



13 November 2017

Dr Ron Ben-David
Chairperson
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

By email: paymentdifficulties@esc.vic.gov.au

Dear Dr Ben-David

Response to Draft guidance note – Payment difficulty and disconnection

Alinta Energy Retail Sales Pty Ltd (**Alinta Energy**) welcomes the opportunity to provide comments on the Essential Services Commission's (**the Commission's**), Draft guidance note – Payment difficulty and disconnection (the Guidance Note).

Alinta Energy is an active investor in the energy retail, wholesale and generation markets across Australia. Alinta Energy has around 2500 megawatts of generation capacity in Australia (and New Zealand) and a growing customer base of over around 800,000 customers in Western Australia and across the National Energy Market and is well placed to provide comment on the Issues Paper.

Alinta Energy acknowledges the need for a guidance note to assist retailers with interpreting the application of certain principle-based entitlements as described in the Energy Retail Code (the Code). This submission primarily focuses on the existing approach and development of the Guidance Note and seeks to ensure that the Guidance Note itself meets all of its intended purposes; one of them being, as described in the Guidance Note itself, as;

.....It (the Guidance Note) does not create any additional obligations on retailers.

Alinta Energy is concerned that the Guidance Note as currently drafted does not meet this objective, as it creates additional obligations on retailers that are not consistent with Retailers current obligations under the energy retail code. This in itself creates a level of confusion the Guidance Note itself was meant to address.



Our responses and comments to the Guidance Note are contained in the attached response. Alinta Energy would be happy to discuss any aspect of this submission, or earlier submissions, where required.

Should you have any questions or wish to discuss any aspect of our submission please contact Mr Ante Klisanin Retail Regulation Manager

Yours sincerely

A handwritten signature in black ink, appearing to read "Shaun Ruddy".

Shaun Ruddy
Manager – National Retail Regulation

Intended purpose of the Guidance Note and its consistent application with the Payment Difficulties Framework – Final Decision

Alinta Energy recognises that the Commission has collaboratively worked with stakeholders to develop the Final Payment Difficulties Framework (the PDF) and has taken on-board critical feedback received from stakeholders during the consultation period. As a result of this, the changes made to the Final PDF came as a result of recognising that previous drafted versions of the PDF were, arguably, oversubscribing the requirements within the Code. The previous drafted versions of the PDF were attempting to prescribe regulations for every possible type of scenario and customer circumstance. As described in the Commission's PDF Final Decisions paper (the Decision paper);

'Were we to try and address every possible way in which payment difficulty might manifest itself, the guidance note would become impossibly long and unmanageably complicated.'

The Decision Paper concisely summarised this fundamental shift in approach to how retailers were expected to meet the minimum entitlements of the PDF by utilising retailers' experience in applying their judgement to develop processes and procedures around customer circumstances. This is further re-enforced in the Commission's PDF Final Decisions paper by the Chairperson;

'Rather than rely on a set of rules from the regulator about how to assist customers, retailers would be expected to judge how to deliver meaningful and timely assistance in light of a customer's circumstances. That is why the entire framework ultimately relies on retailer judgement'

The Guidance Note is inconsistent with the overall purpose of the PDF

Although the Guidance Note tries to re-iterate this principle-based, retailer-judgement approach in its opening Summary, it appears to deviate away from its core purpose when referring to practical examples. Alinta Energy notes that this may only be a drafting error or poor choice of wording, but notes that the language used appears to imply that certain requirements are mandatory. Within the Guidance Note, the language continually reference requirements by using the words 'the retailer must'. Of particular concern to Alinta Energy is the provisions relating to Best endeavours in the PDF, particularly;

9.8.5. Best endeavours to contact a customer in person or by telephone requires:

- a) over a maximum 21-business-day period and not more than 20 business-days prior to the disconnection –

- i. at least one telephone call between 9.00 am and 5.00 pm AEST/AEDT attempting to contact the customer;
 - ii. if a message was not left between 9.00 am and 5.00 pm AEST/AEDT with an adult with legal capacity²³ or on an automated telephone service, at least two telephone calls outside 9.00 am to 5.00 pm AEST/AEDT;
- b) for customers with a supply address in the Melbourne metropolitan area –
- i. where telephone contact has not been successfully made, up to a maximum period of 21 business days and not more than 20 business-days prior to the disconnection, the sending of a letter by registered post advising of the imminent disconnection and providing clear and unambiguous advice about the assistance available under Part 3 and how to access it
 - ii. where the telephone number is not known to the retailer or the telephone is disconnected – at least one attempt to make contact by visit to the customer's premises;
- c) for customers with a supply address outside the Melbourne metropolitan area where telephone contact has not been successful or the telephone number is not known to the retailer or the telephone is disconnected – the sending of a letter by registered post advising of the imminent disconnection and providing clear and unambiguous advice about the assistance available under Part 3 and how to access it.

The language and sheer volume of the provisions mandated above clearly take a step backwards to the Guidance Notes purpose by prescribing new requirements not captured in the Code. And is not consistent with a core objective of the Guidance Note, not to create additional obligations on retailers.

Structure, style and tone with regard to meeting the purpose of the Guidance Note

Although the Commission has had the power to create Guidance Notes, we note that this is the first occasion where the Commission has utilised its powers to do so. To that end, when reviewing the Guidance Note for the first time, one can not help but compare the structure, style and tone of the Commissions' Guidance Note when compared to guidance notes in other industries by other Regulators.

Alinta Energy notes that the Australian Securities and Investment Commission (ASIC) has over 200 regulatory Guidance Notes (the ASIC Guidance Notes) that have been developed to provide practical guidance to assist stakeholders with meeting their compliance obligations. All 200 ASIC Guidance Notes have a very clear structure, style and tone. All ASIC Guidance Notes make it very clear in their Disclaimers that;

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Alinta Energy acknowledges that the PDF Guidance Note does have a disclaimer that states;

1.6.1. The commission has issued this guidance note to provide information to licensees to assist them in complying with the Code. The guidance note contains general information and is not a substitute for legal or other advice which may be required by the licensee. The guidance note does not and is not intended to vary, derogate from or otherwise limit the commission's statutory powers, functions and discretions except as outlined in 1.1 above. The commission may depart from the statements contained in the guidance note where the particular circumstances are different from those described.

It is Alinta Energy's view that the Guidance Note disclaimer should be extended to include similar references that re-enforce the purpose of the Guidance Note. For the avoidance of doubt, by stating that the examples used are purely illustrative and are not intended to impose or imply particular rules or requirements on retailers.

The ASIC Guidance Notes further re-enforces this structure and tone by disclosing;

Examples in our guidance

In this regulatory guide, we have used a number of examples. These examples are for illustration and are confined to their particular facts. Different facts are likely to produce different results in terms of whether the law has been complied with.

Alinta Energy acknowledges that the PDF Guidance Note refers to the use of examples by stating;

1.1.3. Where we consider that retailers have in good faith relied on this guidance note, by acting consistently with the examples of compliant conduct included in this note, we will not take enforcement action.

It is Alinta Energy's view that 1.1.3 expresses how the Commission will assess retailers based on the circumstances referred to in the Guidance Note, but believes this reference should be extended to include a statement that; examples are confined to the particular facts and that different facts or circumstances are likely to produce different results and actions by the retailer to meet the minimum entitlements in the Code.

Alinta Energy also draws attention to the sheer volume of practical examples within the ASIC Guidance Notes. It is Alinta Energy's view that more practical examples within Guidance Note that detail customer circumstances and retailer actions; would be far more beneficial than re-wording the Code and using different

language to express the requirements within the Code. The Practical examples within the ASIC Guidance Notes also have a user-friendly structure, tone and appearance that would greatly assist any stakeholder in developing staff training programs. Alinta Energy is happy to provide practical examples to assist in this development.

Additional obligations created within the Guidance Note

Our submission has raised a number of factors that appear to result in the creation of additional requirements on retailers that go beyond the scope of the Code and purpose of the PDF. In addition to language used, tone, inadequate disclaimers, and the implications of re-wording the Code in the Guidance Note; Alinta Energy is also concerned about the creation of additional requirements on retailers to apply best endeavours requirements to contact customers despite not being required to do so in the Code. In particular, the following provisions from the Code state;

81 (6) If a *residential customer* receiving assistance under this Division fails to make a payment by the date on which it was payable, the *retailer* must contact the *customer* to discuss their putting forward a revised proposal under this clause.

And,

82 (2) If the residential customer fails to make a payment towards the cost of their on-going energy use by the date on which it was payable, the retailer must contact the customer to discuss varying the amount payable, or the frequency of those payments, or both, to give the customer more time to lower their energy costs.

Alinta Energy notes that the obligation and associated requirements to contact the customer do apply in these circumstances but do not extend to the associated requirements with best endeavours to contact the customer under 9.8 of the Guidance Note.

When 81(6) of the Code is addressed in the Guidance Note under section 4.12.13, the guidance Note states;

4.12.13. Retailers must use their best endeavours (see section 9.8 of this guidance note) to discuss a revised payment arrangement with a customer who does not make a scheduled payment.

As does section 4.13.2 of the Guidance Note when addressing the requirements of 82(2);

4.13.2. If a customer, who is paying below the cost of their energy use, does not make a scheduled payment, we expect the retailer to take prompt action to contact the customer to discuss putting forward a revised payment arrangement. If after the retailer has used its best endeavours, the customer

does not put forward a revised payment proposal, the retailer may issue the customer with a disconnection warning notice

Alinta Energy notes that prior to proceeding to any disconnection as a last resort, it would be required to meet best endeavours to contact the customer under 111A of the Code, but not be required to do so in addition to 81(6) or 82 (2) of the Code.

To further illustrate this point, pages 44 and 45 of the Decision paper highlights that the best endeavours requirements were specifically removed from the provisions relating to 81(6) and 82 (2) of the Code.