Lyn Camilleri
Australian Competition and Consumer Commission
Level 17, Casselden
2 Lonsdale Street
Melbourne Vic 3000
By email: electricitymonitoring@accc.gov.au

03 April 2020

Dear Ms Camilleri,

ACCC draft guidelines on the Prohibiting Energy Market Misconduct Bill

ENGIE Australia & New Zealand (ENGIE) appreciates the opportunity to respond to the Australian Competition and Consumer Commission (ACCC) in response to the draft guidelines on the Prohibiting Energy Market Misconduct Bill ("the Bill").

The ENGIE Group is a global energy operator in the businesses of electricity, natural gas and energy services. In Australia, ENGIE has interests in generation, renewable energy development, and energy services. ENGIE also owns Simply Energy which provides electricity and gas to more than 720,000 retail customer accounts across Victoria, South Australia, New South Wales, Queensland, and Western Australia.

ENGIE welcomes the ACCC providing guidance as to how it will approach its enforcement role in respect of the Bill. The draft guidelines and the examples given are useful and add further detail to that contained in the Bill itself and its accompanying Explanatory Memorandum. There are a few matters which would benefit from further consideration by the ACCC as set out below.

Retail market conduct

The Bill requires obligated parties to adjust prices for "sustained and substantial[1]" reductions in the "underlying cost of procuring electricity". The draft guidelines give examples of what the ACCC considers to be substantial cost reductions: Example 7 references a 4 per cent cost reduction while example 9 references a 5c/KWh reduction. These are useful quantitative reference points. However, it remains less clear what is considered a "sustained" cost reduction. Given that price changes are a forward-looking decision, reasonable people can differ in their

[1] Section153E (1) (b) of the Bill

expectations of how long a cost reduction (for example in wholesale costs) will last for. While the ACCC confirms it will consider individual retailer circumstances, it would be helpful if the ACCC could give further indications of what it considers to be a "sustained" cost reduction in the final guidelines.

Example 10 discusses "reasonable adjustments for fixed rate contracts". The underlying assumptions in this example are a cause for concern. Putting aside whether the Bill is a necessary adjunct to competitive market dynamics in the first place, ENGIE understands that its purpose, in respect of the retail market, is to ensure that retailers adjust their variable price contracts on a timely basis in response to changes in their underlying costs of energy. A fixed price contract is an entirely different type of offering. It is on the face of it, an easily understood value proposition in which the retailer takes on the risk of underlying costs changing during the period of the contract, so that the customer gets the certainty of a fixed price. As with most such contracts, the retailer is taking both upside and downside risk and prices accordingly. There is no reason for the customer to expect a unilateral price reduction if underlying costs decrease, nor is it an indication of a lack of competitive pressure or an act of bad faith for the retailer to choose not to offer a unilateral price reduction. It follows that it is entirely inappropriate for the ACCC to expect that a retailer should do so. The only impact of such an approach would be to ensure such contracts are not offered, even though they might suit some customers, or at best that they are offered at a significant premium to reflect the asymmetric risk the retailer faces as a consequence of the ACCC's proposed approach.

ENGIE requests that the ACCC confirm in the final guidelines that where fixed price contracts of any duration have clearly been entered into voluntarily and knowingly by the customer, a retailer's decision not to unilaterally adjust the price in the event of a sustained and substantial reduction in underlying costs does not represent a breach of the bill.

Example 8 speaks to "reasonable adjustments in line with usual price-setting schedule". In this example, Retailer A experiences a sustained reduction in the underlying cost of procuring electricity, the ACCC posits that as the regular annual price reset for Retailer A is 3 months away, it would be reasonable for Retailer A to incorporate this reduction in its regular schedule of price resets. Further clarity around reasonable adjustments both inline and outside of a retailer's usual price-setting schedule is needed. The draft guidelines appear to add confusion through the aforementioned example 8 and section 2.25. Section 2.25 of the draft guidelines highlights that if a retailer's regular price reset is not "commencing soon", the ACCC would consider it reasonable that the retailer make a specific price adjustment in response to the change in the underlying cost of procuring electricity. The challenge retailers will face is determining firstly, whether a specific change is sustained and substantial, and secondly, whether the change warrants a reasonable adjustment immediately or through the regular schedule of price resets.

Contract market conduct

The Bill prohibits generators (or related parties) from failing to offer contracts or offering contracts in a way that limited or restrictive way if they do so "for the purpose of substantially lessening competition in any electricity market"[2]. Noting that the purpose may be inferred rather than explicit, and given that this section of the Bill only

[2] Section 153F (c) of the Bill

prohibits the specified contract market conduct where it is for the purpose of lessening competition, some insight as to how the ACCC would go about inferring such a purpose remains an important component of any guidelines.

The draft guidelines indicate the ACCC's proposed approach is that corporations will be considered generators if they are required to be registered as a generator under chapter 2 of the NER. It may be useful for clarity if the ACCC indicates in the final guidelines whether it considers energy storage systems such as batteries or pumped hydro to be generators for the purposes of the bill. While current arrangements mean such assets are typically registered as both generators and customers (if they meet the registration size thresholds), this may change in the next year or so, as AEMO has lodged a rule change proposal to create a new classification (ERC0280 pending rule change request) for such assets. So, it would be a simple way to future-proof the guidelines if ACCC made its view clear in the final guidelines.

The key example given to illustrate "related parties" is where a single holding company own shares in two other corporations that participate in the electricity market. It would be useful if the final guidelines could cover other examples of shared ownership, such as whether two corporations both owned by the same government shareholder constitute related parties for the purposes of the Bill. ENGIE notes that there are some constraints in the Bill on the application of divestment orders for government-owned entities, but this does not address the initial question of whether a breach has occurred.

Spot market behaviour

The draft guideline discussed generator bidding behaviour in a number of examples, one of which (example 28) contains some ambiguous drafting that could benefit from review. It includes the phrase "***as required by the NER***, generator A's bids are provided ***well in advance*** of the peak period" (emphasis added). This phrasing risks creating the impression that the ACCC views late bidding or rebidding as inherently inappropriate and in conflict with the rules. This is not in fact the case and such behaviour is an integral part of the NEM wholesale market's flexibility and efficiency. The NER only requires, specifically in Clause 3.8.22A, that participants do not making bids or rebids that are "false, misleading or likely to mislead", such as in example 23, when a generator deliberately delays making a rebid until close to the dispatch interval in question. It would be useful if the phrasing of example 28 was revisited in the final guidelines.

ACCC investigation and enforcement

Paragraph 6.19 states that the ACCC "is more likely to use litigation where the conduct is by a large corporation or results, ***or*** has the potential to result, in competitive harm or substantial consumer or small business detriment" (emphasis added). It would be useful to understand the rationale for this approach in the context of the use of the word "or". ENGIE understands that the ACCC's general "priority factors" include "national conduct by large traders, recognising the potential for greater consumer detriment and the likelihood that conduct of large traders can influence other market participants". In this case, the concern with the size of the party under investigation or enforcement is *because* of its potential for greater detriment. There is also at least an implication with the phrase "national conduct" that this applies where inappropriate conduct is widespread. It is not clear in the context of the conduct covered by the Bill that the size of the corporation is in itself relevant, rather it is surely the scale or scope of the conduct that may be a breach of the Bill that is relevant. A large corporation may carry out conduct

on a relatively small scale that is subject to a breach. For example, a failure to adjust a tariff that affects 50 customers is clearly a different scale from one that affects 5,000 customers. Similarly, a failure to offer or accept an offer of a 50MW contract is a different scale from if it is 500MW.

As a related point, and especially if the ACCC continues to maintain that size alone is a factor, further context of "large" is required. For example, ENGIE is globally one of the world's largest electricity utilities, yet this seems of little relevance to the conduct of its Australian subsidiaries that operate in the NEM. ENGIE's NEM generation and retail portfolios are not on the face of it "large". Other parties may have a large generation portfolio but not a large retail portfolio or vice versa or may have a large presence in one region of the NEM, but not others. Accordingly, further clarification of this distinction is important.

The commencement date of the Bill is 10 June 2020. The update to processes, including training staff, poses significant burden under normal circumstances. The broader industry, largely through the Australian Energy Council is seeking to delay the implementation date of the Bill due to the continually evolving COVID-19 situation. The impact of COVID-19 on energy businesses is unprecedented in its scale and the ACCC must acknowledge and understand the challenges that businesses may face in these times. To that end, it would be prudent for the ACCC to consider the impact of COVID-19 when enforcing provisions in the Bill, should the Bill be effective 10 June 2020.

Should you have any queries in relation to this matter, please do not hesitate to contact me on [redacted]

Yours sincerely,

[redacted]

Jamie Lowe
Head of Regulation