



08 May 2017

## Undertaking to the Australian Energy Regulator for the two years ending 30 June 2018 and 30 June 2019

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Given for the purposes of section 59A of the National Electricity (NSW) Law by Essential Energy (ABN 37 428 185 226), a New South Wales State Owned Corporation incorporated under the *Energy Services Corporations Act 1995* (NSW)

## 1 Person giving this Undertaking

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- 1.1 The Undertaking is given to the Australian Energy Regulator (**AER**) by Essential Energy (ABN 37 428 185 226) of 8 Buller Street, Port Macquarie NSW 2444 (**Essential Energy**) for the purposes of section 59A of the NEL.
- 1.2 Essential Energy is the energy services corporation constituted under section 7 of the *Energy Services Corporations Act 1995* (NSW) and specified in Part 2 of Schedule 1 to that Act.

## 2 Background

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- 2.1 Essential Energy is:
  - (a) a 'Registered Participant' within the National Electricity Market; and
  - (b) a 'Distribution Network Service Provider' that engages in the activity of operating a distribution system in New South Wales.
- 2.2 As a Distribution Network Service Provider, the revenue and pricing of electricity network services provided by Essential Energy is regulated by Chapters 6 and 6B of the NER.
- 2.3 The AER is responsible for the economic regulation of Essential Energy under section 15(1)(f) of the NEL and is given obligations in relation to the making of distribution determinations and the approval of pricing proposals under Chapter 6 of NER. Essential Energy must comply with the distribution determination that applies to the electricity network services it supplies under section 14B of the NEL.
- 2.4 The AER made a distribution determination in April 2015 that applies to Essential Energy until 30 June 2019 (**2015 Determination**). The 2015 Determination is a 'reviewable regulatory decision' under section 71A of the NEL. Essential Energy and other third parties applied to the Tribunal for a review of the 2015 Determination under section 71B of the NEL. On 26 February 2016, the Tribunal delivered a judgment in this application (**Decision**). The Decision set aside the 2015 Determination and remitted it to the AER under section 71P(2)(c) of the NEL. Subsequently, the AER sought judicial review of the Decision in the Full Court of the Federal Court of Australia (**Full Federal Court**). The Full Federal Court has heard the matter and has reserved its judgment.
- 2.5 The effect of setting aside the 2015 Determination on pricing by Essential Energy is uncertain. Essential Energy is required by clause 6.18.2 of the NER to submit a pricing proposal to the AER for approval each year. The pricing proposal must demonstrate compliance with any applicable distribution determination under clause 6.18.2(b)(7) of the NER. Essential Energy is required to provide Direct Control Services in accordance with the price of those services under the approved pricing proposal under clause 6.1.3 of the NER. Essential Energy is also required to provide a statement of network charges calculated in accordance with the NER and Essential Energy's distribution determination to each retailer under clauses 6B.A2.3 and 6B.A2.4.
- 2.6 The effect of setting aside the 2015 Determination also creates uncertainty as to whether the 2015 Determination applies to other non-price matters.
- 2.7 Clause 6.11.3(b) of the NER provides for the previous distribution determination and pricing to continue where there is an 'intervening period' between the end of one regulatory control period and the commencement of a new distribution determination providing for the next regulatory control period. However, it is unclear whether this

provision properly applies in circumstances where the 2015 Determination has been set aside.

- 2.8 This uncertainty may result in Essential Energy breaching its obligations under the NEL and NER to comply with its distribution determination and to set prices in accordance with the NER and its distribution determination. The AER may commence proceedings for this potential breach under section 61 of the NEL. This uncertainty is expected to continue following the AER's application to the Full Federal Court for judicial review of the Decision.
- 2.9 On 16 May 2016, under section 59A of the NEL, Essential Energy gave, and the AER accepted, an undertaking to address this uncertainty for the year ending 30 June 2017 (the 2016-2017 Year). The purpose of that undertaking was to provide a means to set prices for Direct Control Services in circumstances where the Tribunal had set aside the 2015 Determination. Under clause 4.1, that undertaking will expire on 30 June 2017.
- 2.10 In circumstances where the Full Federal Court has reserved judgment in relation to the AER's application concerning the 2015 Determination, Essential Energy gives this Undertaking to enable Essential Energy to determine tariffs for Direct Control Services in accordance with clause 6.18 of the NER, and to clarify its obligations to provide services, for the years ending 30 June 2018 and 30 June 2019. The AER acknowledges that this Undertaking is given in response to concerns about the uncertainty associated with, and the risk of breach of, Essential Energy's obligations in relation to pricing and compliance under the NEL and NER and that its acceptance by the AER will facilitate transparency and stability in network charges in the years ending 30 June 2018 and 30 June 2019.
- 2.11 The AER accepts this Undertaking, and Essential Energy's compliance with it, as discharging Essential Energy's obligations in relation to:
- (a) pricing and network charges; and
  - (b) compliance with the matters set out in Schedule 1,
- under the NEL and NER in the financial years commencing on 1 July 2017 and 1 July 2018.
- 2.12 Consistent with clause 4.5 below, Essential Energy and the AER acknowledge that once the Full Federal Court delivers judgment in relation to the Decision, it is expected that Essential Energy and the AER will need to withdraw or vary this undertaking. The way that is dealt with will depend on the outcome of the AER's application for judicial review.

### 3 Commencement

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- 3.1 This Undertaking comes into effect when:
- (a) this Undertaking is executed by Essential Energy; and
  - (b) the AER accepts the Undertaking so executed,
- (Commencement Date).**
- 3.2 On and from the Commencement Date, Essential Energy undertakes to assume the obligations in clause 5.

### 4 Expiry

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- 4.1 Subject to clauses 4.2 and 4.3, this Undertaking expires on 30 June 2019 (**Expiry Date**).



- 4.2 Essential Energy may withdraw or vary this Undertaking at any time, but this Undertaking will be taken to be withdrawn or varied on the date on which the AER consents to such withdrawal or variation in accordance with section 59A of the NEL.
- 4.3 The AER may revoke its acceptance of this Undertaking if the AER becomes aware that any information provided to it was incorrect, inaccurate or misleading.
- 4.4 The AER may, at any time, expressly waive in writing any of the obligations contained in this Undertaking or amend the date by which any such obligation is to be satisfied but the amended date must be earlier than the Expiry Date.
- 4.5 For the avoidance of doubt, Essential Energy and the AER acknowledge that it may be necessary to withdraw or vary this Undertaking once the Full Federal Court has delivered its judgment in relation to the Decision.

## 5 Undertaking

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Essential Energy undertakes for the purposes of section 59A of the NEL that for the regulatory year commencing on 1 July 2017 and ending 30 June 2018, and for the year commencing on 1 July 2018 and ending 30 June 2019:

- (a) subject to clause 5(b), Essential Energy's tariffs for each tariff class for Direct Control Services for the year commencing on 1 July 2017 and ending on 30 June 2018 will be calculated in accordance with clause 6.18 of the NER, including clause 6.18.1A(c) (**Network Charges**);
- (b) for the purposes of clause 5(a):
  - (1) the 2015 Determination will not apply other than as set out in clause 5(e);
  - (2) clause 6.18.2(a) of the NER will not apply and Essential Energy must submit its draft pricing proposal for the year commencing on 1 July 2017 and ending on 30 June 2018 (2017-2018 Year), by 3 April 2017 and for the year commencing on 1 July 2018 and ending 30 June 2019 (2018-2019 Year) by 1 April 2018;
  - (3) A final pricing proposal for 2017-18 will be provided to the AER (if any changes are necessary) as soon as practicable after the commencement date of this undertaking;
  - (4) the Adjusted Allowed DUoS Revenue for the 2017-2018 Year is \$963,518,472. This is calculated by multiplying the forecast revenue for the 2016-17 Year (of \$951,369,569) by the applicable Consumer Price Index (CPI) calculated in accordance with the CPI formula contained in Attachment 14 of the 2015 Determination – in Figure 14.1 (of 1.28% if expressed rounded to two decimal places);
  - (5) the Adjusted Allowed DUoS Revenue for the 2018-2019 Year is to be calculated by multiplying the forecast revenue for the 2017-2018 Year (as at 1 March 2018) by the applicable Consumer Price Index (CPI) calculated in accordance with the CPI formula contained in Attachment 14 of the 2015 Determination – in Figure 14.1. The forecast revenue for the 2017-18 Year is to be calculated by combining 8 months of actual revenue (1 July 2017 to 28 February 2018) with 4 months of forecast revenue (1 March 2018 to 30 June 2018);

- (6) the Adjusted Allowed DUoS Revenue amount calculated for the 2018-2019 Year will be provided to the AER by 15 March 2018 and will also be published on Essential Energy's website;
  - (7) the reference to 'applicable distribution determination' in clauses 6.18.2(b)(7), 6.18.2(b)(8), 6.18.5(g)(2), 6.18.8(a)(1) and 6.18.8(c) of the NER will be interpreted to refer to either the Adjusted Allowed DUoS Revenue for the 2017-18 Year, or to the Adjusted Allowed DUoS Revenue for the 2018-19 Year, as the context requires;
  - (8) the references to 'regulatory control period' in clause 6.18 will be interpreted to refer to the period commencing on 1 July 2017 and ending on 30 June 2019; and
  - (9) where the term 'regulatory year' is referred to in clause 6.18, the reference to 'regulatory control period' in the definition of that term will be interpreted to refer to the period commencing on 1 July 2017 and ending on 30 June 2019;
- (c) Essential Energy will charge the Network Charges for Direct Control Services to retailers and customers (where direct billing has been agreed under clause 6B.A2.2 of the NER) in accordance with the NER;
  - (d) Public lighting prices will:
    - (1) be based on the NPV smoothed revenue methodology consistent with that applied to 2015-16 and 2016-17 public lighting prices;
    - (2) include multiple CPI uplifts to convert base prices for public lighting which are in 2013-14 dollars to 2017-18 and 2018-19 dollars, as the context requires; and
    - (3) be calculated in accordance with the public lighting tariff model that Essential Energy provided the AER on 10 April 2017 (which is available on the AER's website) ;
  - (e) Essential Energy will comply with the 2015 Determination in relation to the matters specified in Schedule 1;
  - (f) Essential Energy will publish this Undertaking on its website within five business days of the Commencement Date; and
  - (g) Essential Energy will notify the AER in writing within seven days of any failure to charge the Network Charges in accordance with this Undertaking.

## 6 Acknowledgement

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Essential Energy and the AER acknowledge and agree that the Network Charges replace any charges payable to Essential Energy under any previously approved pricing proposal or undertaking given under section 59A of the NEL.

## 7 No derogation

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This Undertaking does not prevent the AER from taking enforcement action at any time whether during or after the Term in respect of any breach by Essential Energy of any term of this Undertaking.



## 8 Costs

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Essential Energy must pay all of its own costs in relation to this Undertaking.

## 9 Notices

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9.1 Any notice or communication to the AER pursuant to this Undertaking must be sent to:

Name: CEO  
Address: GPO Box 520  
Melbourne VIC 3001

9.2 Any notice or communication to Essential Energy pursuant to this Undertaking must be sent to:

Name: Company Secretary  
Address: PO Box 5730  
Port Macquarie NSW 2444

9.3 Notices are taken to be received three Business Days after posting (or seven Business Days after posting if sent to or from a place outside Australia).

9.4 Essential Energy must notify the AER of a change to its contact details within three Business Days.

9.5 The AER must notify Essential Energy of a change to its contact details within three Business Days.

9.6 Any notice or communication will be sent to the most recently advised contact details and subject to clause 9.3, will be taken to be received.

## 10 Definitions and interpretation

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10.1 Definitions

The meanings of the terms used in this Undertaking are set out below.

| <b>Term</b>                          | <b>Meaning</b>   |
|--------------------------------------|--|
| <b>2015 Determination</b>            | has the meaning given to that term in clause 2.4.                  |
| <b>Adjusted Allowed DUoS Revenue</b> | has the meaning given to that term in clauses 5(b)(4) and 5(b)(5). |
| <b>AER</b>                           | has the meaning given to that term in clause 1.                    |



| <b>Term</b>                        | <b>Meaning</b>   |
|------------------------------------|--|
| <b>Business Day</b>                | has the meaning given to that term in the NER.   |
| <b>Commencement Date</b>           | has the meaning given to that term in clause 3.1.  |
| <b>Decision</b>                    | has the meaning given to that term in clause 2.4.  |
| <b>Direct Control Services</b>     | has the meaning given to that term in the NER.   |
| <b>DUoS</b>                        | means distribution use of system.  |
| <b>Essential Energy</b>            | has the meaning given to that term in clause 1.  |
| <b>Expiry Date</b>                 | has the meaning given to that term in clause 4.1.  |
| <b>Indicative Pricing Schedule</b> | has the meaning given to that term in the NER.   |
| <b>NEL</b>                         | means the National Electricity Law set out in the Schedule to the <i>National Electricity (South Australia) Act 1996</i> of South Australia, as in force for the time being which, pursuant to section 6 of the <i>National Electricity Act (New South Wales) 1997</i> :<br><br>(a) applies as a law of New South Wales, and<br><br>(b) as so applying, may be referred to as the National Electricity (NSW) Law . |
| <b>NER</b>                         | means the National Electricity Rules.  |
| <b>Network Charges</b>             | has the meaning given to that term in clause 5(a).   |
| <b>Term</b>                        | means the period commencing on the Commencement Date and ending on the Expiry Date.  |
| <b>Tribunal</b>                    | means the Australian Competition Tribunal.   |



| Term               | Meaning   |
|--------------------|---|
| <b>Undertaking</b> | this document (including any schedules or annexures to this document) as varied from time to time under section 59A of the NEL. |

10.2 Interpretation

In the interpretation of this Undertaking, the following provisions apply unless the context otherwise requires:

- (a) a reference to this Undertaking includes all of the provisions of this document including its schedules;
- (b) headings are inserted for convenience only and do not affect the interpretation of this Undertaking;
- (c) if the day on which any act, matter or thing is to be done under this Undertaking is not a Business Day, the act, matter or thing must be done on the next Business Day;
- (d) a reference in this Undertaking to any law, legislation or legislative provision includes any statutory modification, amendment or re-enactment, and any subordinate legislation or regulations issued under that legislation or legislative provision;
- (e) a reference in this Undertaking to any company includes a company over which that company is in a position to exercise control within the meaning of section 50AA of the *Corporations Act 2001 (Cth)*;
- (f) a reference in this Undertaking to any agreement or document is to that agreement or document as amended, novated, supplemented or replaced;
- (g) a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Undertaking;
- (h) an expression importing a natural person includes any company, trust, partnership, joint venture, association, body corporate or governmental agency;
- (i) where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- (j) a word which denotes the singular also denotes the plural, a word which denotes the plural also denotes the singular, and a reference to any gender also denotes the other genders;
- (k) a reference to the words 'such as', 'including', 'particularly' and similar expressions is to be construed without limitation;
- (l) a construction that would promote the purpose or object underlying this Undertaking (whether expressly stated or not) will be preferred to a construction that would not promote that purpose or object;
- (m) a reference to:
  - (1) a thing (including, but not limited to, a chose in action or other right) includes a part of that thing;
  - (2) a party includes its successors and permitted assigns; and
  - (3) a monetary amount is in Australian dollars.



## Schedule 1

### Matters in the 2015 Determination that Essential Energy will comply with

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Essential Energy will comply with the 2015 Determination in relation to the following constituent decisions:

1. Efficiency Benefit Sharing Scheme as set out in Attachment 9;
2. Capital Expenditure Sharing Scheme as set out in Attachment 10;
3. Service target Performance Incentive Scheme as set out in Attachment 11;
4. Demand Management Incentive Scheme as set out in Attachment 12;
5. Classification of services as set out in Attachment 13;
6. Essential Energy's obligation to report to the AER on its recovery of designated pricing proposal charges and jurisdictional scheme amounts as set out in Attachment 14;
7. Additional Pass Through Events as set out in Attachment 15;
8. Form of Control for Alternative Control Services as set out in Attachment 16, except for the components of Attachment 16 relating to public lighting (see clause 5(d) of the Undertaking);
9. Essential Energy's Negotiating Framework and Negotiated Distribution Services Criteria as set out in Attachment 17; and
10. Essential Energy's Connection Policy as set out in Attachment 18.



Signing page

Executed as an undertaking

Essential Energy

Executed by Essential Energy (ABN 37 428 185 226), a New South Wales State Owned Corporation incorporated under the Energy Services Corporations Act 1995 (NSW), by its authorised officer

sign here ▶

[Signature of John Cleary]

Authorised officer

[Signature of Michelle Bowman]

Witness

print name JOHN CLEARY

Michelle Bowman

print title CEO

General Counsel

date 8/5/17

8/5/17

Australian Energy Regulator

Executed by the Australian Energy Regulator pursuant to section 59A of the National Electricity Law by

sign here ▶

on behalf of the Australian Energy Regulator

[Signature of Paula Conboy]

print name PAULA CONBOY

date 11/5/17