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Mr Bill Niak  
Investigator  
Business Competition Branch  
Commerce Commission  
PO Box 2351  
WELLINGTON

Dear Mr Niak

**COMMERCE ACT 1986: SUBMISSION ON APPLICATION FOR AUTHORISATION OF  
PROPOSED ARRANGEMENT – ELECTRICITY GOVERNANCE BOARD LIMITED (EGBL)**

Please find attached a submission from TrustPower regarding the application by Electricity Governance Board Limited for an authorisation of a proposed arrangement to combine the existing electricity market arrangements.

Yours faithfully

**Peter Calderwood**  
**STRATEGIC BUSINESS DEVELOPMENT MANAGER**

## **1. INTRODUCTION**

- 1.1 This submission relates to the application by Electricity Governance Board Limited in respect of a restricted trade practice of the kind described in section 58 of the Commerce Act 1986.
- 1.2 This submission is made by TrustPower Limited (“TrustPower”). TrustPower is a retailer and generator of electricity, based in Tauranga.

## **2. SUMMARY OF SUBMISSION**

- 2.1 TrustPower submits that the Commission decline the application in its present form. However, we believe that with some modifications of the rulebook the arrangement should be approved.
- 2.2 TrustPower does not support the assumption of Government regulation as the counterfactual for the arrangement and believes the appropriate counterfactual is the existing arrangements.
- 2.3 The new arrangement effectively precludes any competition in the use of alternative trading arrangements.
- 2.4 The voting arrangements in many sections of the proposed rulebook provide effective control to sectors of the electricity industry, with the proposed Electricity Governance Board (“EGB”) having almost no authority to effectively govern the new arrangements.

## **3. COUNTERFACTUAL**

- 3.1 Both the application and the supporting assessment carried out by LECG put a case that the appropriate counterfactual to the proposed arrangement is Government regulation. The basis for these arguments is based on the stated intentions of Government to regulate the industry if the policies outlined in the Government Policy Statement on electricity issued in December 2000 (“GPS”) are not implemented. Further strength was given to this argument on the basis that the Minister of Energy has powers to regulate without having to go back to Parliament.
- 3.2 TrustPower views the fact that the Government has signalled regulation as irrelevant in determining the counterfactual. The key issue is determining what would be the outcome if the application is declined.
- 3.3 There are a number of possible outcomes if the Commission declines the application. Government regulation is a possibility, but it is TrustPower’s view that Government fundamentally wishes to see an industry solution in response to the GPS. Given this the possible outcomes are;

- (a) Government will advise the industry that it still intends to regulate if the industry does not put together a rulebook that is acceptable to the Commission within a short but achievable deadline; or
  - (b) Government signals its intent to regulate through a notice in the *Gazette*, as provided for in the Electricity Amendment Act (2001). The Minister is then required to follow a consultation process, which is likely to take between 3-6 months and possibly longer.
- 3.4 If either of these cases eventuates there is no need for the Commission to take a view at this point whether regulation is the most likely outcome. In both cases there will be sufficient time for the industry to put a revised proposal to the Commission that meets the tests under the Commerce Act using the existing arrangements as the counterfactual.
- 3.5 In conclusion the Commission does not have to take a view on Government regulation at this time and use the existing arrangements as the counterfactual.

#### **4. COMPARISON WITH EXISTING ARRANGEMENTS**

- 4.1 The new rulebook has been constructed by attempting to combine the existing NZEM, MARIA and MACQS rulebooks and has added extra rules surrounding transport.
- 4.2 However in merging the rulebooks a fundamental change has occurred in that the trading arrangements previously contained within the NZEM rulebook are now effectively compulsory on all generators, retailers and direct supply customers.
- 4.3 By comparison, under the existing arrangements sellers and buyers can choose to trade physical electricity through the NZEM or can use the MARIA arrangements to transfer physical energy across the National Grid either bi-laterally or through alternative pool arrangements. As an example TrustPower trades its own generation using the MARIA arrangements and manages bi-lateral trades on behalf of other smaller generators and some major customers. Under the new arrangements these trades outside the market will not be permissible.
- 4.4 It is not necessary for the trading arrangements to be mandatory for the new rulebook to work effectively. For the new arrangement to be approved the mandatory requirement on trading rules should be removed.

#### **5. GOVERNANCE ISSUES**

- 5.1 The electricity market in New Zealand is dominated by a few large generator/retailers. Since the forced separation of line and energy companies in 1998 there has been an incentive for generators to balance their trading risk by acquiring retail customers to offset their generation capability.

- 5.2 In the proposed arrangement voting entitlements for the Part G trading rules are allocated on the basis of injection and off take. The rationale for this was that this would ensure a balance of market participants when decisions were made. However the make up of the market with vertical integration of the large generators also being retailers means that generators have considerable influence on the Part G rules in particular.
- 5.3 Given this dominance there could be situations occurring where rule changes that are beneficial overall, but disadvantageous to large generators do not succeed because of the significant voting strength of generators.
- 5.4 This dominance is particularly serious in the new trading arrangements because of the compulsory nature of the trading rules.
- 5.5 The proposed EGB does not have sufficient authority in the rules to override the ability of one side of the market to dominate.
- 5.6 Because of the lack of authority the EGB will not be able to carry out the function expected of it by the GPS, which is to provide overall control of the industry.
- 5.7 To avoid capture of the rules by particular market participants any rulebook approved should have more authority given to the EGB. The EGB should be in a position to review a vote for or against a rule change. If as a result of that review the EGB believes the result should have been different they should have the ability to put the vote to a wider group of stakeholders similar to those who vote for the EGB membership.