

Attention: Sugi Sivarajan  
Acting Senior Regulatory Manager of Regulatory Operations  
Essential Services Commission  
Level 8, 570 Bourke Street  
MELBOURNE VIC 3000

By email only: [licences@esc.vic.gov.au](mailto:licences@esc.vic.gov.au)

18 May 2022

Dear Sir/Madam

**YOUR REFERENCE: C/22/10838 & C/22/10751**  
**PROPOSED VARIATION OF MOMENTUM ENERGY PTY LTD'S ELECTRICITY AND GAS RETAIL LICENCES**

We refer to Ms Sheppard's letters dated 27 April 2022.

We thank you for the opportunity to review and provide comment on the revised proposals to vary both our electricity licence and our gas licence. This letter sets out our comments with respect to each of the concerns we raised in our original response dated 3 March 2022 ("**Original Response**").

The only outstanding issue is the concerns raised at 1B of our Original Response, which we assert have not been adequately considered. Specifically, we still object to the dilution introduced by the proposed variations of our existing rights under our current electricity licence with respect to any revocation of this licence. This is discussed below in more detail.

**1. Proposed variation of Momentum Energy's electricity retail licence**

1A. Dilution of existing rights with respect to a variation of licence terms

In our Original Response, we submitted that proposed clause 4 of the Template Electricity Retail Licence For Consultation ("**Template Electricity Licence**") materially diluted our existing rights under our current licence. We explained that our current licence can only be varied if Momentum Energy is afforded the opportunity to make representations on the matter (unless the licence otherwise sets out a procedure for variation or variation is mutually agreed). Proposed clause 4 of the Template Electricity Licence set out a procedure for variation which did not include a right for the licensee to make representations, notwithstanding that the Commission's decision to vary can be unilaterally made pursuant to very broad grounds of discretion.

We note that the Commission has decided to dispense with proposed clause 4, thereby restoring the original procedure for variation and alleviating this concern. Momentum Energy appreciates the Commission taking our feedback into consideration and has no further comments on this issue.

## 1B. Dilution of existing rights with respect to a revocation of licence

In our Original Response, we submitted that the new revocation clause in the Template Electricity Licence significantly diluted our existing rights because:

1. there would be an increased number of events which entitle the Commission to issue a notice of revocation, and therefore Momentum Energy may receive a revocation notice for a broader range of issues than we would have under our current licence;
2. the notice period for advising of the revocation has been reduced in certain circumstances, and therefore Momentum Energy may receive less notice than we would have under our current licence, including where the Commission discretionarily decides to expediate the matter; and
3. there is no provision entitling Momentum Energy to avoid revocation for subsequently remedying the breach of non-compliance, which we are afforded under our current licence.

With respect to each of these issues, Momentum Energy makes the following comments:

1. We note that the Commission is proposing a very different revocation clause to the clause originally proposed. In response to feedback on proposed clause 6.2's broader list of events that would entitle the Commission to issue a notice of revocation, the Commission has highlighted that the 'underlying legislative framework' actually affords it a right to revoke a licence at its discretion with consideration for its statutory objectives, general principles and limits of administrative decision-making. The Commission concluded that the legislation was silent on whether a licence could fetter the discretion afforded to it by the legislation, and has now dispensed with proposed clause 6.2 and retained only the proposed broad revocation right in clause 6.1:

*"The Commission may revoke this Licence:*

- (i) at any time at the request of, or with the consent of, the Licensee; or*
- (ii) in accordance with the Act."*

We note that the Commission has conceded this would constitute a 'material change' to existing licences, and has offered to publish guidance and pointed to its recently published Compliance and Enforcement Policy to alleviate concerns for revocation due to non-material breaches of licence. Momentum Energy submits that alleviation of this concern would be achieved by including this condition in the Template Electricity Licence itself. Clause 3.4 of our current licence affords the Commission the discretion granted under the legislation on the condition Momentum Energy had acted in clear and material contravention of the licence:

*"The Commission may at any time give notice of revocation in accordance with clauses 3.5 and 3.6 to the Licensee if:*

- (a) the Licensee does not comply with an enforcement order or an undertaking; and*
- (b) the Commission is satisfied that revocation of this licence is necessary having regard to the objectives."*

Momentum Energy submits that this 'material change' to the Template Electricity Licence should include a condition that the licensee has materially contravened the licence.

2. We note that Momentum Energy's feedback with respect to proposed clause 6.3(ii)(1) was seemingly not considered by the Commission in its revised Template Electricity Licence. This proposed clause remains, and the notice period for advising of the revocation has been

reduced in certain circumstances. Although 20 business days remains the default period, 5 business days' notice may be given in cases of various breaches or a failure to comply with an enforcement action and also "where in the Commission's opinion it is appropriate that the Licence be revoked in a shorter time frame having regard to its Objectives and the events or circumstances that gave rise to the notice being issued".

Momentum Energy submits that this proposed clause introduces a discretionary power for the Commission to reduce the notice period of revocation, and therefore dilutes Momentum Energy's existing rights under our current licence.

3. With respect to proposed clause 6.4, the Commission acknowledged feedback that this clause introduced a right of absolute discretion as to whether the Commission withdrew an issued notice of revocation. However, the Commission reasoned that it already has absolute discretion to withdraw a notice by explaining that proposed clause 6.4 was simply removing the bolded words below from some current older licences:

*"The Commission may at its discretion and with written notice to the Licensee, withdraw a notice issued under clause 22.3 at any time prior to the revocation date specified in the notice if the Commission is satisfied that the Licensee has complied with the relevant final enforcement order or undertaking, rectified the breach or complied with the relevant decision, direction, determination or arrangement (as the case may be) or if the Commission considers that is otherwise appropriate to withdraw the notice."*

Momentum Energy submits that our current licence does not resemble the above clause. Instead, clause 3.7 states:

*"The term of this licence does not end at the expiration of the period of a notice of revocation given under clause 3.4 if, before the expiration, the Licensee complies with the enforcement order or the undertaking (as the case may be)."*

Therefore, even though the Commission has dispensed with proposed clause 6.4, Momentum Energy submits that there is still no provision entitling us to a rectification period, in which revocation can be avoided by remedying the non-compliance. This would be a significant dilution of our rights under our current licence.

## 2. Proposed variation of Momentum gas retail licence

In our Original Response, we submitted the same concern that we raised about the Template Electricity Licence at 1B of this letter with respect to proposed clause 4 of the Template Gas Retail Licence For Consultation ("**Template Gas Licence**"). We note that the Commission has also decided to dispense with proposed clause 4 of the Template Gas Licence, thereby restoring the original procedure for variation and alleviating this concern. Momentum Energy appreciates the Commission taking our feedback into consideration and has no further comments on this issue.

### Concluding remarks

Momentum Energy thanks the Commission for revising the Template Electricity Licence and the Template Gas Licence with consideration for the concerns we raised at 1A and 2 of our Original



Response. However, Momentum Energy submits that the concerns we raised at 1B of our Original Response have not been adequately considered. Accordingly, Momentum Energy does not offer our consent to these variations.

Momentum Energy respectfully asks that the Commission takes these submissions into account and considers alternative variations which may achieve the Commission's goals of improving consistency in licence terms but without diluting the rights of existing licence holders.

Please feel free to contact me further at [REDACTED] should you wish to discuss further.

Yours sincerely,

[REDACTED]

General Counsel  
Momentum Energy

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e [REDACTED]

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energy