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21 January 2020

Ms Kate Symons
Chairperson
Essential Services Commission
Level 37, 2 Lonsdale St
Melbourne VIC 3000

Submitted electronically

Dear Ms Symons,

Re: Ensuring energy contracts are clear and fair

Red Energy and Lumo Energy (Red and Lumo) welcome the opportunity to respond to the Essential Services Commission's (the Commission) draft decision on ensuring energy contracts are clear and fair (the draft decision).

We provide this submission on the basis that the Commission is genuinely committed to considering industry views and to understand the likely impact of its proposals as part of this consultation, rather than mechanically implementing the recommendations of the Thwaites review. This is because we have not seen any compelling evidence in the draft decision, nor in the market landscape, which warrants implementation of any further regulatory measures. In our view, the combination of the 1 July 2019 regulations, the Victorian Default Offer (VDO) alongside the payment difficulties framework address the perceived problems that the residual Thwaites recommendations seek to address so we believe no further interventions are required.

We are concerned that Victorian consumers, in aggregate, will be worse off under the proposed measures. Both in terms of higher prices than would otherwise be the case and through a further diminution of competition. This is in direct opposition to the objectives outlined in the *Essential Services Commission Act* to which the Commission is obliged to administer. It is increasingly difficult to see how retailers might be able to compete and differentiate themselves from each other in the Victorian energy market. The Commission makes frequent reference to the need for a consistent consumer experience, which relates to price and contract terms. Competition is a factor that the Commission must assess under its legislative requirements, and the draft decision makes little attempt to consider it and the consequential impact on a retailer's incentives to develop innovative products for consumers.

In the absence of clear quantification of the residual problems that the draft decision is trying to address, considering that the impacts of the 1 July 2019 measures combined with the payment difficulties framework reshaping the Victorian market, we strongly encourage the Commission to pause and undertake further analysis based on empirical and relevant rather than theoretical evidence.

We appreciate that the Commission remains concerned about some specific consumer segments. However, the draft decision does not represent a proportionate response. Inherent in the draft decisions are seemingly unintended consequences that will unfairly penalise the significant majority of consumers who participate in the competitive market. The draft decision also appears to contradict the intent of many of the 1 July 2019 measures, which sought to encourage consumers to participate and consider their options in a competitive market.

In our view, the existing protections for consumers (which also include the payment difficulties framework) offer sufficient protection for the small group of consumers who have historically found it difficult to engage in the market. If the Commission has empirical evidence that contradicts this, then it should be made publicly available. We are concerned if the Commission is basing this draft decision on hearsay rather than mass consumer feedback. It is far too soon to conclude that this segment of consumers will remain disengaged and not take action in response to prompts such as best offer calculations on bills and price change letters.

Red and Lumo firmly believe that implementation of this draft decision as proposed by the Commission will have a detrimental outcome for Victorian consumers. We outline our specific concerns below and propose potential changes to lessen the impacts to the competitive market and on consumer outcomes. We are concerned that the Commission will implement the changes as proposed in the draft decision, irrespective of the consequences (unintended or otherwise).

Back billing rules

Red and Lumo acknowledge that it is unfair and unreasonable for consumers to bear the cost where retailers have clearly made an error in calculating their bills. Tighter controls around back billing will incentivise retailers to develop and maintain accurate and compliant billing systems.

Our concern is not with the shorter timeframe per se. Rather, this is a rushed decision by the Commission that does not take into account the complexities which arise that cause this issue. Adjustments to bills - following estimations or cross metering - may be entirely justified in some instances. Furthermore, regulatory instruments in Victoria clearly place the onus on consumers to provide access to meters but determining whether a consumer is at fault is challenging and requires a more precise definition than currently exists.

Market procedures specify 99 Estimation/Substitution Reason Codes for electricity and 18 for gas, which illustrates the complexity involved. It can be very difficult to establish fault in the event of an access issue that leads to an estimated or adjusted bill. For example, there may be some dispute about who is responsible for not providing access to a meter if a consumer does not own the premises, or access is impossible due to an aggressive animal or a locked gate. Extreme weather might be another reason for a failed attempt by the network to read a meter; it is not the consumer's fault but it may be entirely legitimate for a meter reader not to perform an actual read in these circumstances.

The self meter read rule change from 2019 will assist to some degree but is still in its early days, particularly as consumer awareness remains low. The Commission should also consider mandating monthly billing as the default for all contracts or allow retailers to transition their customers by notice (rather than obtaining EIC), which could assist with the early identification of problems.

Another relevant issue for bill adjustment is that of crossed meters. This is where a network installs a meter but assigns an incorrect address, customer details, NMI or MIRN. It can be very difficult and time consuming to identify who is to blame, which consumers and retailers are impacted, and to then rectify the issue. Crossed meters are not an uncommon occurrence; AEMO has published a process to rectify crossed meters for gas (although no such process exists for electricity). We have recently been involved in one cross metering situation where of the 39 units, only 4 were correctly allocated in the market systems.

The Commission should also be aware of revisions to bills following retrospective transfers (for example, where a retailer has won a customer in error). The Commission's Electricity Customer Transfer Code enables a retrospective transfer to be submitted up to 130 business days before the nomination date, while for gas, the AEMO Retail Market Procedures limits the period for a retrospective transfer to 118 business days. At a minimum, it would be ideal to limit the retrospective timeframe for electricity to 118 business days to align with gas. A better outcome would be to limit a retrospective transfer to 20 business days across the board.

We strongly encourage the Commission to consider and quantify the extent of these issues further before proceeding with this change. Otherwise retailers are exposed to costs that they cannot recover directly from an individual customer due to no fault of its own, but instead from all consumers as part of their operating costs (including an additional allowance in the VDO).

Our strong preference is that the new restrictions also apply to networks (particularly gas networks, because of the absence of remotely read meters). They should face the same incentives as retailers to improve their practices - e.g. to avoid cross metering errors as far as possible - when they also have direct influence on consumers' bills (most notably through their meter reading activities). Networks should either be subject to the same timeframes for adjusting bills or be prevented from recovering costs from retailers. Especially where retailers are prevented through regulation from recovering those costs from consumers; this restriction currently applies under the National Electricity Rules and National Gas Rules. We understand the Commission will look into this when it opens up the Distribution Codes in 2020.

In the meantime, the Commission's draft amendments to the Energy Retail Code (ERC) continue to focus on acts or omissions of the customer as a basis for billing for periods beyond the prescribed timeframe. Given the breadth of reasons that undercharging can occur that fall outside retailers' control, our preference is for further amendments to the ERC. Such amendments should clearly state that retailers are unable to recover undercharged amounts for the 4 month period before the customer is

notified where the undercharging occurs as a result of an act or omission of the retailer. We therefore propose inserting before clause 30(2)(a) the following:

> (aa) limit the amount to be recovered to the amount undercharged in the 4 months before the date the customer is notified of the undercharging, if the amount was undercharged as a result of the retailer's fault or omission; and

and further amending clause 30(2)(a) as follows:

> (a) unless the amount was undercharged as a result of subclause (aa) or the small customer's fault or unlawful act or omission, limit the amount to be recovered to the amount undercharged in the 9 months before the date the customer is notified of the undercharging; and

Finally, even if the Commission chooses to adopt the proposed approach above, this draft decision will require changes to existing processes and systems. As a result, we recommend the Commission delay commencement until 1 January 2021. At the same time, the Commission should confirm that retailers are able to recover any unbilled consumption that have been outstanding for 9 months or fewer immediately prior to commencement and that the 4 month allowable period starts from the commencement date. This is consistent with the Commission's terms of reference.

Presentation of offers

The decision to retain the VDO as a reference price for all electricity offers is appropriate. We also agree that it is extremely difficult to develop a simple and useful reference price for gas and support the Commission's decision not to develop a reference price for gas.

The Commission proposes to align the ERC with the Default Market Offer (DMO) Code. However, it remains unclear whether consumers actually find the volume and type of information that the DMO Code mandates helpful when they assess retail offers. The Australian Competition and Consumer Commission (ACCC) and the Australian Energy Regulator are undertaking ongoing analysis to assess whether the DMO Code is meeting its objective to help consumers participate in the market with confidence.

We note that the DMO Code under formal review, with further amendments likely ahead of 1 July 2020. Additionally, the Department of the Environment and Energy has committed to a more comprehensive review to assess its effectiveness.[1] Within this context, we strongly encourage the Commission to engage in this process and monitor how these reviews proceed. Given the Order in Council does not fall away until there is an equivalent in the ERC, our preference is that the Commission retain the current provisions in the Order, which currently sit alongside our existing general market conduct provisions under Australian Consumer Law until this uncertainty about the DMO Code is resolved.

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[1] See Explanatory Statement for the *Competition and Consumer (Industry Code - Electricity Retail) Regulations 2019*

Should the Commission decide to proceed with the draft proposal, we request that it clarify - through guidance or precise drafting - when retailers must present this information and how it interacts with the clear advice entitlement. Commission staff have explained that they consider that the 'DMO' provisions will apply prior to engagement with a consumer, then the clear advice entitlement will apply, and post-sign up a customer will receive best offer notifications. This clarity must be provided in the ERC to ensure that any inconsistencies between the Victorian arrangement and what applies under the DMO Code are clearly articulated and understood. For example, the draft guide refers to 'advertisement, publication or offer', while draft provisions use an existing definition of 'energy marketing activities' and the terms 'advertisement', 'publication' and 'offer to supply'. The Commission's draft guideline then refers to 'offers over the phone' as an example of a communication medium that must include the prescribed information.

Clear advice discussions are more personalised and retailers draw on actual consumption profiles rather than the benchmarks and other general information that the DMO Code mandates. We don't anticipate that a consumer would find all the prescribed information useful in these discussions, nor should it be a regulatory obligation to include them. In our view, compliance with the clear advice entitlement should be sufficient to satisfy the policy intent and therefore, the proposed provision - that allows for an alternative requirement for the presentation of offers, 64G - is redundant and can be deleted.

Mirroring ACL provisions

The Commission is aware that retailers (and their employees and third party contractors) are already required to comply with the Australian Consumer Law (ACL), including those provisions referred to in the draft decision. Accordingly, retailers are already subject to enforcement action by the ACCC or Consumer Affairs Victoria for engaging in misleading or deceptive conduct or making false or misleading representations.

The Commission does not provide any explanation for its proposal and we believe the existing regulatory framework offers sufficient protection to consumers for misleading and deceptive conduct and false representations, with significant financial penalties to those who do fall foul of the ACL.

Additionally, mirroring provisions of the ACL in the ERC would create significant risks and uncertainty to retailers as to how the ACL would be practically applied. Specifically, retailers would be, unnecessarily, subject to multiple penalty regimes, multiple interpretations of the same provisions by different regulators. In short, the proposal creates the prospect of inconsistent interpretations by State and Commonwealth regulatory agencies of identical regulatory prohibitions, which would, in turn, place retailers in the invidious position of having to choose between complying with either State or Federal legislation. Furthermore, the Commission does not provide sufficient clarity in the draft decision regarding how it intends to interpret the mirrored ACL provisions, investigate or enforce compliance with those provisions in practice.

The ACCC and State-based fair trading agencies, such as Consumer Affairs Victoria, currently participate in various forums to support consistent interpretation and enforcement of the ACL, as well as to ensure that ACL issues are referred to the appropriate agency. These forums include the Compliance and Dispute Resolution Advisory Committee which seeks to ensure that compliance and dispute resolution across Australia is coordinated, efficient, responsive and where appropriate, consistently applied; the Consumer Affairs Australia New Zealand (CAANZ) forum which is Australia's principal national forum for government policy, enforcement cooperation and coordination in respect of consumer affairs issues; and the Consumer Affairs Forum which considers fair trading matters of national significance and occurs at a Ministerial level. If the Commission insists on proceeding with mirroring certain provisions of the ACL, we view it as a necessity that the Commission also seeks to participate and engage in these forums.

Fixing market contract prices

Red and Lumo assert that consumers in aggregate benefit when retailers retain pricing flexibility, subject to some controls (such as advance notice of price changes). We have consistently argued that mandating fixed prices for an extended period for all contracts will increase average prices above what they would otherwise be. The Commission's academic advisers (Associate Professor Byrne and Dr Leslie) also acknowledge this effect, with the precise extent of this premium depending on the expected volatility of movements in significant cost items across the period.[2]

The Commission recognises that the premium could be significant. It notes that consumers on fixed price contracts may pay $22 to $100 a year more than other consumers and that this premium could be even higher if prices were fixed for all consumers.[3] Byrne and Leslie suggest that fixed prices might reduce search costs but also refer to other potentially harmful effects. The Commission makes no attempt to quantify these various effects or to assess whether there is a net benefit to Victorian consumers. We question whether this is consistent with the Commission's legislative requirements.

We do not agree with the Commission that prescribing the date on which prices can change will reduce the premium that retailers would require to manage this volatility. Retailers remain exposed to movements in wholesale costs across the year - in what is an increasingly volatile market - and to government actions and regulatory determinations. Examples of the latter are the Clean Energy Regulator's determination of retailer liabilities under the Large-scale Renewable Energy Target and Small-scale Renewable Energy Scheme, neither of which occur on 1 January, and the costs of the Reliability and Emergency Reserve Trader (RERT) scheme.

We recognise that *some* consumers value certainty and as the Commission notes, some fixed price products exist that cater to their needs. This includes products with a fixed date on which prices change or where prices are held constant for some defined period after sign up. However, the Commission

[2] A/Prof David Byrne and Dr Gordon Leslie, *Market Design Considerations in Implementing Recommendation 4A*
[3] ibid

hasn't established that the benefits of certainty for this group of consumers outweighs the cost to those who don't value certainty to the same degree.

As previously argued, the VDO remains an option for consumers who want a fixed price for a defined period. The Commission could consider strengthening the clear advice entitlement to require retailers to notify consumers they can access the VDO (or indeed any other fixed price product that they might voluntarily bring to market). Retailers must include information about the VDO on their bills so awareness will be high and consumers can easily obtain further information about what it is. It appears that the Commission hasn't considered this suggestion, with little to no commentary on how it would not meet the intent of the terms of reference. As the VDO was specifically developed for consumers who do not regularly participate in the market and the Commission's frequently refers to it as a fair price, it seems a logical option. Furthermore, in a competitive market, retailers will continue to offer fixed price market retail contracts if this is a product that their customers demand.

The Commission's arguments for aligning with the VDO date (i.e. 1 January) are not compelling. We disagree that a common date would create an 'annual focal point' for all consumers to engage with the market. We expect individual notifications such as bills and price change letters - that now include best offer calculations - are more likely to prompt an individual consumer to consider their options. Our understanding was that the various prescribed prompts were designed for consumers who are not highly engaged. The Commission's final decision (*Building trust through new customer entitlements in the retail energy market*) contains a detailed discussion of how it drew on behavioural insights, consumer testing and extensive stakeholder consultation to develop effective notifications in line with its 'nudge based approach', such as the end of benefit and price change letters.[4] By implementing this measure, the Commission is disregarding its own analysis, consumer testing and stakeholder consultation done for the best offer calculation. It appears that the Commission doesn't believe that the best offer messages are effective.

Furthermore, retailers will be able to advise their customers that prices will change under the clear advice entitlement but not the materiality of that change or how it relates to the VDO, which the Commission publishes no later than 25 November of each year.

We repeat our view that consumers in aggregate benefit when retailers retain pricing flexibility, subject to some controls (such as advance notice of price changes). However, if the Commission chooses to proceed with this proposal, we recommend that it clarify the definition of a price change to exclude situations where a consumer is assigned to a different network tariff. This could occur when a distribution business changes its network assignment policy or following a consumer's specific action, such as the installation of solar or other equipment that leads to reassignment under an existing policy. Alternatively, the Commission could recommend that the Victorian Government extends the AMI Tariffs

[4] Essential Services Commission (2018), *Final Decision: Building trust through new customer entitlements in the retail energy market,* page 26

Order in Council to prevent consumers being placed on more complex tariffs until the date that the price change occurs.

Allowable period for price changes

We also recommend that the Commission allow for price changes within a window, such as within a month of the VDO date, rather than on a single day. This would allow retailers to better manage the operational aspects of price changes - such as the development of pricing strategies following release of the VDO, incorporate new prices into billing systems, and management of prescribed and other customer communications.

Our primary concern is our ability to provide compliant price change messages to our customers (in terms of content and timeframes), and adequate levels of support through appropriate resourcing and training for our call centres. This can be challenging but will become even more difficult if the Commission mandates that all retailers must change all prices on a single day.

Another reason to provide retailers with a window relates to the proposal to shift the VDO date to 1 July, which is the same date that revised annual network tariffs take effect and is therefore the most common date for price changes in other jurisdictions.

Non traditional pricing structures

Red and Lumo are also concerned about the impact of the Commission's draft decision on product innovation. The Commission provides examples of potentially allowable products that track wholesale price changes or respond to critical peak pricing. It claims that it does not want to inhibit such products from emerging, but the sheer presence of a regulatory approval process for these products, including the high degree of uncertainty about the regulatory framework in which they will apply, will stifle their development. Retailers will not be willing to risk use resources - to undertake pilots or survey consumer sentiment, for example - in this environment. This process seems also to prevent the trial and error of new products, even where consumers are willing and informed participants and the process is contrary to how retailers currently introduce new products.

The draft guideline offers little insight on important matters such as the information the Commission would require, what factors it would consider, whether it would consult with the consumers involved or seek information about what discussions a retailer has had with its customers, and the timeframe for a decision. Rather, it uses ambiguous terms such as 'all relevant information', 'sufficient time for the application to be assessed', and that it will process applications in a 'timely manner'.[5] We expect it would be difficult for retailers to 'demonstrate' to the Commission what the benefits are for consumers ahead of the introduction of the product in anything other than theoretical terms and it isn't clear that this would be sufficient under this process.

[5] Appendix D: *Draft guideline – applying for an exemption to comply with clause 46AA of the Energy Retail Code*

End of benefit

Red and Lumo have always maintained conditional discounts over the course of a contract as we believe this is a more positive customer experience. Therefore, we are not affected by the Commission's draft proposal.

However, our primary concern is the different approach that the Commission is proposing for electricity and gas at the end of a contract. The decision to transition electricity consumers to the VDO is appropriate and in line with the status quo. It is a default product with prescribed terms and conditions.

On the other hand, the proposal to transition gas consumers to the 'best offer' fundamentally erodes the concept of explicit informed consent and undermines consumers' choices. Red and Lumo have significant concerns about this change and do not support its introduction. The best offer is not a standard product across all retailers and may contain features that do not align with a specific consumer's preferences. For example, it could prescribe the frequency of billing, involve a conditional discount or payments via direct debit. Consumers who have chosen not to respond to a best offer notice on their bills for whatever reason or who have enquired about the best offer but decided to remain on their current offer will automatically transition to this product. Aside from the fact that it disregards the requirement for explicit informed consent, it undermines a customers control over their circumstances and will create significant distrust between retailers and their customers.

The Commission note in the draft decision that there are legislative changes required in order to implement this approach. To date, the Commission has been unable to articulate what these changes might be, and how they will operate in practice. Therefore, on this account and in relation to the potential erosion of consumer protections as a result, we strongly urge the Commission to retain the current gas arrangements. Whereby consumers would transition to a standing offer at the end of a gas contract and to rely on recently regulated prompts to encourage informed market participation.

Regulating conditional discounts

The Commission's discussion of conditional discounts in the draft decision illustrates that it views them very negatively. It refers to the proportion of consumers who don't meet the conditions to receive a discount, and then estimates the cost of that failure. It is not clear that this calculation reflects the lower rates that these consumers pay on other bills when they do meet conditions. The removal of conditional discounts across all products means that rates will tend to be higher on average across the entire year as a consequence.

Furthermore, there is no basis for expecting that these consumers will fail to meet those conditions in the future. If they did, they could move to another product and/or could receive assistance under the payment difficulties framework if it was due to their financial hardship.

More fundamentally, retail offers with conditional discounts are mutually beneficial as they encourage timely payment, which allows retailers to better manage their cash flows and credit risk, while consumers benefit from lower rates. We think there is a place for them in a competitive market,

provided consumers understand what they are signing up to. We have a strong commercial incentive to ensure that all consumers understand the terms and conditions of their contracts and the clear advice entitlement now augments this. The Commission has evidenced that the large majority of consumers are responding to the incentive, paying their bills on time and receiving the benefit.

The Commission has missed the mark in terms of the proposed cap. The draft decision states that it aims for it to be 'simple, transparent and applicable across the market', however, the complicated methodology proposed has little relevance to the Victorian retail energy market. The comparison with water is not relevant in any way as water businesses are regulated monopolies that are not exposed to a wholesale market or to the same prudential and credit support arrangements as energy retailers. The Commission's proposed cap reduces the potential benefits of a conditional discount product available to a well informed and engaged consumer, while reflecting the 'reasonable' costs for some retailers but not others.

The Commission should follow the lead of the Australian Energy Market Commission (AEMC), implementing a nationally consistent approach. The AEMC is adopting a principles based approach, allowing retailers to establish what is reasonable to them. The Commission could decide to request the retailer to justify what is reasonable, considering its dual function as rule maker and rule enforcer. Red and Lumo urge the Commission to adopt a nationally consistent approach, consistent with their legislative objectives.

As a minor point, whatever the Commission decides, we recommend the Commission round up the percentage cap to the nearest whole number to enable retailers to provide a simple message to consumers.

Customers facing payment difficulties

The Commission justifies its draft decision with reference to ACCC findings that hardship consumers are more likely to miss the conditions to receive a discount. We note that this data is from 2016-17 and predates the payment difficulties framework. The Commission explains that it wants to extend what it considers best practice to all consumers facing payment difficulties, i.e. retailers are obligated to honour pay-on-time discounts for consumers on tailored assistance.

We question whether this remains a significant problem. In our view, this measure is redundant in the context of the payment difficulties framework, which prescribes minimum protections but also gives retailers some flexibility to offer assistance in a way that best aligns with their customers' specific needs and preferences.

A prudent retailer will attempt to make contact with a consumer who fails to meet the conditions to obtain a discount to better understand their circumstances and offer an appropriate form of assistance. This conversation would involve a discussion of the most suitable product for them. It is highly likely that many retailers already move consumers facing payment difficulties to alternatives products. They might also maintain a discount or offer a discretionary credit on some occasions.

However, by mandating a specific form of assistance, the Commission will discourage retailers from offering other discretionary benefits that the customer might value more highly. This is another area where the Commission fails to consider the consequences of its draft decision.

Reference to VDO on bills

Red and Lumo consider that the Commission should amend the wording prescribed in the ERC to be as follows:

For information about how to access the Victorian default offer please call XX.

The ERC could allow retailers flexibility as to whether they choose to also provide information on the VDO electronically or not. Retailers will make their own assessments as to their risk appetite in providing clear advice and the suitability of the VDO for a customer.

Should the Commission not take up the suggestion above and mandate the prescribed wording relating to the VDO from the draft decision, it will require Red and Lumo (and presumably other retailers) to reconfigure their bills.

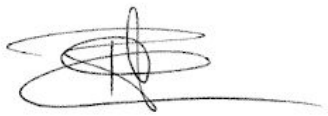
As previously communicated with the Commission, redesigning of bills takes time and we do not expect to be able to do this before 1 July 2020. Therefore, we recommend the Commission amend the wording and delay commencement until 1 January 2021. This is appropriate as the provisions in the current Order in Council under the *Electricity Act 2000* will continue to apply until then.

About Red and Lumo

Red and Lumo are 100% Australian owned subsidiaries of Snowy Hydro Limited. Collectively, we retail gas and electricity in Victoria, South Australia, New South Wales and Queensland, and electricity in the ACT to over 1 million customers.

Red and Lumo thank the Commission for the opportunity to respond to this draft decision. Should you have any further enquiries regarding this submission, please call Geoff Hargreaves, Regulatory Manager on [redacted]

Yours sincerely



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