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COMMERCE COMMISSION

Decision No. 380

Determination pursuant to the Commerce Act 1986 in the matter of an application for clearance of a business acquisition involving:

UNITEDNETWORKS LIMITED

and

ORION NEW ZEALAND LIMITED

The Commission:	K M Brown P R Rebstock E M Coutts
Summary of Application:	UnitedNetworks Limited (or an interconnected body corporate) has sought clearance to acquire assets of Orion New Zealand Limited, comprising natural gas distribution networks, an industrial gas trading business, a five percent interest in the Southdown power station joint venture, and the North Island activities of Connectics Limited.
Determination:	Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission gives clearance for the proposed acquisition.
Date of Determination:	23 December 1999

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THE PROPOSAL

1 Pursuant to section 66(1) of the Commerce Act 1986 (the Act), UnitedNetworks Limited (United) gave notice to the Commission dated 10 December 1999, seeking clearance for it to acquire the following assets of Orion New Zealand Limited (Orion):

- The natural gas distribution networks in Auckland, Manawatu, Horowhenua, Hawkes Bay and Wellington comprising networks totalling approximately 4,400 kilometres in length;
- The industrial gas trading business (involving the sale of gas to 36 industrial customers). The assets and obligations of this division include:
  - Customer contracts;
  - Gas measurement equipment;
  - Gas supply agreements with Natural Gas Corporation (NGC) and Contact Energy Ltd (Contact);
- A 5% interest in the Southdown cogeneration power station joint venture; and
- The North Island activities of Connectics Ltd, Orion's network contracting business.

THE PARTIES

UnitedNetworks Ltd

2 United provides electricity distribution services in:

- the Auckland region - North Shore, Waitakere and Rodney
- the Wellington region - Wellington, Hutt Valley and Porirua Basin
- the Eastern Region – Thames Valley, Coromandel, Western Bay of Plenty, Tauranga, Rotorua and Taupo.

3 Through its trading divisions or subsidiaries, United also provides network maintenance, network construction, metering services and other services such as connection and disconnection throughout New Zealand.

4 United is a public company, listed on the New Zealand Stock Exchange. Its largest shareholder is Utilicorp N.Z. Limited which holds 78.78% of the shares on issue in United. UnitedNetworks Shareholders' Society Inc. (as trustee of the Waitemata Electricity Trust) holds 10.68%, with the public and institutions holding the remaining 10.54%.

Orion New Zealand Ltd

5 The principal business activities of Orion are:

- Operation of an electricity distribution network in Canterbury between the Waimakariri and Rakaia Rivers (including Christchurch city).
- Operation of gas distribution networks in Auckland, Wellington, Manawatu, Horowhenua and Hawkes Bay.

6 Orion is owned by the Christchurch City Council, with 87% of the shares; Selwyn District Council, with 11%; and Banks Peninsula District Council, with 2%.

7 The electricity distribution business of Orion was formerly known as Southpower. Orion's gas distribution networks were formerly part of Enerco New Zealand Ltd, an integrated gas distributor and retailer, in which Southpower was the majority shareholder. The non-industrial gas retail business of Enerco was sold to Contact at the end of 1998. At that time Enerco changed its name to Qest, and Southpower merged the Qest operations into Southpower. On the sale of Southpower's electricity customers, Southpower changed its name to Orion.

PROCEDURES

8 The application was registered by the Commission on 13 December 1999. Section 66(3) of the Commerce Act requires that the Commission, within 10 working days after the date of registration of the application, or such longer period agreed by the Commission and the applicant, gives, or declines to give, a clearance for the acquisition. The tenth working day after the registration of the application is 17 January 2000.

9 United advised the Commission that it did not seek a confidentiality order for the fact of the application, but that it did require confidentiality for some specific information contained in the application. The Commission, in accordance with section 100 of the Commerce Act, made a confidentiality order on 15 December 1999 prohibiting the publication or communication of that information.

10 The Commission's determination is based on an investigation conducted by its staff and their subsequent advice given to the Commission.

THE INVESTIGATION

11 In the course of their investigation of the proposed acquisition, Commission staff have discussed the application with a number of parties including:

- Contact;
- Orion;
- Nova Gas Ltd (Nova Gas);
- BHP New Zealand Steel Ltd;
- Heinz Wattie Ltd;
- Fletcher Challenge Energy;
- TransAlta New Zealand Ltd (TransAlta);
- Todd Energy Ltd (Todd Energy).

12 In addition staff have sought and received comment and further information from United.

THE MARKETS

Introduction

13 The purpose of defining a market is to provide a framework within which the competition implications of a business acquisition can be analysed. The relevant markets are those in which competition may be affected by the acquisition being considered. Identification of the relevant markets enables the Commission to examine whether the acquisition would result, or would be likely to result, in the acquisition or strengthening of a dominant position in any market in terms of section 47(1) of the Act.

14 Section 3(1A) of the Act provides that:

> "the term 'market' is a reference to a market in New Zealand for goods and services as well as other goods and services that, as a matter of fact and commercial common sense, are substitutable for them."

15 Relevant principles relating to market definition are set out in *Telecom Corporation of New Zealand Ltd v Commerce Commission*[1] and in the Commission's *Business Acquisition Guidelines* ("the Guidelines").[2] A brief discussion of the methodology follows.

16 Markets are defined in relation to product type, geographical extent, and functional level. The boundaries of the product and geographical markets are identified by considering the extent to which buyers are able to substitute other products, or across geographical regions, in response to a change in relative prices of the products concerned. A market is the smallest area in which all such substitution possibilities are encompassed. It is in this area that a hypothetical monopoly supplier could exert market power.

17 A properly defined market will include products which are regarded by buyers or sellers as being not too different ('product' dimension), and not too far away ('geographical' dimension). A market defined in these terms is one within which a hypothetical profit-maximising sole supplier of a product could impose at least a small yet significant and non-transitory increase in price (the *"ssnip"* test), assuming other terms of sale remain unchanged. It will also include those suppliers currently in production who are likely, in the event of such a *ssnip*, to shift promptly to offer a suitable alternative product, or offer their product to alternative acquirers.

18 Markets are also defined in relation to functional level. Typically, the production, distribution, and sale of products proceeds through a series of vertical functional levels, so the functional levels affected by the application have to be determined as part of the market definition. For example, that between manufacturers and wholesalers might be called the "manufacturing market", while that between wholesalers and retailers is usually known as the "wholesaling market".

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[1] (1991) 4 TCLR 473.
[2] Commerce Commission, *Business Acquisition Guidelines*, 1999, 11-16.

Relevant trading activities

19 United's trading activities are in the electricity sector, in particular the operation of electricity distribution networks in various parts of the North Island. It also operates contracting divisions which provide network maintenance, network construction, and metering services for electricity networks.

20 The assets which United is seeking clearance to acquire are principally in the gas sector, including various gas distribution networks in the North Island, a gas trading business involving the supply of gas to 36 industrial customers, and a network contracting business. The only asset which falls outside the gas sector is a 5% interest in the Southdown cogeneration power station joint venture.

21 Southdown operates in the electricity generation market. United is not currently involved in the generation market. A 5% interest would not give United the ability to exert a substantial degree of influence over Southdown and hence there is no aggregation in this market. Accordingly the Commission does not consider it necessary to discuss the electricity generation market further in this decision.

22 The Commission notes that the purchase of a 5% interest is not sufficient to result in United being considered involved in an electricity supply business under section 7 of the Electricity Industry Reform Act 1998.

Separate electricity and gas product markets

23 The Commission has previously adopted discrete electricity and gas product markets when assessing business acquisitions in the energy sector. The Commission stated in Decision 270[3]:

> "None of the evidence presented to the Commission points to a clear cut answer to the market definition problem. However, all of the evidence is consistent with the conclusion that natural gas and other fuels, especially electricity and to a lesser extent coal, are indeed substitutes for each other, both technically and commercially – but they are at best imperfect substitutes, and cannot be regarded as being in the same market". (para129)

24 This approach is consistent with more recent decisions of the courts. In the High Court judgment in *Power New Zealand Ltd v Mercury Energy Ltd* (1996) 1 NZLR 686 (*Power NZ/Mercury*), subsequently upheld in February 1997 by the Court of Appeal, the court said:

> "It is common ground that gas is not in close competition with electricity. We see no reason to question this approach". (p.704)

[3] Decision No. 270, *Natural Gas Corporation of New Zealand Limited and Enerco New Zealand Limited*, 22 November 1993.

25 In *Shell (Petroleum Mining) Company Limited and Another v Kapuni Gas Contracts Limited and Another* (1997) 7 TCLR 463, the High Court heard a substantial amount of economic evidence on market definition. It said:

> "We accept that {light fuel oil, coal and electricity} are substitutable {for natural gas} in certain favourable circumstances, but always at the edges and seldom in response to a SSNIP". (p.527)

26 In Decision 333,[4] the Commission considered it appropriate to adopt discrete product markets for electricity and gas. Although the Commission recognised that inter-fuel competition provided some constraint on market power, it did not consider the constraint sufficiently strong to include electricity and gas in the same market.

27 In Decision 345[5], the Commission again adopted separate product markets for electricity and gas.

28 The information obtained during the course of the investigation into the current application indicate that it is still appropriate to adopt discrete markets. Most market participants spoken to agree that electricity and gas place at most only very limited competitive constraint on each other. The Commission has therefore adopted discrete product markets for electricity and gas in considering the current application.

Gas Wholesale Market

29 In recent decisions involving the gas sector[6], the Commission placed sales of natural gas to natural gas retailers and medium and large industrial consumers in a market defined as the North Island gas wholesale market. It did this in recognition of the common supply conditions faced by these categories of purchasers. There continue to be a number of suppliers who can meet the gas requirements of those who fall within these categories.

30 The Commission considers that the market relevant to the supply of gas to Orion's 36 industrial customers is the North Island gas wholesale market.

Gas Distribution Markets

31 In Decision 333, the Commission moved away from the "delivered gas" market which represented the bundling of both the distribution service and the supply of gas to small commercial and domestic consumers connected to a particular gas distribution network. This shift recognised recent divestments by gas utilities resulting in the ownership separation of gas distribution and retail businesses which meant that small consumers would no longer necessarily receive both their distribution services and gas from a single supplier. This was already the case for medium and large industrial consumers. The Commission considers that there are now separate markets for the supply of gas and the distribution service.

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[4] Decision No. 333, *Contact Energy Limited and Enerco New Zealand Limited*, 10 December 1998.
[5] Decision No.345, *UnitedNetworks Limited and TransAlta New Zealand Limited*, 11 March 1999.
[6] See Decision 333 for a discussion of the Commission's recent determinations in relation to gas markets.

32 Gas distribution networks have historically been viewed as natural monopolies. The sunk cost associated with existing pipelines and the scale economies derived from the operation of gas distribution networks means that the duplication of pipelines has generally not been economically viable. However in some areas competition for distribution to large customers has developed in recent years. This has come about principally through by-pass and through new networks built by Nova Gas.

33 In Decision 345, the Commission noted that it was arguable that there were two separate markets for gas distribution services – those for large purchasers who have a choice of distributors and those for other customers. However the Commission concluded that, even if there was a case for making this separation, it was not necessary to do so for the purpose of analysing the application. That is also the Commission's position in respect of the current application.

Electricity Distribution Markets

34 In recent decisions, the Commission has recognised that electricity distribution and electricity retailing have become discrete activities, undertaken by different firms and subject to different competitive forces. Accordingly it has considered it appropriate to place the two activities in separate functional markets.

35 The Commission also recognises that, with few exceptions, electricity consumers are limited to having their electricity delivered over their local network. While by-pass is occasionally possible, it remains a rarity. Accordingly, the Commission has considered it appropriate for the purpose of analysing the current application to place electricity distribution within separate geographic markets, each corresponding with the scope of United's networks.

Summary of relevant markets

36 The Commission considers that the markets relevant to its consideration of the application are the North Island gas wholesale market, the electricity distribution markets corresponding with United's distribution networks and the gas distribution markets corresponding with Orion's distribution networks.

37 In addition the Commission gives consideration to the network contracting services market. A small amount of aggregation would take place in this market as a result of the acquisition.

COMPETITION ANALYSIS

38 Competition analysis assesses competition in the relevant markets in order to determine whether the proposed acquisition would result, or would be likely to result, in an acquisition or strengthening of dominance.

39 Competition in a market is a broad concept. It is defined in section 3(1) of the Commerce Act as meaning "workable or effective competition". In referring to this definition the Court of Appeal said:[7]

> "That encompasses a market framework which participants may enter and in which they may engage in rivalrous behaviour with the expectation of deriving advantage from greater efficiency."

40 Section 3(9) of the Commerce Act states:

> "For the purposes of sections 47 and 48 of this Act, a person has … a dominant position in a market if that person as a supplier … of goods and services, is or are in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in that market and for the purposes of determining whether a person is … in a position to exercise a dominant influence over the production, acquisition, supply, or price of goods or services in a market regard shall be had to-
>
> (a) The share of the market, the technical knowledge, the access to materials or capital of that person or those persons:
>
> (b) The extent to which that person is … constrained by the conduct of competitors or potential competitors in that market:
>
> (c) The extent to which that person is … constrained by the conduct of suppliers or acquirers of goods or services in that market."

The Dominance Test

41 Section 47(1) of the Commerce Act prohibits certain business acquisitions:

> "No person shall acquire assets of a business or shares if, as a result of the acquisition, -
>
> (a) That person or another person would be, or would be likely to be, in a dominant position in a market; or
>
> (b) That person's or another person's dominant position in a market would be, or would be likely to be, strengthened."

42 The test for dominance has been considered by the High Court. McGechan J stated:[8]

> "The test for 'dominance' is not a matter of prevailing economic theory, to be identified outside the statute."
>
> "Dominance includes a qualitative assessment of market power. It involves more than 'high' market power; more than mere ability to behave 'largely' independently of competitors; and more than power to effect 'appreciable' changes in terms of trading. It involves a *high degree of market control*."

43 Both McGechan J and the Court of Appeal, which approved this test,[9] stated that a lower standard than "a high degree of market control" was unacceptable.[10]

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[7] *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554, 564-565
[8] *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC)
[9] *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA)
[10] *Commerce Commission v Port Nelson Ltd* (1995) 5 NZBLC 103,762 103,787 (HC) and *Commerce Commission v Port Nelson Ltd* (1996) 5 NZBLC 104,142 104,161 (CA)

44 The Commission's *Business Acquisitions Guidelines* state:

> "A person is in a dominant position in a market when it is in a position to exercise a high degree of market control. A person in a dominant position will be able to set prices or conditions without significant constraint by competitor {or} customer reaction."
>
> "A person in a dominant position will be able to initiate and maintain an appreciable increase in price or reduction in supply, quality or degree of innovation, without suffering an adverse impact on profitability in the short term or long term. The Commission notes that it is not necessary to believe that a person will act in such a manner to establish that it is in a dominant position, it is sufficient for it to have that ability." (p21)

45 The role of the Commission in respect of an application for clearance of a business acquisition is prescribed by the Commerce Act. Where the Commission is satisfied that the proposed acquisition would not result, or would not be likely to result, in an acquisition or strengthening of a dominant position in a market, the Commission must give a clearance. Where the Commission is not satisfied, clearance is declined.

46 The Commission applies the dominance test in the following competition analysis.

The Gas Wholesale Market

47 Orion's gas trading business which forms part of application comprises the sale of gas to 36 industrial customers each using more than 50 TJ per annum. These sales combined amount to approximately 8PJ to 9PJ per annum, which represents around 12% of all sales in the gas wholesale market. The assets of the division include the customer contracts (with terms of between one and eight years), gas measurement equipment and gas supply agreements with NGC and Contact.

48 Of the 36 customers, 30 are located on Orion's networks, while four are located on NGC's networks, one on Powerco Ltd's (Powerco) network and one on Wanganui Gas Ltd's network.

49 The customers are considered to be contestable. Contact, NGC, Nova Gas and Todd Energy are among the other suppliers in the market. Each has access to gas and the ability to have gas transported to Orion's customers. NGC, Powerco, and Orion all have standard Distribution Services Agreements available for those who wish to use their networks. Major customers spoken to have stated that they consider that their supply options will not be affected by the proposed acquisition.

50 The effect of the proposed acquisition would be to put United in a position which mirrors the current position of Orion in the wholesale market. There is no market aggregation arising from the acquisition and there is no other reason why United will have more market power in this market post acquisition than Orion has at present. The acquisition would merely replace Orion as a supplier of gas in the wholesale market with United.

Conclusion on the gas wholesale market

51 The Commission concludes that the proposed acquisition would not result, and would not be likely to result in the acquisition or strengthening of dominance in the North Island gas wholesale market.

The Gas Distribution Markets

52 The gas distribution markets which are relevant to the consideration of the application are those which correspond with Orion's networks. The networks are in the Auckland, Manawatu, Horowhenua, Hawkes Bay and Wellington regions.

53 As noted above, gas distribution networks have historically been viewed as natural monopolies, although in the past two years some competition has arisen in distribution to larger customers in particular areas, principally as a result of Nova Gas's pipelines in particular areas, and as a result of by-pass where large gas users have taken direct supply from the main gas transmission pipelines. Nova Gas has been particularly active in the distribution market in the greater Wellington region and has had a significant impact on part of Orion's operations. However the great majority of gas consumers in Wellington and elsewhere remain dependent on the incumbent network owner for the distribution of gas. These network owners continue to have a high degree of market power.

54 While these distributors are in a dominant position, the Commission recognises that they face some constraints on market power. These were discussed in Decision 345 where the Commission stated:

> "In Decision 302, the Commission, having concluded that suppliers of delivered gas to small consumers had "substantial market power", identified that suppliers are likely to face constraints on their behaviour from:
>
> - the potential for cross border natural gas network competition bypassing the incumbent's natural gas network;
> - the possibility of by-pass directly from an NGC transmission pipeline in respect of large users situated close to such a pipeline;
> - the (then proposed) gas information disclosure regulations;
> - the potential for government regulation of unreasonable pricing by power companies; and
> - competition from other fuels.
>
> In the period since Decision 302, a number of changes have occurred relating to constraints on market power in gas distribution networks. The Commission considers that the following principal changes are likely to strengthen the extent to which market power is constrained:
>
> - the appearance of direct competition for gas distribution services by Nova Gas;
> - the divestment by some gas utilities of their gas retailing or gas distribution businesses, leaving them as essentially separate distribution network or energy retailing businesses;

- the requirement, by legislation, for ownership separation of electricity lines businesses from electricity retailing and generation businesses (supply businesses), facilitating competition in the national electricity retail market and, as considered in Decision 333, helping to ensure that inter-fuel competition is not lost in any geographical market where the incumbent electricity retailer and gas retailer is the same person;

- the requirement for mandatory information disclosure following the introduction of the Gas (Information Disclosure) Regulations 1997;

- the introduction of a pipeline access code by the gas industry, designed to facilitate neutral and non-discriminatory access to pipelines; and

- the increased threat of price control on electricity distribution businesses with the Government proposing to introduce a price control regime that could, relatively quickly and easily, be applied to gas distribution businesses."

55 To a large extent, these constraints remain relevant and would be unaffected by the proposed acquisition. The matter to which the Commission has given further consideration in the context of its assessment of the current application is that of inter-fuel competition. The acquisition would bring the gas networks and the electricity networks in the North Shore/Waitakere/Whangaparoa (the North Shore region) and Wellington region under common ownership. The attached maps (Appendix 1) show the approximate areas in Auckland and Wellington where United would own both networks.

56 In Decision 345 the Commission considered whether any inter-fuel competition relating to gas distribution services would change as a result of United's ownership of both electricity and gas distribution networks in the Hutt Valley/Porirua region, as opposed to separate ownership by United and TransAlta. The Commission noted that it was possible there would be a strengthening of dominance in the gas market, notwithstanding the slight countervailing power from acquirers that would occur. However the Commission noted:

> "UNL (United) has stated that the proposed acquisition will not result in the strengthening of the dominant position in gas distribution. It argues that strengthening is unlikely as it will retain a strong financial incentive to promote new connections to, and expansion of, its gas distribution network. UNL contends this is because of the significantly higher margin available from selling gas distribution services than selling electricity distribution services. Moreover, UNL contends, a combined gas and electricity distributor has a much higher incentive to encourage electricity customers to switch to gas consumption than does a combined gas and electricity retailer. The margin differential for the retailer relative to the financial reward of the distributor is small.
>
> The Commission has considered how the changes in the electricity sector are likely to affect UNL's market power in gas distribution. Electricity distribution businesses contract with retailers who retail electricity to consumers using the distribution network. These contracts generally have the same terms applying to all retailers, as there is no incentive for distribution businesses to discount the distribution charge to a particular retailer.
>
> In a situation where UNL raised the price of its gas distribution service to the level where some customers decided to disconnect their gas connection and only use electricity, UNL would be constrained from recouping its loss on gas distribution. It would be unable to recover the decrease in gas revenue from increased revenue from particular electricity consumers. Should UNL attempt to increase its electricity distribution charge to a particular electricity retailer, consumers have the ability to switch to another electricity retailer. While it would be possible for UNL to increase its electricity distribution charge across the board, it is not likely to be able to increase these charges to a higher level than a separate electricity distribution business with no gas network."

57 Having taken these matters into consideration, the Commission concluded in Decision 345 that United's acquisition of TransAlta would not strengthen its dominant position in the gas distribution market, despite leading to the common ownership of the gas and electricity networks in the Hutt Valley and Porirua regions.

58 The Commission considers that the same conclusions apply to the current application. It recognises that the acquisition would bring under common ownership the gas and electricity networks in the North Shore and Wellington regions. For the reasons discussed in Decision 345 and set out above, the Commission is satisfied that this common ownership would not increase the market power associated with each network.

Conclusion on the gas distribution markets

59 The Commission is satisfied that the proposed acquisition will not result in the strengthening of a dominant position in the gas distribution markets corresponding with Orion's networks.

Electricity Distribution Markets

60 As with gas distribution networks, electricity distribution networks are, prima facie, natural monopolies. In most cases it is not economically viable to duplicate existing electricity lines due to the sunk costs associated with those lines and the economies of scale derived from the operation of networks. The Commission considers that United currently has a dominant position in the relevant electricity distribution markets. Therefore the focus of the Commission's analysis in this market is whether, as a result of the proposed acquisition, United's dominant position would be likely to be strengthened.

61 United is currently constrained in respect of its market power by a number of factors which the Commission has discussed at length in earlier applications. In Decision 345 the Commission stated:

> "Although they are natural monopolies, the Commission has previously noted that electricity distribution networks are constrained in respect of their market power to some extent. In Decision 302[11] and Decision 317,[12] the Commission stated:
>
> > "Notwithstanding their natural monopoly characteristics, the distribution businesses of power companies are likely to face some constraints on their behaviour. Generally, these arise from:
> >
> > - the ability for a customer close to the border between two distribution networks to connect to the adjacent network;
> > - the ability for a customer close to a Trans Power point of supply to arrange a direct line of supply;
> > - the Electricity (Information Disclosure) Regulations which require power companies to disclose information to assist in the monitoring of power companies and recourse to the provisions of the {Commerce} Act;
> > - potential government regulation of pricing by power companies;

[11] Decision No. 302, *Powerco Limited and Egmont Electricity Limited*, 21 July 1997 (section 67 application).

[12] Decision No. 317, *Mercury Energy Limited and Power New Zealand Limited*, 26 February 1998.

- new networks (developments or sub-divisions) within the relevant distribution markets; and
- competition from other fuels."[13]

Considerable change has occurred in the electricity industry since Decision 302 and Decision 317 which likely strengthen, or will likely strengthen, the extent to which market power is constrained in markets involving electricity distribution. These changes include:

- enhancements to the Electricity (Information Disclosure) Regulations 1994 and Handbook for Optimised Deprival Valuation of Electricity Line Businesses designed to increase the effectiveness of information disclosure;

- an increased threat of price control on electricity distribution businesses with the Government proposing to introduce a price control regime replicating competitive pressure on distribution businesses which, as monopoly services, face weak downward pressures on costs, profits and prices; and

- the requirement, by legislation (the EIR Act), for ownership separation of electricity lines businesses from electricity retailing and generation businesses (supply businesses)."

These comments on competitive constraints remain relevant to the current application. The constraints are not affected by the proposed acquisition. The only one which requires further comment is the constraint from inter-fuel competition.

62 As noted above, the proposed acquisition would bring gas and electricity networks in the North Shore and Wellington regions under common ownership. Consequently in these areas, any inter-fuel competition faced by the electricity network from the gas network would be lost by the proposed acquisition. However, as the Commission has said in the past, it is of the view that:

- natural gas places some constraint on power company activities;
- such constraint is less than the constraint that electricity places on the activities of natural gas companies; and
- there is minimal constraint on the distribution business of power companies.

63 Consistent with earlier decisions, the Commission considers that there is minimal inter-fuel constraint from gas on United's distribution business in the electricity distribution market.

Conclusion on the electricity distribution markets

64 The Commission is satisfied that the proposed acquisition would not result in the strengthening of United's dominant position in the electricity distribution markets corresponding with United's networks.

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13 Decision 302, paragraph 132 and Decision 317, paragraph 110.

Network Contracting Services Market

65 United is engaged in providing a variety of services to distribution network and non-network customers throughout New Zealand, largely through its wholly-owned subsidiary Powerlink Construction Ltd. These services include network maintenance, network construction, metering services as well as other network services such as connections and disconnections. Currently United provides these services chiefly to the electricity sector.

66 Among the assets United is seeking clearance to acquire is the network contracting business of Connectics Ltd, which provides similar services chiefly to the gas sector.

67 While Powerlink and Connectics are mainly providing services to different sectors, it is possible that each could provide some services currently offered by the other. However the Commission is satisfied that any loss of competition between the two as a result of the acquisition would not affect the competitive nature of the market. There will remain a number of significant suppliers of these services (including Transfield, Alsthom, Energex and Siemens) and entry barriers do not appear to be substantial.

Conclusion on the network contracting services market

68 The Commission is satisfied that the proposed acquisition would not result in the acquisition of dominance in the network contracting services market.

CONCLUSION

69 The Commission has considered the impact of the proposed acquisition in the gas wholesale market, the relevant electricity and gas distribution markets and in the network contracting services market.

70 Having regard to the factors set out in section 3(9) of the Commerce Act and all other relevant factors, the Commission is satisfied that the proposed acquisition would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

DETERMINATION ON NOTICE OF CLEARANCE

71 Accordingly, pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission gives clearance for the acquisition by UnitedNetworks Ltd, or any interconnected body corporate, of the following assets of Orion New Zealand Ltd:

- The natural gas distribution networks in Auckland, Manawatu, Horowhenua, Hawkes Bay and Wellington comprising networks totalling approximately 4,400 kilometres in length;
- The industrial gas trading business (involving the sale of gas to 36 industrial customers). The assets and obligations of this division include:
  - Customer contracts;
  - Gas measurement equipment;
  - Gas supply agreements with Natural Gas Corporation and Contact Energy Ltd;
- A 5% interest in the Southdown cogeneration power station joint venture; and
- The North Island activities of Connectics Ltd, Orion's network contracting business.

Dated this 23rd day of December 1999

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K M Brown
Member