause 6.2(iii) of the Template Licence

This condition allowing the Commission to revoke the licence if "*the Licensee breaches any requirement of a Code of Practice*" we suggest is unreasonably broad. It does not consider the severity of a breach, or whether the Licensee was capable of avoiding the breach of the Code of Practice at all.

As the Commission would be aware, in some cases breaches are caused by third-party suppliers through no fault of the Licensee. While the Licensee must bear ultimate responsibility for compliance with the Code of Practice, revoking a licence in such an instance could be a vastly disproportionate response to the breach itself. The case may also be that the supplier services a number of licensees, and the breach would apply to each of those licensees – imperilling all of their licences. Any recourse against a third party to indemnify the Licensee



for loss of the licence, and therefore its business, would be insufficient because it would amount to all future profits. This is impossible to quantify, and in any case most third-party suppliers are smaller than the electricity retailers themselves meaning there would be insufficient funds to remedy the Licensee's loss.

We submit that additional criteria should apply to this clause 6.2(iii) of the Template Licence that must be met before a licence is revoked. The Commission should reasonably have regard for these criteria when exercising their power to revoke under this provision. Such criteria should include at a minimum:

1. The same obligation has been repeatedly breached in the same way, without adequate remediation to avoid or minimise future breaches of that obligation;
2. The breach must significantly detrimentally affect customers; and
3. The ability of the Licensee to foresee or avoid the breach.

Clause 6.2(v) of the Template Licence

This condition states that the Commission may revoke the licence if *“the Licensee’s financial viability or technical capacity is such that the Commission **considers** that the Licensee **would be** unable to satisfactorily meet its obligations under this Licence, a Code of Practice or the Act.”*. Our emphasis added.

This condition appears to be beyond the powers of the Commission as it purports to allow the Commission to revoke a licence for events that have not occurred. It places the Commission in a position to unilaterally determine that future events will happen, and take action based on that determination. This is speculation and is akin to punishing for a crime that has not yet occurred.

The Electricity Industry Act 2000 (**EIA**) does not grant the Commission power to include a licence condition that goes so far as to allow licence revocation for an event that the Commission considers would occur in the future. We consider the following provisions relevant for assessing whether clause 6.2(v) may validly be included in the Template Licence:

Electricity Industry Act 2000

19 Grant or refusal of application

- (1) Subject to subsections (2) and (3) the Commission may grant or refuse an application for the issue of a licence for any reason it considers appropriate, having regard to the objectives of the Commission under this Act and under the Essential Services Commission Act 2001.



- (2) The Commission must not grant an application for the issue of a licence unless the Commission is satisfied that—
 - a. subject to subsection (3), in the case of an application for a licence to sell electricity, the applicant **is financially viable**; and
 - b. subject to subsection (4), the applicant has the technical capacity to comply with the conditions of the licence.
 - c. The Commission does not have to be satisfied as to the applicant's **financial viability**, if the applicant is applying for a licence which includes a condition requiring compliance with the National Electricity Rules and the Rules include prudential requirements.

*Our emphasis added.

This provision only applies to the granting of an application for a licence, not conditions allowing the licence to be revoked once granted. Since “financial viability” is considered here but not specifically included as a licence condition under s21, it suggests the decision not to include it in s21 was deliberate as passed by the legislature. The standard here is that the applicant “*is financially viable*” at the time the licence is granted, not “*would be*” financially unviable as it is under clause 6.2(v) of the Template Licence.

20 Provisions relating to licences

- (1) A licence is to be issued for such term (if any) as is decided by the Commission and is specified in *the* licence.
- (2) *A licence is subject to such conditions as are decided by the Commission.* [Note A licence is also subject to conditions deemed under this Act to be licence conditions of the licence or to which the licence is subject, including conditions specified by the Minister by Order under section 33AB(1).]
- (3) If a licence is issued to 2 or more persons for the purpose of the carrying on by those persons of the activities authorised by the licence in partnership or as an unincorporated joint venture, the licence may include conditions relating to the carrying on of those activities in that manner.
- (4) For the purposes of section 8(1)(k) of the Personal Property Securities Act 2009 of the Commonwealth, a licence is declared not to be personal property.

Section 20(2) is deliberately broad to give the commission wide ranging powers, but could not on any reasonable interpretation be intended to go so far as to give the Commission absolute discretion to revoke a licence based on potential to default in the future.

Section 21 “Specific licence conditions” is where the range of matters that may be included as licence conditions are listed. A financial viability condition is notably absent from s21. It is clearly considered by s19 to apply to applicants, but not Licensees. We submit that the discretion of the Commission to determine licence conditions under s20(2) is to be guided by s21. It follows that any conditions included in a licence that are not listed in s21 must be for exceptional circumstances and be carefully considered.

Likewise the Code of Practice and Compliance and Performance Reporting Guideline do not include an obligation that the electricity retailer be financially viable.



The concept of “financial viability” is inextricably linked to insolvency. Businesses will move in and out of insolvency throughout their existence. The occurrence of a tight financial situation for a short period does not necessarily mean the business is not financially viable. On a legal basis, if a business’ debts are rectified before a creditor’s recovery action is carried to conclusion, the business will be considered viable. There are also a wide range of options available at law to deal with insolvent companies, primarily under the *Corporations Act 2001* (Cth). Many of those are listed in clause 6.2(vii) of the Template Licence. It is our submission that clause 6.2(vii) appropriately deals with the various events in which the Licensee could be determined to be financially unviable.

We note that condition 4.1 of the proposed Standard Electricity Licence Conditions for Electricity Retail (**Standard Conditions**) states that:

“The Licensee must at all times remain financially viable to undertake the activities authorised by this Licence.”

This condition deals appropriately with the issue of financial viability where clause 6.2(v) of the licence does not. Condition 4.1 does not threaten the licence based on the Commission’s discretion to determine whether the Licensee *would* become financially unviable in the future. The onus is on the Licensee to ensure that no period occurs when it is not financially viable. Additionally, the Commission must show that that the financial unviability has resulted in the Licensee being unable to undertake the activities authorised by the licence. We submit that matters of financial viability are appropriately dealt with under condition 4.1 of the Standard Conditions, and that reference to financial viability under 6.2(v) of the Template Licence is unnecessary.

10 Objectives of the Commission

The objectives of the Commission under this Act are—

- (a) to the extent that it is efficient and practicable to do so, to promote a consistent regulatory approach between the electricity industry and the gas industry; and
- (b) to promote the development of full retail competition; and
- (c) to promote protections for customers, including in relation to assisting customers who are facing payment difficulties.

Under the s10(b) of the EIA it is a stated objective of the Commission to “*promote the development of full retail competition*”. Were the Commission to rely on 6.2(v) to revoke a licence for not being financially viable this would have an anti-competitive effect. The Commission would be selecting a retailer for enforced failure instead of allowing the electricity



retailer to compete with other retailers in the regulated market. “*Full retail competition*” implies a competitor would only leave the market when it has *become* financially unviable, not when a regulator has intervened to select it for failure.

Essential Services Commission Act 2001

8 Objective of the Commission

- (1) In performing its functions and exercising its powers, the objective of the Commission is to promote the long term interests of Victorian consumers.
- (2) Without derogating from subsection (1), in performing its functions and exercising its powers in relation to essential services, the Commission must in seeking to achieve the objective specified in subsection (1) have regard to the price, quality and reliability of essential services.

8A Matters which the Commission must have regard to

- (1) In seeking to achieve the objective specified in section 8, the Commission must have regard to the following matters to the extent that they are relevant in any particular case—
 - (a) efficiency in the industry and incentives for long term investment;
 - (b) the financial viability of the industry;
 - (c) the degree of, and scope for, competition within the industry, including countervailing market power and information asymmetries;
 - (d) the relevant health, safety, environmental and social legislation applying to the industry;
 - (e) the benefits and costs of regulation (including externalities and the gains from competition and efficiency) for—
 - (i) consumers and users of products or services (including low income and vulnerable consumers);
 - (ii) regulated entities;
 - (f) consistency in regulation between States and on a national basis;
 - (g) any matters specified in the empowering instrument.
- (2) Without derogating from section 8 or subsection (1), the Commission must also when performing its functions and exercising its powers in relation to a regulated industry do so in a manner that the Commission considers best achieves any objectives specified in the empowering instrument.

Section 8A(1)(b) of the Essential Services Commission Act 2001 (**ESCA**) clearly empowers the Commission to have regard to the financial viability of the industry when achieving its objectives. It follows that this would extend to electricity retailers as key components of the industry. The ongoing financial viability of an electricity retailer is necessary for it to continue to supply energy to its customers without disruption. However, there is nothing in sections 8 or 8A to suggest the objectives of the Commission extend its powers to determining future financial viability of individual electricity retailers, and taking actions based on that determination.



Clause 6.2(v) also allows the Commission to revoke a licence if the Licensee’s **“technical capacity is such that the Commission considers that the Licensee would be unable to satisfactorily meet its obligations under this Licence, a Code of Practice or the Act.”**

We submit that the same issues that apply to the revocation of the licence for financial unviability also apply to technical capacity, i.e. revoking a licence based on the Commissions determination that the Licensee’s technical capacity will be insufficient to meet its obligations in the future, is beyond the Commission’s powers. Condition 3 of the Standard Conditions also sufficiently covers this issue meaning 6.2(v) is unnecessary.

Conclusion

For the above reasons we submit that:

1. The scope to revoke a licence under clause 6.2(iii) of the Template Licence is unreasonably broad; and
2. Clause 6.2(v) of the Template Licence purports to grant the Commission powers that it does not have at law, and is unenforceable. The proposed Standard Conditions together with clause 6.2(vii) of the Template Licence appropriately deal with the same subject matter within the Commissions powers. No powers of enforcement are lost by the removal of clause 6.2(v).

We request that:

1. Clause 6.2(iii) of the Template Licence be amended to qualify the circumstances where a breach of the Code of Practice would give rise to revocation of the licence; and
2. Clause 6.2(v) of the Template Licence be removed.

We trust that you will find our submissions acceptable, and look forward to receiving an amended Template Licence for acceptance by Blue NRG Pty Ltd.

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Group General Counsel