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Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne, Victoria 3000

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Ensuring Energy Contracts are Clear and Fair – Draft Decision

Alinta Energy welcomes the opportunity to respond to the Essential Services Commission's *Ensuring Contracts are Clear and Fair - Draft Decision* (the Draft Decision)

Alinta Energy is an active investor in energy markets across Australia with an owned and contracted generation portfolio of nearly 3,000MW, and in excess of 1.1 million electricity and gas customers.

The Draft Decision has been derived from the remaining recommendations made in the *Independent Review of the Electricity and Gas Retail Markets in Victoria* (the 'Thwaites Review'). During the past two years, Alinta Energy has worked collaboratively with the Commission and stakeholders to ensure the recommendations from previous consultations, *Building trust through new customer entitlements in the retail energy market* ('Building Trust') and the *Victorian Default Offer* ('VDO'), were successfully implemented.

However, we are concerned that the overall objective of the Thwaites reforms will be undermined as a result of two flaws in the Draft Decision recommendations:

1. The recommendations do not have regard to the often-conflicting impact of other decisions, including the outcomes of the Building Trust and VDO reforms
2. The costs of the recommendations are not considered, undermining the overall reform objective

On the first point, the 29 Thwaites Review recommendations were developed as a collective package of reforms to the Victorian energy market, with delivering outcomes in the long-term interest of Victorian consumers as its overall objective.

However, the Commission has compartmentalised tailored outcomes on each reform issue at the expense of the overall objective. For example:

- Despite recently establishing a comprehensive framework to protect customers at the end of a benefit period, the proposed recommendations effectively abolish benefit periods and, historically, retailers most attractive offers.
- Despite a strengthening of information provisions to ensure customers can more easily choose the most suitable product for their own circumstances, the proposed recommendations will force gas customers onto a specific market contract, without their consent, at the end of their contract.
- Despite reforms to address the historically high level of pay-on-time discounts, the proposed recommendations will force retailers, for some customers, to provide high-level benefits in perpetuity.

Indeed, the preceding reforms enacted on 1 July 2019, are (as detailed in our submission) more appropriate to resolve a number of matters raised as part of the Thwaites Review, and we urge the Commission to consider reviewing the outcomes of these changes prior to implementing unnecessary recommendations in the Draft Decision.

With regard to an adequate consideration of reform costs, we commend the Commission's engagement of independent academic economists, Associate Professor David Byrne and Dr Gordon Leslie (Byrne & Leslie), to quantify any impacts on energy prices as a result of the Draft Decision. The Draft Decision states;

on average across the market, customers on fixed-price contracts are paying \$22-100 more a year. However only 20 per cent of customers are currently on this type of contract, so if retailers were required to offer this type of contract to all new customers then the premium could potentially be higher.

However, the increase in energy prices which Byrne and Leslie identify as being potentially higher than \$100 a year is the result of only one recommendation from the Draft Decision (recommendation 4A). We urge the Commission to extend the engagement of Byrne and Leslie to consider the impact of all recommendations from the Draft Decision to ensure the full impact on energy prices is considered, and to assist in identifying the appropriate balance between further regulation and increased regulatory costs.

It is Alinta Energy's view that the proposals made in our submission provide a balanced approach to meeting all the objectives and intended outcomes from the Thwaites Review. In general, we feel the only way to achieve the underlying objective of delivering outcomes in the long-term interest of Victorian consumers, is by allowing competition to drive innovation and choice. By imposing such rigid and restrictive regulations on energy contracts the Victorian consumer loses the empowerment of selecting the most suitable contract for their needs. This empowerment is at the core of the Thwaites Review's recommendation and will ultimately deliver benefits in the long-term interest of Victorian consumers.



Our further detailed comments on the Draft Decision are set out below.
Should you require any additional information or wish to discuss any aspect of our submission please contact Ante Klisanin, Retail Regulation Manager on [REDACTED] or via email: [REDACTED]

Yours sincerely

A handwritten signature in blue ink, appearing to read "G. Hamilton".

Graeme Hamilton

General Manager - Government & Regulatory Affairs

Essential Services Commission Issues Paper- Ensuring Energy Contracts are Clear and Fair

Retailers must offer any ongoing financial benefits for the duration of a contract (Draft decision 8)

Benefit and contract periods will be aligned, so customers receive any ongoing discounts, credits or rebates for the entire duration of a contract. Retailers must not decrease these benefits during the contract term.

Alinta Energy is concerned with the application of Draft Decision 8 to existing contracts, imposing a form of retrospectivity which is unprecedented for the Commission.

It is understood that the Commission made the recommendation on the understanding that all retail contracts have a unilateral right for the retailer to terminate the contract, whereby, for customers under an existing benefit term and evergreen contract, the retailer would always have a right to end the benefit by terminating the contract. This is not the case, and the impact of the Commission's recommendation would be that, for some evergreen retail contracts, the retailer will be required to continue to provide the benefit, possibly in perpetuity. Whilst the customer may at some point choose another product, move, or churn to another retailer, in the absence of any of these actions, the customer would continue to receive the benefit.

There are a number of concerns with such an outcome:

- A key driver of delivering low cost contracts in the energy market is having a prudent and methodical risk management framework that is linked to the terms and conditions of the contract being offered. The benefits offered under an energy contracts, including the benefit period, are developed in accordance with this risk management framework. Whilst it is common practice for retailers to extend benefit periods (to the benefit of the customer), such action is only undertaken for a defined period, in accordance with the retailer's risk management framework. Requiring existing retailer benefits to be provided forever in evergreen contracts immediately raises the risk profile and costs associated with those contracts.
- The recommendation would most impact those retailers who have generally chosen to extend benefit periods, to the benefit of their customers. Those retailers would have a higher proportion of their customer base on a benefit period, and thus, under the reform, locked into providing that benefit for the contract term, or in perpetuity. Those retailers that have allowed customer benefits to lapse, whereby customers are now paying higher prices, would be less impacted.

- Contrary to the objective of Draft Decision 10-15, which seeks to cap conditional discounts, Draft Decision 8 would have the effect of extending higher pay-on-time discounts, for some customers in perpetuity

In Alinta Energy's view, the most appropriate consumer protection for existing customers receiving benefits are already provided under the Thwaites reforms enacted on 1 July 2019, including;

- Best offer message appearing on customer bills,
- Advanced Notification requirements, which also includes a best offer assessment, and
- Clear advice on the most suitable and lowest cost offer when forming new contracts.

The *Advanced Notification* requirements were developed to manage the specific risk of consumers being exposed to a benefit reduction. During the consultation process the Commission also welcomed the concept of harmonising regulation with the National Energy Customer Framework. Alinta Energy acknowledges the intent of Draft Decision 8, but, given the unintended consequence of some customers receiving their existing benefits in perpetuity, the cost far outweighs the benefit, particularly as customer exposure to a benefit change has already been addressed as part of the implemented reforms. On this basis we recommend that the obligation is amended to only apply to new contracts formed from 1 July 2020 onwards, removing any aspect of retrospectivity to the reform.

An alternative transitional arrangement would be to require evergreen contracts with an existing benefit period to terminate at the end of the current benefit period. This would be consistent with the Commission's intent to align contract and benefit periods, and prevent an obligation falling upon retailers to provide existing benefits in perpetuity. It would also trigger the existing provisions noted above, assisting the customer to choose the most suitable and lowest cost product, whilst aligning to Draft Decision 8, whereby the customer would automatically move to the VDO if no other product is chosen.

Regulating conditional discounts (Draft Decision 10-15)

As noted in Alinta Energy's previous submission, it is our view that the recommendations already implemented will achieve the outcomes the Commission is seeking from Draft Decision 10-15, particularly with the introduction of the VDO as a reasonable price that offers are referenced to.

The Draft Decision also recognises the changes that have already occurred in the energy market in relation to conditional discounts;

We have seen retailer practices and offerings change since the recommendations were made. The size and prevalence of conditional discounts has reduced, and retailers are starting to introduce guaranteed discounts and sign-up or loyalty credits

If a conditional discount cap is introduced, the Commission should harmonise its method for calculation with the national framework currently under consultation by the AEMC (albeit the national framework will be a cap determined by the retailer

rather than a regulatory body).

At the end of a fixed-term contract retailers must roll customers onto the VDO or best offer (for electricity and gas respectively) (Draft Decision 9)

At the end of a fixed-term contract, if a customer does not give explicit informed consent to move to a different offer, their retailer must automatically roll them onto the VDO (for electricity) or that retailer's best offer (for gas).

The changes to rules for gas contracts are subject to legislative amendments being made.

Alinta Energy agrees with the recommendation to automatically move customers to the VDO when their electricity contract's fixed term contract ends, consistent with existing regulations. However, we strongly oppose the recommendation to automatically move gas customers to the retailer's 'best offer.'

It is extraordinary that despite Explicit Informed Consent (EIC) being the cornerstone of consumer protection in the retail energy sector for over two decades, with several reviews strengthening EIC provisions over-time, the Commission would make a recommendation which fundamentally undermines its role.

Requiring retailers to move customers onto a new contract (which for Alinta and most retailers will be a market retailer contract) effectively waives EIC requirements for one group of customers. We note that when retailers approached the Commission in response to a request from the Federal Government to move standing offer customers onto discount products, the request was rejected by the Commission on those very grounds.

Furthermore, moving gas customer onto the retailers "Best Offer" could be contrary to the intent of the "Clear Advice" provisions to ensure the customer is informed of the most suitable offer when moving onto a market contract. This is particularly relevant when the specific terms and conditions of the retailer's best offer are not suitable for the customer. Forcing retailers to place customers onto a potentially unsuitable market contract, in the absence of customer consent, contradicts the very essence of the consumer protection framework, and the broad objective of the Thwaites review reforms.

In Alinta Energy's view the most appropriate action would be for consumers to move on to a standard retail contract and accordingly be charged the gas standing offer rates published by the retailer. This approach would be consistent with the electricity draft decision, existing regulatory provisions, and ensure expectations between fuels is not unnecessarily complicated for the consumer. We also note that the consumer protections associated with moving a customer onto a standard retail contract ensures that the contract terms are consistent, reliable and pre-determined by the Commission. There would be less customer confusion and fewer customer complaints.

Whilst the Commission rejected this option in the Draft Decision on the grounds of a concern with the level of gas standing offer tariffs, we note that the Victorian Government has made the policy decision that regulation of gas standing offer tariffs is unwarranted. That is, gas standing offer tariffs are a fair and reasonable default price.

If there are concerns with the level of gas standing offer tariffs as a default price, we suggest the Commission in consultation with the Victorian Government, rather than regulating gas standing offer tariffs through a VDO, consider the proposal by St. Vincent de Paul, to cap the gap between a retailer's market contract prices and their standing offer prices, for example to 20%. Whilst that would require legislative change, so too would the Commission's proposal for the retailer's best offer to be the default contractual arrangements for gas.

Retailers can only change existing market contract prices when the VDO price changes (Draft Decision 5)

Retailers can only change prices of existing market contracts when the VDO price changes

As noted above, the Commission's independent academic economists, Byrne & Leslie, found that fixing market contract prices for 12 months would add at least \$22-100 to the average customer bill. Given Principle 2 of the Australian Government Guide to Regulation states that "*Regulation should be imposed only when it can be shown to offer an overall net benefit,*" it should be incumbent on the Commission to demonstrate how the net benefit to consumers of fixing market contract prices will exceed these additional costs.

Alinta Energy's view is that the introduction of the VDO with its fixed 12-month price, makes Draft Decision 5 redundant, as the VDO provides the price certainty being sought under Recommendation 4A. As stated by the Victorian Government, the VDO is a reasonable price for energy and has the certainty of a fixed price for 12 months.

However, if the Commission believes that further reform is required, Alinta Energy proposes the following alternatives which provide price certainty at lower cost:

- Option 1 (As noted in our previous submission): Requiring retailers to have at least one generally available offer where the prices are fixed for at least 12 months from when the customer signs up.
- Option 2: Requiring retailers to have at least one generally available offer where the prices are fixed for at least 12 months from when the customer signs up. Any non-fixed price generally available offers must be a lower-cost contract than the fixed price contract.

In our view both options would address the price certainty issues identified in the Thwaites Review, whilst balancing other reform objectives.

If the Commission adopts Draft Decision 5 with respect to fixing market contract prices for 12 months, further consideration must be given to the circumstances around the timing of market contract price changes relative to the VDO price change. Specifically, requiring retailers to have a price variation for all offers on the same day as the VDO price change would have a significant impact on operational efficiency and effectiveness. Every customer having a price variation on a set day would result

in;

- Advanced notices informing customers of the price variation being issued to all customers on the same day,
- Customers engaging retailers in response to the Advanced Notices during the same period,
- Retailers adjusting all marketing collateral and requirements to the set date, and
- Retailers having less time to consider the changes to market retail prices once the network price determinations are finalised.

If Draft Decision 5 is adopted, Alinta Energy recommends that the Commission provide retailers with a broader time period to make market contract price variations, for example within one month of the VDO change. Of course, all these challenges are linked to the requirement to fix all market retail contracts for 12 months, whereby we again urge the Commission to take all these impacts and unintended consequences in account when considering the costs and benefits of the recommendation.

Reducing the allowable back-billing period to four months (Draft Decision 17)

Retailers may only recover any amount undercharged in the four months before they notify the customer, unless the undercharging was a result of the customer's fault or unlawful act or omission.

Alinta Energy appreciates the intent of Draft Decision 17, as it is framed in a manner that implies the retailer is the sole cause of any back-billing in excess of four months. However, our data shows that a vast majority of back-billing cases are due to distributor or meter data provider error. We therefore recommend that the Commission amend section 30 of the Retail Code to limit the recovery of an undercharged amount to four months only when the fault or omission is caused by the retailer. We consider this would be the most appropriate approach, given that distributors have no limits on back-billing retailers.

We also note that the Commission is currently conducting a review of the Distribution Code. We would be pleased to work with the Commission on changes to the code that would restore parity between retailers and distributors on back-billing. Any changes to the Distribution Code of this nature would also create greater transparency in identifying back-billing causes.

Marketing offers to the VDO and National reference price obligations (Draft Decisions 1-4)

Alinta Energy supports the approach suggested by the Commission to codify the existing requirements (of electricity customers) under the section 13 Order in Council relating to the VDO. Alinta Energy acknowledges the importance of having the VDO tariffs as the reference tariffs for offers with discounts and appreciates the Commission's consideration of not over-complicating this recommendation.

Alinta Energy also notes that the *Clear advice* and *Best offer on bill* obligations

developed under the implemented recommendations provide information disclosures on the dollar impacts of offers for both gas and electricity customers. Alinta Energy would welcome the opportunity to demonstrate how marketing in dollar terms is applied to gas customers, and to discuss whether any further regulatory prescription is required.

The Commission's previous findings in relation to what a consumer consider to be a material cost amount when comparing energy contracts

During the *Building Trust* consultation, the Commission engaged a Behavioural Insights Team (BIT) to survey consumers on the proposed reforms. The BIT was asked to determine a dollar threshold for when a consumer would be interested in being informed of a better offer from a retailer. The Commission then set this threshold at \$22. One of the main insights we received during this consultation was from consumer groups, who stated that, in their experience;

advice provided by frontline staff of service organisations, that \$22 could be a material sum for a vulnerable customer.¹

Given these findings, we believe that consideration of whether a reform results in an energy cost increase of \$22 or more should be a key factor in weighing the costs and benefits of the Draft Decisions.

Given that Byrne & Leslie have already confirmed that fixing all energy contract prices will lead to increase in excess of \$22-\$100 per customer per year, we urge the Commission to quantify all recommendations in the Draft Decision in order to make a balanced and informed decision that does not unreasonably impact upon energy costs. We also urge the Commission to consider our alternative proposals which we believe will achieve comparable outcomes at a lower cost.

¹ Submissions to, the Essential Services Commission consultation paper 'Draft decision on building trust through new customer entitlements in the energy retail market', October 2018: Community Information and Support Victoria, Consumer Action Law Centre, Consumer Policy Research Centre, Energy and Water Ombudsman Victoria, and Victorian Council of Social Service submissions