

***“PUBLIC VERSION”***

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**Commerce Commission**

**Decision No. 323**

Determination under the Commerce Act 1986 (the Act), and in accordance with a delegation given in terms of s 105 of the Act, in the matter of an application for clearance of a business acquisition involving:

**ROCKGAS LTD**

**and**

**ENERGY SUPPLY LTD**

<b>The Commission:</b>	T G Stapleton E C A Harrison
<b>Commission Staff:</b>	Andrew Brice David Ainsworth
<b>Summary of Proposal:</b>	The acquisition by Rockgas Ltd of the LPG stock and fixed assets of Energy Supply Ltd.
<b>Working Day 10:</b>	27 April 1998
<b>Determination:</b>	Pursuant to s 66(3)(a) of the Act, and in accordance with a delegation given in terms of s 105 of the Act, the Commission determines to give a clearance for the acquisition.
<b>Date of Determination:</b>	24 April 1998

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## **THE ACQUISITION**

- 1 Rockgas Ltd (Rockgas) has given notice dated 8 April 1998, in terms of section 66(1) of the Act, seeking clearance for the acquisition of the stock and the fixed assets of Energy Supply Ltd (ESL) by way of an agreement for sale and purchase of assets.
- 2 The assets to be acquired comprise all stocks of LPG and the fixed assets of ESL. The fixed assets to be acquired are listed in the notice seeking clearance.

## **THE PROCEDURES**

- 3 The notice was registered on 9 April 1998.
- 4 Section 66(3) of the Act requires the Commission either to clear, or to decline to clear, a notice given under s 66(1) within 10 working days, unless the Commission and the person who gave the notice agree to a longer period. As no extension has been sought, a determination is required by 27 April 1998.
- 5 Pursuant to s 105 of the Act, the Commission delegated its powers to consider and determine the notice seeking clearance to Mr Terry Stapleton and Ms Cathie Harrison, members of the Commission.
- 6 Rockgas sought confidentiality for certain information contained in the notice seeking clearance, and a confidentiality order was made in respect of that information for a period of 20 working days from the Commission's determination of the notice. When the confidentiality order expires, the provisions of the Official Information Act will apply to that information.
- 7 This report concludes that Commission staff are satisfied that implementation of the acquisition would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in a market. Accordingly, it is recommended that in terms of s 66(3)(a) of the Act, and in accordance with a delegation given in terms of s 105 of the Act, the Commission gives clearance for the acquisition.

## THE PARTIES

### Rockgas Ltd

- 8 Rockgas is an LPG wholesaler and retailer. Its ownership is 50% Boral Gas Industries Ltd and 50% Caltex Gas New Zealand Ltd.
- 9 There is an ownership chain from Boral Gas Industries Ltd to the ultimate Australian parent, Boral International Pty Ltd. Caltex Gas New Zealand Ltd is a wholly owned subsidiary of Caltex New Zealand Ltd (Caltex) which, among other things, owns, operates and leases service stations.
- 10 Rockgas has a 50% interest in Alpine Gas Ltd. This firm is located in Timaru and is an LPG re-seller. It is a joint venture between Rockgas and Alpine Energy Ltd, the local power company. Rockgas also has an 8.5% shareholding in Liquigas Ltd, the national LPG distributor.
- 11 Rockgas wholesales LPG to Mobil and Caltex service stations, large consumers with bulk storage tanks and LPG re-sellers. It also has a retail division of the company which operates retail outlets in six South Island centres and in Hamilton and Auckland.
- 12 Rockgas describes the purpose of the acquisition as being to establish the presence of Rockgas in the retail LPG market in the greater Wellington and Wairarapa areas.
- 13 Rockgas has previously obtained clearances to acquire Christchurch Gas Ltd<sup>1</sup>, part of the LPG business and related assets of BP Oil NZ Ltd<sup>2</sup>, and the LPG business and related assets of Gas Again Supply Corporation Ltd<sup>3</sup>.

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<sup>1</sup> In August 1995.

<sup>2</sup> In May 1996.

<sup>3</sup> In October 1997.

## Energy Supply Ltd

- 14 ESL is an LPG re-seller. It is 100% owned by TransAlta New Zealand Ltd (TransAlta), the Lower Hutt based electricity and natural gas distributor and retailer. ESL has no subsidiaries. TransAlta has no other interests in the LPG industry.
- 15 ESL supplies LPG to customers in Wellington, Lower Hutt, Porirua, Upper Hutt, the Kapiti Coast as far north as Waikanae and in the Wairarapa as far north as Masterton. Its sales are [ ] tonnes of LPG per annum (tpa).
- 16 ESL is itself supplied with LPG by Propane Gas Ltd (PGL)<sup>4</sup> under an exclusive franchise agreement whereby the LPG sold by ESL is branded Propane Gas.
- 17 In accordance with a provision in the franchise agreement, ESL has terminated the franchise with PGL as from July 1998. Rockgas has concluded an LPG supply agreement with ESL to commence at the date of termination of the franchise agreement, in the event that the acquisition does not proceed<sup>5</sup>.
- 18 ESL's sales contracts belong to PGL in terms of the franchise agreement and will revert to PGL. PGL also has the right, in terms of the franchise agreement, to buy certain of ESL's assets should it wish to do so. [

] This report considers the competition issues arising from the acquisition on the basis that PGL does not re-enter the relevant market.

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<sup>4</sup> PGL is a subsidiary of Elf Antagas Inc which holds 51% of the shares. The other 49% are held by NGC..

<sup>5</sup> As a result, for example, of the Commission declining to give a clearance for the acquisition.

## THE NEW ZEALAND LPG INDUSTRY

### The Product

- 20 LPG is a fuel whose composition comprises either 100% propane ( $C_3H_8$ ), 100% butane ( $C_4H_{10}$ ), or any mixture of the two. The physical properties of the two gases are such that, alone or as a mixture, they can be liquefied under moderate pressures and at normal temperatures.
- 21 The most common composition of LPG consumed in New Zealand is a 60 % propane 40% butane mix although the use of 100% propane is increasing.

### The Producers

- 22 New Zealand's LPG is produced in the North Island by:
- the Maui Joint Venture. The Maui field currently has the ability to produce up to 200,000 tpa of LPG, but this amount depends on the flows of natural gas to thermal power stations for the generation of electricity. Maui LPG is distributed by Liquigas to its marine depots in Auckland, Christchurch and Dunedin. It is sold at those depots to the wholesalers Shell, BP and Rockgas. Some Maui LPG is distributed by truck by Rockgas and BP. The balance of Maui LPG not sold in New Zealand is exported.
  - the Kapuni field. The Kapuni field has the ability to produce between 35,000 - 40,000 tpa of LPG (once again depending on the volume of gas off-take). NGC is the producer but has contractual commitments to re-sell about 19,000 tpa to the Kapuni Joint Venture partners. NGC retains the balance of Kapuni's LPG production to sell to BP, Rockgas, PGL and the cogeneration joint venture between NGC and Bay of Plenty Electricity Ltd. Current sales by NGC to these parties are estimated to be 15,000 tpa; and

- Fletcher Challenge Energy Ltd<sup>6</sup> from the Tariki, Ahuroa and Waihapa fields collectively known as TAW. These fields have a production capability of up to 20,000 tpa of LPG (depending on the gas off-take). All TAW LPG is contractually committed to Rockgas and current sales are about 18,000 tpa.

23 The Kupe natural gas field is also expected to produce LPG when it comes into production.

### **The Distributors and Wholesalers**

24 LPG is distributed by ship by Liquigas Ltd and sold to wholesalers at marine storage depots in Auckland, Christchurch and Dunedin, by Liquigas<sup>7</sup>. LPG is also distributed by road tanker by Shell New Zealand Ltd (Shell), Rockgas and PGL.

25 LPG is sold at wholesale by Shell, Rockgas and BP Oil NZ Ltd (BP)<sup>8</sup> in both the North and South Islands. PGL operates only in the North Island. Wholesalers sell bulk LPG to large consumers and to LPG retailers such as service stations and LPG re-sellers who fill consumers' cylinders and bottles.

### **The Retailers**

26 There are two types of LPG retailer.

27 A proportion of service stations have bulk LPG storage tanks and associated pipework installed and such service stations retail LPG for use in vehicle LPG tanks and LPG cylinders for commercial and domestic consumption<sup>9</sup>. Automotive LPG use is approximately 40% of total consumption but is declining at the rate of 10% per annum.

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<sup>6</sup> Along with other minor shareholders.

<sup>7</sup> Liquigas also distributes small quantities of LPG by road to Hamilton and about Taranaki.

<sup>8</sup> BP now only wholesales to its own branded service stations. It contracts the LPG deliveries to Rockgas.

<sup>9</sup> The majority of service stations fill only 9 and 5 kilogram LPG bottles. However, a number also fill larger 30, 48 and 90 kilogram cylinders such as those used on forklifts and in industrial and commercial applications.

- 28 LPG re-sellers<sup>10</sup> are retailers whose business is uniquely concerned with the sale of LPG and, in some cases, LPG appliances. This type of re-seller receives LPG into its storage tank from its contracted wholesaler, and dispenses it either on its site to automotive and domestic customers, or by delivered exchange cylinder to commercial and larger domestic consumers. Typical commercial consumers are restaurants for use in cooking, manufacturers who need bulk process heat (and are not reticulated for natural gas) and warehouse operators who use LPG (rather than diesel) powered forklifts inside storage buildings for environmental reasons.
- 29 An average throughput service station may retail 100 to 150 tpa of LPG. Other non-service station retailers may retail more than ten times that amount.
- 30 Shell, BP, Rockgas and PGL operate in the retail LPG markets. BP and Shell retail through their service station networks. Rockgas and PGL own LPG retailers. Rockgas's 50% parent, Caltex, is an LPG retailer through its service station network. There are a significant number of other companies which also operate in the retail markets.
- 31 This application concerns the acquisition by Rockgas of a company operating as an LPG retailer in greater Wellington and the Wairarapa.

## **MARKET DEFINITIONS**

### **Product Market**

- 32 The two possible product markets appear to be that for LPG and that for energy.
- 33 In its decision in respect of Rockgas's application for clearance to acquire part of BP's LPG business and related assets, the Commission noted that on the

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<sup>10</sup> The term "re-seller" is an LPG industry expression used to describe the business of retailers other than service stations. The Commission considers that both service stations and re-sellers operate in the retail market and no distinction between the two types of retailer will be made subsequently in this report.



supply-side, the limited possibility for supply-side substitution appears to indicate that LPG may form its own product market, rather than being part of a wider energy market. LPG is a by-product of natural gas production, and the quantity of LPG produced is dependent on the level of natural gas production.

- 34 On the demand-side, there is a wide variation in the degree to which different consumers can substitute different fuel types. Some applications are dependent on LPG, particularly in the absence of natural gas as an alternative fuel. In other applications, LPG offers significant advantages which limit the cost-effectiveness of substituting a different fuel type.
- 35 Applications involving the production of steam from boilers more readily allow substitution, particularly between LPG and diesel fuel. Conversion of a boiler to allow it to fire either or both of the two fuels is not generally an onerous or expensive task.
- 36 Given the above discussion, staff consider that it is more likely that the relevant product market is for LPG rather than energy. If the acquisition is analysed by use of an LPG product market, that is more likely to reveal competition concerns than if a wider energy market is used. If no competition concerns are apparent using an LPG product market, then it follows that there will be no concerns if the acquisition was analysed in a wider energy market.

## **Functional Markets**

### ***Wholesale Market***

- 37 Estimated national sales volumes and market shares of the wholesalers, provided by Rockgas, are as follows:

<b>Wholesaler</b>	<b>Sales Volume (tpa)</b>	<b>Market Share (%)</b>
Rockgas	[ ]	[ ]
PGL	[ ]	[ ]
BP	[ ]	[ ]
Shell	[ ]	[ ]
<b>Totals</b>	<b>114,000</b>	<b>100</b>

- 38 Given the presence of three wholesalers operating nationally<sup>11</sup> and a uniform national wholesale price for LPG, staff conclude the wholesale LPG market is national in scope. There is the possibility of minor aggregation in the wholesale market as a result of the acquisition. If PGL does not re-enter the greater Wellington area, then Rockgas's share of the wholesale market will increase from [ ] as a result of it obtaining the [ ] tpa sales formerly supplied at wholesale by PGL.
- 39 However, staff were advised during the examination of the application that BOC Gases Ltd (which presently obtains wholesale supply of LPG from Rockgas) has arranged wholesale supply from PGL and Shell. The effect of this is that from 31 July 1998, Rockgas's share of the wholesale LPG market will drop by [ ] tpa . Market participants have told staff that the wholesale LPG market is highly competitive and that appears to be evidenced by these transactions.
- 40 Rockgas's wholesale LPG market share is below the Commission's safe harbour guideline of 60%<sup>12</sup>, particularly given the significant presences of Shell [ ] and BP [ ] in the wholesale market. Therefore, staff consider that no issues arise in the wholesale market as a result of the acquisition.

<sup>11</sup> BP, Rockgas and Shell.

<sup>12</sup> The Commerce Commission's Business Acquisitions Guidelines, 1996, note that "in the Commission's view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition,.... the merged entity (including any interconnected or associated persons) has less than in the order of a 60% share of the relevant market and faces competition from at least one other market participant having no less than in the order of a 15% market share."

41 ESL is a retailer. Rockgas has a presence in the retail market though its 50% parent, Caltex. Therefore any significant aggregation resulting from the acquisition will occur in that market.

### ***Retail Market***

42 The geographic scope of a market attempts to define the range at which market behaviour in one geographic area can be said not to affect significantly the market behaviour in another.

43 ESL's retail depot is located at Lower Hutt. ESL retails LPG in the North Island in the area south of a line between Waikanae and Masterton. Rockgas has told staff it intends to operate the business in that same area.

44 It appears to staff that while retail consumers of relatively small quantities of LPG might be persuaded to travel around the area described in paragraph 43 to obtain a lower price, they would not be so persuaded to travel to Palmerston North or Hastings. Similarly, due to the high weight and volume characteristics of LPG cylinders relative to their value, suppliers are not able to service customers who are long distances from their filling depots. That is, transport costs are the most important factor delineating the retail market. It is therefore the view of staff that the geographic scope of the relevant market is confined to the greater Wellington area including the Wairarapa.

45 Therefore, staff consider that the acquisition is best analysed using the retail market for LPG in the greater Wellington area including the Wairarapa (the greater Wellington retail market).

### **EXAMINATION OF THE ACQUISITION**

46 During the examination of the acquisition staff spoke to and obtained information from the following market participants:

- PGL;
- BOC Gases Ltd;

- TransAlta;
- Rockgas;
- Air Liquide Ltd;
- Porirua Cylinder Testing Ltd; and
- Caltex Porirua Ltd, BP Petone Foreshore and BP Waiwhetu.

47 Staff received an oral submission from PGL's solicitors. They argued:

- that the suggested retail market definition above was too wide, and that there were two relevant retail markets, those for domestic and commercial retail sales of LPG;
- the domestic retail market of 9 kilogram and 5 kilogram bottles was serviced by service stations which did not service the commercial market of 30, 48 and 90 kilogram cylinders. That latter market was serviced by the re-sellers; and
- if Rockgas acquired ESL the only competition to Rockgas (post-acquisition) in the commercial retail market was BOC Gases Ltd which was supplied at wholesale by Rockgas and used the Rockgas brand. Therefore if the acquisition proceeded, Rockgas would have 100% of the commercial market.

48 The examination of the proposal revealed that this argument was not supported by the following facts:

- service stations in the region do refill the larger commercial type of cylinder along with the smaller domestic bottles<sup>13</sup>; and
- BOC Gases Ltd and Rockgas informed staff that the wholesale supply contract to BOC Gases Ltd had been changed to Shell and PGL and that the Rockgas brand would no longer be used;

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<sup>13</sup> A survey quickly revealed that Caltex Porirua, BP Petone Foreshore and BP Waiwhetu all supply LPG to commercial consumers in large cylinders. No doubt there are others in the region.

- in addition to BOC Gases Ltd , Air Liquide, Porirua Cylinder Testing Ltd and service stations compete with ESL in the supply of LPG to commercial consumers and would compete with Rockgas (post-acquisition) in such supply.

49 Staff's examination of the market shares provided by Rockgas on page 13 of its application for clearance revealed inconsistencies. Rockgas admitted to an error which it could not explain and has provided the Commission with the revised and expanded figures shown in the table below. Staff accept these figures as being accurate.

<b>Table Showing Pre-acquisition Market Shares in Greater Wellington Retail Market</b>				
	Service Stations (tpa)	Re-sellers (tpa)	Total (tpa)	Market Shares (%)
Shell	[ ]		[ ]	[ ]
BP	[ ]	-	[ ]	[ ]
Caltex	[ ]		[ ]	[ ]
Mobil	[ ]		[ ]	[ ]
ESL	-	[ ]	[ ]	[ ]
BOC Gases		[ ]	[ ]	[ ]
Air Liquide		[ ]	[ ]	[ ]
Porirua Cylinder Testing		[ ]	[ ]	[ ]
<b>Total</b>	[ ]	[ ]	[ ]	[ ]

## COMPETITION ANALYSIS

- 50 The suppliers to the greater Wellington retail market consist of service stations and four LPG re-sellers. The total amount of LPG retailed by service stations is [ ] tpa while the LPG re-sellers account for [ ] tpa.
- 51 The four major oil companies compete in the greater Wellington retail market at a total of 43 sites. Nine of these sites are Caltex sites.

- 52 The four re-sellers, ESL [ ], BOC Gases Ltd [ ], Air Liquide Ltd [ ] and Porirua Cylinder Testing Ltd [ ] also compete in the relevant market.
- 53 Although Rockgas does not currently have any direct financial interests in service stations, it is 50% owned by Caltex and is clearly, in terms of section 47 of the Act, an “associated person” with Caltex. About [ ] is retailed in Caltex service stations within the greater Wellington retail market. If Rockgas retains ESL’s market share post-acquisition, then Rockgas will have retail sales of [ ] within the greater Wellington retail market.
- 54 At present, the Caltex service stations hold about a [ ]% share of the greater Wellington retail market. Post-acquisition, the Caltex/Rockgas retail market share would increase to about [ ]% which is below the Commission’s safe harbour guideline of 40%<sup>14</sup>, with BP [ ], Shell [ ] and Mobil [ ] having significant shares of that market..
- 55 Consequently, the aggregation of market share as a result of the acquisition does not appear to raise dominance concerns.
- 56 Rockgas appears to face a significant constraint at the retail level from retailers owned by Shell and BP. These companies are, like Rockgas, vertically integrated through the distribution, wholesale and retail LPG markets and appear to constrain the ability of Rockgas to extract monopoly profits at any level. PGL, also vertically integrated, has the ability to re-enter the greater Wellington retail market but has yet to decide whether to do so.
- 57 In terms of new entrant re-sellers, the barriers to entry in establishing a re-selling business appear to be relatively low, with the major constraint being the ability to gain access to suitable land on which a bulk tank and filling facilities can be sited. A new entrant should be able to access LPG from Shell, Rockgas or PGL. Furthermore, new or existing retailers may be able to

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<sup>14</sup> The Commerce Commission’s Business Acquisitions Guidelines, 1996, also note that “in the Commission’s view, a dominant position in a market is generally unlikely to be created or strengthened where, after the proposed acquisition,....the merged entity (including any interconnected or associated persons) has less than in the order of a 40% share of the relevant market.”

vertically integrate into wholesaling by obtaining direct supply from the producers or Liquigas. The potential for new entry also constrains the ability of Rockgas to extract monopoly profits at the retail level.

- 58 Finally, all LPG retailers face some constraint from the varying ability of consumers to switch to a competing fuel if LPG is priced less competitively than at present.

### **CONCLUSION**

- 59 Staff have had regard to the information discussed above and the factors set out in section 3(9) of the Act and are satisfied that the acquisition would not result, and would not be likely to result, in the acquisition or strengthening of a dominant position in either the national wholesale market for LPG or the retail market for LPG in the greater Wellington area including the Wairarapa.

### **RECOMMENDATION**

- 60 It is recommended that, in terms of section 66(3)(a) of the Act, the Commission give clearance for the acquisition.

Investigator

Chief Investigator

**DETERMINATION ON NOTICE OF CLEARANCE:**

**ROCKGAS LTD/ENERGY SUPPLY LTD**

We agree/disagree with the recommendation.

We are satisfied/not satisfied that implementation of the proposal would not result, and would not be likely to result, in any person acquiring or strengthening a dominant position in a market.

Accordingly, pursuant to s 66(3) of the Commerce Act 1986, we hereby give/decline to give clearance for the acquisition by Rockgas Ltd of the LPG stock and fixed assets of Energy Supply Ltd.

Dated this                      day of April 1998

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T G Stapleton  
Deputy Chairman

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E C A Harrison  
Member