



23 September 2019

Ms Sarah Proudfoot  
General Manager, Consumers and Markets Branch  
Australian Energy Regulator  
GPO Box 520  
Melbourne VIC 3001

By e-mail to: ringfencing@aer.gov.au

Dear Ms Proudfoot

### **Update to the Distribution Ring-fencing Guideline consultation**

Ergon Energy Corporation Limited (Ergon Energy) and Energex Limited (Energex) welcome the opportunity to provide comment to the Australian Energy Regulator (AER) on its *Update to the Distribution Ring-fencing Guideline* consultation (the consultation).

We note the purpose of the AER's consultation is to identify possible improvements to the Guideline, following the period since its commencement in January 2018. As distribution network service providers (DNSPs), Ergon Energy and Energex acknowledge the importance of avoiding cross-subsidies and discriminatory behaviour in a competitive electricity market. However, it is extremely important that the mechanisms designed to achieve these outcomes do not adversely impact customers and the market more broadly in terms of cost and service efficiency.

Our comments on certain aspects of the consultation are included below. As members of Energy Networks Australia (ENA), we have also contributed to, and generally support the ENA's submission to the Consultation.

### **Functional Separation**

The functional separation obligations in the *Ring-fencing Guideline Electricity Distribution – Version 2* (the Guideline) focus on, among other things, office and staff sharing, branding and information disclosure. In the consultation, the AER has placed particular emphasis on the office and staff sharing provisions of the Guideline, citing its concerns that some DNSPs have inadequate controls in place for staff and office sharing. The AER has also raised a concern that DNSPs' approach to staff and office sharing provisions are too generous and may not be in keeping with the intent of the Guideline.

Ergon Energy and Energex have undertaken a very rigorous process to determine which staff are able to be shared in accordance with the Guideline and have in place comprehensive registers to evidence the outcomes of this process. These registers are reviewed and updated on a regular basis.

To a large extent, the ability to share staff and offices is contingent on whether the staff to be shared or co-located have access to confidential electricity information and an ability to use that information to discriminate in favour of a related electricity service provider who provides contestable electricity services. On this basis, Ergon Energy and Energex consider a review of the definition for confidential electricity information will assist in providing greater certainty for DNSPs seeking to share or co-locate staff. We support the ENA's proposal for confidential electricity information to be separated into two categories; sensitive and non-sensitive electricity information in recognition of the fact that non-sensitive electricity information is not information that could be used to engage in conduct that would result in the harm ring-fencing seeks to avoid.

Ergon Energy and Energex also agree with the ENA that the AER may not have adequately assessed the extent to which competition is being harmed as a consequence of the use of 'soft' controls (such as training or operating protocols) to complement existing physical separation controls. In fact, there is no evidence to suggest that the sharing of kitchens or bathrooms results in conduct that is contrary to the Guideline. Further, as highlighted by the ENA, even the 'hardest' of physical separation controls will never prevent a staff member who wants to engage in conduct contrary to the Guideline, from doing so. As such it is Ergon Energy's and Energex's firm view that to insist DNSPs provide separate kitchen and bathroom amenities, often at a significant cost, is not in keeping with the long-term interests of consumers. Ergon Energy and Energex have invested close to \$3M to-date to comply with the physical separation requirements of the Guideline. Any additional costs as a consequence of the AER's proposed actions to address perceived staff sharing issues, far exceed any potential harm that would otherwise result, particularly where there is no evidence to suggest the existence of any harm under the current framework.

## **Compliance Reporting**

Ergon Energy and Energex support the AER's proposal to update the Best Practice Manual to include a template for the AER's preferred long-form assessors report.

Ergon Energy and Energex also support the proposal for compliance reporting to be undertaken on a calendar year, as opposed to financial year basis. We agree with the ENA that this will greatly assist DNSPs' resourcing requirements by helping to spread the workload of reporting staff who are heavily engaged in Regulatory Information Notice (RIN) processes throughout September and October. However, it is important that any move to calendar year reporting does not require DNSPs to provide their next annual compliance reports prior to the compliance year ending 31 December 2020. To require these reports to be submitted in respect of the calendar year ending 31 December 2019, would be of little benefit given the reports would only cover a six-month period.

Further, notwithstanding our support for reporting on a calendar year basis, Ergon Energy and Energex do not support the AER's proposed reduction of the compliance

reporting timeline from four months to three months, for the reasons cited by the ENA in its submission to the consultation.

Ergon Energy and Energex also do not support the AER's interpretation that a breach is 'material' if it is 'not trivial'. In assessing whether or not a breach is 'material' it is important to assess the breach and any resultant harm in the context of the objectives of the Guideline. For this reason, Ergon Energy and Energex have developed a materiality matrix as an objective tool for assessing breaches in the context of the Guideline. We have previously shared this tool with the AER to evidence our approach to assessment of breach and recall the AER being generally supportive of the approach. We have also recently shared this tool with our DNSP counterparts through the ENA for peer review as to its effectiveness. As noted in the ENA's submission to the consultation, members have indicated that this tool and approach would enable them to assess and consider breaches in a consistent manner.

## **Branding**

Ergon Energy and Energex agree with the requirement for a DNSP to use branding for its direct control services that is independent and separate from the branding used by a related electricity service provider for contestable electricity services. However, we do not agree that an affiliated entity and a DNSP being linked under a shared parent company name is, or should be, a breach of the Guideline. In particular this in no way constitutes a DNSP (being the entity whom the Guideline has the power to regulate) advertising or promoting contestable electricity services provided by related electricity service provider other than the DNSP itself.

Should you require additional information or wish to discuss any aspect of this submission, please do not hesitate to contact me on the details below.

Yours sincerely



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