17 April 2018

Mr Thomas Redmond
Advisor
Australian Energy Market Commission
PO Box A2449
Sydney South NSW 1235

Email: aemc@aemc.gov.au

Dear Mr Redmond

Preventing Discounts on Inflated Energy Rates – Proposed Rule Change

Origin Energy (Origin) welcomes this opportunity to respond to the Australian Energy Market Commissions (the Commission) Consultation Paper on 'Preventing discounts on inflated energy rates'. There are two parts to this consultation.

As one of the seven retailers that signed up to the Prime Minister's commitments this year, Origin supports the AEMC's work to date to improve transparency and assist customers in selecting a market offer that provides the greatest price and benefits that best suits their circumstances. This includes this proposed Rule change to prevent retailers discounting off market rates that are higher than standing offer rates.

In terms of the proposed inclusion of a civil penalty attached to the RPIG, Origin does not support this proposal. Firstly, there is no demonstrated failure of current enforcement measures under the RPIG or that retailers are not generally complying with the RPIG. Secondly, the RPIG covers a myriad of issues ranging from the marketing of standing and market offers to the presentation of offers. It is ambiguous which sections of the RPIG deal with the presentation of market and standing offers and to which a civil penalty would apply. It is thus unclear how a civil penalty could be enforced. The ambiguous nature of this proposal will lead to regulatory uncertainty. This is discussed further in this submission.

Questions Raised in the Consultation Paper

The Consultation Paper raises a number of questions with regards to the proposed Rule change and the inclusion of a civil penalty in the RPIG. Origin provides specific comments to these questions below.

Prevalence of the issue raised in the rule change request

1. How prevalent is this practice of discounting in market offers where any (or all) of the demand, usage or daily supply rates are above these rates in the equivalent standing offer in the same distribution supply area? How prevalent has this practice been historically?

Origin agrees that there is a low prevalence in the market where there is discounting off inflated rates. Origin did some random audits of market offers across states on 17 September 2017 and found that only one offer would be in breach of the indicative drafting of the Rule. This is further supported by the analysis undertaken by the Commission on 15 January 2018.

Origin Energy Retail Limited ABN **Error! Unknown document property name.Error! Unknown document property name.**, 264-278 George Street Sydney NSW 2000
GPO Box 5376, Sydney NSW 2001• Telephone (02) 8345 5000 • Facsimile (02) 9252 9244 • www.originenergy.com.au

Standing Offers

2. Do stakeholders agree that retailers applying discounts in market offers to rates above that retailer's standing offer rates is inherently confusing?

3. Should standing offer rates be considered base rates, or effectively a "cap", for the purpose of applying discounts to market offers?

Origin believes the Standing Offer rates should be considered base rates. These are the rates that a customer can refer to when assessing market offers and whether the standing offer or market offer is best for them.

Appropriateness of ACL and RPIG and Civil penalty recommendation

4. Are the ACL and the RPIG generally the appropriate mechanisms to govern retailers making and advertising market offers to consumers?

5. Should a civil penalty provision be added to sections 25 and 37 of the NERL, in respect of the requirement to present standing and market offers in accordance with the RPIG? What would be the benefits of doing so? What would be the costs?

Origin does not support a civil penalty provision being added to sections 25 and 37 of the NERL. We are concerned that the Commission and the Australian Energy Regulator (AER) have not demonstrated a problem with the existing compliance procedures that would indicate a need for civil penalties to be introduced, nor has an argument been made that civil penalties are an appropriate enforcement response.

It is also unclear why a the RPIG merits a civil penalty provision at all. The Commission appears to equate the provisions of the RPIG with the general consumer protections that exist in the Australian Consumer Law. In Origin's view, the ACL governs fundamental market conduct; prohibitions against misleading and deceptive conduct and false representations are overarching obligations that help to promote competition. In contrast, the RPIG establish obligations about what retailers must do in order to support *Energy Made Easy* and to ensure customers have clear information that enables the comparison of prices. It is important that retailers comply with these obligations by presenting correct and accurate information in a timely manner; however, breaching these obligations are not tantamount to misleading and deceptive conduct or making false representations about offers. Attaching a civil penalty, which can only be contested via court proceedings, is a disproportionate penalty. Origin believes that existing remedies are more appropriate and proportionate.

One of the reasons why a civil penalty should not apply to the RPIG is the ambiguity that exists in some of its provisions. Currently, civil penalties apply to breaches of the AER's (Retail Law) Performance Reporting Procedures and Guidelines ('Performance Reporting Guideline'). The Performance Reporting Guideline sets out the manner and form in which regulated entities must submit data to the AER. The data sets are generally well understood and the AER is prescriptive in its approach about the format and the manner that the data will be submitted.

In contrast, there is ambiguity about which provisions the civil penalty would to in the RPIG as RPIG covers both (1) the presentation of standing and market offers and (2) the marketing of offers. Clause 74 of draft version five of the RPIG[1] is an example of where it is unclear whether a likely future obligation would apply to a retailer. Would a retailer failing to provide a clear link for its Basic Plan

[1] The AER are consulting on a new RPIG at present. We use the most recent draft for illustrative purposes. See *Draft AER Retail Pricing Information Guidelines*, January 2018, Version 5.0.

Information Document (BPID) constitute a civil penalty provision? It is unclear whether it is in the scope of the presentation of market and standing offers to which the civil penalty would apply.

Clauses 15 and 16 of the latest draft RPIG proposes to make retailers responsible for ensuring that third party agents and comparator websites use the BPIDs and comply with the Guideline. It is unclear whether the civil penalty provision would apply to this provision, making retailers responsible for paying civil penalties for the activities of third parties and comparators. Origin does not support this position. Retailers can require these third parties to meet the obligations through their service agreements but they do not ultimately have control over the conduct of these businesses.

Origin suggests that the RPIG has a much greater focus on the marketing of standing and market offers than the presentation of offers. We agree with the Commission that a civil penalty provision should not apply to retailer marketing. The Australian Consumer Law already covers marketing conduct (with respect to misleading and deceptive conduct or false representations) and retailers face heavier penalties as a result. Origin thus believes that applying civil penalties to the RPIG is therefore unnecessary.

Direct prohibition within the NERR and Exclusion of fees and penalties

6. Should some specific types of market retail contracts be expressly prohibited under the NERR?

7. Do you agree with the Commission's initial discount prohibition as applied to the market retail contracts as set out in section 4.2.2?

8. Do you agree with the exclusion of fees and penalties from consideration of whether there is an equivalent standing offer in the Commission's initial position?

Origin believes that generally retailer energy offers should be governed by the ACL and the RPIG. There is no need to expressly provide the prohibition of certain retail contracts under the NERR.

However, the wording of the proposed Rule for the discount provision appears appropriate. The requirement that all energy rates need to be above the standing offer and all benefits below the standing offer rates will fulfil the intentions of the Rule change. It will capture the market offers that would result in a customer being worse off from either a price or benefit point of view.

Fees and penalties should be excluded from the review of market offers and equivalent standing offers. Standing Offer contracts generally have regulated fees and charges with restrictions on the types of fees, charges and penalties that can be charged. Market Contract regulations however allow retailers to set the terms and conditions of fees and charges as well as the value of them.

Materiality and discretion for the AER

9. Do you think the concept of materiality for differences between tariff structures and benefits and services in standing offers and market retail contracts is appropriate?

Origin strongly supports regulatory certainty and the Rules being clear, consistent and unambiguous to ensure market participants are clear on the framework in which they are operating.

Origin believes that the use of the term "materiality" is difficult to define in terms of the differences between tariff structures, benefits and services in standing offers and market retail contracts. Give it is open to interpretation and is ambiguous for this Rule, Origin suggests that the term be removed or some guiding examples be included.

Equivalency on energy payments

10. The basis on which energy payments are made may differ between market retail contracts and standing offers. Is it appropriate for differences of this kind to prevent the standing offer being an equivalent standing offer (assuming the other conditions for equivalence are met)? If not, what approach would be preferable?

Origin agrees with the Commission's approach that every energy payment to the customer under the market retail contract would also need to be equal to or lower than the equivalent payments in the equivalent standing offer.

Market retail contract and standing offer availability to the same customer

11. The Commission's initial position relies upon the market retail contract and standing offer being available to the same small customer (if the retailer were the designated retailer for the customer's premises) for matching the market retail contract to the standing offer for the discounting prohibition on energy rates to take effect. Is this appropriate?

Yes, it is appropriate that the Rule relies upon the market retail contract and standing offer being available to the same small customer.

Energy rates and energy payments

12. Do you consider that the definitions of energy rates and energy payments in the indicative drafting are clear and workable? Please note any potential ambiguities or items that you consider should be specifically included in or excluded from these concepts.

The definitions of energy rates and energy payments appear to be appropriate in the indicative drafting of the Rules.

Approach to dual fuel contracts

13. Is the Commission's approach to dual fuel contracts in the indicative drafting appropriate? Are there any issues in the treatment of the types of contracting for dual fuel services, particularly in matching the relevant energy rates, energy payments, tariff structure, and benefits and services to an "equivalent" standing offer, that have not been addressed in the Commission's initial position?

The approach to dual fuel contracts is appropriate. It would be cumbersome and inefficient to develop standing offer dual fuel contracts as in the majority of cases the prices would be the same.

A review of market offers has shown that it is the benefit arrangement that changes with the dual fuel arrangement. For example, a retailer may offer $50 off the first bill if the customer signs up to an electricity offer and $100 off the first bill if the customer signs up to both an electricity and natural gas offer.

Prices changes throughout a contract

14. Should market retail contracts with fixed prices for a period (or throughout the life of) the contract be considered differently from contracts with variable prices for the Commission's initial position?

The Rule should only apply at the time that the customer enters into a contract. This is to allow for the movement of the standing offer price during a contract period. Market circumstances could result in a

fall in the standing offer rate year on year if there has been a reduction in wholesale purchase costs, network costs or any other retail or market costs.

If the Rule was to apply anytime during a contract period, there would be a reluctance for a retailer to reduce the standing offer rate as it would be likely that the retailer would breach this proposed Rule.

Likely response and regulatory burden to a rule reflecting the indicative drafting

15. What would be the expected response of retailers to a rule implementing the indicative drafting?

16. Would a rule implementing the indicative drafting be burdensome to maintain compliance with?

Given that the prevalence of this practice is low, compliance should not be burdensome.

Civil penalties for part one of the initial position

17. Is a civil penalty recommendation for a rule reflecting the Commission's initial position in this consultation paper appropriate?

Please see Origin's response to questions 4 and 5.

Regulation of standing offers

18. Would a rule in response to this rule change request need to consider jurisdictions or parts of the NEM where the standing offer is regulated?

Generally, discounting occurs off either regulated Standing Offer rates (some retailers are obliged to offer regulated rates such as ActewAGL in ACT) or the published Standing Offer rates (retailers can generally publish their own Standing Offer rates). Origin does not envisage issues with this Rule in jurisdictions where Standing Offer rates are regulated. Retailers will need to ensure that they comply with the regulations in that State.

Commencement dates

19. Should a rule, if made, commence immediately upon being made (on 15 May 2018 according to the Commission's proposed timeline) or should its commencement be delayed to provide time for retailers to implement compliance systems? If it should be delayed for this reason, what period of time will retailers require?

Origin believes that it would be appropriate that this Rule commence when retail and network prices are due to change on 1 July 2018. This will allow all businesses to review and adjust products accordingly.

Complementarity of the rule change to current and future arrangements

20. Given the current regulatory arrangements does the rule change complement these arrangements and address discounting practices which can cause confusion and consumer detriment?

Do you consider there are instances where consumer detriment could result from discounting practices described in the rule change request, where there may not be a breach of the ACL or where the ACL may be costly to have recourse to?

21. Would a final RPIG including the comparison pricing table requirement in the draft RPIG published 30 January 2018 reduce the need for, or reduce the benefit for, a potential rule on this rule change request? Are there other aspects of the draft RPIG that would reduce the need for, or reduce the benefit of such a rule?

There are many concurrent Rule changes that are being proposed that need to be considered as part of this Rule change. In particular, there are significant enhancements to the Retail Pricing Information Guidelines (RPIG) that amends the definition of a 'generally available' offer, introduce a reference price, standardises all price factsheets and contract summary documents and ensures consistency in the language used to describe tariff structures and prices. The introduction of a reference price (in dollar terms on an annual basis) will mean that customers will have an indication of the value of the plan beyond a headline discount.

Further, the Australian Energy Regulator (AER) is currently consulting on a rule change that will require retailers to write to customers at the end of their benefit period so that they are prompted to engage with the market.[2] The rule requires the AER to design a Guideline that will assist customers to use the comparator (EME) to compare offers. To that end, the Issues Paper canvases retailers being asked to provide a historical figure and a projected cost. Given the length of a benefit period is generally 12 months at present, it is likely that at least the projected cost will be an annual figure. Customers will therefore will be better placed to make a comparison of rates, discounts and other benefits and deter any retailer practices whereby market rates are inflated.

Origin supports the Commission taking a holistic and collaborative approach to the various Rule changes to ensure they interact as intended and do not lead to adverse price, benefit or service outcomes for customers.

Consideration of retail gas

22. Is there a reason why a rule made in response to this rule change request should not cover retail gas offers? Is there a case to exclude gas from a rule, or to treat retail gas differently from retail electricity?

At this time, Origin does not view that there are reasons that gas offers should be treated any differently to retail electricity offers.

Closing

Origin supports the Commission's work to improve transparency and assist customers in selecting offers. This includes the proposed Rule change to prevent discounting on inflated energy rates. However, Origin believes that further consideration needs to be given to the proposal to introduce a civil penalty to the RPIG. It is not clear that the provision is required nor how it would be applied to the RPIG in a practical sense.

Should you have any questions or wish to discuss this information further, please contact Caroline Brumby on (07) 3867 0863.

Yours sincerely

Keith Robertson

[2] AER, *Benefit Change Notice Guidelines: Issues Paper*, February 2018.

Manager, Wholesale and Retail Regulatory Policy
(02) 9503 5674 keith.robertson@originenergy.com.au