



27 November 2009

Mr Paul Kelly
Executive Director
Licensing, Monitoring & Customer Protection
Economic Regulation Authority
PO Box 8469
Perth Business Centre
PERTH WA 6849

Dear Mr Kelly

**SUBMISSION – CLEAR ENERGY PTY LTD ELECTRICITY RETAIL LICENCE
APPLICATION & STANDARD FORM CONTRACT**

We refer to the Invitation by the Economic Regulation Authority (the Authority) for Public Submissions on the Clear Energy Pty Ltd (Clear Energy) Electricity Retail Licence Application & Standard Form Contract (Contract), dated 6 November 2009.

We have reviewed the Contract and attach our detailed comments on the Contract for your consideration.

Generally the Office of Energy supports means to assist the take up of photovoltaic systems by the public. Clear Energy appears to be proposing to make photovoltaic systems available to a consumer without the consumer having to purchase the system itself; the cost being recovered from the sale of electricity and renewable energy certificates (RECs).

The business model inherent in Clear Energy's proposed Standard Form Contract is a relatively new concept and has the potential to be applied to a relatively large number of households in Western Australia. This raises a number of energy policy questions for the Office of Energy; as the Government's energy policy body. The questions raised include the impact on other energy market participants and whether consumers will be able to make adequately informed choices about the uptake of the product and whether their rights and obligations are clearly identified.

Some of these policy questions will need further consideration and consultation with stakeholders and are beyond the scope of this call for submissions by the Authority. The attached detailed response attempts to provide specific comments on the Contract that will be useful to the Authority in its review. In addition, where the Office of Energy believes there are policy issues that are beyond the scope of the Authority's review, they are identified and possible further actions outlined.

Our attached detailed comments on the Contract fall into four main categories, those being:

- general consumer protection concerns that consumers are able to make informed decisions when making the choice to contract with a company such as Clear Energy;
- the need for greater clarity about how the scheme proposed by Clear Energy may work;
- the need to amend some of the clauses in the Contract; and
- equity issues, in particular concerning consumers opting out of the scheme where they move house.

On the broader issue of the application by Clear Energy for a retail license, the Office of Energy believes that it is entirely appropriate that Clear Energy be required to obtain a retail license as it potentially will be selling electricity to a large number of relatively small consumers. Given the special circumstances in which Clear Energy will be conducting business, there may be a need for additional license conditions to be applied and this will need further consideration.

The Office of Energy initial option is that the general exemption for generators to not have a distribution license to connect to a network would apply in this case and Clear Energy would not need to obtain a distribution license as well. However, it will need to comply not only with the usual industry standards such as the AS 3000 Wiring Rules, but also with the Technical Rules applying to those parts of the South West Interconnected System (SWIS) that are owned and operated by Western Power.

The Office of Energy believes that while the business and physical model adopted by Clear Energy would appear to circumvent the current contestability rules for consumers on the SWIS, it has not come to a concluded position as to whether there are other policy issues that would need to be considered before it can fully support this business model.

It is planned to meet with Clear Energy to discuss these policy issues directly. We would be happy to meet with the Authority to discuss any of the issues raised in this submission.

Yours sincerely

ANNE HILL
A/COORDINATOR OF ENERGY

COMMENTS ON CLEAR ENERGY STANDARD FORM CONTRACT

SPECIFIC COMMENTS

- Clause 4 – When the Contract Starts
 - Contracts usually commence either on a nominated date specified in the Contract or on the date the last party signs. In this situation, it would be more appropriate for the contract to commence on the date the last party signs the contract so that the cooling off procedure can work smoothly.
 - Additionally, we note the *Electricity Industry (Customer Contracts) Regulations 2005* (Regulations) specify at regulation 6 that a customer contract must specify the day on which the contract comes into effect and the period for which it has effect.
- Clause 5 – Charges
 - We comment generally that regulation 13 of the Regulations provides that a customer contract must describe the prices payable by the customer and the circumstances in which they are payable. At present we do not believe this is clearly addressed in the contract.
- Clause 5.1 – Electricity Charge
 - The draft contract indicates the electricity charge will be specified in the Electricity Charges Schedule, which is provided for at the end of the contract. The form of the draft table, which is blank, indicates that a two part tariff and a supply period apply, but this is not clear.
 - The basis for calculation of the electricity price is not revealed, apart from the escalation method.
 - The electricity charge increases by CPI each year. It is recommended that the customer should be made aware in the marketing material that this may cause their bill for electricity supplied by Clear Energy to increase at a rate that is greater or less than a bill for electricity supplied from the grid.
- Clause 5.2 – Standard Price
 - It is not clear when a Standard Price would apply or when the Electricity Charges Schedule would apply. It is not clear how a Standard Price would be determined. Both the Contract and the marketing material should clearly specify in which situations the various charges apply.
- Clause 5.3 – Fees
 - A “Fee” means a Charge other than the Standard Price or the Electricity Charge.
 - It is not clear what any fees would be for and the basis for calculating them. It is recommended that Clear Energy should outline what fees it intends to apply; i.e. what they are for and how they would be determined.
 - It is recommended that a fee schedule (and any changes to fees) should not just be provided on Clear Energy’s website, but also provided by the same mechanism as bills are provided.

- Clause 6 – Changes to the Standard Price, Electricity Charge and Fees
 - Clear Energy is able to change these amounts at any time by giving notice of any change to the Electricity Charge on the customer's bill and otherwise publishing changes on their website.
 - The Office has concerns about the situation where there is no oversight of prices, fees and charges but there are large penalties for the customer cancelling the contract (see later comments). This may place some customers in an invidious situation. The Office will need to consider whether greater regulatory oversight is needed if such a situation can eventuate.
- Clause 7 – Adjustments for change in Relevant Taxes
 - In-good-faith adjustments due to changes in taxes to pass the effect of these on to the consumer appears appropriate as long as they only reflect the pass through of the net impact on Clear Energy. Presumably any disagreement about the calculation of the pass through can be referred to the complaints mechanism under clause 23.
- Clause 8 – Change in law
 - This clause places the change of law risk on the customer. Similar comments to those above for clause 7 apply.
- Clause 9 – How we calculate your electricity use
 - There is no indication of what the target billing cycle is to be. Customers should be entitled to some indication of the likely cycle for budgeting purposes.
- Clause 9.3 – You can ask for a meter test
 - It is recommended the meter testing fee should be disclosed to the customer and included on a publicly available schedule of fees.
 - By way of comparison, Schedule 4 of the *Energy Operators (Electricity Retail Corporation) (Charges) By-laws 2006* (By-laws) prescribes the meter testing fee for Synergy as \$152.
 - It should be made clear that the repair or replacement of the meter will be at Clear Energy's cost.
- Clause 10 – Bills
 - It is recommended the overdue account fee should be disclosed to the customer and included on a publicly available schedule of fees.
 - By way of comparison, Schedule 4 of the By-laws prescribe the amount that Synergy can be charged for an overdue account notice as \$4.40.
- Clause 12 – Electricity Supply Equipment
 - It is recommended that the phrase "intentionally damage" is defined or clarified so that it is clear to the customer for what types of damage it may be liable.
 - Clear Energy are entitled to demand the customer pay them for the cost of replacing or repairing the Electricity Supply Equipment. We recommend these costs should be limited to Clear Energy's reasonable replacement or repair costs.
 - There may be issues if Clear Energy novate the contract as there is no obligation on Clear Energy (or its successor) to maintain the standard of the

installed system (i.e. to maintain a certain brand or capacity). For example, the contract could be novated to another company who decide that they want to take out the system's currently in use and replace them with an inferior product. In that situation, the customer has no recourse except through the complaints mechanism at clause 23.

- Clause 16 – Moving out of the Premises
 - Please see our comments regarding clause 25.5 of the contract and the potential issue of customers being penalised for moving households and therefore having to end the contract.
- Clause 17 – Access to the Premises
 - The contract currently provides that the customer must provide Clear Energy or a person nominated by Clear Energy with safe and unrestricted access to the premises when needed however it is recommended that access should only be required to be provided at reasonable times.
 - In terms of notice, clause 17.2(a) which provides that Clear Energy must give at least 5 Business Days notice before coming onto a customer's premises unless removing Electricity Supply Equipment under clause 25, we think this should be restricted to clause 25.4 only which sets out the situations in which Clear Energy can end the contract.
 - It is also recommended that Clear Energy should be required to give a reasonable amount of notice for meter readings and routine maintenance pursuant to clauses 17.2(b) &(c).
- Clause 18 – Interruptions to your Electricity Supply
 - We have some concerns with how and in what circumstances a customer's supply may be interrupted.
- Clause 18.1 – Emergencies
 - We are of the view Clear Energy should disclose the amount of the fee charged where Clear Energy disconnect the Electricity Supply Equipment because the customer creates an emergency, in the circumstance set out in clause 18.1(b).
- Clause 18.3 – Events beyond your control
 - The customer appears to be required to continue to pay bills even if an event beyond its control occurs. This may not be an issue if the electricity cannot be supplied and the customer would not be expected to pay if the service is no longer provided by Clear Energy. The contract does not address how the customer obtains energy once disconnected by Clear Energy. Presumably it would not be a breach of the section that prohibits the alternative supply of electricity (clause 19(f)), if the customer receives electricity from its normal grid retailer.
- Clause 18.4 – Events beyond our control
 - We also note that Clear Energy is not required to perform its obligations to the customer for as long as the event continues.
 - The customer therefore has no certainty as to the length or duration of the event and the contract does not address whether or not the customer has to continue to pay its bills or whether Clear Energy can continue to charge.

- We recommend there should be some suspension of fees and charges or a right of the customer to terminate the contract (without being subject to a penalty) after a certain period of time or if certain events occur.
- Clause 19 – Disconnection of Electricity Supply Equipment due to your actions
 - We query whether it is fair for Clear Energy to be able to automatically disconnect a customer if there is some query or dispute regarding the circumstances of entry on the customer's premises by Clear Energy pursuant to clause 19(b).
 - More detail should be provided by Clear Energy on the nature of the reconnection charge and in any event this amount should be disclosed to the customer in the marketing material and the contract. For example, the reconnection fee for Synergy is prescribed in the By-laws as \$29.60.
 - This clause relies on the Code of Conduct provisions with regard to timeframes and procedures for disconnection and we are comfortable with the protection this offer customers.
 - We do however note that the definition of "Disconnection" is not in line with other industry legislation and feel that this may need to be harmonised.
 - The terminology used in this clause may also need to be revisited to differentiate between 'your supply' as supplied by Clear Energy, and 'your supply' as supplied from the grid. Further, a distinction may be required to differentiate between 'disconnection' from the Clear Energy system and 'disconnection' from the grid.
 - Section 19(f) restricts a customer obtaining a supply of electricity from another party and we feel this may be anti-competitive.
- Clause 20 – Limitation on Liability in Certain Circumstances
 - We note that this clause contains a blanket limitation of liability for the items set out in subclauses (i) to (vii) and uses similar wording to the Synergy standard form contract.
 - We make the general comment that these items generally relate to the quality of electricity supplied to customers, surges or failures to supply and consequential losses suffered by the customer such as business interruption losses, lost profits, losses of an opportunity and liability to other people under other contracts. While it is quite common to limit these sorts of consequential losses, it needs to be considered what the policy position on this should be generally and how much protection is offered to customers or discretion given to them to negotiate with Clear Energy the terms of the contract.
 - The contract is silent on Clear Energy's liability to a customer for other types of damage it may cause.
 - We understand that Clear Energy would be subject to the Technical Rules applying to those parts of the South West Interconnected System (SWIS) that are owned and operated by Western Power.
 - Further, there is no obligation on Clear Energy to take care or precaution while on the customer's property.
 - We also note that Western Power is liable for surges and question whether Clear Energy should also be liable.
 - Finally, this section does not address what happens if Clear Energy endangers or causes damage to another party.

- Clause 21 – Limitation in relation to implied warranty
 - This clause limits (however only to the extent permitted by law), Clear Energy's liability for a breach of a condition or warranty implied under this Contract by the *Trade Practices Act 1974*. However, it may be the case that such implied warranties cannot be limited. Again, the wording used in this section is similar to that used in the Synergy standard form contract.
 - We note that implied terms generally relate to goods and services and concern issues such as quality, title and compliance with samples or descriptions and in some cases attempts to exclude, or limit liability for breach of, the implied terms can be void.
 - We suggest the Authority obtain legal advice on the types of implied warranties or conditions and Clear Energy's ability to limit such liability for their breach.
 - Clear Energy seeks to limit its liability to the supply of an equivalent amount of electricity or the payment of the cost of acquiring an equivalent amount of electricity. In any event, these provisions are not clear or specific enough. They should refer to all costs associated with the supply to the customer of an equivalent amount of electricity or the payment of the customer's costs.
 - This raises policy issues as we are of the view clauses such as clauses 20 and 21 need careful consideration as to how customers are treated by companies such as Clear Energy.
 - For example, the customer's ability to negotiate with Clear Energy as to the terms of the contract (and seek amendments to the standard contract) need to be considered. If Clear Energy is not flexible in its negotiations at what point do the parties end up entering into a non standard contract?
- Clause 22 – Things you must tell us
 - We are concerned that subclause (d), is unclear as is the phrase "change the way you use electricity". It is not clear what constitutes a change of use? Do we want customers to be in a position where this is not defined yet they inadvertently in breach the contract?
 - Clarification should be sought as to the intention behind subclause (b), as surely the person with whom Clear Energy contracts is responsible for payment of the bills and no one else?
- Clause 23 – Complaints
 - We question whether this clause sufficiently complies with the requirements in the Regulations at regulation 18 which requires the contract to describe the procedures to be followed by the retailer in responding to a complaint. Section 23 merely provides Clear Energy will notify the customer within 3 Business Days of receiving the complaint, however it does not compel Clear Energy to take any action or respond as to the content of the complaint.
- Clause 25.3 – Moving out of the Premises (see also clause 16)
 - Subclause (a)(iii) and (iv) contemplate that a customer can assign its rights and obligations to a new owner or occupier of the Premises.
 - Subclause (b) requires a customer to pay an amount specified in the Electricity Supply Equipment Schedule, however, no amounts are specified in the contract. Notwithstanding this, the amount appears to relate/respond to the number of years which the customer has been under contract. There also

appears to be some kind of break fee or penalty. The customer does not purchase the equipment yet may have to pay a capital contribution towards the equipment which can then be re-used by Clear Energy. Further information should be sought by the Authority to clarify this.

- Subclause (c) permits the transfer of the contract if consent is obtained from Clear Energy. In that situation the customer doesn't have to pay the break fee.
 - However, there is nothing in the contract to say what the break fee is for, or is made up of. We assume the break fee is to cover the cost of removal of the equipment if the contract is not transferred on sale of the house or change of a tenant? In this situation, the fee may be justifiable, however it would need to be shown that it is a reasonable cost and the remainder of the term of the contract is made clear to the transferee.
 - There is nothing in the contract dealing with how a transfer is arranged or what the transferee has to do when it takes on the contract or the length of time it is contracting for.
- Clause 25.4 – We can end the contract
 - This clause sets out when Clear Energy can end the contract or turn off the electricity. Clear Energy does not have to provide notice to the customer. When this occurs, the customer is required to pay the amounts set out under clause 25.5.
 - Although not required by the Regulations it would be preferable if some period of notice in writing had to be provided by Clear Energy to the customer prior to termination of the contract or turning off electricity. This could be somewhat like a default mechanism in a lease.
 - Clarification of what Clear Energy means by the use of the words "otherwise vacates". If a customer goes overseas for a few months and leave the house locked up, does this constitute "otherwise vacating" and therefore render a breach of the contract? We note that clause 22(a) does not cover this situation.
 - Clause 25.5 – What happens if the contract ends
 - With regard to subclause (b), where Clear Energy may remove its Electricity Supply Equipment at any time, the customer should be notified when Clear Energy intend to enter the customer's property to remove the equipment. This should also be done only at reasonable times.
 - At subclause (d), which provides that the customer remains liable to pay any outstanding payments to Clear Energy and they have no further obligation to supply electricity, the customer again has no certainty of the amount of fees it will be charged for Disconnection (see below regarding the definition). The meter reading fee, when requested by a Synergy customer is prescribed in the By-laws as \$19.20.
 - Clause 26 – Confidentiality
 - In our view the contract should be confidential unless each party is required to disclose anything by law, not just because another section of the contract allows it.
 - Subclause (a) is vague and unclear as to what constitutes "business purposes" and further, the clause is not limited to the examples provided but could be interpreted widely.

- At subclause (b)(ii) we do not believe it is appropriate that details be disclosed for accounting purposes, but only legal requirements such as disclosures to ASX.
- Further, this clause doesn't, nor does the contract, contemplate a change in control of the ownership (such as a change in majority shareholding) of Clear Energy and a customer's rights in that situation.
- Clause 29 – Miscellaneous
 - Clear Energy can novate the contract without notice to the customer. This doesn't seem fair to the customer as a change in supplier may result in an increase in fees and charges or a change in quality of supply or customer relations and support (even the asset/PV system may be changed). Although this provision is contained in the Synergy contract, it leaves the customer in a difficult position whereby control of Clear Energy can change without the customer being notified. This is problematic in terms of our comments above on the uncertainty surrounding fees, charges and the length of the contract and confidentiality issues.
- Clause 29.7 – Notices
 - We believe notices should always be in writing. It is problematic for correspondence to only be provided orally or in some other manner in which it may be misinterpreted particularly when there are penalties resulting from non compliance or ending of the contract.
- Clause 29.9 – Contract details
 - At subclause (b) the contract provides that any changes to Clear Energy's contract details will be published, however, it does not specify where those changes will be published. This should be amended so that this is clear to the customer.
- Clause 30.1 – Definitions
 - "Beyond Your Control or Beyond Our Control" – we believe that "operational necessity" and "required maintenance" shouldn't be classed as beyond Clear Energy's control.
 - "Disconnection" – we do not believe this definition accords with other industry definitions in legislation. However, because it is not the same kind of disconnection that say Western Power would carry out it may not be an issue. However, for clarity, perhaps another term could be considered such as 'removal of the Electricity Supply Schedule'.
 - "Emergency" – we note that an emergency is limited to a situation which Clear Energy considers constitutes an emergency (not say, an objective person) and accordingly this should be limited to what Clear Energy considers when "acting reasonably". Or rather what 'a reasonable and prudent person considers'. We do however, note the definition is similar to that used in the Synergy contract.
 - "Network Access Tariff" – we note that this term is not used in the Contract and suggest it be removed from the list of definitions.
 - "Standard Price" – we note this definition provides the charge for selling electricity is stated in clause 5.2 however no charge is stated in clause 5.2. This should be rectified so the price is clear to the customer.
 - "Specified Rate" – we would suggest this be a per annum rate, calculated on a daily basis.

- Electricity Supply Equipment Schedule
 - In addition to our comments above on clause 5, the Regulations provide at regulation 8 that a customer contract must give an exact description of the goods and services that the retailer will provide under the contract. The Schedule however is blank and therefore does not contain this required information.

GENERAL COMMENTS

- The contract does not permit a customer to continue the contract and move the photovoltaic system to a new house they purchase. This would seem to be a situation which may occur, for example if a customer sells a house and wants to move the photovoltaic system and continue their contract or if the customer moves to new leased premises. Presently, the customer would have to terminate the contract, pay the break fee and enter into a new contract with Clear Energy (presumably at an increased price).
- The marketing associated with this contract needs to be very clear about what is disclosed to the customer. That is, all the fees (including the break fee) and charges potentially payable by the customer should be clearly outlined. Similarly, the consequences for the customer of terminating the contract or moving house and the obligations imposed on them.
- This is a standard form contract. Clear Energy may decide to use a non standard form contract which is not regulated.
- New Commonwealth legislation, the *Trade Practices Amendment (Australian Consumer Law) Bill 2009*, which is currently before the Parliament of Australia, will amend the *Trade Practices Act 1974* to implement a national consumer law regime (the Australian Consumer Law) which will: address unfair contract terms; and include penalties, enforcement powers and consumer redress options. It is understood that the new legislation will include provisions that a contract that cannot be negotiated by the customer is in effect a standard form contract. Therefore this new legislation may have an impact on how any non-standard contracts are viewed.
- It is not clear how long the contract goes for. It is not appropriate for the contract to be indefinite as this offers the customer no certainty with regard to some of the charges and fees Clear Energy intend to apply.

OFFICE OF ENERGY
27 November 2009