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Dear EPWA

EXPOSURE DRAFT CONSULTATION - COMPLIANCE AND ENFORCEMENT PROVISIONS DRAFT AMENDING WHOLESALE ELECTRICITY MARKET (WEM) RULES DRAFT ENERGY REGULATIONS AMENDMENT REGULATIONS 2023

Synergy welcomes the opportunity to provide feedback to Energy Policy Western Australia (**EPWA**) in relation to the above exposure drafts.

Synergy also provided feedback to EPWA on 15 August 2022 (**August Letter**) on the earlier drafts. Synergy appreciates EPWA addressing a number of material issues raised in the August Letter (such as the deeming of breaches, the issuance of infringement notices and rectification orders). However, a number of key matters still remain as detailed in this submission.

1. OVERARCHING ISSUES

1.1 Change to *ex post* objective tests

Synergy is concerned by the introduction of new objective tests in a number of new and amended Wholesale Electricity Market Rules (**WEM Rules**) that are now civil penalty provisions. Specifically, Synergy considers that the effect of many of these new civil penalty provisions is that, in attempting to make *ex post* enforcement more certain and cost-effective, the new WEM Rules compromise the transparency and fairness objectives of *ex ante* regulation, resulting in potentially unreasonable outcomes for market participants.

In particular, in shifting the focus from an *ex ante* assessment of the *subjective* reasons for a market participant's conduct and the reasonableness of the conduct to an *ex post* assessment of the *objective* 'efficiency' effect of that conduct on the market, a market participant may potentially be liable for civil penalties even in circumstances where the *ex post* facts relied on to establish the breach were completely outside the market participant's knowledge and/or control at the time the participant engages in the conduct.

That is, a market participant may be exposed to investigation and enforcement when *ex-post* facts are identified, irrespective of whether the participant's *ex-ante* behaviours were

reasonable at the time the behaviour was undertaken and there was no basis, at that time, for the market participant to expect, or mitigate against, the occurrence of the relevant undesirable market impact. Overall, this will result in regulatory uncertainty for market participants.

In the limited time available to review the compliance and enforcement exposure draft, Synergy has not been able to assess every instance where this occurs. However, Synergy provides the following illustrative example.

Clause 3.21.2(a) replaces the current clause 3.21.4 and will be a Category C civil penalty provision. Currently, a market participant will only breach clause 3.21.4 if it does not advise AEMO of a Forced Outage “as soon as practicable” after the market participant “*becomes aware*” of the relevant Forced Outage. However, under the new WEM Rules, the market participant is required to advise AEMO of the Forced Outage “*as soon as practicable*” after the facility “suffers, or will suffer, a Forced Outage”. That is, the WEM Rules have been amended to remove the *subjective* requirement for the market participant to be “*aware*” of the Forced Outage” before it will be in breach of the WEM Rules.

1.2 Amnesty period

Synergy reiterates its views that an amnesty period should be applied at the commencement of the new market. Please refer to the August letter - page 2 and Synergy’s related comments in its submission on EPWA’s Market Power Mitigation Exposure Draft #2 (item 1 on page 3).

1.3 ERA enforcement procedures

Synergy reiterates its view that, to properly comment on the proposed changes to the compliance and enforcement regime, it needs to also review the ERA’s proposed Monitoring Protocol Market Procedure. Please refer to the August Letter - page 3.

A key issue that remains under the proposed WEM Rules and WEM Regulations is the possibility that a market participant can be exposed to potentially very large amounts of daily civil penalties in circumstances where the participant and the ERA have been engaged in good faith discussions in relation to a genuine dispute about the proper interpretation and application of a civil penalty provision.

Synergy considers that the WEM Rules (cl 2.13.42) and WEM Regulations (reg 33(4)) should expressly require the ERA and the Electricity Review Board (**Board**) (respectively) to consider favourably the extent to which the market participant has a genuine dispute with respect to the application of a Rule when determining whether to impose a daily civil penalty amount. Similar changes should also be made to the equivalent GSI Regulation (reg 18(20)).

2. WEM RULES AMENDMENTS

2.1 Clause 2.13.27 - Compliance investigation

Clause 2.13.27 should be amended to impose an obligation on the ERA to notify the Rule Participant the subject of an alleged breach investigation of the outcome of the ERA’s alleged breach investigation.

2.2 Clauses 2.13.49 and 2.13.51(c) - Public register

Synergy does not support the public reporting of breach investigations by the ERA for the

reasons set out in the August Letter (refer to pages 4 and 5). Further, given proposed WEM Rule clause 2.13.51(c) and the breadth of Synergy's wholesale market operations and activities, it will be obvious when an investigation relates to Synergy without Synergy needing to be named in the public register. If clause 2.13.51(c) were to apply without any information that could identify Synergy, its operations or activities being published, then Synergy questions the purpose and benefit of having a public register that publishes incidents the subject of an ERA investigation.

3. ELECTRICITY INDUSTRY (WHOLESALE ELECTRICITY MARKET) AMENDMENT REGULATIONS

3.1 Regulation 30 - Drafting note correction

Synergy recommends that the note under regulation 30 is amended to reflect the civil penalty categories A, B and C are specified in Schedule 1.

30. Civil penalty provisions and civil penalties

- (1) The provisions of the market rules specified in Schedule 1 are *civil penalty provisions* for the purposes of these regulations.
- (2) The category of a civil penalty provision is the category specified for the provision in Schedule 1.

Note:

Categories B and C are specified in Schedule 1 for the purposes of the market rules.

3.2 Regulation 31(1) and (1A) – Matters the ERA must have regard to

Regulation 33(1) is arguably ambiguous. Specifically, it is not clear whether this regulation contemplates that a participant is only required to pay a maximum fixed penalty or a maximum daily penalty but not both.

Synergy understands the intention is for a participant to potentially be exposed to both the maximum fixed penalty and the maximum daily penalty, including because this appears to be consistent with how the provisions are drafted in Schedule 1. Synergy recommends the drafting in Schedule 1 and regulation 33 are amended to be consistent.

Synergy also considers the drafting in regulation 31(1) and (1A) is currently ambiguous and needs to clearly specify that:

1. Regulation 31(1) refers to the maximum (fixed) amount payable under Schedule 1.
2. Regulation 31(1A) refers to the maximum (daily) amount payable under Schedule 1.

WEM Rule clause 2.13.42 specifies the matters that the ERA must have regard to before the Authority issues a civil penalty notice. However, regulation 31(1) does not reflect this. Further, regulation 30(1A) specifies alternate (and in Synergy's view, inconsistent) criteria that the ERA must consider when making a decision to impose a civil penalty daily amount. WEM Rule clause 2.13.42 should be the sole criteria for the ERA to have regard to when considering whether to impose either a maximum civil penalty or a civil penalty daily amount.

3.3 Regulation 37(ba) - Distribution of penalties to negatively impacted persons

Regulation 37(ba) and clause 2.13.43A of the WEM Rules provide that that persons who are not market participants can receive a penalty distribution amount if they have been

negatively impacted. Synergy does not support this outcome. Synergy considers that the reference to persons “negatively impacted by a breach” is too wide and there is no guidance as to how the ERA should determine the amount of the “specified portion” to be distributed.

Non-market participants receive the benefit of an efficient market funded by market participants. Therefore, it is not reasonable that non-market participants receive a distribution when they are not contributing to the on-going cost of market operation. If EPWA is minded to retain the distribution to negatively impacted persons, it should be limited to persons who are *materially* negatively impacted and further guidance should be provided as to the basis on which the distribution should be calculated.

3.4 Regulation 42 – all reviewable decisions

Regulation 42(2A) provides the Board may refuse a reviewable decision if it considers that the application for a review is trivial or vexatious. On the basis of procedural fairness, the regulations should require the Board to give the person who has applied to the Board for a review, written reasons for its decision that an application is trivial or vexatious as per regulation 42(3). For consistency, Synergy considers similar amendments should be made to the equivalent regulations in the Pilbara Regulations (reg 13B(3)) and the GSI Regulations (reg 26(3)).

3.5 Regulation 45A(3) – Timeframes for a review

Regulation 45A(3) permits the Board to extend or further extend the period in sub-regulation (2) by 30 days in relation to a reviewable decision. The drafting of regulation 45A(3) contemplates there is no limit to the number of times the Board may further extend the period in sub-regulation (2).

Synergy considers that in the interests of ensuring proceedings are expedited and consistent with best practice regulation, regulation 45A(3) should specify a limit to the number of times the Board may further extend the period in sub-regulation (2). Further, regulation 45A(1) should apply to a decision on a procedural review for the same reasons timeframes have been introduced for a reviewable decision. For consistency Synergy considers similar amendments should be made to the equivalent regulations in the Pilbara Regulations (reg 13F(3)) and the GSI Regulations (reg 30(3)).

Yours sincerely,

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