

COMMERCE ACT 1986: BUSINESS ACQUISITION SECTION 66: NOTICE SEEKING CLEARANCE

Date: 23 September 2005

The Registrar
Business Acquisitions and Authorisations
Commerce Commission
PO Box 2351
WELLINGTON

Pursuant to section 66(1) of the Commerce Act 1986 notice is hereby given seeking clearance of a proposed business acquisition by Energy Market Services Ltd of The Marketplace Company Limited.

PART I: TRANSACTION DETAILS

- 1. The business acquisition for which clearance is sought¹**
 - 1.1** Clearance is sought for the acquisition by Energy Market Services Limited ("EMS") of all of the shares of The Marketplace Company Limited ("M-co").
 - 1.2** A copy of the Sale and Purchase Agreement relating to the proposed acquisition, in the form originally executed is **attached** as Appendix A. The Sale and Purchase Agreement has been subsequently amended by exchange of letters between the parties. The material changes are set out in two letters from EMS to M-co dated 5 September 2005 (other than with respect to a change in the date for satisfaction of the second condition, which has been agreed as needing to be satisfied within 8 weeks of the date the first conditions are satisfied), **attached** as Appendix B.

- 2. The person giving notice**
 - 2.1** This notice is given on behalf of Energy Market Services Limited by the solicitors for the acquirer:

Simpson Grierson (solicitor for the acquirer)
HSBC Tower
195 Lambton Quay
Wellington

PO Box 2402, Wellington

¹ For ease of reference, paragraph headings and numbering follow the Commission's application form as far as is practicable.

Attention: Tanya Thomson
Telephone: 04-924-3561
Fax: 04-472 6986
DX: SX 11174
Email: tanya.thomson@simpsongrierson.com

2.2 Contact details of the acquirer are:

Energy Market Services Limited
c/- Tanya Thomson
Simpson Grierson
HSBC Tower
195 Lambton Quay
Wellington

PO Box 2402, Wellington

Telephone: 04-924-3561
Fax: 04-472 6986
DX: SX 11174
Email: Tanya.Thomson@simpsongrierson.com

3. Confidentiality

3.1 Confidential information in the public version of the application is indicated by bold square brackets: [Confidential information], together with the whole of appendices A and B. The applicant requests a confidentiality order under section 100 of the Commerce Act on an ongoing basis for:

- (a) the entire Agreement for Sale and Purchase, including the two letters from EMS to M-co dated 5 September 2005 recording some agreed amendments to the terms of the Agreement for Sale and Purchase;
- (b) further details of the transaction set out in paragraphs 4.5 and 5.6;
- (c) certain details of EMS' business activities as set out in paragraph 9.2;
- (d) the reasons for the acquisition as set out in paragraphs 10.2 and 10.3;
- (e) information relating to tenders for support services in paragraph 16.13;
- (f) footnote 12 (at paragraph 16.25(c)); and
- (g) footnote 13 (at paragraph 16.25(e)).

3.2 The reasons for seeking confidentiality for the information set out in paragraph 3.1 are that:

- (a) this information is commercially sensitive and of commercial value to the applicant; and

- (b) disclosure is likely to give unfair advantage to competitors of the applicant and/or prejudice the commercial position of the applicant.

Confidentiality is sought indefinitely or until the applicant advises the Commission that it can make public disclosure of those details. Confidentiality is sought under section 100 of the Commerce Act and section 9(2)(b)(ii) and section 9(2)(f) of the Official Information Act 1982.

4. Details Of The Participants

The Participants

- 4.1** The person who proposes to acquire the shares referred to in section 1 above is EMS. The company in which shares are to be acquired is M-co.
- 4.2** The contact details for EMS are given in section 2.
- 4.3** Contact details for M-co are:

c/- M-co International Limited
Level 13
60 Castlereagh Street
Sydney NSW 2001

GPO Box 1686

Attention: Jomar Eldoy
Chief Executive Officer

Telephone: +61 2 9256 6348
Fax: +61 2 9256 6322

Electricity Commission Approval

- 4.4** The Electricity Commission has approved the transaction subject to certain requirements which are discussed in sections 4.5 and 5.6 below. In particular the Electricity Commission has consented to the change in control of M-co for each of the following contracts, as required under the terms of each of them:
- (a) Clearing Manager Service Provider;
 - (b) Pricing Manager Service Provider;
 - (c) Information Systems Service Provider; and
 - (d) Market Support Services (Wholesale and Retail).

Disposition of the Market Support Services – Transmission Contract

- 4.5 As a result of requirements imposed by the Electricity Commission the contract for market support and administration services (transmission) will not be performed by EMS following the acquisition. Instead, these services will be undertaken by [] an independent consultant. []

- 4.6 The applicant considers that the changes to the proposed acquisition as a result of the disposition of this contract will have little impact on competition, and if there is any impact, it will increase rather than decrease, competition in the market support and administration services market compared with EMS acquiring this contract. For this reason this aspect has not been dealt with in any further depth in the remainder of the application.

5. Interconnected/Associated Parties

Acquirer group/associates:

- 5.1 The acquirer is a wholly-owned subsidiary of Transpower New Zealand Limited. It was established by Transpower in 1998 and known at that time as d-Cypha Limited. In 2004 it changed its name to Energy Market Services Limited. Transpower New Zealand Limited ("Transpower") also has several other subsidiaries, none of which are active in the same markets as EMS.

- 5.2 The acquirer has no subsidiaries.

Target company group/associates

- 5.3 The target company is a wholly owned subsidiary of M-co International Limited ("MIL") and is ultimately owned by a South-African based international financial group.

- 5.4 The target company owns 100% of the following companies:

- M-co Clearing House Limited (soon to cease trading);
- New Zealand Electricity Exchange Limited (non-trading);
- Energy Clearing House Limited; and
- NZEM Limited (non-trading).

- 5.5 M-co performs its business activities through itself and its operating subsidiaries. For the purposes of this application there is no relevant distinction between M-co and these subsidiaries. Accordingly, references to M-co should be read as references to M-co and its subsidiaries.

- 5.6 Following consultation with the Electricity Commission about the transaction, it has been agreed, as a condition of the Electricity Commission's consent to the

change in control of M-co [] that EMS will assign M-co's contracts for market support and administration services in respect of wholesale and retail markets to a wholly owned subsidiary of the EMS/M-co corporate group following the acquisition. These services are described more fully in paragraph 9.11 below. []

5.7 M-co is also the majority shareholder in Efficient Market Services Ltd which operates the Unlisted business. Efficient Market Services Limited is excluded from the acquisition and the parties have agreed that it will be disposed of prior to the acquisition becoming unconditional. Its activities are detailed below in paragraph 9.14.

6. Beneficial Interests

6.1 Neither EMS nor M-co has any beneficial interests in any other market participants.

7. Links between participants and competitors

7.1 There are no links between EMS/Transpower and M-co other than the licensing of Transpower's scheduling, pricing and dispatch software ("SPD") by Transpower to M-co and of M-co's Commodity Market Information Trading System ("COMIT") by M-co to Transpower, as detailed at sections 9.5 and 9.9.

8. Directorships

8.1 Neither EMS/Transpower nor M-co has directors involved in other relevant businesses.²

9. The business activities of each participant

EMS

9.1 EMS's primary business is its role as the Reconciliation Manager for the electricity wholesale market. In this role it is contracted by the Electricity Commission to provide reconciliation services required under the Electricity Governance Regulations and Rules 2003 ("EGRs"), including a monthly reconciliation of metering data against a register of contracts. The process includes profiling of domestic consumption data into half hourly data. This is required to facilitate settlement of the wholesale market. The reconciliation results are issued by the Reconciliation Manager for clearing and settlement of the market. In addition, the EMS service includes the management of an internet-based data transfer hub for secure delivery of data.

² Three of EMS's four directors are Transpower senior executives.

9.2 EMS also provides certain other data information services for participants in the electricity industry (on a contract basis) as follows:

- (a) Data administration for [] - This includes remote monitoring of metering, validation and verification of data and reporting to various parties in specific file formats. This service is designed to support the market requirements for the provision of metering data for reconciliation and billing.
- (b) Network reporting – Essentially this involves facilitating lines companies to invoice electricity retailers based on the extent of retailer trading activity on each particular lines company's network. This service is currently provided to [].
- (c) Geographic/spatial services work - EMS is involved in the development and operation of a database for Transpower which combined several different geographical data sets, enabling Transpower to (for example) obtain a map to display on screen that includes various geographic information (terrain elevation, land boundaries, etc).

International involvement

9.3 EMS is also party to an arrangement with Sydney Futures Exchange ("SFE") for the marketing, promotion, product development and customer relationship management of the SFE Electricity Futures and Options Contracts (in respect of electricity in Queensland, New South Wales, Victoria and South Australia). These contracts are offered by EMS to the market and cleared and settled by SFE.

9.4 EMS has been involved in tenders for the provision of market system services for both electricity systems and gas systems in other jurisdictions (including for the electricity regulator in Australia and various Australian state gas systems). It does not currently provide any services internationally.

Transpower

9.5 Transpower, EMS's parent, is the owner and operator of the national transmission system. Transpower is also the System Operator. The EGRs require that Transpower be appointed to the System Operator role. Transpower has a licence agreement with M-co under which Transpower licences Transpower's SPD to enable M-co to perform its Pricing Manager obligations.

9.6 Other than as described in this section 9, Transpower has no direct relationship or involvement with the activities of EMS or M-co. Neither EMS nor M-co are active in the physical electricity market. Transpower is indirectly affected by the activities of EMS and M-co (in terms of providing information and market support services to the electricity market). The applicant believes that the Commission is aware of the nature and extent of Transpower's, role and accordingly has not detailed it any further in this application. The applicant is happy to answer any questions the Commission has in relation to Transpower's activities insofar as they are relevant to the application.

M-co

- 9.7** M-co was established in 1993 as a joint venture by the electricity industry to assist in the design and implementation of the then new wholesale electricity market. Once the market was established, its primary role was to operate and administer the market under the New Zealand Electricity Market ("NZEM") Rules (now superseded by the EGRs).
- 9.8** Historically, M-co was involved in the design and establishment of the wholesale market, and acted as market administrator. Following the establishment of the wholesale electricity market as a trading market in 1996, M-co had a larger role as market administrator than it currently does. It also had a quasi-judicial role in supporting the market surveillance committee responsible for admitting new entrants and disciplining industry participants. Some of the market administration functions, and the entire market surveillance role, have now been taken over by the Electricity Commission under the EGRs. M-co has also been pricing and clearing manager since the establishment of the wholesale electricity market on 1 October 1996.
- 9.9** M-co was originally owned by Transpower, ECNZ and the Electricity Supply Association (representing electricity lines companies). When ECNZ was split into three state-owned generators, M-co was sold to RMB Australia which then on-sold it to another related company, MIL, which is M-co's current owner.
- 9.10** Since the establishment of the Electricity Commission and the reshaping of the market pursuant to the EGRs, M-co's role has changed. The Electricity Commission is now the primary market administrator. M-co occupies three service provider roles:
- (a) Pricing Manager: This involves receiving metering information from generators, producing final prices and providing final pricing information to the Clearing Manager.
 - (b) Clearing Manager: M-co (through Energy Clearing House Limited) calculates the amounts of electricity bought and sold, issues invoices to purchasers and notifications to generators and provides the settlement services for these transactions.
 - (c) Information Systems Service Provider: M-co provides access to COMIT, the internet-based trading system it developed for electricity market participants to enable the wholesale market to function.
- 9.11** M-co also provides market support and administration services to the Electricity Commission for the wholesale and retail markets and the transmission work stream. These services involve providing a range of administrative support services to the electricity market, including collation and reporting of system operator and pricing manager reports, registering and auditing data administrators, storage of electricity profile information. The Electricity Commission's consent is required to any deemed assignment (including a change of control of M-co) of these contracts. As noted in paragraph 4.4 above, the Electricity Commission has

consented to the change in control of these contracts and has approved the transaction.

- 9.12** M-co provides some additional market information services to electricity market participants including a line settlement and billing system for Orion New Zealand Limited and an electricity derivatives hedge market information system for generators. It also provides consultancy services to the Electricity Commission (including on transmission issues). M-co has contracts with various market participants who have access to COMIT (via the EGRs) to provide added value services including access to dispatch prices, hydro reports and the like. M-co also has an access agreement with Transpower allowing Transpower to access COMIT to enable it to perform System Operator functions.

International Electricity Industry Involvement

- 9.13** M-co has "exported" its market design and operation skills internationally via MIL (M-co's parent company), which is also involved in the provision of market design and administration services to electricity markets in other jurisdictions. MIL's activities include:

- (a) a joint venture with the Singapore Government to set up and implement the wholesale electricity market in Singapore;
- (b) designing the South African wholesale electricity market;
- (c) designing Taiwan's independent system operator for its electricity market.

While M-co (the New Zealand company) was involved in assisting with these projects, it no longer has any active involvement in their ongoing operations. It does continue to provide specialist advice and support on a commercial basis when requested but other than that these activities are not part of the acquisition. The applicant considers that it is useful for the Commission to be aware of the M-co group's international activities as this highlights the global nature of the markets, and the possibility that competitors are located internationally.

Unlisted

- 9.14** M-co is the major shareholder in Efficient Market Services Ltd, a joint venture which established Unlisted, an internet-based trading platform for the trading of shares in small-to-medium sized companies. As noted above, Efficient Market Services Limited, and thus Unlisted, is excluded from the acquisition.

Activities Outside the Electricity Industry

- 9.15** M-co has two roles in the New Zealand telecommunications industry. It acts as independent Number Administrator and Secretariat to the NAD Management Committee (Telecommunications), and it provides administration and secretariat support to the Telecommunications Carrier Forum.

9.16 M-co also undertakes ad hoc consulting assignments with recent examples being project management work for NZQA, and the Ministry of Transport, the Commerce Commission and Treasury.

9.17 MIL is also involved in various market design and administration services in other industries including assisting in the design of the competitive gas market in NSW, and acting as finance and administration manager for that market.

10. The Reasons For The Proposal

10.1 The acquisition would give EMS greater critical mass and synergies through the bringing together of several market systems which have a natural fit – clearing and settlement is the next step in the Reconciliation process, creating efficiency benefits and a stronger base for innovation and investment.

10.2 [

]

10.3 [

]

10.4 EMS also believes that it can benefit from the intellectual capital of M-co's employees, especially in relation to the financial operation of markets. In many areas M-co's and EMS' employees' skills are complementary rather than identical due to the historical differences in the focus of the respective firms.

PART II: IDENTIFICATION OF MARKETS AFFECTED

11. Horizontal Aggregation

Market Administration and Operation Functions

11.1 The activities undertaken by EMS and M-co have very little, if any, actual overlap. They occupy different service provider roles in the electricity market. Both are involved in the provision of some data information services on a consulting or contract basis, but in general, EMS's focus is on data collation and spatial services whereas M-co's strength is the design and operation of markets. On the basis that EMS and M-co provide different services to the electricity market, and such different services are not substitutable for one another, it could be argued that the parties are engaged in different markets and so the transaction would not result in any horizontal aggregation.

11.2 However, this lack of aggregation arises largely due to the structure of the electricity industry and the nature of activities that support the operation of the wholesale market, namely that there is only a single provider for each of the service provider services at any one time, and thus each role could be characterised as a single-supplier market. While none of these services is substitutable from the demand side, the applicant believes that it would be unrealistic to define each service as a separate market. There is a considerable degree of supply-side substitution between the services provided by EMS and M-co respectively. Furthermore, the purchaser of the services (the Electricity Commission) is unlikely to purchase a single service in isolation, but will need to purchase the entire range of services in order for the market to function effectively.

Market Design, Administration and Operation

11.3 Therefore, the applicant believes it is more realistic to define the market as the whole group of administration and data information services that are necessary for the functioning of a tradeable market. This includes the design and establishment of tradeable markets and administration and operational functions such as clearing and settlement, reconciliation etc.

11.4 In the electricity industry, the design and establishment function has largely been completed (M-co was involved in this initially) and so the applicant has not focused on it here. However, it is relevant because entities involved in that process are able to step into the other two categories with relative ease.

11.5 The second category includes, for the electricity industry, the service provider roles specified in the EGRs necessary for the market to function i.e. clearing manager, pricing manager, reconciliation manager, information systems provider and registry, and market administrator (which the Electricity Commission has elected to undertake itself). It also includes the provision of administrative support, analytical support and consulting services to the primary work streams operated under the auspices of the Electricity Commission. The primary work streams at present are wholesale, retail, hedge market, transmission, common quality and security of supply. These services are highly competitive and not

reliant on complex software systems and the applicant considers there are no real competition issues in relation to them. Therefore they have not been considered in any detail in this application.

Related Market Support and Data Information Services

- 11.6** There are some additional services that are provided by EMS and/or M-co, other than those provided under service provider agreements, which are addressed in this application for completeness. These include network reporting and other services that mainly involve the provision of data information to market participants. Some of these services are necessary for the functioning of the market (such as network reporting in the case of the electricity market) whereas others are more peripheral, enabling more efficient planning through the use of data information. However, given they are all of the same nature (involving the collation and processing of information relating to and for the benefit of market participants), and are provided by essentially the same potential group of suppliers, the applicant considers they are in the same market.
- 11.7** The provision of related market support and data information services could be viewed either as part of the market administration and operation services market, or as a separate market. As these services do not display single-supplier characteristics and are the subject of continuous competition, the applicant considers it more appropriate to analyse these services separately from core market administration and operation services. Overall, this market is extremely competitive, and the aggregation resulting from the acquisition is minimal, and correspondingly, only limited attention is focused on these services in this application.

Non-Industry Specific

- 11.8** While EMS provides services solely to the electricity industry, and M-co's New Zealand activities are largely focused on electricity, the applicant considers that the market for the provision of data information and market administration services is wider than the electricity industry. The market operation/information services are software driven rather than industry specific. For example, M-co's market trading software has been used to support a Green Electricity market in Australia, an electricity hedge market in New Zealand and an equity market in New Zealand. Skills and expertise in market administration are also transferable from one industry to another, as evidenced by M-co, which has parlayed its experience in establishing the electricity market into market design and support roles in aspects of the gas, telecommunications and investment industries.
- 11.9** However, the applicant acknowledges that given the focus of EMS's and M-co's activities, the Commission is likely to be particularly interested in the impact of the acquisition on the electricity industry and has presented information regarding market participants both in terms of electricity and non-electricity experience and expertise.

Functional level

- 11.10** As the market is the market for the provision of services, the functional level distinction is not relevant in the same way as for product markets (as the Commission has acknowledged in its Mergers and Acquisitions Guidelines³). Both EMS and M-co provide core services to the Electricity Commission, the entity responsible for running the wholesale electricity market. Both parties also provide some services directly to participants in the wholesale electricity market as detailed in section 9.2 and 9.12 above.

Geographic markets

- 11.11** The core market administration services are, for the most part, purchased on a national basis. Some particular aspects of related data information services are regional (e.g. network reporting to a particular electricity network) but are still purchased from a pool of national suppliers.
- 11.12** There are strong arguments that, from a commercial perspective, the market for the provision of data information and market administration services is an international one. International companies compete with domestic providers (evidenced by M-co itself, which is owned by the FirstRand Group). However, given the constraints of section 3(1A) of the Commerce Act, the applicant acknowledges that the market should be defined as the market for the provision of the relevant services in New Zealand, and has addressed the international aspects of the market in the discussion of constraints.

The Timeframe

- 11.13** The Commission has noted that where a market is characterised by infrequent transactions, it may seek to define a separate time dimension⁴. The applicant believes that it may be appropriate to do so here, at least in relation to the segment of the market represented by service provider contracts for the electricity market. The core services provided by EMS and M-co are purchased via contracts that are allocated according to periodic tenders. A meaningful competition analysis can really only be applied to those periods of tender activity.
- 11.14** Market operation/administration services outside the electricity industry vary, but in general, operate on a long-term contract basis. The related market information services, such as network reporting, function continuously.

Impact of Horizontal Aggregation

- 11.15** Although EMS and M-co are currently both service providers, and prima facie the acquisition will result in horizontal aggregation, the competitive impact of this is insignificant while the existing service provider agreements are in force. This is because competition does not take place between service providers for provision of services during the term of the agreements, but between service providers (and potential providers) at the tendering stage. This is discussed further in section 16 below.

³ Para 34.

⁴ Decision No. 439, paragraph 84

12. Differentiated Product Markets

12.1 While services, by their nature, can never be as undifferentiated as homogeneous products (like "widgets"), the service provider activities of EMS and M-co are essentially standardised services. The nature of the services is prescribed by the EGRs and largely determined by the Electricity Commission.

12.2 Other services that the parties provide are more differentiated, but this differentiation is driven by the needs of particular purchasers rather than by any innate differences in the services the firms provide. The applicant believes that purchasing decisions are made on the basis of a combination of price and service quality.

12.3 Suppliers are able to vary their services fairly easily in order to meet the specific requirements of purchasers. In particular, the software that drives the service would almost certainly be built to specification. Thus, in a sense, every service that is provided in this market is "differentiated", but the driver of such differentiation is the requirements of the specific purchasers not the different products produced by the suppliers. Each supplier is more or less able to provide the same service that any other supplier would provide.

12.4 The Commission has pointed to localised competition between businesses producing "immediately adjacent substitutes" as a potential competition issue⁵. The applicant does not believe that the issue arises here. Although EMS and M-co may be viewed as close competitors for each others services, removal of one of them will not result in a "loss of localised competition". This is because the services each provides are not immediately in competition on an ongoing basis. Competition only occurs when the functions come up for tender. At that point, there will be a number of vigorous competitors competing to supply, as discussed in paragraphs 16.20 to 16.24 below. Furthermore, the removal of M-co will not result in localised price rises, because the prices for the tendered services are fixed until the next tender round and at that time other tenderers are likely to be price-competitive.

13. *Not used*

14. Vertical Integration

14.1 The proposal will not result in vertical integration. Neither firm currently supplies services to the other (other than the licensing of COMIT and SPD respectively). In terms of the electricity market, both supply services primarily to the Electricity Commission, and (in relation to related data information services) to participants in the wholesale electricity market.

⁵ Mergers and Acquisitions Guidelines, para 5.4

15. Previous Acquisitions

- 15.1** There have been no notifications made to the Commission in the last three years or acquisitions involving either EMS or M-co.

PART III: CONSTRAINTS ON MARKET POWER BY EXISTING COMPETITION

16. Suppliers of competing products, including imports

16.1 The usual classification of competitors as "existing", "new entrant" and "potential" is not entirely appropriate in relation to the market for administration and information services. This is partly because the single-supplier characteristics of the market mean that competition takes place by virtue of the tender process, prior to any actual transactions. This is a common feature of network markets and the subject of considerable commentary on the appropriate method of assessing competition. The following extract provides a useful summary of the competition assessment in this type of market:⁶

"Competition is more likely to take the form of 'Schumpeterian competition' in which competitors compete 'for the market' rather than 'in the market'. Auctions of publicly owned assets, bidding contests and other tender processes are prevalent examples. Competition is expressed in the process of winning the dominant position. The process of bidding rather than the outcome of the bidding, then becomes the relevant conduct to assess.

...

As competition for the market takes place prior to market transactions occurring, it is easy to *incorrectly assume* that the presence of one or a small number of competitors is a sign of weak competition or the existence of predatory behaviour" [Emphasis added].

16.2 Therefore, analysis of who currently provides such services is of limited use in assessing competition. The best assessment of competition in the market is to examine those firms that have previously competed in relevant tenders, and the firms which are likely to do so in future. Most of these potential tenderers do not currently occupy service provider roles, but are active in market administration services either in New Zealand outside the electricity industry, or in electricity or related utilities internationally. They could be viewed as competing suppliers, new entrants or imports. To provide as full a picture of market activity as possible in this section, the applicant has described competitors specifically in relation to their current active participation. Likely future participation/competition is discussed in the following section. For ease of analysis the applicant has distinguished between electricity and non-electricity participants.

Electricity Industry

16.3 Other than EMS and M-co, Jade Direct NZ Limited ("Jade") and Concept Consulting Group ("Concept") also currently provide administration and data information services to the Electricity Commission. Jade Direct NZ Ltd provides the registry function. Concept provides market support and administration services in relation to security of supply and common quality. Some other firms

⁶ "Taking Advantage of Market Power in the Modern Economy" Donald Robertson, paper presented to the Competition Law and Policy Institute of New Zealand Inc, 22-24 August 2003. While these comments are made in respect of "network markets" the applicant submits they are equally applicable to the related markets for the administration and operation of markets.

such as Stratagen and TWS Consulting also provide consulting and some administrative support services to the Commission.

- 16.4** Until the establishment of the Electricity Commission, the consulting firm LECG was involved in the market design aspect of the market (through its involvement in the design of the Electricity Governance Board). This market design role is now less significant as the design of the market has largely been completed.
- 16.5** Probably the most significant competing provider of market administration services to the electricity industry is the Electricity Commission itself. It is now largely responsible for market design, and has appointed itself as the market administrator⁷ (a function that until November 2004 was primarily provided by M-co). It has the ability under the EGRs to appoint itself to any of the service provider roles. The Electricity Commission's role as a significant constraint is discussed in section 30 and 31 below.

Non-Electricity Industry

Outside the electricity industry there are a number of firms providing market administration and information services. These include: NZX, EDS, Castalia and other consulting firms, as well as various niche providers in different industries. The Gas Industry Company Limited which has recently been established as a co-regulatory provider for the gas industry, is likely to provide a similar role as the gas market develops.

Related Market Support and Data Information – Other Suppliers

- 16.6** Other data information/market administration functions are performed by a variety of industry participants and providers to the industry. This includes NGC, which provides data administration and collation for Mighty River Power. In addition many participants in the physical electricity market carry out some of these functions for themselves. This is effectively an alternative to purchasing them from stand-alone suppliers. There are also a number of small businesses who provide various data services, such as Critchlow Associates⁸ which provides geographic information systems, in competition with EMS. Other data administrators registered with the Electricity Commission include Datacol NZ Limited, Energy Intellect Ltd and Energy Online Limited. Given the significant number of competing suppliers this market has not been discussed further.

Market Shares and Capacity

- 16.7** It is difficult to discuss market shares and capacity in terms of the provision of market information and administration services. As the article referred to in paragraph 16.1 above notes, market share or market size is not a good filter to determine whether market power is being, or could be, exercised. A focus on market share or size fails to take into account the way in which the competitive process necessarily works in this market. “Market shares” are somewhat meaningless in markets where there is effectively only a single provider appointed to each of the service provider roles and when those roles are only competed for

⁷ Pursuant to Regulation 35 of the EGRs

⁸ For a short time EMS had a 50% interest in Critchlow

sporadically. Furthermore, no one in the industry measures their activities in terms of market shares or capacity.

16.8 Assuming the market includes provision of market administration and data information services regardless of industry, as the applicant believes, the market is very significant although the applicant is not able to put a dollar value on it. The combined services provided by EMS and M-co would be a very small percentage of that market, although as the applicant has no way of measuring the size or value of the market it could not put a “market share” on this.

16.9 Even if examining the electricity industry alone it is very difficult to place value or market share figures on all the relevant activities. Neither M-co or EMS keep statistics on this. While both companies are obviously aware of the value of the services they provide, there is no concept of “market shares” in the way there might be for most commercial markets.

Tender History as Evidence of Competition

16.10 The fact that EMS and M-co occupy the majority of service provider roles should not be taken as an indicator that they face little competition. Their pre-eminence is not unexpected given that M-co was the original market designer/implementer and EMS (then d-Cypha) was established by Transpower when Transpower won the tender for the national reconciliation manager role in 1998 due to its role as operator of the transmission system.

16.11 Therefore, in assessing the extent of competition, it is more useful to analyse the ability of other suppliers to provide such services when the roles arise. One measure of this is the actual competition for each of the service provider and supporting roles at the time of the most recent tender.

Market Administrator

16.12 As detailed in section 9.8, M-co was the initial market administrator when the wholesale market was established under NZEM in October 1996. M-co continued in this role until November 2004, when the Electricity Commission took it over. However the Electricity Commission has tendered out secretarial, analytical consulting and other support services. The tender was split into several streams (transmission, wholesale market, retail market, security of supply and common quality). M-co won the support services contract for wholesale, retail and transmission. Concept Consulting successfully tendered for support services in relation to security of supply and common quality.

16.13 The applicant believes that there were at least a dozen tenderers (although not every tenderer tendered for all streams). [

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Registry

16.14 This role was established in 1999 following the introduction of competition in the retail markets and the development switching rules. The tender for it was won by Jade (a new entrant into the market).

Pricing Manager

- 16.15** This role was last put to tender in 1999. The tender was international, and was won by M-co. EMS was not involved in this tender.

Clearing Manager

- 16.16** This role was last put to tender in 1999. The tender was international, and was won by M-co. EMS was not involved in this tender.

Reconciliation Manager

- 16.17** This was last tendered in 1998. At the time there were 14 registrations of interest and EMS believes there were several tenderers including Contact (together with Alinta, a US utilities company). Transpower was the successful tenderer. Transpower then created d-Cypha to perform this function.

Information System Services

- 16.18** M-co is contracted by the Electricity Commission to provide information system services (essentially COMIT) to the market. M-co has performed this function since the establishment of the wholesale market.

Vigorousness of the Tender Process

- 16.19** In markets where the tender process is the forum for competition, the vigorousness of that process – both in terms of the number of tenderers and the "fairness" of the tender process - is a vital determinant of competition. While the applicant believes that tenders (at least the ones in which it has been involved) have been vigorous in the past, it believes that future tenders will be even more vigorous, increasing the likelihood of introducing competitive bidders. This is likely for a number of reasons:

- (a) Prior to the latest market restructuring and the introduction of the Electricity Commission the service provider aspect of the market was perceived as less competitive than now, with incumbents having a stronger position. This has changed, particularly as the market design and implementation is now largely within the ambit of the Electricity Commission and so previous incumbents have a less influential role.
- (b) While the market administrator role was held by M-co, it was arguably difficult for other providers to get a foothold in that aspect of the market (and the support services were never tendered separately). Now the Electricity Commission is the market administrator there is greater scope for other providers to enter the market by obtaining one or more of the support services contracts as Concept has done.
- (c) The tender processes under the NZEM were somewhat ad hoc. There was no single body clearly responsible for identifying the need for tenders or running those tenders. M-co oversaw some of the tenders and

contracted out the operation of tenders in which it was involved. The emergence of the Electricity Commission with a clearly defined role in appointing service providers, and the increase of transparency provided by the EGRs and otherwise expected of a Crown regulator, is likely to improve the competitiveness of the tender process. EMS understands that the Audit Office recently conducted an investigation of the service provider appointment process following the Electricity Commission's decision to reappoint existing service providers when it was established, and that the Office considered this was acceptable given the transition to the new regime but indicated that it would expect robust tendering processes in future.

- (d) It takes time for competition to develop. The wholesale electricity trading market was only established in October 1996 and the industry went through significant changes during the 1990s, including Transpower's split from ECNZ, the establishment of Contact, the split of ECNZ and the introduction of ownership separation under the Electricity Industry Reform Act. Focusing on obtaining efficiencies from service provider contracts was not a priority. The industry was in flux during the attempt at industry self-regulation and service provider agreements were rolled over. Further rollovers occurred following the establishment of the Electricity Commission for reasons of stability and speed. However the wholesale market is now well-established and the regulatory issues resolved, and competitors better placed to enter the market. It is expected that when the roles next come up for tender that they will be actively contested, as happened for the market administration role.
- (e) The growing convergence of utilities has increased the potential pool of suppliers. This convergence is already having an impact – for example M-co has moved into gas market administration in Australia and telecommunications in New Zealand.

Upcoming Tenders

- 16.20** The contracts for the Pricing Manager and Clearing Manager may be terminated by either party giving notice any time after 1 October 2005 (i.e. the earliest termination date is 1 March 2006). EMS expects that the Electricity Commission will seek to tender these roles in late 2005, for commencement in 2006. The Information Systems contract is also terminable on 6 months notice from 1 October 2005, and it is likely to be tendered next year.
- 16.21** The Reconciliation Manager is on a contract terminable on 6 months' notice. The services provided by the Reconciliation Manager are currently being reconsidered at the instigation of electricity market participants. A proposal has been developed by the Electricity Commission for a new method of reconciliation to be adopted, and the Commission is consulting with industry players as to its acceptability. EMS is the Reconciliation Manager but was not involved in the committee that considered overhauling the Reconciliation Manager role. This is a strong indicator that purchasers in the market have a strong influence over service delivery.

- 16.22** EMS expects that if the industry accepts the proposal to restructure reconciliation, the Reconciliation Manager's role will be tendered within a similar timeframe to the Registry, Pricing Manager and Clearing Manager i.e. late 2005 or early 2006. If the restructuring for the Reconciliation Manager role takes longer, that tender could be delayed.
- 16.23** EMS expects that when next tendered, competition for all service provider roles will be vigorous. As all service provider roles have similar supply-side requirements (focusing on the provision and operation of software), tenderers for each role are likely to be drawn from the same pool except that the Reconciliation Manager's role is likely to draw fewer tenderers as it is more specialised.
- 16.24** The pool of likely tenderers for at least one service provider role (and in many cases several) includes the following⁹:
- (a) NGC/Vector;
 - (b) NZX. In November 2003 NZX made a formal submission to the Electricity Commission seeking appointment as pricing and clearing manager and market administrator. The Electricity Commission decided not to tender the roles at that time but it is reasonable to assume NZX will put itself forward again when the opportunity arises;
 - (c) Capgemini. Capgemini's local affiliate CGNZ is involved in the development of operating rules and computer systems for the open access transmission of gas in New Zealand, and Capgemini has been involved in electricity market operations in Australia, the UK, USA and Europe;
 - (d) Jade;
 - (e) Potentially other lines companies, and/or internationally-based market administrators, including NEMMCO,¹⁰ the Sydney Futures Exchange and PJM;¹¹ and
 - (f) any of the potential competitors discussed in the following paragraphs.

Potential Competitors

- 16.25** In addition to the firms listed above who are already active (or have expressly indicated their interest) there are many potential competitors. Firms that are not currently in the market are almost too numerous to list individually but can be divided into the following categories:
- (a) Firms who are involved in the electricity market but do not currently provide market administration support services. This includes the lines

⁹ This is the view of the applicant only, and is not based on any representations made by any of the parties identified.

¹⁰ The National Electricity Market Management Company/NEMMCO is responsible for administration of the Australian National Electricity Market

¹¹ PJM Interconnection, a US "Regional Transmission Organisation" responsible for the market administration of the wholesale electricity market in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

companies, who could perform registry and reconciliation functions. Contact, for example, undertakes network reporting and this gives it a platform to compete for the reconciliation manager role. In addition, the convergence of utility companies provides some cross-over opportunities, for example NGC has developed a reconciliation process for users of the Maui Gas Pipeline (in anticipation of open access) and could use this expertise as a platform for challenging EMS for the Reconciliation Manager role.

- (b) Firms that operate in New Zealand but outside the electricity industry that currently provide market administration and information services to other industries. NZX is an obvious example and probably the most likely near entrant. NZX has previously indicated its desire to expand its business into other markets.
- (c) Firms outside New Zealand with electricity industry experience who could provide similar services in New Zealand. This includes PJM¹² and NEMMCO among others. While to date no market administrator from another jurisdiction has entered New Zealand, there is an increasing pattern of internationalisation in the electricity industry as markets that have been through the reform process look to export their expertise. Examples of this include New Zealand itself for example M-co's partnership in Singapore. New Zealand was a fairly early starter in electricity market development but there are now a number of other international players who might seek to enter New Zealand. New Zealand is not a big fish internationally but it could provide an entry point to Asia-Pacific participation especially for US or European market participants.
- (d) IT firms with access to software platforms looking to expand their services. This has already occurred with the entry of Jade into the market. Unisys, Logica and EDS are other possibilities. Logica was responsible for the early development of some of the market systems in New Zealand and is highly active in Australia in reconciliation systems development and deployment. EDS has significant experience of the New Zealand electricity industry. It was contracted by Transpower to design the original reconciliation system for the New Zealand electricity market. That system was replaced in 1999 by a system designed and built by Digital (now Hewlett Packard).
- (e) Consulting firms, especially those who have gained experience in electricity or related industries. This could include Capgemini (which has advised a number of electricity industry participants and has been involved in implementing electricity market systems in Australia),¹³

¹² |

¹³ |

Castalia (currently acting as technical advisers to the Gas Industry Company), PA Consulting, Charles River Associates, Accenture and Synergy International (a Wellington based company that was brought in by PA to assist in testing of the system software for the operation of the Singapore electricity market). Most of the large international consulting firms have had significant experience in the development and implementation of utilities markets and so would be well placed to enter the New Zealand market. For example, PA Consulting was responsible for the design, development and delivery of the electricity market in Singapore in conjunction with the Energy Market Authority of Singapore. The market is now run by a joint venture between M-co Singapore, a subsidiary of MIL, (49%) and the Singapore government (51%).

Exports/Imports

- 16.26** The services provided by market participants are obviously not exported to the extent that they relate to the New Zealand wholesale electricity market. However, the category of services that includes market design and implementation is exportable as M-co has demonstrated by its successful forays into Singapore, the Philippines and other countries.

Vigorousness of Target

- 16.27** M-co has been a significant player in the market for the provision of market administration and related services in the New Zealand electricity market. However in some respects it has not been a particularly vigorous competitor to EMS. Initially M-co was owned by Transpower, ECNZ and the lines companies (through ESANZ, the predecessor to the Electricity Networks Association). After it was sold, EMS (then d-Cypha) and M-co tended to focus on different elements of the range of market administration services – with M-co focusing on the market administrator's role and EMS on roles that fitted better with its parent Transpower's system operator role.
- 16.28** In addition M-co's role and influence relative to the market has recently decreased for several reasons. First, its primary role was in the market design and implementation – a role that is now complete in terms of the New Zealand electricity market. Secondly, its role as market administrator under NZEM and MARIA has in large measure been taken over by the Electricity Commission (e.g. M-co used to be responsible (on a de facto basis) for rule development and the instigation of working groups to consider rule changes. This is now within the jurisdiction of the Electricity Commission). Lastly, as indicated above the market is becoming increasingly international and so the relevance of history and incumbency is lessened.

17. Barriers to Expansion by Existing Competitors

- 17.1** The barriers to entry/expansion are low. The prime requirement to compete as a provider of market administration and operation services is a software platform. This must be specially created or commissioned, or adapted from an existing platform. While these platforms are not simply “off the shelf” the cost is not

overwhelming ranging from less than \$1m for a registry system up to \$3m for the more complex systems. The build time would be around six months. This would be well within the capacity of any number of international or national software providers and consulting firms.

- 17.2** In order to compete for a service provider role, potential tenderers would need to establish some credibility and convince the Electricity Commission they could provide the service at least as well as the incumbent. The tenderer might make an initial investment to develop a software prototype, but this will not always be necessary, especially if the established provider has a market operation systems in use elsewhere (as NZX has for clearing or PJM has for the PJM electricity market).
- 17.3** In almost all markets incumbency provides some advantage because the incumbent providers have, at some point (probably by the end of their initial term), recovered their initial investment. However the significance of the incumbency advantage varies greatly depending on the return period and the requirements for new investment. In the market for administrative support and data information services to operate marketplaces, there is little long-term infrastructure (unlike in the electricity and some of the other primary markets they service). The software systems on which the market operations are based change fairly rapidly and thus need to be replaced or at least upgraded with reasonable frequency. This is driven by two factors: the inherent speed at which technology in general changes, and the changing requirements (and increasing sophistication) of the electricity and other primary markets. The history of the reconciliation system is an example of this – as noted above, the EDS prototype was developed in 1993/94, and was significantly enhanced in 1996 in conjunction with the introduction of the NZEM. It was replaced in 1999 by a DEC-designed system and the current restructuring of the reconciliation role will almost certainly result in new system requirements.
- 17.4** The other main expenditure is building a knowledge base through the acquisition of skilled personnel. There is strong competition for these people but labour is a relatively fluid market. Existing providers (including both EMS and M-co constantly) lose, and thus have to acquire, personnel.
- 17.5** There are a number of other ways to establish credibility which means it is unlikely to be a significant barrier: for example, firms can trade on their software expertise (as Jade has done) or their personnel with industry experience – as Concept Consulting has done. Parallel experience in other utilities markets such as gas could provide the necessary credibility for a cross-over into electricity. Capgemini provides evidence of the transferability of systems between electricity and gas, noting on its website that its solution for rules for open access gas transmission "*draws on the services based model that [it] implemented in 2002 to enable retail competition in the Australian National Electricity Market*".¹⁴
- 17.6** Major contenders for service provider roles include consulting firms, many of which rely on internationally established brands, increasingly partnering this brand strength with firms with specific industry experience, e.g. M-co and Logica have

¹⁴ www.cgn3.com/energy-utilities/energy-news-global-reach.aspx

successfully co-operated to obtain tenders for aspects of the establishment and operation of state gas markets in Australia.

17.7 The provision of market support services is essentially a secretariat function and does not require any particular software system. These roles provide the easiest and cheapest way into the market. Entry via one of the services may be a platform for expansion into other market administration and data services roles.

17.8 There are no real regulatory or frontier costs involved. The EGRs require participants in the electricity industry to register with the Electricity Commission.¹⁵ "Participants" includes those involved in data administration which is a defined term in the EGRs relating to management of metering data. However, registration is essentially open provided the correct basic information is provided, and so this does not constitute a barrier to entry. The EGRs apply to all participants and are unlikely to act as a barrier to entry to any potential participants.

18. Recent Entry

18.1 As detailed above Jade entered the market in 1999 when the registry function was established.

18.2 Concept Consulting entered the market as a service provider when it successfully tendered for two of the market support services contracts in November 2004. Prior to that Concept personnel were involved in the establishment of M-co and the design of the New Zealand electricity market and the development of MAQS. Concept also provided advice to the industry working group that developed the industry self-regulation model (the Electricity Governance Board) for the electricity industry.

18.3 NGC significantly expanded its role in the data information sector of the market when it purchased EMS's meters.

19. Increases in Supply by Existing Competitors

Capacity

19.1 The only inputs of note are software and personnel. Neither of these are significantly capacity constrained – software can be purchased or commissioned easily. Personnel might be more of a constraint to the extent there is specialised knowledge, but in reality this is not a significant constraint and the transferability of personnel means it is nearly as significant a constraint for an incumbent provider as a challenger.

19.2 The applicants consider that all participants, near entrants or potential participants could expand into some or all of the market administration services roles without being constrained by capacity. It would take a few months to develop the necessary software for clearing, pricing and reconciliation. Administrative support/secretariat requires no special software. However, tenders are signalled

¹⁵ Regulation 9

well in advance and so some of this work would be done in anticipation of a successful tender.

- 19.3** Entry into the markets could be very rapid. The applicant believes that NZX and Capgemini are poised to enter the market for market support and information services to the electricity industry immediately should the opportunity arise. NGC/Vector are in the process of expanding their presence in terms of network reporting.

Constraints on Merged Entity by Existing Competitors

- 19.4** Jade, NGC/Vector and Concept all provide real constraints on the merged entity. In addition there are a number of near entrants that are likely to compete vigorously for tenders for service provider roles. In terms of market administration services other than service provider roles, the acquisition will result in little aggregation.

20. Co-ordination and Collusion

- 20.1** Co-ordination effects would be fairly limited in the service provider markets because each of these services is contracted for separately by the Electricity Commission, and the services provided are as set out by the Electricity Governance Rules.
- 20.2** The factors that the Commission has identified as conducive to collusion¹⁶, which are not present in the market administration and data information market, are as follows:
- (a) high sector concentration – not applicable when new entrants are taken into account;
 - (b) undifferentiated product – the services are differentiated as required by the purchaser;
 - (c) new entry slow – on the contrary, entry is likely to be fast and significant in scope;
 - (d) lack of fringe competitors – the "fringes" (e.g. Concept, NZX, international players) are significant;
 - (e) price inelastic demand curve unknown but unlikely - presumably the Electricity Commission would have some price sensitivity especially given it has the alternative of providing such services to itself;
 - (f) industry's poor competition record – on the contrary, competition has steadily increased (e.g. introduction of Jade, Concept, and "champing at the bit" by potential competitors such as NZX);
 - (g) presence of excess capacity – not relevant in this market; and

¹⁶ Decision No. 439, Table 2.

- (h) presence of industry associations – the industry co-operates on issues (e.g. the redevelopment of the new reconciliation manager role as detailed in paragraph 16.21), for the benefit of the industry as a whole, but this is now under the auspices of the Electricity Commission, however, the transparency and independence provided by the regulator will assist in monitoring and discouraging any potentially collusive behaviour.

20.3 Given the above factors, there is no reason to believe that the transaction will increase the risk of coordinated behaviour.

PART IV: CONSTRAINTS ON MARKET POWER BY POTENTIAL COMPETITION

21. Potential Competitors

21.1 The line between existing and potential competitors is not entirely clear in these markets given the periodic timeframe for competitive activity. There are a number of competitors that the applicant has discussed as existing or near entrants that might be viewed as potential entrants. The applicant has chosen to complete the following section to give as full a picture as possible of the state of actual and potential competition in the market.

22. Conditions of Entry

22.1 The most significant driver for new entry is the opportunity to tender for service provider roles. Other than that, the "fit" between a specific role and a potential competitor's existing business, and the desire to capitalise on that experience in other industries, is likely to be determinative. This is presumably a factor for NZX, which has indicated its desire to translate its experience in running a stock market into other markets.¹⁷

22.2 International firms will be driven partly by the fit between their originating jurisdiction in industry and the markets in New Zealand. This could provide an opportunity for firms such as NEMMCO, which uses a software system easily adaptable to the New Zealand electricity industry. NEMMCO currently operates a system known as MSATS (the Market Settlement and Transfer System) which was based on an earlier New Zealand system known as MERLIN. As a result there is a significant degree of commonality between the market rules in both countries.

22.3 The ability to use New Zealand as a stepping stone into Asia is likely to influence international players. This means that the market administration services in New Zealand could attract heavyweight players that in pure dollar terms may not otherwise be interested in New Zealand. M-co itself is a good example of this – it has leveraged off its experience in design and administration in the New Zealand electricity market to win other contracts in Asian markets.

23. Likelihood, Sufficiency and Timeliness of Entry

23.1 In a market with continuous transactions (i.e. most markets) there will usually be a time lag between raised prices/lowered service levels and new entry. This is not the case in the market for administration/operation of markets where services are periodically purchased on a long-term contract basis and where new entry can occur immediately that competitive tender processes takes place.

¹⁷ See for example NZX press release of 27 November 2003: http://www.nzx.com/aboutus/news/press/2003/submission_27nov

23.2 Furthermore, the tender process for service provider roles has always been signalled well in advance and been relatively transparent. This transparency is likely to increase under the Electricity Commission. This means that new entrants have plenty of time to prepare for entry and are unlikely to be caught by surprise by tender opportunities.

23.3 Thus the applicant believes that new entry would be sufficiently timely.

24. The Threat of New Entry

24.1 As noted above there are a number of firms eager and willing to enter the market which would act as a significant constraint on the merged entity. These firms are seeking opportunities to enter – e.g. the creation of new service provider roles (Jade re the registry function in late 1990s), tender rounds (numerous potential entrants as discussed at section 16.25 above), restructuring of the market (Concept and LECG) and convergence of utilities (NGC).

24.2 New entry could occur immediately the opportunity arises (i.e. a tender round or other opportunity for the purchase of services). This opportunity is determined (insofar as service provider roles goes) by the Electricity Commission.

25 – 29 not used

PART V: OTHER POTENTIAL CONSTRAINTS

30. Constraints on Market Power by the Conduct of Acquirers

- 30.1** The acquirer of the service provider services is the Electricity Commission. The Electricity Commission is a Crown-appointed regulator, established under the Electricity Act.
- 30.2** The acquirers of other market administration services in the electricity industry are the participants in the physical electricity market including lines companies, Transpower (as grid asset owner and System Operator), and retail companies.
- 30.3** The acquirers of market design and implementation services are probably outside the electricity industry given that this work has effectively been completed (at least for the moment) in the electricity industry. It is possible that the gas industry and elements of the telecommunications industry would acquire these services from the merged entity.
- 30.4** There are international acquirers of market design services both inside and outside the electricity industry. These include the existing clients of M-co and potentially other utilities industries internationally.

31. Constraining Effect of Acquirers

- 31.1** Constraints are usually thought of as primarily provided by competing suppliers, with acquirers having only a limited impact, if any, on the potential market power of the merged entity. This is not the case in relation to the market administration and information services market, at least insofar as those services are provided to the electricity industry.
- 31.2** The Electricity Commission is enshrined in legislation as the single purchaser of the service provider services. Thus it provides a real constraint as a monopsony purchaser. If the Electricity Commission is dissatisfied with the prices and/or service levels offered at tender by the merged entity it will refuse to purchase. The merged entity has no other acquirer (at least within New Zealand) to whom to sell and so it is strongly incentivised to provide cost-effective and quality services.
- 31.3** This incentive is an ongoing one as if a service provider breaches its obligations under its service provider agreement (including by failing to meet performance or system specifications) the Electricity Commission can terminate the agreement and require a licence (for six months on reasonable commercial terms) of the provider's intellectual property (e.g. COMIT, for the Information System Service Provider Agreement) to the incoming provider or the Commission itself. This enables another provider to take over the service provider functions quickly and without having to immediately rely on, or develop, its own software.

- 31.4** Furthermore, the EGRs specifically give the Electricity Commission the ability to undertake service provider functions itself. This option gives the Commission considerable leverage and countervailing market power. If performance is unsatisfactory during the term of a service provider role, the Electricity Commission can terminate the relevant contract. This standard remedy is given teeth by the requirement that in situations of termination for breach a service provider must licence its software system to an alternative provider if required by the Electricity Commission.
- 31.5** The applicant believes the Electricity Commission has a sufficient degree of market power to act as a strong constraint on the merged entity and prevent any exercise of market power by the merged entity.