



# **Ergon Energy Distribution Determination 2020 to 2025**

## **Attachment A Negotiating framework**

June 2020

# Ergon Energy Negotiating Framework

2020-25

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# **1 Background**

## **1.1 National Electricity Rules**

Clause 6.7.5(a) of the National Electricity Rules (NER) stipulates that a Distribution Network Service Provider (DNSP) must prepare a negotiating framework setting out the procedure to be followed during negotiations between the DNSP and any person (service applicant) who wishes to receive a negotiated distribution service from the DNSP, as to the terms and conditions for access for the provision of the service.

The negotiating framework must comply with and be consistent with the DNSP's distribution determination and the minimum requirements as set out in clause 6.7.5(c). Further, the negotiating framework must not be inconsistent with the requirements set out in clause 5.3, 5.3A, 5.3AA, S5.3A, S5.4A of the NER.

## **1.2 Negotiated Distribution Services**

In the Australia Energy Regulator's (AER's) Framework and Approach (F&A) final decision, the AER did not classify any of Ergon Energy's distribution services as negotiated distribution services. However, should the AER depart from the F&A and classify certain services as negotiated distribution services in the final determination then this negotiating framework will apply.

## **2 Ergon Energy's Negotiating Framework**

### **2.1 Application**

This negotiating framework applies to Ergon Energy and each service applicant that has made an application in writing to Ergon Energy for the provision of a negotiated distribution service.

Ergon Energy and any service applicant who wishes to receive a negotiated distribution service from Ergon Energy must comply with the requirements of this negotiating framework.

The requirements set out in this negotiating framework are in addition to any requirements or obligations contained in the NER. In the event of any inconsistency between this negotiating framework and any other requirements in the NER, the requirements of the NER will prevail.

Nothing in this negotiating framework or in the NER will be taken to impose an obligation on Ergon Energy to provide a negotiated distribution service to the service applicant.

The service applicant acknowledges that Ergon Energy is not liable for any loss or costs incurred or suffered by the service applicant as a result of Ergon Energy not providing the negotiated distribution service at the conclusion of the negotiation process.

### **2.2 Obligation to negotiate in good faith**

Ergon Energy and the service applicant must negotiate in good faith the terms and conditions of access for the provision by Ergon Energy of the negotiated distribution service sought by the service applicant.

### **2.3 Timeframes**

The timeframes for commencing, progressing and finalising negotiations in relation to applications for negotiated distribution services are set out below in Table 1. Ergon Energy and the service applicant must use reasonable endeavours to adhere to the time periods specified in Table 1 and may by mutual agreement extend any such time period.

**Table 1 – Negotiating Timeframe**

Event	Indicative Timeframe <sup>1</sup>
Receipt of written application for a negotiated distribution service. The application must be made by completing an application form published by Ergon Energy or as otherwise agreed with Ergon Energy If required, the service applicant must pay the application fee with the application form	X
Parties meet to discuss a preliminary negotiation program with milestones that represent a reasonable period of time for commencing, progressing and finalising negotiations	X + 15 business days
Parties finalise negotiation program, which may include, without limitation, milestones relating to: <ul style="list-style-type: none"> <li>• The request and provision of commercial information</li> <li>• Notification and consultation with relevant third parties and distribution network users, and</li> <li>• Provision of information by Ergon Energy to meet the obligation in section 2.6</li> </ul> Notification by Ergon Energy of its reasonable direct expenses incurred in the processing of the application and the payment of those expenses	X + 30 business days – subject to clause 2.8
Ergon Energy provides service applicant with an offer for the negotiated distribution services	X + 40 business days or negotiated timeframe
Parties finalise negotiations	X + 60 business days or negotiated timeframe taking into account the above variations in the timeframe

The timeframes in Table 1 will not apply where a timeframe is specified under Chapter 5 or Chapter 5A of the NER in relation to any application for negotiated distribution services and in that case, the timeframes in the relevant Chapter of the NER will apply.

The preliminary program may be modified from time to time by agreement with the parties, where such agreement must not be unreasonably withheld

Timeframes may be suspended in accordance with section 2.4 of the negotiating framework.

The timeframes set out in Table 1, or as otherwise agreed between the parties, do not commence until payment of the amount referred to in section 2.10 has been received by Ergon Energy

## 2.4 Suspension of timeframe

The timeframes in Table 1 for the negotiation and provision of negotiated distribution services, or as otherwise agreed between the parties, may be suspended if:

- Within 10 business days of Ergon Energy providing the commercial information to the service applicant, the service applicant does not formally accept that commercial information and the parties have agreed to a date for the undertaking and conclusion of commercial negotiations

<sup>1</sup> 'X' being the date that the service application is received



- Within 10 business days of Ergon Energy requesting additional commercial information from the service applicant, the service applicant has not supplied that commercial information
- If either of the parties does not promptly meet any of its obligations as required by this negotiating framework or as otherwise agreed to by the parties
- Ergon Energy has been required to notify and consult with any affected distribution network users or the Australian Energy Market Operator (AEMO) at any time regarding the provision of the negotiated distribution services. In those circumstances, the timeframe for the negotiations will be suspended from the date of notification to the affected distribution network users or AEMO, until:
  - The end of the time limit specified by Ergon Energy for any affected distribution network users or the AEMO, or
  - The receipt of information from the affected distribution network users or the AEMO regarding the provision of the negotiated distribution service.

Whichever is the later.

- A dispute has been notified to the AER, such suspension being from the date of notification of that dispute to the AER until the earlier of the:
  - Withdrawal of the dispute
  - Termination of the dispute, or
  - Determination of the dispute.

Each party will notify the other party if it considers that the timeframe has been suspended, within 5 business days of that suspension.

## **2.5 Provision of commercial information by service applicant**

Ergon Energy may give notice to the service applicant requesting commercial information that is reasonably required by Ergon Energy to enable it to engage in effective negotiations with the service applicant and to enable Ergon Energy to submit commercial information to the service applicant. Ergon Energy must use its reasonable endeavours to make the request within the period of time agreed by the parties.

The service applicant must provide Ergon Energy with the commercial information, which Ergon Energy reasonably requires to engage in effective negotiations in relation to the application, within the timeframe agreed to between the parties in the negotiation program. Commercial information that may be requested (but not limited to) includes:

- Technical information, such as maintenance requirements, performance criteria, electrical specification
- Financial information, and
- Details of how the service applicant's application complies with any law, the NER or applicable guidelines and Australian Standards.

For the purposes of this clause, commercial information does not include:

- Confidential information provided to the service applicant by another person, or

- Information that the service applicant is prohibited by law, from disclosing to Ergon Energy.

Commercial information provided by the service applicant is subject to the condition that Ergon Energy must not disclose the commercial information to any other person unless the service applicant consents in writing to the disclosure.

## **2.6 Provision of commercial information by Ergon Energy**

Ergon Energy must provide the following commercial information to the service applicant, upon written request, where such information is reasonably required by the service applicant to enable them to engage in effective negotiations with Ergon Energy for the provision of a negotiated distribution service:

- A description of the nature of the negotiated distribution service including what Ergon Energy would provide to the service applicant as part of that service
- The terms and conditions upon which Ergon Energy would provide the negotiated distribution service to the service applicant
- The reasonable costs and / or the increase or decrease in costs (as appropriate) of providing the negotiated distribution service to the service applicant
- The charges applicable for providing the service based on the information that is available to Ergon Energy and how the charges for providing the negotiated distribution services reflect those costs and/or the cost increment or decrement ( as appropriate)
- Ergon Energy's arrangements for the assessment and review of the charges and the basis upon which they are made, and
- Any other information the service applicant reasonably requires to enable effective negotiation on the price and the terms and conditions associated with the provision of the negotiated distribution service.

For the purposes of this clause, commercial information does not include:

- Confidential information provided to Ergon Energy by another person, or
- Information that Ergon Energy is prohibited by law, from disclosing to the service applicant.



Ergon Energy may provide the commercial information outlined above subject to relevant conditions, including the condition that the service applicant must not disclose the commercial information to any other person unless Ergon Energy consents in writing to the disclosure.

Ergon Energy reserves the right to withhold information requested by the service applicant if the information is legally privileged.

## **2.7 Confidential information**

A party receiving commercial information that is confidential information may be required by the party disclosing such information to enter into a confidentiality agreement on terms reasonably acceptable to both parties, before the disclosure of confidential information to that person.

Notwithstanding the above, a party in receipt of confidential information under this negotiating framework shall:

- Keep confidential the confidential information
- Take all reasonable steps to protect the confidentiality and security of the confidential information
- Not, directly or indirectly, divulge, use, disclose or publish the confidential information, and
- Not make or allow to be made, copies of or extracts of any part of the confidential information, except for the purpose of negotiating the terms and conditions to a negotiated distribution service sought by the service applicant.

However, nothing restricts the disclosure of such confidential information to the extent it is required by law.

Each party is liable for and indemnifies the other in respect of any claim, action, damage, loss, liability, cost, expenses or payment which the disclosing party suffers or incurs or is liable for as a result of a breach of this section.

## **2.8 Impact on other distribution network users**

Ergon Energy must determine the potential impact on distribution network users, other than the service applicant, of the provision of the negotiated distribution services.

Ergon Energy must notify and consult with any affected distribution network users and ensure that the provision of the negotiated distribution services does not result in non-compliance with obligations in relation to other distribution network users under the NER.

If Ergon Energy is required to consult with affected distribution network users, the timeframes outlined above in section 2.3 shall be suspended until the information required to assess the impact is received from the affected distribution network user.

## **2.9 Dispute Resolution**

Where negotiations with the service applicant fail to agree on the price and / or the terms and conditions of the service, the matter will be referred to the AER's dispute resolution processes in accordance with Part 10 of the National Electricity Law and Part L of Chapter 6 of the NER.

## **2.10 Assessment and review of charges and basis of charges**

Ergon Energy must have arrangements for the assessment and review of the proposed charges for the negotiated distribution service and the basis upon which those charges are made.

Ergon Energy must (if requested) provide these arrangements to the service applicant in accordance with section 2.6 above.

## **2.11 Payment of Ergon Energy's reasonable costs**

The service applicant must make payment of the application fee prior to negotiations commencing. The fee must be no more than Ergon Energy's reasonable estimate of the costs it expects to incur in assessing the application.

From time to time, Ergon Energy may give the service applicant a notice setting out the reasonable direct costs incurred by Ergon Energy and the off-set of any amount paid as an application fee.

If the aggregate of the reasonable direct costs, exceed the application fee amount paid by the service applicant, the service applicant must, within 20 business days of the receipt of a notice, pay Ergon Energy the amount stated in the notice.

If the aggregate of its actual reasonable direct costs, is less than the application fee amount paid by the service applicant, Ergon Energy must promptly notify the service applicant and must within 20 business days of the date of the notice, refund to the service applicant the amount by which the application fee paid by the service applicant exceeds Ergon Energy's actual aggregate direct costs.

## **2.12 Termination of negotiations**

The service applicant may elect not to continue with its application for a negotiated distribution service and may terminate the negotiations by giving Ergon Energy written notice of its decision to do so.

Ergon Energy may terminate a negotiation under this framework by giving the service applicant written notice of its decision to do so where:

- Ergon Energy has reasonable grounds to believe that the service applicant is not conducting the negotiation in good faith in accordance with this negotiating framework
- The service applicant consistently fails to comply with the requirements of the negotiating framework
- Ergon Energy has reasonable grounds to believe that the service applicant will not acquire any negotiated distribution service
- an act of solvency default occurs in relation to the service applicant, or
- the service applicant fails to make a required payment in relation to the negotiation or provision of the negotiated distribution service.

## 2.13 Publication of results of negotiations

At the conclusion of the negotiations between Ergon Energy and the service applicant, whether by way of agreed outcome or by termination, Ergon Energy will publish the results of the negotiation on its website.

## 2.14 Giving notices

Any notice, consent, information, application or request given or made to Ergon Energy under this negotiating framework, is only given or made if it is in writing and sent in one of the following ways:

- Delivered or posted to Ergon Energy at its address and marked for the attention of the relevant officers set out below, or
- Sent via email to Ergon Energy at the relevant email address and marked for the attention of the relevant officers set out below.

Name: Ergon Energy  
Address: PO Box 1090, Townsville QLD 4810  
OR  
420 Flinders Street , Townsville QLD 4810  
Email : GeneralCounsel-Lawyers@energyq.com.au  
Attention: General Manager Legal, Regulation and Pricing

The name and nominated address of the service applicant must be provided in writing to Ergon Energy as part of the application.

A notice, consent, information, application or request is to be treated as given or made at the following time:

- If it is delivered, when it is left at the relevant address
- If it is sent by post, 2 business days after it is posted
- If sent by fax, on the day the transmission is sent (but only if the sender has a confirmation report specifying a fax number of the recipient, the number of pages sent and the date of transmission)
- If a notice, consent, information, application or request is delivered after the normal business hours of the party to whom it is sent, it is to be treated as having been given or made at the beginning of the next business day
- If sent by email – once acknowledged as received by the addressee.

## **2.15 Governing law and jurisdiction**

This document is governed by the law of the State of Queensland.

The parties submit to the non-exclusive jurisdiction of the courts of the State of Queensland

The parties will not object to the exercise of judgement by the courts of the State of Queensland on any basis.

## **2.16 Severability**

If a clause or part of a clause of this negotiating framework can be read in a way that makes it illegal, unenforceable or invalid, but can also be read in a way that makes it legal, enforceable and valid it must be read in the latter way.

If any clause or part of a clause is illegal, unenforceable or invalid that clause or part is to be treated as removed from this negotiating framework, but the rest of this negotiating framework is not affected.

## **2.17 Time for action**

If the day on by which something is required to be done is not a business day, that thing must be done on or by the next business day.

### 3 Definitions

**Business day** means a day on which all banks are open for business generally in Brisbane, Queensland

**Commercial information** will include at a minimum, the following classes of information in relation to a service applicant, where applicable:

- Details of corporate structure, financial details relevant to creditworthiness and commercial risk and ownership of assets
- Technical information relevant to the application for a negotiated distribution service
- Financial information relevant to the application for a negotiated distribution service, and
- Details of an application's compliance with any law, standard, NER or guidelines

**Confidential Information** means information held by either party that is, by its nature confidential, is marked confidential or the receiving party knows or ought to know is confidential, and specifically includes:

- Information relating to or about the business affairs and operations of Ergon Energy
- Commercial information provided by Ergon Energy to service applicant
- Information provided to Ergon Energy by the service applicant, and
- Trade secrets, information, ideas, concepts, know-how, technology, processes and knowledge and the like provided to, or obtained by, a party by the other party (including but not limited to in relation to a party, all information reports, accounts or data in relation to that party's business affairs, finances, properties and methods of operations, regardless of the form in which it is recorded or communicated).

**Costs** means any costs or expenses incurred by Ergon Energy in complying with this negotiating framework or otherwise advancing the service applicant's request for the provision of negotiated distribution service or such other costs or expenses consistent with the NER, Ergon Energy's Cost Allocation Method or any relevant part of Ergon Energy's Distribution Determination.

**Distribution Network User** means a Distribution Customer or an Embedded Generator as defined by the NER

**Service Applicant** means a person who asks Ergon Energy for access to a distribution service, as defined by the NER

**Solvency Default** means the occurrence of any of the following events in relation to the service applicant:

- An originating process or application for the winding up of the service applicant (other than a frivolous or vexatious application) is filed in a court or a special resolution is passed to wind up the service applicant, and is not dismissed before the expiration of 60 days from service on the service applicant

- A receiver, receiver and manager or administrator is appointed in respect of all or any part of the assets of the service applicant, or a provisional liquidator is appointed to the service applicant
- A mortgagee, charge or other holder of security, by itself or by or through an agent, enters into possession of all or any part of the assets of the service applicant
- A mortgage, charge or other holder of security is enforced by its holder or becomes enforceable or can become enforceable with the giving of notice, lapse of time or fulfilment of a condition
- The service applicant stops payments of, or admits in writing its inability to pay, its debts as they fall due
- The service applicant applies for, consents to, or acquiesces in the appointment of a trustee or receiver of the service applicant or any of its property
- A court appoints a liquidator, provisional liquidator, receiver or trustee, whether permanent or temporary, of all or any part of the service applicant's property
- The service applicant takes any step to obtain protection or is granted protection from its creditors under any applicable legislation or a meeting is convened or a resolution is passed to appoint an administrator or controller (as defined in the *Corporations Act 2001*) in respect of the service applicant
- A controller (as defined in the *Corporations Act 2001*) is appointed in respect of any part of the property of the service applicant
- Except to reconstruct or amalgamate while solvent, the service applicant enters into or resolves to enter into a scheme of arrangement, compromise or reconstruction proposed with its creditors (or any class of them) or with its members (or any class of them) or proposes re-organisation, re-arrangement moratorium or other administration of the service applicant's affairs
- The service applicant is subject of an event described in section 459C(2)(b) of the *Corporations Act 2001*, and
- Anything analogous or having a substantially similar effect to any of the events specified above happens in relation to the service applicant.



## 4 Interpretation

In this document, unless the context otherwise requires:

- Terms defined in the National Electricity Law (NEL) and NER have the same meaning in this negotiating framework
- A reference to any law or legislation or legislative provision includes any statutory modification, amendment or re-enactment and any subordinate legislation or regulations issued under that legislation or legislative provision
- A reference to any agreement or document that is to that agreement or document as amended, novated, supplemented or replaced from time to time
- A reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this document, unless otherwise stated
- An expression importing a natural person includes any company, trust, partnership, joint venture, association, corporation, body corporate or governmental agency
- A covenant or agreement on the part of two or more persons binds them jointly and severally
- If a day on or by which an obligation must be performed is not a business day, the obligation must be performed on or by the next business day