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29 June 2020

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### **Spark Energy Australia Pty Ltd application for electricity retailer authorisation**

I refer to the application by Spark Energy Australia Pty Ltd (**Spark Energy**) dated 22 November 2019 for an electricity retailer authorisation under the *National Energy Retail Law* (**Retail Law**).

On 19 June 2020, in accordance with section 92 of the Retail Law, the Australian Energy Regulator (**AER**) considered Spark Energy's application and decided to refuse it because it does not satisfy the criteria in section 90(1).

Section 97(1) of the Retail Law states that if the AER decides to refuse an application for a retailer authorisation it must, as soon as practicable, give the applicant a notice stating the decision, the reasons for the decision and indicating whether, and (if so), how the entry criteria were not or will not be satisfied. This correspondence is the AER's notice for the purposes of section 97(1) of the Retail Law.

### **Background**

In May 2019, Spark Energy submitted an application for retailer authorisation. After providing feedback and seeking further information, the AER published the application on 22 November 2019. The application was subject to a 23 business day consultation period with the application published on the AER's website. There were no submissions.

## Reasons for decision

In accordance with section 92(1) of the Retail Law, the AER refused Spark Energy's application for a retailer authorisation because the application did not satisfy all three of the entry criteria in section 90(1) of the Retail Law:

- (a) the organisational and technical capacity criterion;
- (b) the financial and resources criterion;
- (c) the suitability criterion.

Each of these criteria are addressed below.

### Organisational and technical capacity

This criterion goes to the applicant's industry experience, operational systems and staff expertise. Applicants are required to demonstrate their ability to comply with regulatory obligations under energy laws and their ability to operate as an authorised retailer.

In considering whether the applicant has done this, the AER reviewed Spark Energy's organisational structure, third party arrangements, and the experience, qualifications and compliance history of Spark Energy's officers and associates. Upon review of these arrangements, the AER has determined that they were not sufficient to demonstrate that Spark Energy has met this criterion.

To satisfy the organisational and technical criterion, the *AER Retailer Authorisation Guideline Version 2 December 2014* (the **Guideline**) requires applicants to demonstrate not only how their skills and experience will assist in meeting the requirements of retailer authorisation, but also how they will ensure compliance with the Retail Law and *National Energy Retail Rules*. The Guideline also requires applicants to demonstrate an ability to manage risk and operate in accordance with the Retail Law objective, particularly the long term interests of consumers.

Spark Energy has advised that senior management experience and third parties, particularly [REDACTED] will provide sufficient technical and organisational expertise to support the inexperienced sole Director.

However, Spark Energy was unable to satisfy the AER that these arrangements are sufficient to satisfy the criterion.

The Authorisation Guideline requires that applicants 'demonstrate their ability to comply with regulatory obligations under the energy laws,' in order to satisfy the first criterion.

Two of Spark Energy's senior managers held senior positions in entities that were found to have contravened laws in the telecommunications and energy sectors. These matters are identified in the section below discussing the 'suitability' criterion. These contraventions were not initially disclosed in Spark Energy's application.

The information provided by Spark Energy, including proposed compliance plans, does not adequately address these past compliance issues or demonstrate that appropriate measures have been put in place to ensure that similar compliance issues would not arise if the application were granted.

Notwithstanding that senior management possess relevant industry experience, the AER could not be satisfied that this is sufficient to overcome the regulatory compliance history of the business' senior staff and to support the inexperienced sole Director.

In the section below dealing with the ‘suitability’ criterion, the AER has made additional findings relating to the importance of transparency and the deficiencies in Spark Energy’s application. These deficiencies further support the conclusion that Spark Energy has failed to demonstrate the organisational and technical capacity to comply with the obligations imposed by and under the Retail Law.

The AER is therefore not satisfied that Spark Energy’s application satisfies the organisational and technical capacity criterion.

### **Financial resources**

Under this criterion the AER considers whether applicants have (or have access to) adequate financial capacity to support their planned retail operations. Applicants must be able to demonstrate that they have adequate finances.

In its application, Spark Energy was able to support its claims, including providing relevant declarations in support of its financial position.

The AER is satisfied that Spark Energy’s application satisfied the financial capacity criterion.

### **Suitability**

The suitability criterion is intended to establish whether an applicant is a ‘fit and proper’ person. Section 90(4) of the Retail Law permits the AER, in considering the suitability criterion, to take into consideration such matters as it thinks relevant, including previous commercial dealings of the applicant and its associates, and the standard of honesty and integrity shown in these dealings.

In the section above relating to operational and technical capacity, the AER noted that two of Spark Energy’s senior managers held senior positions in entities found to have engaged in regulatory contraventions in the telecommunications and energy sectors. Specifically:

- (a) in 2015, the Federal Court found that EnergyAustralia and Bright Choice were liable for false and misleading representations made under the *Australian Consumer Law*;
- (b) in 2015, Business Service Brokers (trading as TeleChoice) provided an enforceable undertaking to the Office of the Information Commissioner with respect to compliance issues arising under Australia’s privacy laws;
- (c) in August 2019, the Australian Communications and Media Authority took action against Business Service Brokers relating to the presentation of pricing information on TeleChoice’s website;
- (d) in October 2019, the Australian Communications and Media Authority issued a remedial direction to Business Service Brokers for breaching the *Telecommunications Act 1997*, and a formal warning for breaching the IPND Code.

None of these compliance issues were disclosed by Spark Energy in its initial application. This is despite the fact that the Guideline specifically requires disclosure of compliance and regulatory breaches involving both the applicant and its individual officers.

These matters were disclosed only after the AER drew them to the attention of Spark Energy. Even after these matters were identified by the AER, Spark Energy has not disclosed that one of its proposed officers was a senior manager at EnergyAustralia during the period in which the contraventions of the *Australian Consumer Law* occurred.

Further, as noted above, there has been insufficient explanation of how both Spark Energy and Business Service Brokers will address regulatory compliance with energy laws should it be granted an electricity retailer authorisation.

The AER considers that transparency is a core attribute of an authorised electricity retailer. The Retail Law imposes substantial reporting obligations on authorised retailers, including requirements to self-report failures to comply with applicable laws. Spark Energy was clearly advised of its disclosure obligations under the Guideline, both prior to the publishing of its application and during the consultation period.

Spark Energy's failure to fully disclose its compliance history, even once the obligation to do so had been confirmed by the AER, indicates that Spark Energy does not have an adequate commitment to transparency, or an appreciation of its importance.

The AER is not satisfied that Spark Energy's application satisfies the suitability criterion.

### **Notice**

As per section 97(2) of the Retail Law, the AER will publish this notice on its website.

Should Spark Energy wish to submit another application for a retailer authorisation, the AER will assess it in accordance with the Retail Law.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Clare Savage', written in a cursive style.

Clare Savage  
Chair  
Australian Energy Regulator