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Allens Arthur Robinson 

24 February 2012

Mr David Jones
Acting General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

Attention: Imogen Hartcher-O'Brien

ABN 47 702 595 758

Level 31
Riverside Centre
123 Eagle Street
Brisbane QLD 4000
Australia

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PO Box 7082
Riverside Centre
Brisbane QLD 4001
Australia
DX 210 Brisbane

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Dear Mr Jones

Notification of third line forcing

We act for ENERGEX Limited.

We enclose for lodgement a third line forcing notification on behalf of our client, together with a supporting submission. Regarding the applicable lodgement fee of \$100, we request that you apply the cheque that was enclosed with our client's third line forcing notification dated 19 January 2012 (for which we received a notice of invalidity dated 1 February 2012) to this notification.

If you require any further information regarding any aspect of the notification, please contact Peter James or Michael Morris on the numbers below.

Yours faithfully


Peter CJ James
Partner
Peter.James@aar.com.au
Tel +61 7 3334 3360

Michael Morris
Senior Associate
Michael.Morris@aar.com.au
T +61 7 3334 3279

Encl

AUST. COMPETITION &
CONSUMER COMMISSION
CANBERRA

28 FEB 2012

Bangkok
Beijing
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Hong Kong
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Shanghai

28 FEB 2012

Form G

Commonwealth of Australia

Competition and Consumer Act 2010 – subsection 93(1)

NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93(1) of the *Competition and Consumer Act 2010 (Act)*, of particulars of conduct or of proposed conduct of a kind referred to in subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

1. Applicant

(a) Name of person giving notice:

N95736

ENERGEX Limited ACN 078 849 055 (**ENERGEX**).

(b) Short description of business carried out by that person:

The transportation of electricity via an electricity distribution network in South East Queensland.

(c) Address in Australia for service of documents on that person:

C/- Peter James
Allens Arthur Robinson
Level 31, Riverside Centre
123 Eagle Street
Brisbane QLD 4000

2. Notified Arrangement

(a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

- (i) Services to external design consultants, specifically ENERGEX providing external design consultants with the opportunity to perform work for ENERGEX; and
- (ii) Network connection services to subdivision developers, specifically ENERGEX connecting the networks of subdivision developers to the ENERGEX distribution network.

(b) Description of the conduct or proposed conduct:

ENERGEX submits this notification because of an argument (which ENERGEX does not admit) that: By requiring external design consultants and subdivision developers to submit electrical network plans to ENERGEX using ENERGEX's Design Automation Tool or WorkPlans Program (as outlined in Attachment A), or by ENERGEX charging a fee to an external design consultant or subdivision

developer because the consultant or developer has submitted an electrical network plan to ENERGEX without using ENERGEX's Design Automation Tool or WorkPlans Program, ENERGEX's conduct might be characterised in the following manner:

- (i) supplying, or offering to supply, a service to external design consultants (specifically ENERGEX providing consultants with the opportunity to perform work for ENERGEX), or supplying or offering to supply at a particular price, on the condition that the consultant will acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's Design Automation Tool or WorkPlans Program) from another person not being a body corporate of ENERGEX;
- (ii) refusing to supply a service to external design consultants (specifically ENERGEX providing consultants with the opportunity to perform work for ENERGEX), or refusing to supply such a service at a particular price to such persons, for the reason that the consultant has not acquired or agreed to acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's Design Automation Tool or WorkPlans Program) from another person not being a body corporate of ENERGEX;
- (iii) supplying, or offering to supply, a service to subdivision developers (specifically ENERGEX connecting the networks of subdivision developers to the ENERGEX distribution network), or supplying or offering to supply at a particular price, on the condition that the subdivision developer will acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's Design Automation Tool or WorkPlans Program) from another person not being a body corporate of ENERGEX;
or
- (iv) refusing to supply a service to subdivision developers (specifically ENERGEX connecting the networks of subdivision developers to the ENERGEX distribution network), or refusing to supply such a service at a particular price to such persons, for the reason that the subdivision developer has not acquired or agreed to acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's Design Automation Tool or WorkPlans Program) from another person not being a body corporate of ENERGEX.

For further detail, please see Attachment A.

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

- (a) Class or classes of persons to which the conduct relates:

The notified conduct relates to the following classes of persons:

- (i) providers of design services in relation to electricity networks and electricity connection services; and
- (ii) persons wishing to obtain network connection services to a new subdivision of land, where this will require the creation and processing of new designs relating to those new connections.

- (b) Number of those persons

At the present time: The arrangements have not yet been implemented. If implemented, the number of persons likely to be affected by the notified conduct is as follows:

- (i) providers of design services in relation to electricity networks and electricity connection services - approximately 26; and
- (ii) persons wishing to obtain network connection services to a new subdivision of land, where this will require the creation and processing of new designs relating to those new connections - this number is indeterminate. It is estimated that ENERGEX processes between 800 – 1000 subdivisions per year. It is likely, however, that a portion of these subdivider supply agreements are lodged by repeat developers.

- (c) Estimated within the next year:

It is anticipated that the above numbers will remain stable over the next year.

- (d) Where number of persons stated in items 3(b) is less than 50, their names and addresses:

The numbers are greater than 50.

4. Public benefit claims

- (a) Arguments in support of notification:

See Attachment A

- (b) Facts and evidence to be relied upon in support of these claims:

See Attachment A

5. Market definition

- (a) Provide a description of the market(s) in which the goods or services described at 2(a) are supplied or acquired including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the

supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

- (i) the supply in Australia of electrical network design services; and
- (ii) the supply in Australia of electrical network connection services.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2(a) above and the prices of goods or services in other affected markets:

It is submitted that there is not likely to be any significant public detriment from the proposed conduct.

- (b) Facts and evidence relevant to those detriments:

See Attachment A

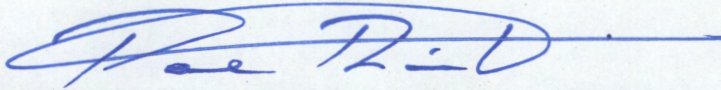
7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

C/- Peter James
Allens Arthur Robinson
Level 31, Riverside Centre
123 Eagle Street
Brisbane QLD 4000
Tel: (07) 3334 3360

Dated 21 February 2012

Signed by /on behalf of the applicant:



(Signature)

Paul Rainbird

(Full Name)

ENERGEX Limited

(Organisation)

A/Executive General Manager Network
Performance

(Position in Organisation)

**AUST. COMPETITION &
CONSUMER COMMISSION
CANBERRA**
28 FEB 2012

Attachment A

1. Background

1.1 ENERGEX's network

- (a) ENERGEX Limited (**ENERGEX**) transports electricity services via an electricity distribution network. It owns the electricity distribution assets comprising the network in South East Queensland and maintains the network for continuity of electricity supply.
- (b) There is a strong public interest in a network of high quality design. The benefits to the public of maintaining the integrity of the network include:
 - (i) increased public safety;
 - (ii) a reduced likelihood of network failure (and therefore disruption to the supply of electricity to consumers); and
 - (iii) a reduction in the cost of maintaining the network (which results in minimised costs to electricity retailers and, ultimately, consumers).
- (c) ENERGEX processes around 10,000 medium to large planned changes to its network every year. These are designed by a collection of internal and external teams, with around one third of them being designed externally to ENERGEX.

1.2 ENERGEX External Consultants

- (a) ENERGEX regularly engages external design consultants ("**ENERGEX External Consultants**") to design planned changes to ENERGEX's electricity distribution network ("**Work Plans**").
- (b) ENERGEX pays those consultants a fee for their design services pursuant to a contract entered into between ENERGEX and the ENERGEX External Consultant.

1.3 Subdivision Developers

- (a) ENERGEX also contracts with subdivision developers ("**Subdivision Developers**") for the connection of their subdivision developments to ENERGEX's electricity distribution network.
- (b) In connection with such a development, the applicable Subdivision Developer often directly engages an external design consultant to develop an applicable Work Plan for changes to the network. ENERGEX does not usually pay (or reimburse) Subdivision Developers for such work. The exception is where ENERGEX requires additional works to be installed as part of the subdivision than that which is strictly necessary to cater for the subdivision alone (for example, if ENERGEX requests additional work to cater for expected population growth).
- (c) ENERGEX does not typically receive payment from a Subdivision Developer to connect the network except where any switching of the network is required to connect the new development to the ENERGEX network.

1.4 Manual redrawing of designs

- (a) Currently, many Work Plans designed by:
- (i) ENERGEX External Consultants; and
 - (ii) external consultants directly engaged by Subdivision Developers (together with ENERGEX External Consultants, referred to as "**Third Party Designers**"),
- require manual redrawing by ENERGEX in order to be useful.
- (b) In this regard, ENERGEX currently redraws around 60-70 plans every month originating from Third Party Designers.
- (c) This manual redrawing is both time-consuming and can cause data errors and delays as the source of information is not in a format where it can be easily loaded into ENERGEX's system. It also causes delays to updating network information where official cadastre is not available which can affect designers as they require this data as a basis for their designs.

1.5 ENERGEX's DAT and WorkPlans Program

- (a) To address this issue, ENERGEX has developed a Design Automation Tool ("**DAT**"), specifically for relevant Third Party Designers working without connection to ENERGEX's computer network. The WorkPlans program is a variation of the DAT used by ENERGEX design staff and ENERGEX external consultants when connected to the internal ENERGEX computer network.
- (b) These tools will enable designs produced by such Third Party Designers to be automatically uploaded into the ENERGEX asset database without the need for reformatting or redrawing by ENERGEX.
- (c) Use of the DAT or the WorkPlans program by such Third Party Designers will have the benefit of both reducing ENERGEX's time spent on redrawing plans into a format capable of being uploaded into ENERGEX databases and improving the accuracy of the ENERGEX database.
- (d) The DAT and the WorkPlans program will be made available at zero cost to such Third Party Designers.
- (e) To use the DAT or the WorkPlans program, a copy of AutoCAD 2011 is required. If the design consultant does not already have AutoCAD 2011 installed on their system, obtaining it may cost in the order of \$5000 per licence.
- (f) Although ENERGEX has made arrangements with one supplier (KarelCAD) to offer favourable pricing to Third Party Designers, they (as well as Subdivision Developers) may obtain AutoCAD 2011 from any supplier of their choosing.
- (g) Although AutoCAD 2011 is the version of that software currently used by ENERGEX in relation to DAT and the WorkPlans Program, ENERGEX may subsequently upgrade to a later version of that software, in which case consultants and subdivision developers would need to also upgrade. ENERGEX would advise them when this occurs.

1.6 Proposed Conduct

- (a) Unless the parties otherwise agree, ENERGEX will require ENERGEX External Consultants to prepare Work Plans using the DAT or WorkPlans program. ENERGEX anticipates that it will permit ENERGEX External Consultants to produce Work Plans using other systems only in limited circumstances (eg, in CBD areas where there is already extensive mapping of the relevant area). Wording along the lines of the following is intended to be used when ENERGEX seeks to update its panel contracts used to engage ENERGEX External Consultants (which is intended to occur shortly):

"ENERGEX requires consultants to prepare work plans using either ENERGEX's DAT program or WorkPlans program. Production of works plans in any other drafting system must be agreed prior to award of project for design services".

As (unless otherwise agreed) ENERGEX External Consultants will be required to use the DAT or WorkPlans program when preparing Work Plans, and such programs cannot be used without a licence to AutoCAD 2011 (or the later version of that software which ENERGEX may use at a particular subsequent time), there is an argument (which ENERGEX does not admit) that: By requiring external design consultants to submit electrical network plans to ENERGEX using ENERGEX's DAT or WorkPlans Program, or by ENERGEX charging a fee to an external design consultant because the consultant has submitted an electrical network plan to ENERGEX without using ENERGEX's DAT or WorkPlans Program, ENERGEX's conduct might be characterised in the following manner:

- (i) supplying, or offering to supply, a service to external design consultants (specifically ENERGEX providing consultants with the opportunity to perform work for ENERGEX), or supplying or offering to supply at a particular price, on the condition that the consultant will acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's DAT or WorkPlans Program) from another person not being a body corporate of ENERGEX; or
- (ii) refusing to supply a service to external design consultants (specifically ENERGEX providing consultants with the opportunity to perform work for ENERGEX), or refusing to supply such a service at a particular price to such persons, for the reason that consultant has not acquired or agreed to acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's DAT or WorkPlans Program) from another person not being a body corporate of ENERGEX.
- (b) ENERGEX does not currently expect it will require Subdivision Developers (or Third Party Designers engaged by them) to use the DAT or WorkPlans program. Due to the cost and time involved in redrawing and reformatting, ENERGEX will however charge the Subdivision Developer a 'conversion fee' in respect of such plans where the DAT or WorkPlans program has not been used. ENERGEX

estimates the conversion fee to be between \$600 to \$1200 per plan and will be charged in accordance with the alternate control service regulated pricing model endorsed by the Australian Energy Regulator. The fee represents the actual cost of the additional work incurred to redraw the designs.

As Subdivision Developers will be charged a fee for plans which have not been created using the DAT or WorkPlans program, or by that conduct may be indirectly required to use DAT or WorkPlans, there is an argument (which ENERGEX does not admit) that ENERGEX's conduct might be characterised in the following manner:

- (i) supplying, or offering to supply, a service to subdivision developers (specifically ENERGEX connecting the networks of subdivision developers to the ENERGEX distribution network), or supplying or offering to supply at a particular price, on the condition that the subdivision developer will acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's DAT or WorkPlans Program) from another person not being a body corporate of ENERGEX; or
- (ii) refusing to supply a service to subdivision developers (specifically ENERGEX connecting the networks of subdivision developers to the ENERGEX distribution network), or refusing to supply such a service at a particular price to such persons, for the reason that the subdivision developer has not acquired or agreed to acquire goods or services of a particular kind or description (namely, a licence to use AutoCAD 2011, or any subsequent version of AutoCAD required to use ENERGEX's DAT or WorkPlans Program) from another person not being a body corporate of ENERGEX.
- (c) ENERGEX does not think that paragraphs (a) and (b) are a correct characterisation of the proposed conduct, but submits this notification to avoid the contrary argument (which it does not admit). Rather, instead of the use of AutoCAD being a condition of any supply (if there is any supply by ENERGEX, which is also not admitted), it is submitted that is a *consequence* of ENERGEX's proposed use of the DAT and WorkPlans to automate the process of uploading plans and not a condition of supply.

2. Benefits to the Public

The likely public benefits of the proposed conduct are outlined below.

- (a) As the DAT enables designs produced by external design consultants to be automatically uploaded to the ENERGEX asset base, the proposed conduct will improve efficiencies and decrease the potential for data errors and delays when ENERGEX processes new plans. Improving data accuracy is of benefit to the public because the data is used for multiple purposes including Dial Before You

Dig (**DBYD**), storm outage recovery, asset maintenance and switching sheets for all works. Greater data accuracy enables ENERGEX to:

- (i) respond in a more timely manner to DBYD requests;
 - (ii) maintain the integrity of the network and minimise the likelihood of network failure (and therefore disruption to the supply of electricity to consumers);
 - (iii) reconnect customers quickly following outages;
 - (iv) minimise the cost of replacing and maintaining parts of the network (which costs are passed on to electricity retailers and, ultimately, consumers); and
 - (i) ensure the safety of both ENERGEX crews and the public.
- (b) The improved efficiencies in processing the designs arising from the proposed conduct will result in cost savings to ENERGEX. Such cost savings will eventually result in cost savings to electricity retailers, and, ultimately, consumers.
- (c) The improved efficiencies in processing the designs arising from the proposed conduct will encourage additional suppliers of design services to enter the market, which will in turn encourage competitive prices. The associated cost savings will be passed on to electricity retailers, and, ultimately, consumers.

Approved for Internet
YES / NO

Approved for Public Register
YES / NO