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Ms Michele McAuliffe  
Compliance Officer  
Essential Services Commission  
Level 37 / 2 Lonsdale Street  
Melbourne Victoria 3000

By email: [customerprotection@esc.vic.gov.au](mailto:customerprotection@esc.vic.gov.au)

Dear Ms McAuliffe

**Re: Draft Decision – Guideline 22 - Regulatory Audits of Energy Businesses (March 2013)**

The Consumer Utilities Advocacy Centre Ltd (“CUAC”) is a specialist consumer organisation established in 2002 to represent Victorian energy and water consumers in policy and regulatory processes. As Australia’s only consumer organisation focused specifically on the energy and water sectors, CUAC has developed an in-depth knowledge of the interests, experiences and needs of energy and water consumers.

CUAC is of the view that regulatory audits are a critical component of the Essential Services Commission’s (the “Commission”) overall compliance strategy. For regulatory audits to be effective, results should be publicly reported in a transparent and timely way and the appropriate enforcement action should be applied, followed up and results again reported. We believe that the Commission’s audit process has not always met these requirements and that this area of its performance needs immediate attention and improvement. We therefore welcome the opportunity to comment on the Essential Service Commission’s March 2013 *Draft Decision - Guideline 22 - Regulatory Audits of Energy Businesses* (“Draft Decision”).

CUAC generally agrees with the Commission's proposed approach towards regulatory audits outlined in the Draft Decision and the need for regulatory process to follow an agreed process controlled by the Commission. In particular, we support:

- the proposed inclusion of concrete timeframes for various milestones of an audit;
- the use of a reporting template to facilitate comparability;
- the amendment of the compliance rating system to facilitate consistent application by auditors;
- the establishment of a panel of auditors;
- the publication of audit reports on the Commission's website; and
- the reference to Australian standards.

These changes have the potential to enhance the framework for regulatory audits. In addition to auditing retail businesses, we regard as a positive feature, the ability for the Commission to require audits of distribution, generation or transmission businesses should there be relevant cause for concern linked to retail performance issues.

#### **Data accuracy**

The Commission has acknowledged in the Draft Decision that very few retailers had accurate and reliable reporting processes in the context of performance reporting. As rightly pointed out by the Commission, this would no doubt impact customer confidence in this important area.<sup>1</sup> It is of great concern to CUAC that in the Energy Retailers Comparative Performance Report, the Commission stated that *"historical and current 2011-12 data may not be 100 percent accurate and reliable, as in the past some retailers have failed audit requirements and have not resubmitted data for this report."*<sup>2</sup> In August 2011, the Commission identified significant discrepancy between the numbers of wrongful disconnection payment cases reported by retailers (i.e. under-reporting) compared with the numbers reported by the Energy and Water Ombudsman (EWOV) in their Compliance Report.<sup>3</sup> It is noticeable that most wrongful disconnection payments are made with the intervention of EWOV. It is unclear to what extent this problem has been resolved. CUAC is of the view that the discrepancy appears to be inconsistent with or potentially in breach of the

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<sup>1</sup> Essential Services Commission 2013, Draft Decision – Guideline 22 – Regulatory Audits of Energy Businesses, March, at 3.

<sup>2</sup> Essential Services Commission 2012, Energy retailers comparative performance report—customer service 2011-12, December, at 3.

<sup>3</sup> Essential Services Commission 2011, Compliance Report for Victorian Retail Energy Businesses 2009–10, July, at 11-12.

Commission's Compliance Policy Statement which specifies how wrongful disconnection should be reported.<sup>4</sup>

Customers and consumer advocates need access to reliable and accurate data to ascertain how retailers are performing, and, critically, whether they are complying with regulatory obligations, in the provision of an essential service and in their interactions with their customers. CUAC and other consumer organisations rely on data collected by regulatory bodies to support analysis of energy businesses' performance and to direct research and advocacy priorities. Apart from the Commission's reports, there is no other comprehensive and independent source of performance data publicly available on indicators such as disconnections, financial hardship, payment plans, complaint rates etc. While data from the Energy and Water Ombudsman (Victoria) (EWOV) is also an important indicator, the data is limited to consumers who have raised enquiries or complaints with them.

In particular, CUAC is concerned that in the key area of access to energy, published disconnections data may be inaccurate and cannot therefore be relied on for comparative purposes. This should also be of concern to those retailers accurately reporting their performance results. CUAC is also concerned that in the event that data is not comprehensive or accurate, our analysis of performance may also be inaccurate or may inadvertently penalise those retailers accurately reporting their performance.

Where a retailer reports incorrect data or delays in reporting data to the Commission, the Commission should take appropriate enforcement action against the retailer so that the error is rectified and the same problem does not arise in the future.

### **Common definitions**

To facilitate comparability of reports between retailers, there is a need for common definitions to ensure accurate reporting. For example, some retailers may take a broad definition of what a complaint is and therefore report more complaints than other retailers which adopt a narrower definition of a complaint. There is an Australian complaints handling standard. Competition by comparison should incentivise energy retailers to improve customer service; however, this is only possible if a meaningful comparison can be made between the data reported by energy businesses.

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<sup>4</sup> Essential Services Commission, *Compliance Policy Statement for Victorian Energy Businesses*, January 2012 (C/11/25490), at 15.

### **Outcome of audit reports**

According to the Commission's Compliance Policy Statement, the Commission's overall approach *"is to encourage a culture of compliance by the regulated businesses."*<sup>5</sup> To encourage a culture of compliance and an environment where there is continuous improvement in service quality and efficiency, CUAC believes that the Commission also needs to ensure that matters of noncompliance are appropriately addressed by the retailer. We would like to see the Commission take a strong and active enforcement role against retailers who do not implement what they have proposed as remedial actions, to address instances of noncompliance. CUAC is of the view that the example of AGL cited below falls well short of an effective compliance approach, to the detriment of Victorian consumers.

The Commission's 2009 audit found AGL to be in significant noncompliance with 37 out of 41 performance indicators and with 12 of 22 licence obligations. AGL provided an undertaking to rectify the issues identified and a re-audit in 2010 found that AGL complied with the reporting obligation for 32 of the 37 performance indicators and with all 12 licence obligations within the scope of the audit. As part of the Commission's audit plans for retailers, AGL was audited in 2011 on 21 licence obligations and 4 performance indicators and was found to be in overall compliance with 20 of 21 licence obligations during the audit period (1 July 2010 –30 June 2011) but with only two of four performance indicators – (a) AGL's telephone marketing operation failed to provide most new customers promptly with the contract information it was required to send; (b) AGL's telephone marketing staff did not reliably ensure that customers adequately understood the contracts on offer and actually gave their agreement to them; (c) AGL charged some customers early termination fees that were not documented in their contracts or in its policies and procedures; (d) AGL did not review its records of life support customers as often as required by the Commission; (e) AGL failed to comply with reporting requirements for two of the indicators of customer hardship that had already been audited before, and again the undocumented nature of the reporting procedures has been criticised.

The Commission's 2011 audit found that AGL twice breached an administrative undertaking in respect of one of the performance indicators, number of energy field audits provided at no cost to customers. This was inaccurately reported at the 2009, 2010 and 2011 audits. The Commission's response to this was to ask AGL to show cause as to why the Commission should not proceed to enforcement measures to ensure that it would comply with reporting requirements for this

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<sup>5</sup> Essential Services Commission, *Compliance Policy Statement for Victorian Energy Businesses*, January 2012 (C/11/25490), at 7.

indicator, and to require AGL to provide an administrative undertaking to comply with its other performance reporting obligations.<sup>6</sup>

Given that there had already been two undertakings given by AGL, CUAC believes that the Commission's approach of requiring yet another undertaking was an insufficient action. We believe the Commission should have sent a stronger signal to AGL and thus to industry, that the Commission takes noncompliance seriously, particularly where the same problem reported in two previous audits had not been rectified despite the retailer providing previous undertakings to the Commission. Consumers are entitled to rely on an independent regulator to provide effective regulatory oversight which includes appropriate enforcement when incidents of noncompliance emerge. In light of this, CUAC urges the Commission to use its available powers, particularly in cases of ongoing or repeated non-compliance. We note that under the Commission's Compliance Policy Statement, the Commission is empowered to; "*proceed with more serious enforcement actions in appropriate circumstances and when other measures have not had the desired effect.*"<sup>7</sup> Clearly, there are a range of enforcement activities as outlined in the pyramid model of enforcement, which may be used by the Commission.<sup>8</sup>

In the event the Commission issues an enforcement order, in addition to publishing a copy of the order in the Government Gazette as soon as possible after the order has been served which is a legislative requirement,<sup>9</sup> we are of the view that in the interest of accountability and transparency, this should also be published on the Commission's website at the same time. For example, the Australian Competition and Consumer Commission (ACCC) issues statements about enforcement actions that are taken against a business.

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<sup>6</sup> Essential Services Commission, 2012, Summary Audit Report - Regulatory Audit of AGL, March, at III & IV.

<sup>7</sup> Essential Services Commission, *Compliance Policy Statement for Victorian Energy Businesses*, January 2012 (C/11/25490), at 17.

<sup>8</sup> Essential Services Commission, *Compliance Policy Statement for Victorian Energy Businesses*, January 2012 (C/11/25490), at 19

<sup>9</sup> Section 53, Essential Services Commission 2001 Act

### **Timely publication of audit results and evidence of corrective actions**

CUAC has previously alerted the Commission to the need for timely publication of audit results and evidence of subsequent corrective action, which is critical to transparency and accountability. Our December 2012 report, *Minimising Consumer Detriment from Energy Door-to-Door Selling*, discussed the results of regulatory audits in relation to door-to-door selling:

*In responding to the results of these regulatory audits, the ESC asked retailers to make administrative undertakings that they will remedy areas of non-compliance.*

*In most cases, the deadline for these corrective actions and independent verification has now passed, but no further information has been made publicly available on the ESC website. For example, following its 2011 audit demonstrating major non-compliance with the Energy Marketing Code and Guideline 19, in January 2012 Origin Energy committed to a range of corrective actions and a further independent audit in July 2012.<sup>10</sup> At the time of writing, the results of this audit were not yet available on the ESC website. Similarly, while initial regulatory audits of Red Energy, Neighbourhood Energy, Australian Power and Gas and Powerdirect were scheduled for completion between April and June 2012, the results had not yet been published by the ESC as of December 2012. (pp 56-57)*

Based on this analysis, the report recommended that the Commission ensure that results from regulatory audits and evidence of subsequent corrective action be made available on the Commission's website within three months of their completion (Recommendation 4).

### **Systemic issues**

CUAC has been monitoring the significant upward trend of the number of complaints to EWOV. EWOV received 63,998 cases during 2011-2012 – 61,176 complaints and 2,822 enquiries. Complaints increased by 23 per cent largely due to a 31 per cent increase in electricity complaints. Concerns about solar and smart meters, billing system problems of two large retailers (which impacted hundreds of thousands of customers) and affordability were drivers for the increase in the number of complaints.<sup>11</sup>

While EWOV addresses consumer complaints on a case by case basis, their role includes alerting the Commission to systemic issues where further regulatory action may be required to

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<sup>10</sup> Origin Energy (2012) Letter to Mr David Heeps, CEO, Essential Services Commission, 4 January 2012, *ESC* website.

<sup>11</sup> EWOV Annual Report 2012, at 6.

ensure that retailers are complying with regulations. Unless effective auditing, compliance and enforcement actions are taken by the Commission, it is likely that systemic issues such as those identified by EWOV, or in the AGL example cited above remain unaddressed. Consumers will suffer detriment and complaints numbers will continue to increase.

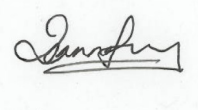
CUAC believes that it is important that market participants work together to ensure better outcomes for consumers, in particular ensuring appropriate access to payment assistance and hardship support and minimising the number of disconnections.

We thank you for the opportunity to participate in the Commission's consultations on the Draft Decision. If you have any questions, please do not hesitate to contact the undersigned on 03 9639 7600.

Yours sincerely,



Jo Benvenuti  
Executive Officer



Deanna Foong  
Research & Policy Advocate