3 April 2020

Lyn Camilleri
General Manager, Electricity Markets Branch
Australian Competition and Consumer Commission
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Melbourne VIC 3000

Submitted by email: electricitymonitoring@accc.gov.au

Dear Ms Camilleri

Draft Guidelines on the Prohibited Energy Market Misconduct Act

Origin Energy Limited (Origin) welcomes the opportunity to provide comments on the Australian Competition and Consumer Commission's (ACCC) Draft Guidelines on the Prohibiting Energy Market Misconduct Act. We have provided comments on specific aspects of the Draft Guidelines below.

1. Retail pricing provision (153E)

Origin considers it appropriate the ACCC has sought to maintain consistency with the Explanatory Memorandum (EM) to the Act. This includes specifying that the prohibition only relates to market / sector-wide movements in wholesale costs, network costs and environmental costs (i.e. retail costs and margin are not included). Further, normal spot market volatility / seasonal fluctuations in wholesale costs would not be considered representative of long-term trends and therefore warrant price adjustments.

Notwithstanding the above, a key aspect of the framework will be the ACCC's approach to assessing whether a 'reasonable adjustment' to retail prices has been made. To this end, it is important the Guidelines ensure adequate regard is given to the nature of the retail price setting process as explained below.

1.1 The circumstances that would drive an out-of-cycle price change are likely to be infrequent

In assessing the timing and level of any adjustment, the ACCC should consider the likely hedge position of a retailer. Consistent with the methodology applied to determine the default market offer (DMO), a prudent and efficient retailer will generally hedge its forecast load over at least the 12-month period for which its retail tariff applies. This is achieved by building up a portfolio of products that include base, peak and quarterly cap contracts. Given the market prices for these products are based on expectations of average future spot prices, it is unlikely a new entrant generator would drive a significant reduction in spot prices that had not been factored into contract prices (and therefore a retailer's costs), as described in Example 6 of the Draft Guidelines. Large generators have long planning, construction and commissioning lead times that are visible to financial market participants. A disconnect between forward contract and spot market prices is more likely to emerge in cases where there has been an unforeseen event (e.g. a sustained generator/interconnector outage) – noting prices would likely rise in that scenario.

1.2 Out of cycle price changes are likely to be the exception rather than the norm

Should circumstances eventuate that do lead to an unforeseen, sustained and substantial reduction in wholesale market prices, the window for making an out-of-cycle price change is likely to be limited by the following factors:

- Implementing price changes generally takes between one and two months from when a decision to change prices has been made, given internal analysis/approvals processes and customer notification requirements. This is consistent with the timeframe provided for through the Australian Energy Regulator's (AER) DMO price setting process, where the AER seeks to provide a final determination on 30 April for implementation from 1 July.

- It would likely take a period of months before a retailer could reasonably determine that a reduction in wholesale prices was sustained and substantial relative to its own wholesale procurement costs.

An outworking of the above is that a mid-cycle price adjustment would likely be the most practical time to adjust prices for any sustained and substantial reduction that emerges in the six-month period following the final DMO and Victorian default offer (VDO) determinations being made in their respective regions. Sustained and substantial cost reductions that become apparent outside of that initial six-month period could then be addressed in the next scheduled price reset.

Origin considers the ACCC could further clarify its intended approach through the addition of further examples in the Guidelines, or by explicitly acknowledging some of the above practical considerations in the final document.

1.3 The ability to adjust offers in different ways remains an important feature of the market

The ACCC recognises that competitive choices can lead to not all cost reductions being reflected to the same extent in each type of tariff.[1] However, the Draft Guidelines go on to specify that retail products with the same underlying characteristics should be reduced to a similar extent.[2] These two statements are potentially contradictory, with the latter potentially constraining a retailer's ability to respond to competitive pressures by differentiating offers and adopting a wide variety of efficient risk management strategies. For example, a new/incumbent retailer's ability to win new customers by offering a tariff near/below cost may be impeded out of concerns it would be required to pass through further cost reductions should circumstances eventuate.

It would be useful to clarify the above in the Guidelines to better reflect the ACCC's first statement that competitive choices can drive different tariff outcomes, possibly through the inclusion of additional examples. Related to this, we recommend Example 12 in the Draft Guidelines is revised to demonstrate that it may be appropriate for Retailer A to adjust the aggressively priced offer and standard electricity supply tariffs to differing extents, having regard to any costs that may have already been absorbed in initially setting the aggressively priced offer.

1.4 In assessing the size of an adjustment, regard should be given to a retailers current and future costs

Origin agrees the ACCC should have regard to a retailer's individual circumstances when assessing the reasonableness of any adjustment, including the extent to which a reduction may have been offset by other costs. It is also appropriate that regard is given to other recent pricing decisions where it can be demonstrated that a retailer had previously absorbed increases in one or more cost components. However, consistent with the EM, the Guidelines should also specify that regard will be given to the

[1] *ACCC 2020: Draft Guidelines on Part XICA – Prohibited conduct in the energy market, paragraph 2.26, pg. 10*
[2] Ibid.

retailer’s anticipated/actual future costs and risk management strategies, noting it would not be appropriate to require a retailer to make an adjustment that could undermine its financial viability.

Electricity financial contract liquidity provision (153F)

As acknowledged in the Draft Guidelines, the prohibition is not intended to interfere with prudent risk management behaviour. Consistent with this, Origin considers the list of factors, and associated examples, provide an adequate representation of the type of decisions that would be considered reasonable in the context of 153F. The Draft Guidelines also outline a reasonable approach to assessing a corporation’s conduct, whereby:

- the ACCC will seek to distinguish between contracting decisions that reflect genuine risk management practices and decisions that have an anti-competitive purpose; and

- a corporation will not be in breach of 153F unless the purpose of the corporation’s actions is to substantially lessen competition, noting the concept of substantially lessening competition will be applied on a consistent basis with other sections of the Competition and Consumer Act (CCA).

In addition to the above, the Draft Guidelines specify that 153F should not force generators to enter into contracts they would otherwise have rejected due to legitimate counterparty risks. Origin agrees with the inclusion of this statement given counterparty creditworthiness is a key risk to be considered when entering into financial contracts. However, the extent to which a generator could reasonably accommodate the type of contract requested by a counterparty having regard to the generator’s portfolio of physical assets, is also a relevant factor that should be reflected in paragraph 3.33. Further, the ACCC should consider the extent to which the product being sought may be generally available in the market from other sources (e.g. through the Australian Securities Exchange or market makers).

Electricity spot market provisions (153G/H)

Origin supports the ACCC’s recognition that 153G/H are not intended to interfere with genuine commercial behaviour as intended by the design of the National Electricity Market (NEM). This includes strategies undertaken by generators to optimise their operation and the economic rationing of capacity. Consistent with this, it is appropriate the ACCC has sought to maintain consistency with existing ‘Bidding in Good Faith’ provisions in the National Electricity Rules (NER), particularly with respect to the way in which ‘fraudulently, dishonestly or in bad faith’ will be interpreted. In assessing the purpose or character of a corporation’s conduct, we also agree the ACCC should:

- not consider high price events to be necessarily indicative of ‘distortion’ or ‘manipulation of electricity prices and recognise it is appropriate for generator’s to bid in a manner that allows them to recover fixed costs;

- recognise that different generation technologies lend themselves to different bidding strategies and operational constraints;

- acknowledge generators will require maintenance/closure, some of which will be unplanned;

- not view rebidding as a concerning practice in and of itself, noting generators rebid in response to a range of material factors; and

- consider the bidding strategies of individual generation units in the context of the corporation’s broader generation portfolio.

If you wish to discuss any aspect of this submission further, please contact Steve Reid at [redacted]

Yours Sincerely,

[redacted]

Keith Robertson
General Manager, Regulatory Policy