

IN THE AUSTRALIAN COMPETITION TRIBUNAL

1 of 2014

AGL Energy Limited

RE: PROPOSED ACQUISITION OF MACQUARIE GENERATION (A CORPORATION ESTABLISHED UNDER THE ENERGY SERVICES CORPORATIONS ACT 1995 (NSW))

Statement of: Liza Windel Carver

Address: Level 36, Grosvenor Place, 225 George Street, Sydney in the State of New South Wales

Occupation: Solicitor

Date: 28 March 2014

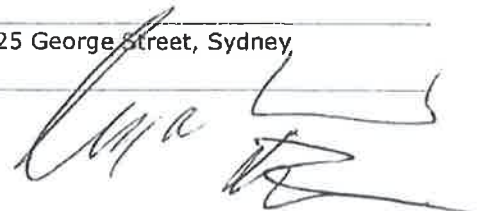
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I, Liza Windel Carver of Level 36, Grosvenor Place, 225 George Street, Sydney in the State of New South Wales, Solicitor, do solemnly and sincerely affirm that:

1. I am a partner at Ashurst Australia, solicitors for AGL Energy Limited (**AGL**) in this proceeding. I have the care and conduct of this matter on behalf of AGL.
2. I make this affidavit in support of the suggested timetable for the conduct of this proceeding which is set out in AGL's proposed direction of the Tribunal, submitted to the Tribunal by letter today.
3. The matters set out in this affidavit are based on my own information and belief, save where otherwise indicated.

Filed on behalf of (name & role of party)	AGL Energy Limited, Applicant
Prepared by (name of person/lawyer)	Liza Carver
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Commercial background to the Proposed Acquisition

4. AGL seeks to acquire assets from Macquarie Generation, a statutory state owned corporation established under the *Energy Services Corporations Act 1995* (NSW) and the *State Owned Corporations Act 1989* (NSW) (**Proposed Acquisition**).
5. The Proposed Acquisition follows an extended process concerning privatisation of NSW electricity generation assets, which is described in the affidavit of Brett Redman from paragraph 35. I summarise below the key steps in that process which are immediately relevant to the Proposed Acquisition, based on my own knowledge and on those paragraphs in Brett Redman's affidavit.
6. On 30 July 2013, the Treasurer of the State of NSW announced the commencement of the sale of Macquarie Generation as part of the broader privatisation of NSW electricity generation assets. On that date, AGL received a Request for Expressions of Interest relating to the sale of the assets of Macquarie Generation.
7. On 19 August 2013, AGL submitted an expression of interest to acquire the assets of Macquarie Generation.
8. On 30 August 2013, AGL was invited to make an indicative bid for the assets of Macquarie Generation. On 21 October 2013, AGL submitted an indicative bid.
9. On 4 November 2013, the NSW Government notified AGL that it had been accepted to participate in the binding bid phase of the process for the sale of the Macquarie Generation assets.
10. On 29 November 2013, AGL applied for informal clearance for the Proposed Acquisition, as I describe in paragraph 12(a) below.
11. On 5 February 2014, AGL submitted a binding bid to acquire the Macquarie Generation assets for a cash consideration of \$1.505 billion, which was conditional on AGL receiving clearance for the Proposed Acquisition from the ACCC.

The ACCC is familiar with the subject matter of the Proposed Acquisition

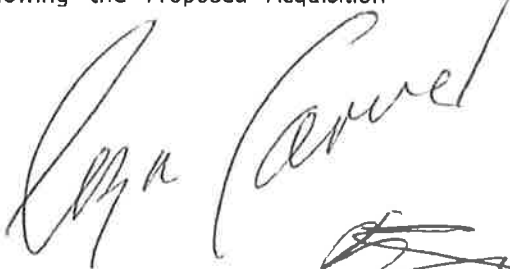
12. The Australian Competition and Consumer Commission (**ACCC**) has recently considered AGL's application for informal merger clearance for the Proposed Acquisition. I provide the following description of some of the key steps in that process, based on my knowledge of my own involvement acting for AGL during that process, and on the bundle of publicly available materials contained in Annexure **LC-4**.
 - (a) On 29 November 2013, AGL applied to the ACCC for informal clearance for the Proposed Acquisition – at that time, AGL submitted to the ACCC an extended written submission (**First Submission**), which relevantly contained:
 - (i) factual information about the Proposed Acquisition, the overlapping activities of AGL and Macquarie Generation, key features of the National Electricity Market (**NEM**) and market share data relevant to assessing the competitive impact of the Proposed Acquisition, and recent regulatory reviews concerning competition in the retail electricity industry in NSW;
 - (ii) analysis of whether the Proposed Acquisition would have the effect or be likely to have the effect of substantially lessening competition within the meaning of s 50 of the *Competition and Consumer Act 2010* (Cth) (**CCA**), including analysis of the counterfactual, market definition and impact of the transaction on competition in the wholesale and retail supply of electricity (including the supply of hedge contracts);
 - (iii) Annexure A, which set out further factual information on AGL and Macquarie Generation, other NEM participants, the NEM and approaches to risk management in the NEM, AGL's approach to managing its

wholesale position in the NEM, and information relating to the uncertainty associated with wind generation in the NEM; and

- (iv) Annexure B, which set out factual information on AGL's electricity generation assets, energy constraints on those generation assets, AGL's power purchase agreements, AGL's retail customer numbers and consumption, retail customer "churn" (ie customer switching from one retailer to another), and the comparison between historical average pool prices and entry costs for base load generation;
- (b) on 2 December 2013 the ACCC commenced its public review of the Proposed Acquisition;
- (c) on 5 December 2013, AGL provided supplementary correspondence to the ACCC regarding the scope of the Proposed Acquisition;
- (d) on 12 December 2013:
 - (i) the Chief Executive Officer (**CEO**) and Managing Director of AGL, the Chairman of the ACCC, and other attendees from AGL, the ACCC, Frontier Economics and Ashurst attended a meeting at which AGL made a presentation on, and attendees at the meeting discussed, key elements of AGL's submissions to the ACCC; and
 - (ii) AGL provided a report from Frontier Economics which addressed the economic analysis, and detailed results of economic modelling, of the Proposed Acquisition (the underlying data relating to that modelling was provided under letter dated 13 December 2013);
- (e) the ACCC sought submissions on the Proposed Acquisition from interested parties, which it requested be provided on or by 18 December 2013;
- (f) during the period from 7 January 2014 until 3 February 2014, AGL provided further written and oral information to the ACCC regarding the Proposed Acquisition, including:
 - (i) representative samples of AGL's hedge contracts with small retailers in Victoria (provided by letter dated 7 January 2014);
 - (ii) additional information from Frontier Economics regarding their modelling results and methodology (by memo dated 17 January 2014);
 - (iii) a written response to potential competition concerns and requests for information contained in a letter from the ACCC to AGL dated 15 January 2014 (**Second Submission**). The Second Submission was provided by letter dated 22 January 2014, and included:
 - (A) a response to the ACCC's concerns that the Proposed Acquisition could give rise to "coordinated conduct" between AGL and other vertically integrated generators and retailers;
 - (B) responses to questions from the ACCC regarding AGL's expectations about generation plant likely to be retired or mothballed, the potential closure of the Liddell power station, the likelihood of closure of the Point Henry and Tomago aluminium smelters and the sale of Delta Electricity;
 - (C) copies and a description of AGL's Wholesale Energy Risk Management Policy and Wholesale Energy Risk Management Framework;

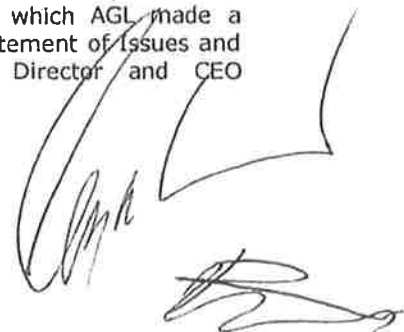
Handwritten signatures in black ink, appearing to be two distinct signatures, one larger and more stylized than the other.

- (D) a detailed analysis of bidding and pool prices in the NEM during periods of extremely high temperatures in the week beginning 13 January 2014; and
- (E) two further written reports by Frontier Economics in relation to the Proposed Acquisition, comprising:
 - (aa) a report of the results of detailed economic modelling, which was modelling by Frontier Economics of specific scenarios requested by the ACCC (associated underlying data, and a response to questions from the ACCC about the modelling, were subsequently provided under cover of a note dated 24 January 2014); and
 - (bb) a report addressing concerns expressed by the ACCC regarding coordinated conduct between AGL and other vertically integrated electricity generators and retailers, barriers to entry for smaller retailers, and the liquidity of hedge contracts used by electricity generators and retailers;
- (iv) correspondence from the Managing Director and CEO of AGL to the Chairman of the ACCC dated 31 January 2014; and
- (v) information provided during a meeting on 3 February 2014, which was attended by senior executives from AGL, the Chairman and another Commissioner of the ACCC, and other representatives of AGL, the ACCC, Frontier Economics and Ashurst, at which AGL made a presentation on, and the attendees discussed, the ACCC's and AGL's analysis of the impact of the Proposed Acquisition on competition (AGL's Managing Director and CEO subsequently wrote to the Chairman of the ACCC on 4 February 2014, addressing matters arising from that meeting, and AGL provided a supplementary report from Frontier Economics dated 5 February 2014 addressing matters raised in that meeting);
- (g) between 6 and 17 February 2014, the ACCC sought submissions from interested parties regarding the Statement of Issues in relation to the Proposed Acquisition which the ACCC published on 6 February 2014 (**Statement of Issues**);
- (h) on 12 February 2014, the ACCC sent AGL a notice issued under section 155 of the CCA, requiring AGL to produce certain specified information and documents, including internal AGL documents regarding:
 - (i) the commercial rationale for the Proposed Acquisition;
 - (ii) AGL's plans for the Bayswater and Liddell power stations, and the supply of electricity to retail customers;
 - (iii) AGL's forecasts of electricity demand in NSW, Queensland, Victoria and South Australia;
 - (iv) AGL's bidding and trading strategies for the output from Bayswater and Liddell power stations;
 - (v) the temporary or permanent closure of all or part of the Liddell power station;
 - (vi) the effect of the Proposed Acquisition on AGL's bidding and trading strategies, and changes to those strategies as a result of the Proposed Acquisition;
 - (vii) AGL's hedge contracting strategy following the Proposed Acquisition (focussing on NSW hedge contracts);



Lynn Powell

- (viii) AGL's current policies regarding electricity trading and hedge contracting;
 - (ix) analysis of the Proposed Acquisition which was prepared for AGL by investment banks or corporate advisors; and
 - (x) correspondence between AGL and Frontier Economics regarding the Proposed Acquisition;
- (i) on 12 February 2014, Frontier Economics provided further data used in its economic modelling, in response to a request from the ACCC dated 7 February 2014;
- (j) on 17 and 18 February 2014, AGL provided the ACCC with a proposed undertaking under s 87B of the CCA (**Undertaking**), the effect of which would, if it had been accepted by the ACCC, have been to require AGL to make hedge contracts available to market participants following the Proposed Acquisition. AGL also submitted a written explanation and other information regarding the Undertaking at this time;
- (k) during the period from 18 to 25 February 2014:
- (i) AGL complied with the notice issued under s 155 of the CCA by producing information and a total of over 200 electronic files on 18 and 25 February 2014;
 - (ii) the ACCC undertook market inquiries with interested parties regarding the Undertaking in the period from 19 to 25 February 2014 (**Third Consultation**);
 - (iii) AGL provided a written response to the ACCC's Statement of Issues (**Third Submission**) comprising:
 - (A) a letter dated 18 February 2014, containing:
 - (aa) a sworn statement from the Chief Financial Officer of AGL (Brett Redman), which addressed matters including AGL's internal risk management protocols and practices and their relevance to AGL's hedge contracting practices; and
 - (bb) a statement made on affirmation by the General Manager of Energy Portfolio Management of AGL, regarding matters including suppliers of hedge contracts to NSW retailers, AGL's own hedge contracting practices, and liquidity in the supply of hedge contracts;
 - (B) reports from Frontier Economics regarding liquidity in the supply of hedge contracts (dated 17 February 2014), and concerns about the price sensitivity forecasts prepared by the Australian Energy Market Operator and relied on by the ACCC in its consideration of the Proposed Acquisition (dated 25 February 2014); and
 - (C) a letter dated 20 February 2014, which addressed the ACCC's concerns regarding the effect of the Proposed Acquisition on the availability of hedge contracts to NSW electricity retailers and pool prices in the NEM, and provided further information on the Undertaking;
- (l) on 28 February the Managing Director and CEO of AGL, the Chairman and another Commissioner of the ACCC, and other representatives of AGL, the ACCC, Frontier Economics and Ashurst attended a meeting at which AGL made a presentation responding to the issues identified in the Statement of Issues and attendees discussed those issues (AGL's Managing Director and CEO



subsequently wrote to the ACCC to provide further information on a topic discussed at that meeting); and

- (m) on 4 March 2014 the ACCC announced that it opposed the Proposed Acquisition, and issued a media release regarding its decision to oppose the Proposed Acquisition, which stated that:

In the time available since the transaction became public, the ACCC has engaged with a large number of market participants and industry experts and received significant cooperation from the NSW Government and AGL. A significant proportion of the market participants consulted, especially second tier retailers, expressed concerns about the effect of the proposed acquisition.

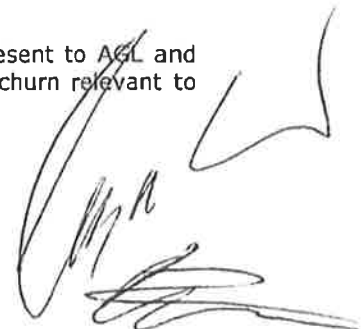
13. Based on my experience conducting complex litigation in the Australian Competition Tribunal, including in relation to merger authorisation applications, I expect that the information and analysis made available in the:

- (a) three written submissions from AGL;
- (b) extensive modelling and associated analysis provided by Frontier Economics;
- (c) three meetings between senior representatives of AGL and the ACCC;
- (d) three rounds of public consultation undertaken by the ACCC; and
- (e) information and documents provided to the ACCC in response to the notice under s 155 of the CCA,

will materially assist the ACCC in fulfilling its role in this proceeding.

14. The ACCC also recently considered AGL's application for informal clearance to acquire Australian Power and Gas Limited (**APG**), a small, second tier electricity and gas retailer in NSW and other States. I provide the following description of some of the key written materials provided to the ACCC during that process based on my knowledge of my own involvement acting for AGL during that process, and on the bundle of publicly available materials contained in Annexure **LC-5**.

- (a) On 15 July 2013, AGL applied for informal clearance of its proposed acquisition of APG (**APG Acquisition**), and submitted an extended written submission which addressed factual matters including AGL's business, competing electricity retailers, the state of competition in the supply of retail electricity, and data on retail customer "churn";
- (b) on 15 July 2013, the ACCC commenced its public review of the APG Acquisition;
- (c) on 13 August 2013 APG provided the ACCC with information regarding the ACCC's consideration of the APG acquisition;
- (d) on 21 August 2013, AGL produced information and documents requested by the ACCC under letter dated 9 August 2013, including information on AGL's strategies for growing its retail customer base, the location of AGL's retail customers, and over 80 documents regarding matters concerning AGL's retail business and strategy;
- (e) on 4 September 2013, AGL responded to concerns raised by the ACCC about the potential impact of the APG Acquisition on competition in a letter dated 28 August 2013; that response included information prepared separately by AGL and APG regarding:
 - (i) the competitive constraint that second tier retailers present to AGL and other first tier retailers, including analysis of customer churn relevant to that constraint;



- (ii) AGL's and APG's pricing to retail customers;
 - (iii) APG's cost structure, including as a result of its hedge contract position in NSW and Queensland;
 - (iv) barriers to entry for second tier energy retailers, including regulatory barriers in NSW and Queensland; and
 - (v) liquidity in the supply of electricity hedge contracts; and
- (f) on 12 September 2013, the ACCC announced that it would not oppose AGL's acquisition of APG.

15. Based on my experience conducting complex litigation in the Australian Competition Tribunal, including in applications for merger authorisation, I expect that the information and analysis in these written materials provided to the ACCC in relation to the APG Acquisition will materially assist the ACCC to fulfil its role in this proceeding.

Comparison of information in AGL's Form S and supporting affidavits to information considered by the ACCC in relation to the Proposed Acquisition and the APG Acquisition

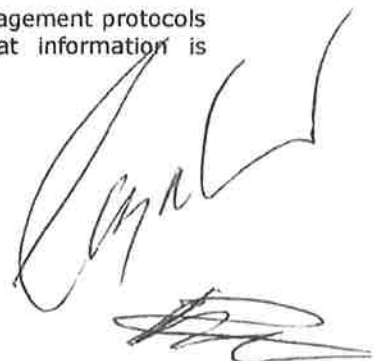
16. There is limited information in AGL's Form S and the affidavits filed in support of that Form S which was not previously addressed in, or is substantively different to, the information which was provided to the ACCC in relation to the Proposed Acquisition and the APG Acquisition. In summary:

- (a) much of the information in the Form S and affidavits which addresses the competition analysis of the Proposed Acquisition, and the factual information relevant to that analysis, is substantially similar to information provided to the ACCC during its consideration of the Proposed Acquisition and the APG Acquisition;
- (b) the information in the Form S and the affidavits regarding public benefits from the Proposed Acquisition (including the content of the affidavits of Glenn Schumacher, Ross Bunyon, and Henry Ergas, and some of the content of the affidavits of Daniel Price and Phillip Williams) is new information which has not previously been provided to the ACCC; and
- (c) other information which is specifically required by the Form S, such as supplier and customer details, and corporate and financial data, is also new information which has not previously been provided to the ACCC.

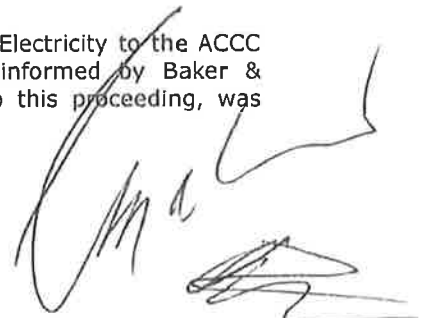
17. I provide further detail on the overlap between the content of the Form S and supporting affidavits filed by AGL, and the information previously provided to the ACCC, in the following paragraphs.

18. The key affidavits of AGL executives cover a large volume of information which is substantially similar to information previously provided to the ACCC:

- (a) the affidavit of Mark Brownfield addresses information on electricity retailing, much of which is substantially similar to the information AGL provided to the ACCC in the First Submission on the Proposed Acquisition, and in the written submissions and internal AGL documents regarding the ACCC's consideration of the APG Acquisition (including the materials referred to in paragraphs 14(a), 14(d) and 14(e) above);
- (b) the affidavits of Brett Redman and Anthony Fowler address information on the activities of AGL's Merchant Energy division, and the risk management protocols AGL applies in relation to those activities; much of that information is substantially similar to:



- (i) in the case of the Redman affidavit: matters addressed in the First Submission, the statement of Brett Redman provided with the Third Submission, and other materials referred to in paragraph 12 above; and
 - (ii) in the case of the Fowler affidavit: matters addressed in the First Submission, the statement of the General Manager of Energy Portfolio Management for AGL provided with the Third Submission, and other materials referred to in paragraph 12 above; and
- (c) to the extent that those affidavits address information which was not previously provided to the ACCC in connection with the Proposed Acquisition or the APG Acquisition, material parts of that information is information which the Tribunal's "Form S" requires to be provided, but which the ACCC did not request in the course of its consideration of the Proposed Acquisition or the APG Acquisition, and which AGL has provided in order to comply with the Form S, but not in the expectation that the information will bear on the assessment of the public benefits from the Proposed Acquisition. Examples of information of this type are:
- (i) the information on AGL's suppliers contained in Annexure MB-1 to the Brownfield affidavit;
 - (ii) the financial data and information on AGL's suppliers contained at paragraphs 13 to 32 of the Redman affidavit; and
 - (iii) the information on AGL's "customers" contained at annexure AF-6 of the Fowler affidavit.
19. In relation to the information contained in the affidavits of Dr Philip Williams and Daniel Price:
- (a) the "Competition Issues" report contained in Annexure PW-2 and Annexure DP-3 contains information and analysis regarding conditions in the NEM and the competition analysis of the Proposed Acquisition, and much of the information and analysis in these reports is substantially similar to the information and analysis provided by Frontier Economics to the ACCC in relation to the Proposed Acquisition as referred to in paragraph 12 above; key information in that report which has not previously been put before the ACCC includes:
 - (i) references to the evidence filed by AGL in this proceeding;
 - (ii) additional explanation of the analytical framework for considering the competition impacts of the Proposed Acquisition;
 - (iii) sections addressing the vertical and horizontal efficiencies from the Proposed Acquisition; and
 - (iv) information on governance considerations relevant to considering the privatisation of the Macquarie Generation assets; and
 - (b) the "General Industry Report" contained in Annexure DP-2 covers many factual matters which are substantially similar to those addressed in the First Submission and in the written materials AGL provided to the ACCC in relation to the APG Acquisition; key information in that report which has not previously been put before the ACCC includes the particular data on market shares in the generation and supply of electricity which are calculated on the specific bases identified in the Form S.
20. In relation to my affidavit dated 24 March 2014:
- (a) Annexure LC-1 contains the written submission of Delta Electricity to the ACCC in relation to the Proposed Acquisition, which I am informed by Baker & Mackenzie, lawyers for the State of NSW in relation to this proceeding, was



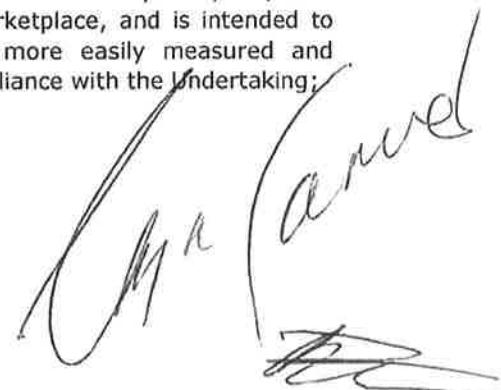
provided to the ACCC by Delta Electricity as part of the ACCC's consideration of the Proposed Acquisition; and

- (b) the affidavit and annexures otherwise contain information regarding the share structure and related bodies corporate of AGL which is provided in response to the Tribunal's Form S but which is not provided in the expectation that it will bear on the analysis of the public benefits from the Proposed Acquisition.
21. In relation to the affidavits of Dominic Drenen, Benjamin Burge and Katherine Farrar, which relate to certain smaller electricity retailers:
- (a) these affidavits comprise a total of 10 pages, and do not include any annexures; and
 - (b) Ashurst is informed by the deponents of those affidavits that Click, Meridian and Qenergy provided information similar to the content of those affidavits to the ACCC during its consultations on the Proposed Acquisition.
22. Accordingly, the only affidavits filed by AGL in this proceeding which do not include information which substantially overlaps with information previously put before the ACCC in relation to the Proposed Acquisition or the APG Acquisition are the affidavits of Glenn Schumacher, Ross Bunyon and Henry Ergas.
23. Based on my experience conducting complex litigation in the Australian Competition Tribunal, including in applications for merger authorisation, I expect that:
- (a) the significant overlap between the subject matter of the information considered by the ACCC in its review of the Proposed Acquisition and the APG Acquisition and the content of the Form S and supporting affidavits filed by AGL in this proceeding; and
 - (b) the fact that only three of the affidavits filed by AGL do not address information which has previously been put before the ACCC in relation to the Proposed Acquisition or the APG Acquisition,

is likely to significantly confine the scope of the analysis and investigation the ACCC needs to undertake in order to fulfil its role in this proceeding.

Comparison of the Undertaking provided to the ACCC to the proposed conditions on which AGL requests that the Tribunal grants authorisation of the Proposed Acquisition

24. The conditions on which AGL requests that the Tribunal grants authorisation of the Proposed Acquisition in this proceeding, which are addressed in paragraphs 3.4, 3.5 and Annexure H of the Form S (**Conditions**), are similar to the terms of the Undertaking. The differences between the Conditions compared to the Undertaking reflect a number of changes which respond to concerns raised by the ACCC following its Third Consultation, and which the ACCC communicated to AGL in a letter dated 27 February 2014. The key differences between the Conditions and the Undertaking are:
- (a) the term of the Conditions is 7 years after completion of the Proposed Acquisition, with the obligations commencing 6 months after completion (the term of the Undertaking was 5 years);
 - (b) the range of hedge contract products which AGL must make available under the Conditions is simpler than the range of hedge contract products addressed in the Undertaking – this change means that the Conditions relate to specific, flat, base load products that are well understood in the marketplace, and is intended to ensure that compliance with the Conditions is more easily measured and audited, compared to measuring and auditing compliance with the Undertaking;
 - (c) under the Conditions:

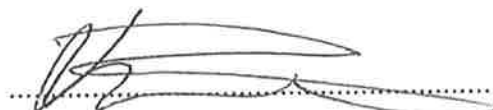


- (i) hedge contract volumes entered into by Macquarie Generation prior to completion of the Proposed Acquisition are not counted towards the volume of hedge contracts (500 MW) that AGL must make available (whereas they were so counted under the Undertaking); and
- (ii) AGL must offer or enter into hedge contracts for 250 MW for the first six months in which the Conditions apply, and 500 MW for the balance of the period in which the Conditions apply;
- (d) under the Conditions, the price at which AGL will be taken to have made an offer to the market, and at which AGL must offer products to retailers, has been reduced to the higher of \$0.75 (rather than 2% under the Undertaking) above the previous trading day's clearing price on the exchange and the price of the last trade for which AGL was not a party – this simplifies the calculation of prices under the Conditions, compared to the obligations under the Undertaking; and
- (e) the Conditions clarify points of potential ambiguity under the Undertakings, including that products purchased or acquired by AGL are not counted towards the volume of products that AGL must make available under the Conditions; the Conditions also simplify the trigger events for a review of the terms of the Conditions.

Affirmed at Sydney)
 in the State of New South Wales)
 this 28th day of March 2014)
 before me:)



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Name: Mandy Bendelstein,
 a solicitor admitted in the
 Supreme Court of New
 South Wales.

**IN THE AUSTRALIAN COMPETITION TRIBUNAL
AGL ENERGY LIMITED**

of 2014

**RE: PROPOSED ACQUISITION OF MACQUARIE GENERATION (A CORPORATION
ESTABLISHED UNDER THE ENERGY SERVICES CORPORATIONS ACT 1995
(NSW))**

ANNEXURE CERTIFICATE

This is the annexure marked "LC 4" annexed to the statement of **LIZA WINDEL CARVER** dated
28 March 2014

Annexure LC 4

Filed on behalf of (name & role of party)	AGL Energy Limited		
Prepared by (name of person/lawyer)	Liza Carver		
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[Form approved 01/08/2011]

ACCC opposes AGL's proposed acquisition of Macquarie Generation

4 March 2014

The Australian Competition and Consumer Commission has today announced that it will oppose the acquisition of the assets of Macquarie Generation by AGL Energy Limited (AGL). The ACCC considers that the proposed acquisition is likely to result in a substantial lessening of competition in the market for the retail supply of electricity in New South Wales.

The key assets of Macquarie Generation are the Bayswater and Liddell power stations (together, these power stations account for 27 per cent of NSW capacity). AGL is already a substantial electricity retailer in NSW.

"The proposed acquisition would result in the largest source of generation capacity in NSW being owned by one of the three largest retailers in NSW. Indeed, with this acquisition, the three largest retailers in NSW would own a combined share of 70 to 80 per cent of electricity generation capacity or output. This is likely to raise barriers to entry and expansion for other electricity retailers in NSW and therefore reduce competition compared to the situation if the proposed acquisition does not proceed," ACCC Chairman Rod Sims said.

The ACCC formed the view that the proposed acquisition would be likely to result in a significant reduction both in hedge market liquidity and the supply of competitively priced and appropriately customised hedge contracts to second tier retailers competing in NSW.

"In particular, it does not appear likely that the remaining non-aligned generators in NSW, Delta Coast and Snowy Hydro, would be able to provide a sufficient quantity and type of hedge cover to be able to adequately service the requirements of second tier retailers that sought to either enter the NSW retail market or grow their existing retail position," Mr Sims said.

"In this way, the acquisition would be likely to prevent sufficient vigorous competition with AGL, Origin and EnergyAustralia, who already have 85 per cent of the overall retail market in NSW and 95 per cent of the mass market, and would have a combined share of 70 to 80 per cent of electricity generation capacity or output in NSW if the acquisition proceeded."

"In addition, had the acquisition proceeded, AGL would have become the largest generator in each of NSW, Victoria and South Australia. The ACCC remained concerned about the likely competitive impact of the proposed acquisition in one or more of the wholesale electricity markets in these regions," Mr Sims said.

For commercial reasons, AGL required the ACCC to make its decision by 4 March 2014. In the time available since the transaction became public, the ACCC has engaged with a large number of market participants and industry experts and received significant cooperation from the NSW Government and AGL. A significant proportion of the market participants consulted, especially second tier retailers, expressed concerns about the effect of the proposed acquisition.

The ACCC concluded that the draft undertaking offered by AGL on 17 February 2014 was not capable of addressing the ACCC's competition concerns in relation to the likely effect of the proposed acquisition on competition in the market for the retail supply of electricity in NSW. Most of the market feedback received by the ACCC in relation to the undertaking raised concerns about its ability to address the likely competitive harm, as well as circumvention risks.

See the public register: [AGL Energy Limited - proposed acquisition of Macquarie Generation assets in NSW](http://registers.accc.gov.au/content/index.phtml/itemId/1147200/fromItemId/751046) (<http://registers.accc.gov.au/content/index.phtml/itemId/1147200/fromItemId/751046>).

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- Authorisations & notifications registers
- Infringement notice registers
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- Undertakings register
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AGL Energy Limited - proposed acquisition of Macquarie Generation assets in NSW

Type of assessment	Informal Review	
Reference	53220	
Acquirer(s)	AGL Energy Limited	
Target(s)	Macquarie Generation assets	
Industry	Electricity	
Summary	AGL entered into an agreement with the NSW government to acquire the assets of Macquarie Generation.	
Outcome of assessment	Opposed	
Total review days *	63	
Commenced public review	2 nd December 2013	
Date completed	4 th March 2014	
Market definition	Public Competition Assessment will be published in due course.	
Competition analysis	Public Competition Assessment will be published in due course.	
Statement of issues	AGL proposed acquisition of Macquarie Generation - Statement of Issues - 6 February 2014 6th February 2014 MER14+1581.pdf (181.8 KB) AGL proposed acquisition of Macquarie Generation - Statement of Issues - 6 February 2014 6th February 2014 MER14+1580.doc (277.5 KB)	
Undertakings	AGL Proposed s87B Undertaking 19th February 2014 MER14+2082.pdf (449.8 KB)	
Review timeline	Date	Event
	2 nd December 2013	ACCC commenced review under the Merger Process Guidelines.
	18 th December 2013	Closing date for submissions from interested parties. ACCC assessing information provided during market inquiries and consulting with merger parties on any relevant issues or concerns arising.
	23 rd January 2014	ACCC received further information from AGL. ACCC amended former provisional date for announcement of findings (30 January 2014).
	5 th February 2014	Former proposed decision date of 5 February 2014 extended to 6 February 2014.
	6 th February 2014	ACCC published a Statement of Issues outlining preliminary competition concerns.
	17 th	Closing date for submissions relating to Statement of Issues.

February 2014	
18 th February 2014	Draft s87B Undertaking proffered by AGL.
19 th February 2014	ACCC commenced market inquiries on draft s87B undertaking.
25 th February 2014	Closing date for submissions re AGL's draft s87B undertaking.
4 th March 2014	ACCC announced it would oppose the proposed acquisition.

* Total Review days = Total business days less public holidays and time during which the review was suspended.

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**IN THE AUSTRALIAN COMPETITION TRIBUNAL
AGL ENERGY LIMITED**

of 2014

**RE: PROPOSED ACQUISITION OF MACQUARIE GENERATION (A CORPORATION
ESTABLISHED UNDER THE ENERGY SERVICES CORPORATIONS ACT 1995
(NSW))**

ANNEXURE CERTIFICATE

This is the annexure marked "LC 5" annexed to the statement of **LIZA WINDEL CARVER** dated
28 March 2014

Annexure LC 5

Filed on behalf of (name & role of party)	AGL Energy Limited		
Prepared by (name of person/lawyer)	Liza Carver		
Law firm (if applicable)	Ashurst Australia		
Tel	+61 2 9258 5897	Fax	+61 2 9258 6999
Email	Liza.Carver@ashurst.com		
Address for service (include state and postcode)	Level 35, 225 George Street, Sydney, NSW, 2000 DX 388 Sydney		

[Form approved 01/08/2011]

ACCC to not oppose the proposed acquisition by AGL of Australian Power and Gas

12 September 2013

The Australian Competition and Consumer Commission will not oppose the proposed acquisition by AGL Energy Limited (AGL) of Australian Power and Gas Company Limited (APG).

“The ACCC has concluded that the proposed acquisition is not likely to substantially lessening competition in the relevant markets,” ACCC Chairman Rod Sims said.

“The ACCC formed the view that the removal of APG as an independent retailer was not likely to substantially reduce the competitiveness of price and non-price offerings in the relevant retail energy markets.”

The ACCC considered the impact of the proposed acquisition primarily in state-based retail markets for the supply of electricity and gas in Victoria, New South Wales and Queensland.

While APG’s customer base is predominantly based in Victoria, the ACCC found that the collective presence of a number of other second tier retailers in that state would continue to drive competition.

“Our review indicated that second tier retailers are the primary drivers of competition in retail energy markets. The ACCC recognises that a sufficient number of second tier retailers are required to constrain the pricing of the major retailers. The ACCC is very concerned to ensure that acquisitions in the energy sector do not result in the removal of second tier retailers that play a significant role in driving pricing, discounting activity or innovation in energy offerings,” Mr Sims said.

“However, after a close review, it became apparent that the removal of APG was not likely to substantially reduce the overall competitiveness of the relevant markets.”

First tier retailers are in essence those energy retailers that acquired government-owned ‘host’ retailers at privatisation. The first tier retailers are AGL, EnergyAustralia and Origin. Second tier retailers are in essence those retailers that have subsequently entered in competition with host retailers following the introduction of full retail contestability.

Related public register records

- [AGL Energy Limited - proposed acquisition of Australian Power and Gas Company Limited](https://www.accc.gov.au/content/index.phtml/itemId/1125838/fromItemId/751046)
(<https://www.accc.gov.au/content/index.phtml/itemId/1125838/fromItemId/751046>)

Release number:

204/13

Media enquiries:

Mr Duncan Harrod - (02) 6243 1108 or 0408 995 408



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AGL Energy Limited - proposed acquisition of Australian Power and Gas Company Limited

Type of assessment	Informal Review
Reference	51756
Acquirer(s)	AGL Energy Limited
Target(s)	Australian Power and Gas Company Limited
Industry	Gas and electricity retailing
Summary	AGL Energy Limited (AGL) proposed to acquire Australian Power and Gas Company Limited (APG).
Outcome of assessment	Not opposed
Total review days *	44
Commenced public review	15 th July 2013
Date completed	12 th September 2013
Market definition	<p>The ACCC assessed the effects of the proposed acquisition in the context of state-based markets (in Victoria, NSW and Queensland) for:</p> <ul style="list-style-type: none"> i. the retail supply of electricity to residential and small business customers; ii. the retail supply of gas to residential and small business customers; iii. the wholesale acquisition of electricity (including entry into associated risk management arrangements); and iv. the wholesale acquisition of gas and gas transportation (including entry into associated risk management arrangements). <p>The ACCC recognised that competitive effects on a wider geographic basis (such as NEM-wide) may be relevant for other acquisitions.</p>
Competition analysis	<p>The ACCC considered that the proposed acquisition was not likely to substantially lessen competition in any relevant market. Factors informing this view included:</p> <ul style="list-style-type: none"> i. in Victoria, the merged entity would continue to face a competitive constraint from first tier retailers and a sufficient number of second tier energy retailers; ii. the removal of APG as an independent retailer was not likely to reduce the overall competitiveness of the relevant retail markets in Victoria, NSW or Queensland; and iii. the proposed acquisition was not likely to have a material impact in markets for the wholesale acquisition of electricity or gas, since there would be minimal increase to the level of vertical integration. <p>The ACCC found that second tier retailers drive competition in price and non-price aspects of their offerings disproportionately to their market shares and that the collective presence of a sufficient number of second tier retailers is a key competitive constraint upon first tier retailers in retail energy markets, particularly in Victoria which has experienced a higher degree of new entry in recent years.</p>
Review	

timeline	Date	Event
	15 th July 2013	ACCC commenced review under the Merger Process Guidelines.
	9 th August 2013	Closing date for submissions from interested parties.
	12 th September 2013	ACCC announced it would not oppose the proposed acquisition.

* Total Review days = Total business days less public holidays and time during which the review was suspended.

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