

15 March 2022

Ms Sarah Sheppard
Executive Director
Essential Services Commission
Level 8, 570 Bourke Street
MELBOURNE VIC 3000

Via email: licences@esc.vic.gov.au

Dear Ms Sheppard

RETAIL LICENCE REVIEW

Tango Energy welcomes the opportunity to provide a submission on the licence review being conducted by the Essential Services Commission (the **Commission**). While Tango Energy understands the intent of the Commission's proposed changes, the proposal to create a schedule of standard licence conditions is a substantive change to the licensing framework. For this reason, Tango Energy is not in a position to confirm whether or not it agrees to any changes to its electricity and gas licences until the Commission has undertaken further consultation with industry participants in respect of the overarching structure of the Victorian energy retail licence framework. With this in mind, Tango Energy would like to take this opportunity to:

- firstly, suggest that additional procedural safeguards be included in Victorian retail energy licences;
- secondly, assess the Commission's proposal to establish a standard schedule of licence conditions; and
- finally, set out administrative changes that need to be made to Tango Energy's proposed retail licences.

The comments in this submission are general comments and should be taken to apply to both Tango Energy's proposed electricity and gas licences, as applicable.

1. Electricity and Gas Licences

Tango Energy considers the Commission should use this review as an opportunity to enhance procedural safeguards afforded to licensees. For instance, there should not be any need for the Commission to make an urgent amendment to a licence. Indeed, unless otherwise specified at law, the Commission should only have the right to unilaterally vary a licence where it is unable to, or it would otherwise be impractical to, consult with an affected licensee.

In respect of licence revocation procedures, Tango Energy considers that further detail needs to be included in retail licences to ensure there is a process in place to facilitate genuine and realistic consideration being given to any alleged misconduct before any action is taken to revoke a licence. To provide for greater transparency and reassurance around the scope of the Commission's power to revoke a licence, it should be made clear that the licensee shall not be taken to have failed to have complied with an enforcement action that is subject to an ongoing appeal or review. Further, revocation for a breach of a Code of Practice should be confined to serious or repeated breaches of a Code's requirements. Indeed, the revocation of a licence could have serious flow-on implications for the licensee's employees, customers and shareholders, potentially leading to a broader diminishment of public and investor confidence in the State's energy sector.

In view of this, the Commission's revocation process should be confined to exceptional circumstances where a licensee is either no longer financially or technically capable of fulfilling its retail functions, or has demonstrated that it is not a fit and proper entity to provide an essential service to the community. In achieving this end, the Commission must explicitly assure licensees as well as prospective licence holders that any revocation action taken will be fair, transparent, considered and only exercised to address or otherwise mitigate a real and apparent likelihood of serious consumer harm.

Consistent with the seriousness and significance of any decision to revoke a licence, Tango Energy asks that the Commission provides for a process that affords the licensee the opportunity to make a submission to the Commission as to why its licence should not be revoked. This process should require the Commission, acting reasonably, to assess whether there is any legitimate prospect of the licensee being able to rectify the matters giving rise to the Commission's decision to revoke the licensee's licence. Only once the licensee has had the opportunity to explain its position and put forward any relevant undertakings to remediate any alleged or actual deficiencies in its conformity with its licence obligations, should the Commission proceed to revoke a licence.

This fundamental right of procedural fairness was eloquently described by Mason J in *Kioa v West* (1985) 159 CLR 550, 582. His Honour observed:

It is a fundamental rule of the common law doctrine of natural justice ... that ... when an order is to be made which will deprive a person of some right or interest ... he is entitled to know the case sought to be made against him and to be given the opportunity of replying to it...

2. Schedule of Conditions

More broadly, Tango Energy does not consider it necessary nor desirable for the Commission to specify a standard schedule of licence conditions. A retail licence provides individual entities an authorisation to provide retail services, subject to relevant legislative and regulatory requirements. There should not be any need to provide for prescriptive standardised conditions. As an example, obligations in respect of the provision of information to large customers is a broader policy consideration that should be specified in a legislative instrument rather than forming part of a licence. The licence should only mandate the fundamental requirements necessary for an entity to provide retail energy services in Victoria.

Notwithstanding this, if the Commission proceeds with its proposal to establish a standard schedule of conditions, then it should be qualified that a licensee's obligations to comply with legislative instruments such as the *Electricity Safety Act 1998* (Vic) and relevant national energy laws only apply to the extent that they regulate the licensee's functions as a Victorian energy retailer. Further, statutory deemed contract arrangements only apply to small customers, so the obligation to notify large customers that there is a deemed contract in place is superfluous. Further, the non-discrimination requirements around use of system agreements appear to be more appropriately characterised as distribution obligations rather than obligations that should be imposed on energy retailers.

3. Administrative Changes

As an administrative matter, Tango Energy's address for service should be updated as follows:

General Manager, Retail
Tango Energy Pty Ltd
Level 13, 700 Collins Street
DOCKLANDS VIC 3008

Moreover, the reference to 'load sheeting' at clause 6.2(vi) of the draft electricity retail licence appears to be a typographical error.

Concluding Remarks

Tango Energy looks forward to working collaboratively with the Commission to not only implement the Commission's proposed licence changes, but to improve the overarching procedural safeguards afforded to Victorian retail energy licensees.

If the Commission would like to discuss Tango Energy's views on the proposed licence changes in further detail, please email [REDACTED]@tangoenergy.com or call (03) [REDACTED]

Yours sincerely

[REDACTED]

Corporate Lawyer, Regulatory & Compliance
Tango Energy Pty Ltd