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Monday, 14 October 2019

Energy Analysis Team
Essential Services Commission
Level 37, 2 Lonsdale Street
Melbourne VIC 3000

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

Dear Energy Analysis Team

RE: Compliance & Performance Reporting Guideline Draft decision 13 September

ERM Power Retail Pty Ltd (ERM Power) welcomes the opportunity to respond to The Essential Service Commission's (the Commission) Draft Decision on the Compliance and Reporting Guideline.

About ERM Power Retail

ERM Power Retail Pty Ltd, which trades as ERM Power, is a subsidiary of ERM Power Limited, an Australian energy company operating electricity sales, generation and energy solutions businesses. Since launching in 2007, ERM Power has grown to become the second largest electricity provider to commercial businesses and industrials in Australia by load[1], with operations in every state and the Australian Capital Territory. ERM Power has increasing success in the small business market. www.ermpower.com.au

General Comments

ERM Power recognises and understands the importance of statistical monitoring of energy retail businesses to provide guidance and transparency in the level market activity to the Commission. Further, we are cognisant of the importance of compliance reporting as a monitoring tool of any regulator, underpinning its credibility and authority. However, we note the Commission has proposed to considerably increase regulatory compliance obligations with several new indicators and breach categories to monitor the compliance and performance of retail businesses. This change in the number of reporting indicators imposes significant additional costs on retailers to develop systems, processes and training to accommodate the new requirements.

Retailers operating in the national market have been under a constant barrage of new obligations at the behest of governments, regulators and the market operator, and information requests from regulators. Some of these changes imposed on participants require major system related projects, such as the costly changes to support 5 minute markets and global settlement that are currently underway. Others, perceived by rule makers to be just 'minor amendments', such as the recent changes to the display of GST on bills and marketing in Victoria, actually require significant cost and time to implement as a separate IT project.

This heightened level of intervention impacts heavily on IT resources that would otherwise be dedicated to further expanding innovation, product development and improved service offerings to customers. It is imperative that the

[1] [1] Based on ERM Power analysis of latest published financial information.

Commission's monitoring initiatives are proportionate to the compliance risk, as laying further system changes in the wake of the numerous additional regulatory obligations recently imposed on retailers ultimately comes at a cost to customers, at a time when costs pressures are particularly felt across the industry.

Changes to performance reporting

We are concerned that the Commission may have underestimated the impact of changing customer definitions in automated reporting systems, with a proposed commencement date of 1st January 2020.The proposed changes create a new definition of a 'customer' being an account linked to a premises/site. This is a substantial change to our reporting system which is based on NMI, (a measure agreed in our previous discussions with the Commission), as it will require a reconfiguration of all customer number-based statistics. We note that the new definition does not align to our service delivery of a customer, which is largely multi-site, or the application of Energy Retail Code's regulations to a customer, which is currently defined to a connection point.

ERM Power strongly believes that the rushed introduction of new indicators, without allowing time for proper preparation, poses additional costs on retailers and compromises accuracy and compliance. Retailers must be provided enough time to manage this regulatory change. We believe the expectation that retailers can make these system changes within less than 6 weeks, over the Christmas period and at the same time as retailers prepare systems to accommodate the expansion of the Victorian Default Offer, is unrealistic and will undoubtably place reporting compliance at risk. Due to the significant reconfiguration required in this compressed timeframe, we will not meet the requirements for 1 Jan 2020.

We propose an implementation date of July 2020 to allow for system scoping, development, testing, procedure building and training for staff to capture information.

The new reporting templates will be the 5th iteration in 4 years. Retailers are burdened with the complexity in complying with the constant alteration of reporting requirements and the costs from the perpetual IT projects required to meet these obligations; costs that are ultimately borne by consumers. Of concern, the Commission predicts that there may be "further updating of our reporting guideline"[2]. We suggest the Commission waits and makes changes once it fully understands its information and analysis needs, rather than continuing with this fragmented, costly approach. The suggestion that the draft still contains an incomplete set of requirements further justifies a delay of implementation to July 2020.

We note that the Commission is also seeking to bring forward the quarter 4 reporting deadline by one month, to the end of July. This compressed timeframe not only places further burden on resources to compile statistics post financial year end, but also limits the opportunity for thorough accuracy checks and to seek CEO sign off. We note that this new proposed deadline would include the submission of compliance breach reporting and would no longer be consistent with the AER's compliance reporting due date, resulting in an inefficient process of seeking executive approvals for compliance reporting.

Changes to compliance reporting

Classification of non-compliance to types 1,2 or 3 determines the frequency with which retailers must report any contraventions of regulatory obligations to the Commission. Generally, we are concerned about the Commission's approach to heavily categorise many of the new obligations to be that of a type 1 classification, which appears to not be commensurate with nature and scale of the harm that would warrant the immediate (2 day) notification timeframe. This increases the quantum of regulations for immediate reporting and puts into question the

[2] [2] Essential Services Commission 2019, Compliance & Performance Reporting Guideline updated to include new entitlements for customers: Draft decision, 13 September, page 8.

effectiveness and efficiency of resource allocation. It is our view type 1 breaches should be reserved for those contraventions that pose significant risk of harm to customers, warranting immediate notification to the Commission, such as life support breaches.

We believe the Commission has disproportionately classified low level harm non-compliance items (such as marketing of the Victorian Default Offer, basis of bills with estimated data and record keeping obligations around price change) as 'serious' and 'significant', suggesting they hold equivalence in criticality to life support obligations. Further the Commission's approach of assessing the new obligations with the level of time sensitivity to determine customer impact has grossly overestimated the need for type 1 immediate notification. The Commission's hypotheses and assumptions underpinning its view of customer impact, and its interpretation of the time sensitivity assessment, is both arbitrary and broad. With its approach, the Commission infers that once a contravention is identified, a retailer would take no steps to address, minimize or rectify the breach between the detection and reporting days. It is highly implausible that retailers, once identifying breaches, will not attempt to restore compliance and minimize reoccurrence, particularly when faced with the consequences of heavy penalties which are likely to compound. The following are specific regulations where we believe the breach classification should be reconsidered:

Bill messaging on accessing the Victorian Default Offer (VDO)

As per the final orders' explanatory statement, this requirement was introduced to apply on customer bills from 1 October, promoting the Government's policy of the VDO. It was supported by consumers groups as a form of "ongoing government and community information provision"[3]. Our view is that this obligation is consistent with the other 26 bill content items required under clause 25 of the Energy Retail Code, including bill messaging around government funded energy charge rebates, concessions or relief schemes. We suggest that the obligation should not be classified as type 1, which should be reserved for breaches resulting in serious harm that require immediate notification to the Commission. Contrary to the Commission's assessment, a breach of the requirement to market and promote the VDO does not expose customers to serious/ significant harm as:

- any omitted prompt to a customer to access a cheaper tariff (which may be the VDO) is covered by the 'best offer' obligations that are placed on a bill. The best offer information is tailored more specifically for the customer's circumstance, rather than the general marketing of the VDO;
- time does not compound the perceived harm (time sensitive), as customers are provided the best offer information to move to a cheaper tariff routinely on bills (including the VDO), negating any time impact of this promotional content;
- the purported loss in savings from a contracted customer not being prompted via a bill message to access the Government's regulated price, would be no more than the financial harm from omitting bill messaging on the availability concessions or rebates (more sensibly classified as type 2); and
- time sensitivity greatly escalating the impact is highly questionable. We note that this message appears on market customers' bills, that is, those customers who have actively engaged in seeking a competitive offer previously in the absence of any bill message prompting them to.

We suggest that the assessment of this requirement should be aimed to be that of level 2, which is consistent with bill messaging items now.

Price change notifications

We suggest price change notification obligations should not be viewed on a similar level to breaches of life support obligations, that is type 1, but rather as a type 2 breach (more consistent to the Australian Energy Regulator's

[3] Victorian Default Offer, Final Orders, Explanatory Statement, page 11.

categorization of half yearly reporting). Contrary to the Commission's assessment, this breach of the requirement to notify the customer 5 business days in advance of a price change with specific new content requirements does not warrant immediate notification as:

- For the notification breach to have been triggered, the customer would have already been impacted by the specific price change and likely notified through a bill. The harm is largely perceived to be the opportunity cost of seeking alternative cheaper offers; and entering an alternative offer that *may* provide a small financial gain to the customer, over the period that the customer was otherwise unaware of the price change. The time sensitivity driving opportunity cost of seeking alternative competitive offers ends when the customer is made aware of the change, likely to be through a bill if the notice was not sent. To suggest that non-compliance poses a "significant risk of customer harm, that worsens over time" overestimates this obligation's risk. The risk does not magnify over time as the customer would be aware of any change once receiving the bill; and
- Time sensitivity due to systemic risk should not be deemed high for one off regulatory tasks, such as notifications around a price change event. To suggest that this compliance risk compounds over time as more customers will be impacted over time is highly unlikely to reflect how a retailer would run a price change event, operationally. If the issue is systemic, it would likely impact the customers of a single price change event and then the customers of a subsequent price change event. Systemic breaches are not stopped by a reporting timeframe as they are undetected. Consider the risks surrounding a 6 monthly notification rather than a 2 day notification - if a compliance issue was detected for a price change event, it would be implausible that a retailer would ignore it and not rectify this compliance issue for any further price change events in the following months until a 6 monthly notification, given the resulting outcome of multiple breaches and likely enforcement penalties.

Please contact me if you would like to discuss this submission further.

Yours sincerely,

[signed]

Libby Hawker
Senior Manager Regulatory Affairs