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8 November 2017

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

Submitted electronically

Dear Dr Ben-David,

**Re: Draft guidance note - Payment difficulty and disconnection**

Red Energy (Red) and Lumo Energy (Lumo) welcome the opportunity to respond to the Essential Services Commission (the Commission) on the Payment difficulty and disconnection Draft guidance note (the draft guidance note).

As the Commission is aware, Red and Lumo have actively participated in the development of the Payment Difficulty Framework (PDF), beginning in 2014 with the Hardship Review and continuing until the Final Decision encompassing version 12 of the Energy Retail Code (ERC) which was released in October this year. Throughout this process we have continually highlighted the complexities of the PDF, in particular how it will be applied to the varied experiences of customers in payment difficulties. For this reason, the Commission's decision to create a principles based code is welcomed. As stated many times in recent years, payment difficulty is not binary, that is a customer is not either in difficulty or out of it. Noting this, the principles codified in version 12 of the ERC commendably focus on objectives, rather than concerning itself with the specific actions retailers must undertake to comply.

As noted by the Chairperson in a recent letter to stakeholders "*the challenge of dealing with payment difficulty means that the most appropriate regulatory response is for the regulator to establish the overall framework of objectives and minimum standards. How that framework is operationalised, and how it is applied in individual circumstances, must be a matter for retailers to determine. Our guidance can assist in the exercise of judgement, but it will not replace it.*" We support this view, however do not believe the draft guidance note achieves this purpose.

**The purpose of the guidance note**

In a principles based framework, it is critical for licensees to be aware of any specific factors the Commission considers are essential to achieving compliance. Additionally, as all stakeholders who have participated in the development of the PDF are aware, several elements of the framework have raised a number of questions as to both their intent and their intended practical operation. These types of issues are essential to be included in the guidance note.

The draft guidance note goes significantly beyond the advice of the Chairperson, and the notion of essential guidance detailed above. The draft guidance note reads as a how-to guide for compliance, rather than a guide to aid compliance. This is concerning. Despite the Commission's continued assurances that the document is not intended to be

prescriptive and that retailers may decide on their own method of achieving compliance, the draft guidance note presents itself as far more than an “approach to promoting and enforcing compliance” and “what the Commission considers to be better practices that retailers may adopt”.

At the stakeholder forum held on 24 October 2017, Commission staff mentioned that although the purpose and status of the draft guidance note contained in section 1.1 was necessarily legalistic, its actual purpose was to assist stakeholders understand what is a fundamentally changed framework. We strongly disagree with this concept. We consider that the final decision of the PDF performed this function, with the implementation of ERC version 12 signalling the beginning of ‘business as usual’ where licensees are responsible for ensuring their practices adhere to their obligations under the Electricity and Gas Industry Acts, including the amendments arising out of the PDF.

### **Outcomes of the draft guidance note**

By detailing almost every element of the PDF, it is not unreasonable to assume the guidance note is intended to be a plain english re-creation of the ERC. The draft guidance note uses terms such as ‘must’ and ‘we expect’, and in the context of a plain english re-creation, it makes it unclear how this is mere guidance that a retailer may or may not act upon.

A further outcome, and what is more concerning, is the fact that genuine and important guidance for what are complex issues are lost in the length of the document. The draft guidance is 72 pages long. The vast majority of these are used to redraft sections of the ERC that are not unclear. As an example, section 4.4.6 of the guidance note uses 48 words to say exactly what is already written in the ERC (and is again recreated in the guidance note on page 25). Conversely, section 4.4.5 provides limited guidance as to what is meant by “assisting the customer to propose a payment arrangement which limits this increase” - an important concept. We discuss good guidance in more detail below.

We strongly recommend the Commission rethinks how they can provide guidance in an effective manner. We provide a list of sections of the document we consider to be superfluous in Appendix A attached.

### **The structure of the draft guidance note**

Should the Commission make a decision to retain the current format of the guidance note, we consider the structure needs to be amended to make it more user friendly. The draft guidance note is not user friendly, and the reader needs to know exactly what is and isn’t discussed in each section in order to use it effectively. This issue is highlighted by section 4.6.3 which suggests that retailers should work with customers towards the shortest payment arrangement that the retailer believes is affordable. Further guidance on this same provision is then provided in section 9.2.8.

In practice, this is not how retail businesses ensure compliance with their obligations. The ERC is first consulted, with guidance only sought where clarity is required. Clause 79(1)b doesn’t differ fundamentally when read in conjunction with section 4.6.3 of the guidance note, but is substantially enriched when section 9.2.8 is added. Without an in depth knowledge of all elements of the ERC, and each section of the guidance note, this nuance would be lost.

We strongly recommend that when the plain english re-draft also relates to guidance provided in another section of the guidance note, the link is specifically highlighted in each section.

## Examples of good guidance

Despite the above issues, Red and Lumo consider when the draft guidance note has been drafted in line with its stated purpose, genuinely useful assistance is provided. This information provides nuance, highlights examples of good practice, provides suggestions that might lead to better customer outcomes, and advises how the Commission might determine compliance with a particular clause.

Excellent guidance is provided in parts of section 8, 9 and 10. This advice provides nuance to the ERC, detailing additional steps that should be considered when dealing with undoubtedly complex topics such as fair and reasonable treatment and repeated late payers. Unfortunately, the positioning of this guidance amongst the other less useful advice results in it being 'hidden' on page 62 of the draft guidance note.

As a principle, we suggest guidance provided should be sufficiently detailed so as the intent of the obligation is clear. This allows the Commission to present a holistic view of what might be expected, and include practical examples. An example of this notion is provided in sections 4.14.4 to 4.14.11. These sections, in particular 4.14.8, highlight exactly how the Commission considers a licensee could comply with the highly subjective term 'reasonably'. We consider that this section of the draft guidance note the most useful, as it provides the correct level of guidance to licences regarding compliance with the complex issues being discussed. On this basis, we strongly urge the Commission to redraft the draft guidance note, using this section as the template.

## Increasing obligations from the ERC

The draft guidance note appears to create additional compliance obligations from the ERC, despite the statement to the contrary in section 1.1.2.

This is no more evident than the guidance on best endeavours contained in section 9.8. While the level of detail provided is welcome, the guidance provided in the section irrefutably appears to create compliance obligations on the retailer. The guidance is extremely clear - retailers 'must' undertake a number of clear steps to constitute best endeavours. The section goes into great detail what this might look like, even providing the distance from Melbourne in which a home visit must be completed.

We understand the importance of best endeavours in the context of the PDF, so it is not unsurprising that the Commission has taken the approach of strictly defining what must be undertaken to achieve it. But this is not guidance. Clear, unambiguous compliance obligations should have been included in the ERC.

Red and Lumo consider section 9.8 could have been drafted in a manner that allowed a retailer to utilise its judgement in achieving compliance. Statements suggesting that the Commission considers best endeavours to include multiple contact attempts, using multiple methods preferred by the customer, and ensuring that attempts are made even if common contact methods are impossible. This would allow retailers to implement processes and procedures that suit their customers, while retaining the high standards of best endeavours.

We will provide a list of sections of the guidance note we consider impose additional compliance obligations on retailers in Appendix A. We suggest the Commission reconsider how the objectives of the clause can be met, without limiting retailer innovation.

### **Benefits of amending the draft guidance note**

Finally, we would like to reiterate that we consider the benefits of refocusing the draft guidance note significantly outweigh the negatives. As noted above, Chapter 5 of the Final Decision clearly and succinctly provides advice to both licensees and other stakeholders the nature of the changes resulting from the PDF. The purpose of the guidance note is not change management - if stakeholders are unclear about the operation of Part 3, the Final Decision will continue to be available to them.

Refocusing the guidance also allows the Commission to give greater weight to the very helpful guidance already provided. A number of sections would be benefited by greater detail to capture the conversations and issues raised throughout the long PDF consultation. We will highlight these sections in the attached Appendix A.

### **About Red and Lumo**

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

Red and Lumo thank the Commission for the opportunity to respond to this consultation. Should you have any further enquiries regarding this submission, please call Ben Barnes, Regulatory Manager on 0404 819 143.

Yours sincerely

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

### **Ramy Soussou**

General Manager Regulatory Affairs & Stakeholder Relations  
**Red Energy Pty Ltd**  
**Lumo Energy Australia Pty Ltd**

## Appendix 1

### Unnecessary clauses - should be deleted as no guidance given

2.2.1	3.5.6	4.7.7	4.10.6	4.13.7	7.2.1	8.1.14
2.2.2	4.1.2	4.8.6	4.11.1	4.14.3	7.3.1	
2.3.1	4.2.1	4.8.8	4.11.3	5.1.1	7.4.1	
2.4.1	4.2.2	4.8.9	4.12.1	5.1.2	7.5.1	
2.5.1	4.3.2	4.9.1	4.12.2	5.2.1	7.6.1	
2.5.2	4.4.2	4.9.2	4.12.4	5.2.3	7.7.1	
2.6.1	4.4.4	4.9.3	4.12.5	5.2.4	7.7.2	
2.6.2	4.4.6	4.9.4	4.12.7	6.1.1	7.7.3	
2.6.3	4.6.2	4.10.1	4.12.11	6.2.2	7.9.1	
2.6.5	4.6.6	4.10.2	4.12.12	6.2.3	7.10.1	
3.3.1	4.6.8	4.10.3	4.13.1	6.2.7	7.11.1	
3.3.3	4.6.9	4.10.4	4.13.4	7.1.1	8.1.6	

### Clauses that create additional obligations

4.3.4	Re-draft to clarify principles of acting fair and reasonably regarding legacy payment plans
4.6.5	
4.10.7	
4.11.5	
4.12.13	
4.12.15	
4.13.2	

### Clauses that we recommend are strengthened or amended

Clause	What needs to change?
3.5.2	Remove SRC obligation to offer bill smoothing in accordance with Clause 23. Unclear rationale behind this.
3.5.5	Redraft to clarify intent. Current drafting appears to suggest a mini-bill for each payment frequency offered.
3.5.7	Can be incorporated into general guidance that a retailer can accept anything proposed by a customer above the minimum entitlements of the PDF.
3.5.9	As in 3.5.7
4.6.11	This is impractical and wasn't considered in cost benefit. This could be an example of best practice.

4.12.6	This is overly prescriptive. The purpose is to end the payment plan with no arrears, irrespective of length - the retailer is best placed to determine how this should happen.
4.13.5	This gives little guidance - how long must a retailer maintain assistance if a customer is not making payments?
4.13.8	Clause is useful, however better suited amongst information in 9.2
4.14.4(c)	This needs greater guidance - for example, a customer promising to pay an amount in 6 months seems unreasonable.
4.14.9	Needs greater clarification - shouldn't simply restate code - what does not facing payment difficulty mean?
5.2.2	This should be fleshed out - what is intended here? Is it expected a full outline of the assistance under Part 3 is included?