

LICENSING ARRANGEMENTS FOR THE ELECTRICITY AND GAS SUPPLY INDUSTRIES

AB4/8

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PURPOSE

This Bulletin outlines processes to be followed to obtain licences under the *Electricity Act 1996* (**Electricity Act**) and *Gas Act 1997* (**Gas Act**) authorising operations in the electricity and gas supply industries in South Australia, and for the variation, transfer and surrender of such licences.

LEGISLATIVE FRAMEWORK

The Electricity Act (s 14D) and Gas Act (s 18B) declare the electricity and gas supply industries to be regulated industries for the purpose of the *Essential Services Commission Act 2002* (**ESC Act**).

The ESC Act provides the Essential Services Commission of South Australia (the **Commission**) with broad regulatory powers in relation to regulated industries including price setting, licensing, compliance monitoring and enforcement, making of codes and rules and performance monitoring.

Part 3 of the Electricity Act specifies in detail the role of the Commission in regulation of the electricity supply industry, including its role in licensing of electricity entities. Licences are required under the Electricity Act for generation, transmission, distribution, retail and system control functions.

Similarly, Part 3 of the Gas Act specifies in detail the role of the Commission in regulation of the gas supply industry including its role in licensing of gas entities. Licences are required under the Gas Act for distribution and retail functions.

The ESC Act, the Electricity Act and the Gas Act can be viewed on the South Australian Legislation website, www.legislation.sa.gov.au. Prospective licence applicants are strongly encouraged to peruse the relevant legislation before making a licence application to the Commission.

Following the implementation of the National Energy Customer Framework (NECF) in South Australia from 1 February 2013, the Commission's responsibility for administering the licensing regime for the retailing of electricity and gas changed. Under the NECF, energy retailers operating within the NEM or retailing natural gas (as the case maybe) no longer require a licence issued by the Commission but instead require an authorisation issued by the AER. For further detail on authorisations contact the AER at <http://www.aer.gov.au/node/486>

As a result of the commencement of the NECF in SA the Commission's energy retail licensing functions are limited to "off-grid" electricity operations (ie non NEM connected) and reticulated LPG distribution and retail operations. Consequently, retail licences previously

issued by the Commission to retailers who are now NERL retailers ceased to have effect from 1 February 2013.¹

LICENCE APPLICATION PROCEDURE

Who should apply

Part 3 of the Electricity and Gas Acts provide that a person must not carry on operations in the electricity or gas supply industries for which a licence is required without holding a licence authorising relevant operations.

The operations for which a licence is required are:

- ▲ generation of electricity;
- ▲ operation of an electricity transmission or distribution system;
- ▲ operation of a gas distribution system;
- ▲ retailing of electricity in locations not connected to the NEM;
- ▲ retailing of gas other than natural gas;
- ▲ system control over a power system; and
- ▲ other operations specified by regulations.

An application for a licence may be made by any legal person including, without limitation, individuals, partnerships, incorporated associations, unit and other forms of trusts and corporations.

Application procedure

A person or entity seeking an electricity or gas licence must make an application to the Commission by filling out the relevant Application Form for the issue of the licence required. These forms are available on the Commission's website (www.escosa.sa.gov.au), on the licensing page. Applicants must provide all information requested in the application form. Failure to provide this information may result in delays in processing the application or the application being denied.

When two or more applicants wish to apply to hold a licence jointly, each of the applicants should complete a separate application form. These forms should be submitted to the

¹ NERL retailers wishing to operate in the South Australian market are reminded of the specific obligations (including payment of an Administrative Fee) that they are required to comply with in South Australia as set out in the National Energy Retail Law (SA) and the Statutes Amendment (National Energy Retail Law Implementation) Bill 2012. NERL retailers must be granted a retailer authorisation by the AER if they have not already been granted one.

Commission together with a covering letter explaining that the application is for a licence to be held jointly.

A completed application form should be submitted both:

- ▲ in writing to the mailing address below:

Essential Services Commission of South Australia
GPO Box 2605
Adelaide SA 5000

- ▲ electronically to: licensing@escosa.sa.gov.au

Applicants should allow the Commission approximately 12 weeks to consider an application, as a public consultation period of at least four weeks forms part of the application process.

The Commission advises any licence applicant that may have entered into commercial and contractual arrangements (including the construction of infrastructure), prior to the issuing of the requisite licence, that they do so entirely at their own risk.

Information to be submitted with an application

Licence applicants must provide sufficient information with the application to enable the Commission to make an assessment of the suitability of the applicant to hold the licence requested. The application form indicates the information to be submitted. As a minimum, applicants will be required to submit information addressing the following matters:

Corporate and legal information

- ▲ details in relation to the identity of the applicant (e.g., details of the major shareholders if applicable and the person or entity that will carry on the operations under the licence being sought);
- ▲ details regarding the nature and scope of the operations for which a licence is sought;
- ▲ sufficient information to enable the Commission to make an assessment of the suitability of the applicant and its officers to hold the licence requested, using the assessment criteria as detailed in section 17 of the Electricity Act and section 21 of the Gas Act.

Regulatory information

- ▲ information to satisfy the Commission that the applicant can meet the relevant licence conditions (refer for example to ss 21-24A of the Electricity Act and ss 25-26A of the Gas Act) and has (or will have) a robust compliance program in place to ensure; and
- ▲ information to satisfy the Commission that the issuing of a licence is consistent with its objectives, which are specified in section 6(1) of the ESC Act.

Technical and human resource information

- ▲ details in relation to the technical capacity of the applicant to comply with the conditions of the licence;
- ▲ evidence that the applicant can properly and safely conduct the business authorised by the licence, including details of experience in the energy market and copies of its risk management strategy and compliance program.

The Commission may seek advice from the Australian Energy Market Operator (AEMO) and the Office of the Technical Regulator on matters of technical capacity.

Financial and Prudential information

- ▲ sufficient information to enable the Commission to determine the applicant's financial capacity. This information would include the provision of copies of past financial statements, details of capital support arrangements, bank or cross guarantees, credit history and business continuity arrangements. In addition, details of the applicant's strategic direction and objectives, identified opportunities in the market place and forecast results should be provided which may be contained in documents such as business plans;
- ▲ in respect of an applicant wanting a retail licence, the Commission will be satisfied with the financial capacity of the applicant if the applicant can demonstrate that it:
 - has a long term credit rating of BBB or greater with Standard and Poor's or Moody's; or
 - is registered as a Market Participant by AEMO (electricity only); or
 - has operated as a licensee and held a retail licence in another jurisdiction for a period of at least 2 years.

Applicants must take all reasonable steps to ensure the information provided in the application form is complete, true and correct and are required to make a declaration to that effect in the application form. Failure to disclose information or misrepresent any matter relevant to such information may result in the suspension or cancellation of a licence.

Applicants are encouraged to consult with the Commission prior to submitting an application.

Additional Information - Generation Technical Licence Conditions

Additional technical licence conditions apply to all new electricity generators seeking to connect to the South Australian power system. Applicants for a generation licence should familiarise themselves with the Commission's Inquiry into the licensing arrangements for generators in South Australia final report, available on the Commission website.

Model licence conditions reflecting the Inquiry findings and conclusions have been developed and will be applicable to all new applications, having regard to advice from the Australian Energy Market Operator (AEMO) on the specific circumstances of individual applications received.

Depending on the specific characteristics of a given generation project, the model conditions may be varied to the degree necessary to ensure that South Australian consumers' long-term interests with respect to the price, quality and reliability of electricity services are protected.

Assessment

In performing its electricity and gas licensing functions, the Commission must have as its primary objective the protection of the long-term interests of South Australian consumers with respect to the price, quality and reliability of electricity and gas supply, and must also have regard to the factors outlined in s 6(1) of the ESC Act. These factors include the need to:

- ▲ promote competitive and fair market conduct;
- ▲ prevent misuse of monopoly or market power;
- ▲ facilitate entry into relevant markets;
- ▲ promote economic efficiency;
- ▲ ensure consumers benefit from competition and efficiency;
- ▲ facilitate maintenance of the financial viability of regulated entities and the incentive for long term investment; and
- ▲ promote consistency in regulation with other jurisdictions.

Subject to the above factors, key criteria for assessment of both electricity and gas licence applications are outlined in Part 3 of the Electricity Act and Gas Act respectively and include:

- ▲ that the applicant and its officers are suitable persons to hold a licence and have the ability to operate a viable business; and
- ▲ in the case of a licence authorising the operation of an electricity transmission, electricity distribution network, or a gas distribution system - the network or system has the necessary capacity for transmitting or distributing electricity or gas safely; and
- ▲ in the case of a licence authorising retailing of electricity or gas - the applicant will be able to meet reasonably foreseeable contractual obligations for the sale of electricity or gas; and

- ▲ in the case of a licence of any class – the grant of the licence would be consistent with criteria (if any) prescribed by regulation for a licence of the relevant class.

Additional criteria specific to electricity include:

- ▲ the issue of an electricity licence will not result in the same person holding both a licence authorising the operation of a distribution network and a licence authorising retailing of electricity;
- ▲ in the case of a licence authorising the generation of electricity – the generating plant (or proposed generating plant) will generate electricity of the appropriate quality for the relevant transmission or distribution network.

In deciding whether an applicant is a suitable person to hold an electricity or gas licence, the Commission may consider the following:

- ▲ the applicant's previous commercial dealings and the standard of honesty and integrity shown in those dealings;
- ▲ resources available to the applicant – financial, technical and human;
- ▲ whether the applicant (and, where applicable, its officers and major shareholders) has shown, in their past commercial and other dealings, honesty and integrity; and
- ▲ any other matters prescribed by regulation.

Each electricity and gas licence issued by the Commission contains a variety of conditions. Mandatory licence conditions, which the Commission must include in each licence, are specified in Part 3 of the Electricity Act and Gas Act. Again, prospective licence applicants should review the legislation.

The licence conditions will vary, depending on the type of licence and the specific application. For example, most licences issued by the Commission will require compliance with specified industry codes made by the Commission under the ESC Act. These industry codes are available from the Commission's website. All licences are also subject to a compliance scheme outlined in the Commission's Energy Industry Guideline No. 4 – "Compliance Systems and Reporting".

Prospective licence applicants are invited to discuss licence conditions with the Commission.

Confidentiality

Applicants must clearly inform the Commission if information provided in respect of a licence application is confidential information and where that is the case, also provide a non-confidential version of the application for public release.

The Commission reserves the right, pursuant to Part 5 of the ESC Act, to release or refer to a licence application, part of a licence application or information provided in support of an application, notwithstanding a claim of confidentiality, if the Commission believes that to do so is in the public interest.

Consultation

Unless confidentiality is claimed in respect of a licence application, part of a licence application or information provided in support of an application, the application and/or information will be made available on the Commission's website and in hard copy from the Commission's office.

The Commission will consult with relevant government, industry and consumer groups in the conduct of its licensing functions through a public consultation process. The Commission accepts submissions in relation to an application from all interested persons. All submissions received, except those that are commercial-in-confidence, are published on the Commission's website. If consultation requires the release of confidential information, the Commission will first advise the applicant and seek consent to the release of information. The Commission has established a Charter of Consultation and Regulatory Practice which is available on the Commission's website at www.escosa.sa.gov.au.

The Commission will, as necessary, seek independent expert advice on specific licence applications. For example, it will refer electricity generation licence applications to AEMO for technical evaluation of network and market impacts of the proposed generation plant. The Commission may also engage external consultants to conduct fit and proper searches and evaluate financial reports.

Application Fees

An electricity or gas licence application must be accompanied by the appropriate application fee, which has been set at \$1,000 per licence pursuant to Part 3 of the Electricity Act (s 16) and the Gas Act (s 20).

The application fee cannot be refunded in the event the Commission does not approve the licence application.

Licence Fees / Administrative Fee

A licence will not be issued to an applicant until the first annual licence fee (or approved licence fee instalment) has been paid.

Annual licence fees and Administrative fees are set by the Minister and are payable by each licensee as an amount that the Minister considers to be a reasonable contribution towards the costs associated with administering the Electricity and Gas Acts. The licence fees and administrative fee determined by the Minister are collected by the Commission. At annual intervals, the Commission, on behalf of the Minister, will send to each licensee, depending on the category within the sector, an invoice for the licence fee or administrative fee. Fees are to be paid on receipt of an invoice via one of the payment options set out in the invoice.

The fees set for the various licences in the gas and electricity supply industries in South Australia are available from the Commission's website at <http://www.escosa.sa.gov.au/electricity-overview/licensing/licence-applications.aspx>

(Electricity) and <http://www.escosa.sa.gov.au/gas-overview/licensing/licence-applications.aspx> (Gas).

Reviews and appeals

If the Commission refuses to issue a licence to an applicant, the applicant may apply for a review of the decision, pursuant to Part 8 of the Electricity Act and Part 7 of the Gas Act.

Similarly, an existing licensee may apply to the Commission for review of a decision of the Commission to:

- ▲ refuse the variation of the terms or conditions of a licence;
- ▲ suspend or cancel a licence; or
- ▲ vary the terms or conditions of a licence.

A licence applicant (or existing licensee) dissatisfied with a decision as confirmed, amended or substituted by the Commission arising from any of the above reviews (as relevant), may appeal against the decision to the Administrative and Disciplinary Division of the District Court of South Australia.

The Electricity Act and Gas Act permit the Minister responsible for administering that Act to intervene, personally or by counsel or representative, in a review or appeal.

VARIATION, TRANSFER AND SURRENDER OF LICENCES

Variation

Under s 27 of the Electricity Act and s 29 of the Gas Act, a licensee may apply to the Commission to vary the terms or conditions of its licence.

Licensees should provide sufficient information to enable the Commission to assess the impact and significance of the variation to the current licensing arrangements. The Commission can also vary the terms and conditions of an licence as it considers appropriate (but not so as to remove a condition that the Commission is required by the Electricity Act or Gas Act to impose on such a licence) after giving the licensee reasonable notice of the proposed variation and allowing a reasonable opportunity to respond to the proposed variation.

In considering whether or not to vary the conditions of a licence, the Commission may undertake a program of consultation.

Where a licensee applies to change its name without changing the legal entity that has been issued a licence, the Commission would process the application as a variation.

There is no applicable fee for the variation of a gas or electricity licence.

Transfer

Under s 28 of the Electricity Act and s 30 of the Gas Act, a licence holder may apply to the Commission for the transfer of the licence to another entity with the approval of the Commission. An application for transfer of a licence requires the consent of both transferor and transferee of the licence. The Commission will therefore request that the transferee complete a licence application form before considering the transfer

The Commission may also impose conditions on the transfer of the licence or vary the terms and conditions of the licence on its transfer. The Commission will not agree to the transfer if the transferee would not be entitled to the issue of the licence.

An application fee of \$1,000 is applicable to an electricity or gas licence transfer.

Surrender

In accordance with s 29 of the Electricity Act and s 31 of the Gas Act, a licensee may surrender its licence by providing written notice to the Commission at least six months before the surrender is to take effect, unless the licensee and the Commission mutually agree to a shortened period of notice. Licensees should provide sufficient information to enable the Commission to assess the application to surrender its licence, including information concerning the arrangements in place to transfer its customers, if any, to another licensee.

Annual licence fees due and payable prior to an application for surrender of a licence, or during the six month notice period, must still be paid by the licensee.

EXEMPTIONS

The Commission can, with the approval of the Minister, issue an exemption from the requirements of Part 3 of the Electricity or Gas Acts, including the requirement to be licensed, pursuant to section 80(1) of the Electricity Act and section 77(1) of the Gas Act (or from various licence conditions). In deciding whether to grant an exemption, the Commission will consider the impact of the proposed exemption on the achievement of the various factors specified in section 6 of the ESC Act, in particular, the need to ensure that the long-term interests of consumers with respect to price, reliability and quality of supply are served.

Exemptions will only be granted by the Commission in exceptional circumstances where the regulatory burden of being licensed would outweigh any benefits the wider community receives. It must be evident to the Commission that licensing is simply not appropriate.

The onus will be on an applicant to demonstrate to the Commission why it should not be licensed (or why it should be exempt from various licence conditions).

FURTHER INFORMATION

Any queries relating to the licensing arrangements covered by this Bulletin should be directed to:

Contact person: Manager Licensing
Essential Services Commission of South Australia
Postal address: GPO Box 2605, Adelaide SA 5001
Telephone: (08) 8463 4444
E-mail: licensing@escosa.sa.gov.au

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