Notice seeking clearance for Mercury to acquire the Trustpower retail assets

30 July 2021

Public version

EXECUTIVE SUMMARY

1 Mercury seeks Commerce Act clearance to acquire Trustpower's retail business, with the principal asset being Trustpower's ~234,000 residential and SME electricity, gas and telecommunication customer contracts.

2 The transaction does not affect competition in New Zealand's wholesale electricity market. Trustpower will continue to wholesale electricity in this country as a vertically separated electricity generator.

3 In assessing this application, the Commerce Commission will look at whether the proposed transaction is likely to substantially lessen competition in any New Zealand market. In doing so the Commission will be asking whether Mercury will be materially less constrained in future by actual and potential rivalry if it acquires Trustpower's retail customer book.

4 This clearance application explains why the proposed transaction will not change competitive pressure in any way. The application records that consumers in affected electricity, gas and broadband retail markets have extensive options:

4.1 In electricity there is: Genesis (including Energy Online); Meridian (including Powershop); Contact; Nova; Electric Kiwi; Pulse; Vocus (Slingshot); and over 20 other smaller retailers.

4.2 In reticulated North Island gas there is: Genesis (including Energy Online); Contact; Nova (including Megatel); and Pulse.

4.3 And in broadband there is: Spark; Vodafone; Vocus; 2degrees; and dozens of smaller ISPs to choose from.

5 With the proposed transaction, Mercury's retail business will also face the threat of new retailers emerging, including overseas firms like Octopus Energy amongst others. New entry simply involves retailers buying wholesale services from generators, gas producers and telecommunication infrastructure owners on the open market.

6 The proposed transaction will not affect the conditions or ease of entry into affected markets in any way at all.

CONTENTS

NOTICE SEEKING CLEARANCE

The Registrar
Mergers and Acquisitions
Commerce Commission
PO Box 2351
WELLINGTON

The Applicant seeks clearance for a business acquisition under section 66 of the Commerce Act 1986.

CONTACT DETAILS

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[MCY AND TRUSTPOWER CONFIDENTIAL INFORMATION]
[MCY CONFIDENTIAL INFORMATION]
[TRUSTPOWER CONFIDENTIAL INFORMATION]

PARTIES AND TRANSACTION DETAILS

Mercury

1 Mercury NZ Limited (***Mercury***) is a publicly-listed New Zealand energy generation and energy retailing company. The New Zealand Government (the Crown) holds a legislated 51% shareholding in the company. Mercury's head office is in Newmarket, Auckland.

2 Mercury's primary business activities are:

2.1 generating 100% renewable electricity from its geothermal, hydro and (soon) wind power stations across New Zealand;

2.2 selling that electricity in the New Zealand wholesale electricity market (or, in some cases, selling its generated electricity to large customers directly ("***commercial & industrial***" customers)); and

2.3 reselling the following utilities to New Zealand residential and SME customers ("***mass market"*** customers):

(a) electricity purchased in the wholesale "spot" electricity market; and

(b) reticulated gas purchased in the wholesale "spot" gas market.

3 Mercury operates those retail electricity and gas businesses through the *Mercury* brand. Mercury also sells retail electricity through its wholly-owned subsidiary, Globug Limited. *Globug* is a prepaid electricity retail business. Unless otherwise specified, this application refers to Mercury's electricity and gas retailing businesses generally as "Mercury".

4 Mercury has a 49% shareholding in NOW New Zealand Limited (trading as NOW Broadband). Now Broadband retails fibre broadband to approximately 20,000 customers across New Zealand (or ~1.1% of the market).

Trustpower

5 Trustpower Limited (***Trustpower***) is a publicly-listed New Zealand energy generation and energy retailing business. Infratil Limited holds a 51% shareholding in Trustpower. Trustpower's head office is in Tauranga.

6 Trustpower's primary business activities are:

6.1 generating electricity from its 38 hydropower stations across New Zealand;

6.2 wholesaling that electricity in the New Zealand wholesale electricity market (or selling that electricity to commercial & industrial customers directly); and

6.3 retailing the following utilities to New Zealand mass market customers:

(a) electricity purchased in the wholesale electricity market;

(b) reticulated gas purchased in the wholesale gas market;

(c) bottled LPG purchased in the wholesale gas market (from OnGas Limited);

(d) broadband services via Chorus and Local Fibre Companies (like Ultra Fast Fibre); and

(e) mobile ("MVNO") and wireless broadband purchased from Spark's mobile network.

7 This transaction only relates to Trustpower's retail business, being the assets that Trustpower uses to resell electricity, gas, broadband and mobile telco services to mass market customers.[1]

Transaction details

8 Mercury seeks clearance under s66 of the Commerce Act 1986 to acquire the assets of Trustpower's retail business, as set out in the parties' 19 June 2021 Sale and Purchase Agreement, (the ***proposed acquisition***) for $441m, subject to adjustment pursuant to the SPA and related documents. Those transaction documents bringing about the proposed acquisition are enclosed in **Schedule A**.

9 The key Trustpower retail assets that Mercury seeks clearance to acquire are:

9.1 Trustpower retail's existing ~234,000 retail contracts to supply utility services to mass market customers across:[2]

(a) ~249,000 electricity installation control points (ICPs);

(b) ~43,000 gas connections (of which, ~35,500 are North Island reticulated gas customers with the remainder bottled LPG users); and

(c) ~109,000 telco customers (comprising broadband, fixed wireless, voice and mobile retail offerings).

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[1] To avoid doubt, the transaction includes Trustpower's ~[] commercial & industrial gas customers which, like Trustpower's mass market gas customers, are serviced by natural gas that Trustpower purchases from gas producers/wholesalers. [].

[2] Mercury notes that exact ICP figures vary constantly, so these figures are the approximate figures at the time Trustpower begun this sale process.

9.2 Certain Trustpower retail branding, IT systems, and employment contracts used to sell and service those retail utility offerings to mass market customers, including Trustpower's:

(a) retail brand;

(b) Internet Service Provider (ISP) infrastructure and telco support systems;

(c) retail IT systems; and

(d) office leases in Tauranga and Oamaru.

9.3 Mercury will also make employment offers to ~[] existing Trustpower staff conditional on this transaction completing.

10 In other words, Mercury is acquiring Trustpower's "retail book" of mass market customers.

11 To be sure, we note for completeness that:

11.1 the Acquisition does **not** include:

(a) Trustpower's generation assets; and/or

(b) Trustpower's commercial & industrial electricity customers (as defined in the SPA);[3] and

11.2 Trustpower will continue to operate independently in the wholesale electricity market.

Ancillary agreements

12 As part of the Acquisition, Mercury would enter a ten-year wholesale electricity hedge arrangement with Trustpower to provide financial risk cover over some of the electricity volumes that Mercury expects to supply to the to-be-acquired retail book of Trustpower mass market customers.

13 Electricity hedges are common in the industry and do not affect or hinder other rival retailers' ability to purchase electricity in the wholesale electricity market. That is because a hedge is not a supply agreement but an instrument to deal with financial risk inherent in the wholesale electricity spot market which can be volatile.

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[3] Subject to footnote 1.

14 That hedge arrangement is attached in the confidential **Schedule A**.

15 Under the hedge arrangement, Trustpower would provide financial risk cover to Mercury for certain electricity volumes [].

16 [].

17 [].

18 []. Throughout the term of the hedge, Mercury will continue to manage pricing risks in the electricity spot market through various mechanisms including other hedge arrangements, trading ASX futures, buying FTRs and the like (see paragraph [77] below for further discussion on hedging pricing risk).

19 The transaction, coupled with the hedge arrangement, will not change – let alone lessen – competition in the retail or wholesale electricity markets. Over time, Trustpower will become a "long generator" and will need to manage its risk by entering into additional hedge arrangements subject to their portfolio risk settings.

20 Indeed, this acquisition will see Trustpower vertically separate – which is what some independent retailers campaigned for during MBIE's Electricity Price Review.[4]

[4] As MBIE recorded in its 2019 Electricity Price Review: "some submitters proposed an additional step of operational separation, that is, requiring vertically integrated businesses' generation and retailing arms to interact at arm's-length through the contract market".

STRUCTURE OF THIS CLEARANCE APPLICATION

21 This clearance application:

21.1 explains the commercial rationale for the transaction;

21.2 explains the factual and counterfactual; and

21.3 separately assesses the proposed transaction's effect on New Zealand's:

(a) retail electricity industry;

(b) retail gas industry; and

(c) retail broadband industry.

COMMERCIAL RATIONALE

Mercury rationale

22 Mercury's retail strategy is to offer a multi-product offering that will deliver value for its customers and the Mercury business. A combined Mercury and Trustpower retail business would create an attractive platform offering multi-product energy and telco services to residential and small commercial customers at an efficient scale.

Trustpower rationale

23 From Trustpower's perspective, the rationale for the transaction is to establish a standalone generation business, in particular given:

23.1 Trustpower has identified that there needs to be a significant increase in New Zealand's electricity generation capacity over the next 30 years to meet electrification, and so Trustpower wants to focus its efforts and capital investment on meeting that need; and

23.2 the dynamic and highly competitive nature of the retail markets, with increasing entry, innovative business models and technological disruption (such as electrification and decarbonisation, decentralised energy, digital trends in service provision, and utilities convergence), means that further investment would be required to remain relevant in the retail markets, and that investment would distract capital and attention from the generation markets where Trustpower wishes to focus.

24 Accordingly, Trustpower identified that it would be in its strategic interests as a company to focus on the electricity generation sector.

FACTUAL AND COUNTERFACTUAL

25 Taking a conservative competition law approach, Mercury submits that the proposed acquisition is best assessed against a status quo counterfactual. With that counterfactual reflecting Trustpower retaining its retail business.

26 That counterfactual would capture the most competitive market scenario for Commerce Act purposes and simplifies the Commission's analysis.

27 [].

RETAIL ELECTRICITY INDUSTRY

INDUSTRY BACKGROUND

28 In this section we describe New Zealand's electricity industry.

29 New Zealand's electricity industry supply chain works as follows:

Generating & distributing electricity using physical assets	**Generation:** Electricity generators own assets that generate electricity, like hydroelectric dams, wind farms, geothermal plants, fossil-fuelled stations and solar panels. Those electricity generation assets are located in different regions throughout New Zealand. Generated electricity is typically put into our national electricity transmission network ("the grid") at 50+ "injection points" (being points where generators' power stations connect to the grid). **Transmission (the grid):** Electricity is transported around the national grid using 12,000km of high-voltage power lines and 170+ substations. Transpower owns, operates and maintains those assets. The grid's key rules are that: (a) all major electricity generators must connect to the grid; (b) Transpower's investment must be approved by the Commerce Commission; and (c) Transpower cannot own other assets elsewhere in the electricity industry supply chain. **Local lines distribution:** Electricity "leaves" the grid at Transpower's substations. Electricity is transported from those substations to homes and businesses using power lines owned by "local lines companies". There are 27 local lines companies in New Zealand. Local lines companies charge electricity retailers to use their distribution assets. Those prices are regulated by the Commerce Commission. And, like Transpower, local lines companies face restrictions on participating in other parts of the electricity supply chain.
Trading electricity within that supply chain via contract	**Wholesale electricity market**: Electricity cannot be stored easily. So, electricity is generated to match real-time electricity demand from mass market and commercial & industrial electricity users. That instant matching of supply and demand (i.e., trading) happens in New Zealand's

wholesale electricity market regulated by the Electricity Authority.

Retail electricity market: Mass market customers buy electricity from retailers who purchase electricity from the wholesale electricity market. Unlike the generation and distribution part of the industry supply chain, retailers do not require special electricity assets. Rather, retailers participate through contracts with generators (via the wholesale electricity market) and local lines distribution companies, with those prices passed on to mass market customers as part of their (typically) monthly bills.

30 Electricity retailers operate "below" the line above by buying electricity from the wholesale electricity market and reselling it in the retail electricity market.

31 All electricity supplied by retailers to mass market customers is purchased from the New Zealand wholesale market at the spot price. Retailers may choose to enter into electricity price hedging arrangements with counterparties, usually generators, or by buying electricity futures traded on the Australian Stock Exchange (ASX) to reduce the volatility of their wholesale electricity costs. We expand on how sales are made in the retail electricity market further below.

32 But, first, we discuss the electricity industry's history.

33 That history is important, as some things we observe in the retail market today are historical artefacts from a time when generating, distributing and retailing electricity was all done by the same public body.

History: New Zealand's electricity industry

Pre mid-1990s

34 Historically central government, through the New Zealand Electricity Department owned and operated the infrastructure that generated and transmitted electricity across the country. Local government, operating through municipal electricity departments and power boards called electricity supply authorities ("ESAs"), owned the local distribution networks. ESAs purchased electricity from NZED and sold and distributed that electricity to rate payers connected to the local distribution networks.

35 These ESAs were, in effect, statutory regional monopolies with control over all electricity supplied into a particular area because each city/town only had, typically, one set of power lines.

36 The Auckland Electric Power Board controlled, for instance, electricity supply in Auckland. Tauranga Electric Power Board in Tauranga. The Central Canterbury Electric Power Board in Christchurch. And so on.

37 Alongside these ESAs was the Electricity Corporation of New Zealand ("*ECNZ*"). A state-owned enterprise formed in 1987 that owned the national grid transmission assets and New Zealand's largest power stations that ESAs purchased electricity from.

38 ECNZ's transmission assets would later be split into Transpower and its generation assets to Contact Energy, Genesis Energy, Meridian Energy and Mighty River Power (now Mercury).

1993-1998

39 The Energy Companies Act 1992 provided for the corporatisation of New Zealand's ESAs.

40 The ESAs were privatised in a variety of ways, sometimes through community trust holdings. For instance:

40.1 Auckland Electric Power Board's retailing and distribution assets were split into a new company formed by the Auckland Energy Consumer Trust: "Mercury Energy". (Subsequently AEPB's distribution assets were separated to a company called "Vector" – under the Electricity Industry Reform Act 1998, referenced from [45] below).

40.2 Tauranga Electric Power Board's assets, previously used for generating, distributing and retailing electricity in the area, were placed in a new publicly listed company partly held in a local consumer trust: "Trustpower".

41 In other areas, different ownership structures emerged for each region's now-corporatised electricity distribution and retailing assets. For instance:

41.1 Wellington City Council Municipal Electricity Department's distribution and retail electricity assets were transferred to Capital Power,[5] which was then sold to TransAlta in 1996. In turn, Genesis Energy acquired TransAlta's North Island retail base – including TransAlta's Wellington customers – in 2001.[6] (As part of that TransAlta deal, Genesis also acquired TransAlta's Hamilton customer base which it had, previously, purchased from Waikato Electricity

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[5] https://archivesonline.wcc.govt.nz/nodes/view/7744; https://www.stuff.co.nz/dominion-post/comment/6596585/When-we-sold-off-Wellingtons-power

[6] http://www.sharechat.co.nz/article/48cb999a/ngc-drops-retail-power.html

Limited – a company formed from Central Waikato Electric Power Board's electricity assets).

41.2 Christchurch City Council retained material ownership in Southpower – a joint venture between Central Canterbury Electric Power Board, Riccarton Electricity and the Port Hills Energy Authority. Southpower's retail assets were subsequently sold to TransAlta in 1998 and then again to Meridian Energy in 2001.[7]

41.3 Dunedin City Council established Dunedin Electricity Limited (now Aurora) to distribute and retail electricity in the Dunedin. Dunedin Electricity Limited's retail base was subsequently sold to Contact Energy in 1999.[8]

42 We explain this history to show that Mercury, Trustpower, Genesis, Meridian and Contact's original retail bases were all formed/acquired from – directly or indirectly – local ESAs that were, up until the mid-1990s, statutory monopolies.

43 As a result, the firms linked to each region's ESA began life with very high regional market shares reflecting the former ESA statutory monopolies.

44 But, as the following graphs show,[9] those firms' regional retail shares have steadily trended downwards over the last 10-15 years reflecting that electricity retailers can now compete for customers across the country because of various market developments (which we expand on in the next section).

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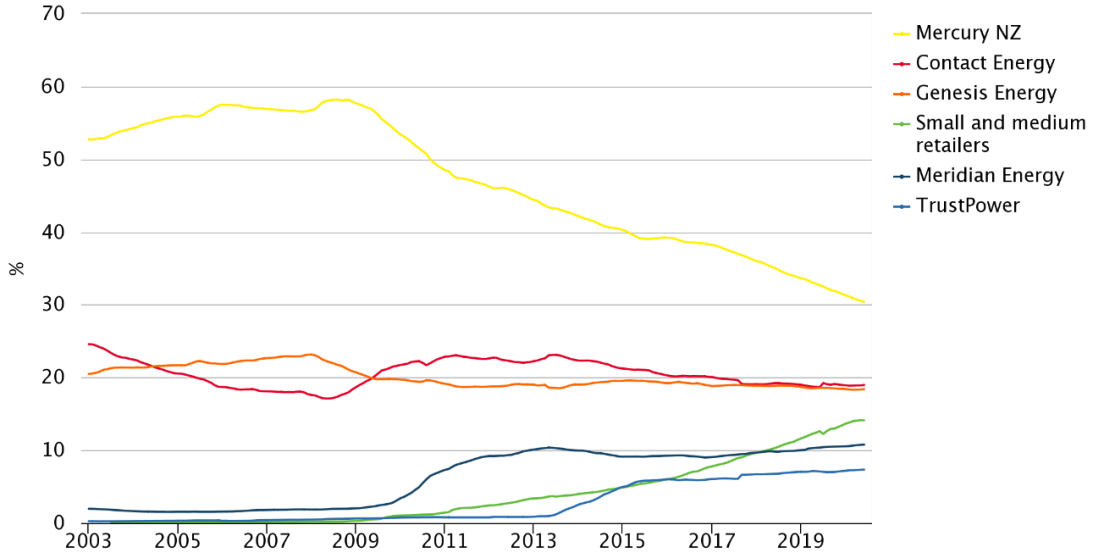
7 https://www.scoop.co.nz/stories/BU0106/S00282.htm?from-mobile=bottom-link-01

8 https://ir.canterbury.ac.nz/bitstream/handle/10092/11772/Otago_Energy.pdf?sequence=1&isAllowed=y . (p22).

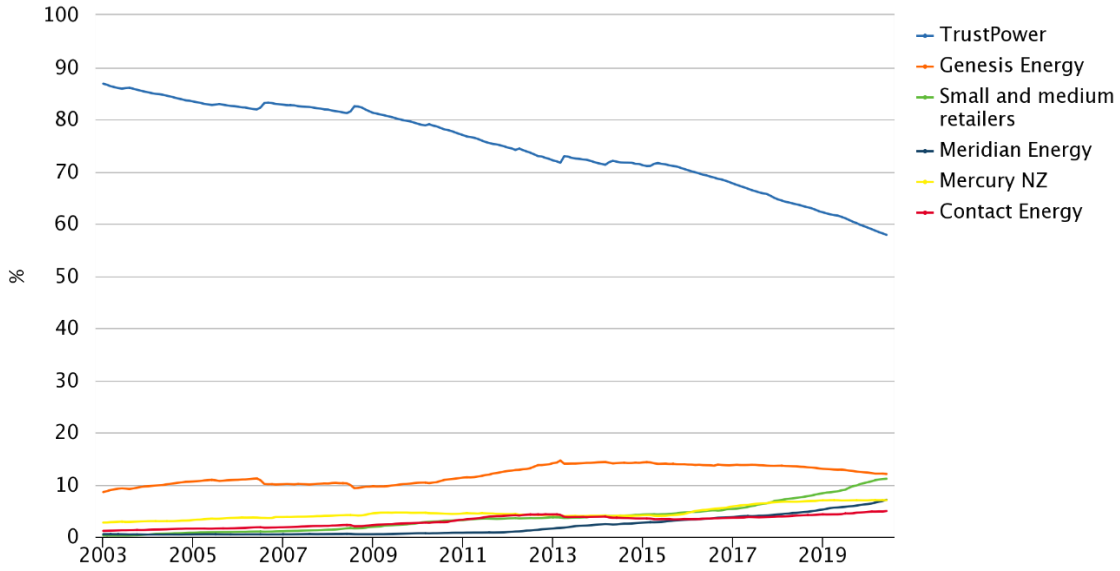
9 Please note that these market share *trend* graphs are for "All ICPs", as it is not easy to extract just mass market customers ("residential" and "SMEs") from the Electricity Authority website for its trend data (those customers are, though, easily split out from the Electricity Authority's stationary market share – see Schedule C, for example). As a result: (a) for these reproduced Electricity Authority trend graphs, the ICPs include some commercial & industrial electricity customers that are unlikely to be subject to this transaction; and (b) the figures are likely to slightly underrepresent the small & medium retailers who do not typically service commercial & industrial customers.

Auckland (Auckland Electric Power Board → Mercury)



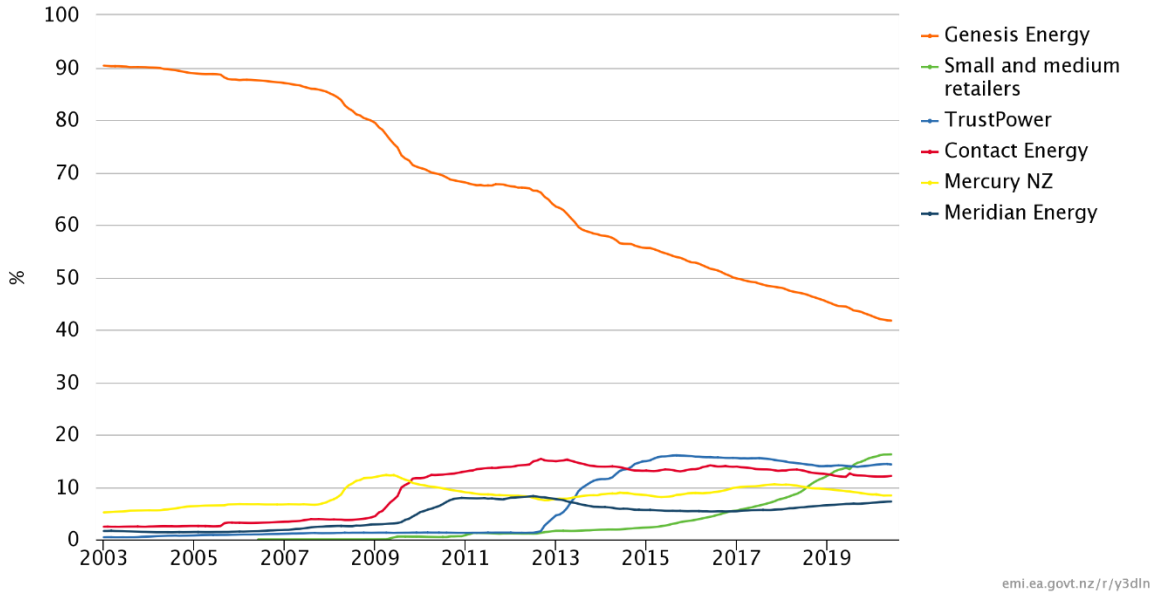
emi.ea.govt.nz/r/wbtll

Tauranga (Tauranga Electric Power Board → Trustpower)



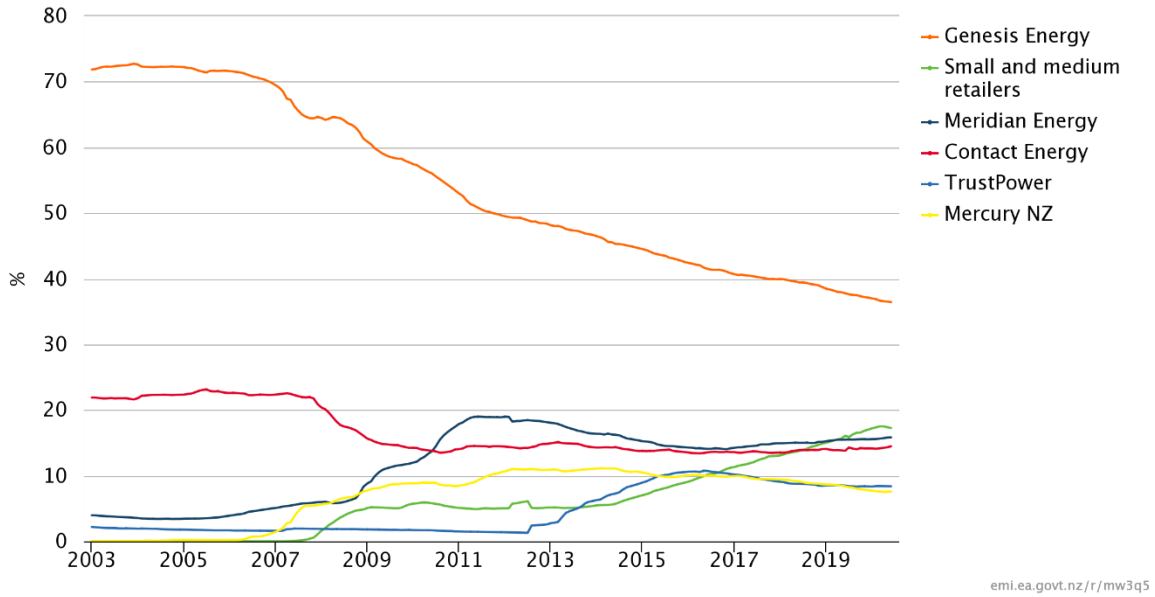
emi.ea.govt.nz/r/rxqop

Hamilton (Central Waikato Electric Power Board → TransAlta → Genesis)



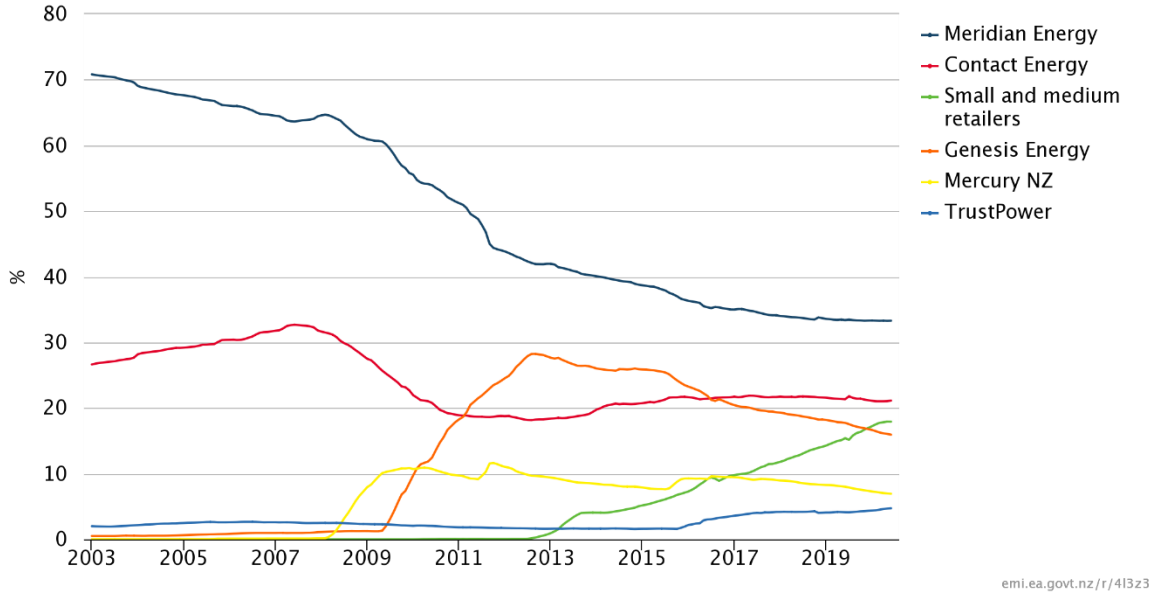
emi.ea.govt.nz/r/y3dln

Wellington (Wellington City Council Municipal Electricity Department → TransAlta → Genesis)

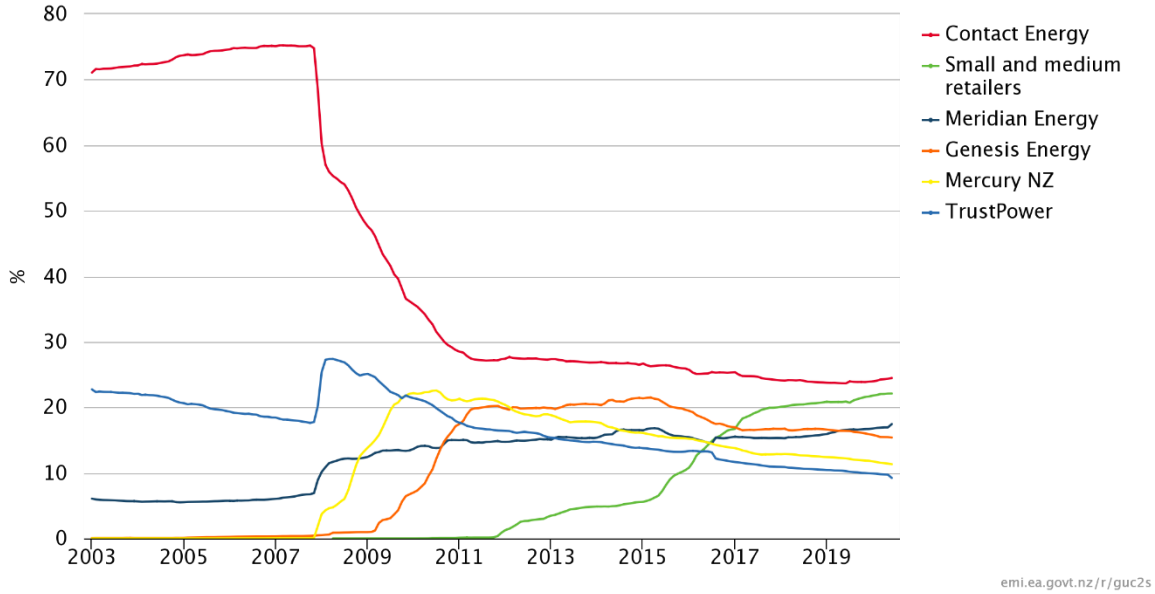


emi.ea.govt.nz/r/mw3q5

Christchurch (Central Canterbury Electric Power Board (Southpower) → TransAlta → Meridian)



Dunedin (Dunedin City Council (Dunedin Electricity Limited) → Contact Energy)



1999-2021: market developments

45 The Electricity Industry Reform Act 1998 required retail and electricity lines companies to be separated, structurally removing the key ownership advantage that ESAs once had in securing their position as statutory monopolists.

46 That structural change meant, even back in ~1999, electricity retailers needed very few assets to compete in New Zealand's nascent, newly-structured, retail electricity market.

47 To be an electricity retailer around that time, the Commission recorded in 2002 that an electricity retailer would need:[10]

47.1 a sales force;

47.2 a meter reading function (for old, non-smart, meters);

47.3 an administration team that manually dealt with billing and switching;

47.4 a customer service team;

47.5 distribution agreements with lines companies; and

47.6 the supply of electricity traded through the former New Zealand wholesale electricity market (called "NZEM") administered by M-co. (That wholesale market began in 1996).

48 And, against that reality, the Commerce Commission defined a "national market in electricity retailing".[11]

49 Since then, technology advancements, policy initiatives, infrastructure upgrades and further regulation have made it even easier for electricity retailers to compete around the country, re-confirming the Commission's held view that there is a national retail electricity market.

50 Over the last ten or so years, every region in New Zealand has experienced significant growth in small and medium retailers for mass market customers and a convergence of the large, legacy, electricity retailers. Those ever-lowering barriers to entry/expansion and customer switching are displayed in the graphs in the last section and expanded on in the competition analysis in this clearance application.

51 The key market developments that have led to those trends since the Commission's 2002 decision are:

51.1 **industry regulation**, including for instance:

(a) The Electricity Industry Reform Amendment Act 2008 permitted some lines business to sell electricity from smaller-scale renewable energy sources, increasingly the country's generation capacity and bringing new and different competitors to market.

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[10] *Genesis Power Limited and Energy Online Limited,* Commerce Commission Decision 476, at [9]-[10].

[11] *Genesis Power Limited and Energy Online Limited,* Commerce Commission Decision 476.

(b) The Commerce Amendment Act 2008 improved regulatory regimes for electricity lines businesses, including introducing input methodologies that establish criteria to, among other things, ensure retailers have affordable and sustainable distribution access. In essence, lines companies' prices must be based on a well-defined, clearly explained and published pricing principles.

(c) The Government's 2010 $15m fund to promote the benefit of consumer switching retailers, resulting in the "What's My Number?" campaign. In 2014, the Government added another $7.5m to that consumer switching fund. And, in 2016, the Government revamped its www.powerswitch.org.nz website that made it quick, easy and affordable for consumers to switch electricity suppliers on mobile phones, tablets and computers.[12]

(d) In 2011, as part of Government-ordered "virtual asset swaps", Meridian sold "South Island electricity" to Mercury and Genesis in return for equal amounts of "North Island electricity". With that move designed to further facilitate the national electricity market by accommodating any transmission constraints between the South and North Islands.

(e) In a similar vein, again in 2011, Meridian transferred Tekapo A and B power stations to Genesis.[13]

51.2 In 2010, the Electricity Industry Act 2010 established the **Electricity Authority**: the electricity market regulator. The Electricity Authority is an independent Crown entity responsible for ensuring New Zealand's electricity market operates efficiently.

The Electricity Authority's statutory direction is "to promote competition in, reliable supply by, and efficient operation of, the electricity industry for the long-term benefit of consumers".[14] The Electricity Authority is accountable for ensuring a thriving competitive retail electricity market and, in its words in 2021:[15]

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12 https://www.consumer.org.nz/articles/powerswitch-website-relaunched

13 https://www.scoop.co.nz/stories/BU1105/S00488/genesis-energy-set-to-acquire-tekapo-a-and-b-power-stations.htm

14 Electricity Industry Act 2010, s15.

15 Electricity Authority Statement of Intent, 2021-2025.

We encourage competition in all electricity-related markets, right across the supply chain, taking into account long-term opportunities that will lead to better outcomes for consumers.

[…]

Our market-oriented solutions have successfully reduced barriers to retail participant entry and expansion. Consumers can now choose from over 40 different brands, with some now opting to pay the wholesale market spot price rather than a fixed plan.

The Electricity Authority develops, administers and updates the Electricity Industry Participation Code 2010. All electricity industry participants, including electricity retailers, must comply with **the Code**. The Code is the vehicle for a number of recent Electricity Authority initiatives aimed at facilitating competition in the national electricity market, including:

(a) Standardising lines companies' distribution agreements to make them quick, easy and affordable for electricity retailers to enter into.

(b) Banning "saves" and "win-backs" in the first 180-days after a customer decides to switch electricity retailers.[16] MBIE's Electricity Price Review recorded that "win-backs are arguably one of the bigger barriers independent retailers face in expanding their market share, and we recommend they are banned".[17]

(c) Requiring electricity retailers to promote the industry's price comparison and utilities disputes websites.

(d) Mandating (at a low level) the maximum level of upfront security that lines companies can charge electricity retailers that wish to use its distribution network.

(e) Increasing the amount and detail of publicly available industry data.

51.3 **Infrastructure investments**, including:

(a) Since 2002, Transpower invested ~$5bn to increase capacity across New Zealand's electricity grid, making it easier for generators to send

[16] A save is when a customer is switching to a new retailer, but their current retailer persuades them to stay before the switch happens. A win-back is when a customer switches retailers, and the losing retailer persuades them to return after the switch happens.

[17] EPR, page 37.

electricity around the country. Key Transpower upgrades over that time include:

(i) The $672m HVDC upgrade that links New Zealand's North and South Island transmission infrastructure, significantly increasing transmission capacity over that part of the grid.

(ii) The North Island transmission grid upgrade involving New Zealand's first 400 kV-capable transmission line commissioned from southern Waikato into Auckland, increasing capacity into Auckland and reducing the city's dependence on local power stations.

(iii) And many other smaller grid upgrades.[18]

51.4 **Establishing the ASX hedge market.** In 2011, following a 2009 Ministerial direction, Contact, Genesis, Meridian and Mercury established a hedge trading market. That market allows retailers to trade futures and options contracts on New Zealand electricity thereby managing price fluctuations in the wholesale electricity market.

The Australian Securities Exchange (ASX) provides the platform on which NZ electricity futures and options are traded. The ASX platform is currently supported by "market making" services provided by the country's four largest generators: Contact; Genesis; Mercury; and Meridian. Those four generators each have an agreement with ASX to offer to buy and sell specific futures contracts with an agreed maximum difference between the buy and sell price (the bid-ask spread) for a half hour period during each trading day.

The traded ASX electricity futures are standardised and centrally cleared Contracts for Difference (CFDs) that are cash settled against two grid reference nodes – Otahuhu (North Island) and Benmore (South Island) – in the New Zealand wholesale electricity spot market.

In January 2020, the Electricity Authority urgently amended the Code to introduce a "back-stop" mandatory market making scheme that applies to market makers who fail to provide voluntary market making services on three or more separate days within any 90 day period.[19]

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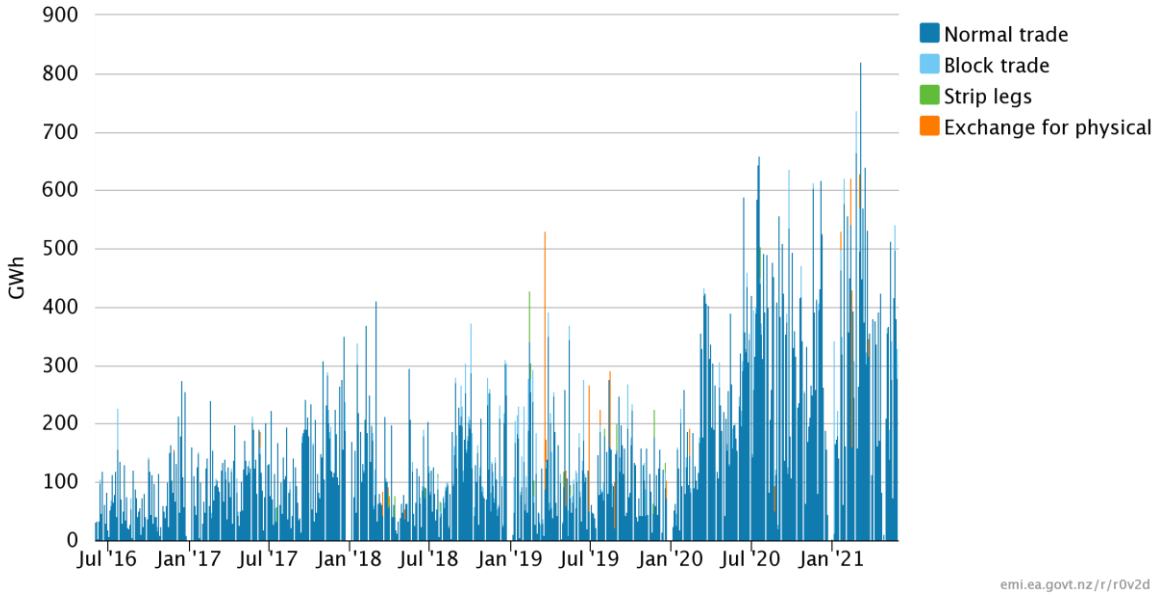
[18] See for instance: https://www.transpower.co.nz/keeping-you-connected/projects

[19] https://www.ea.govt.nz/development/work-programme/risk-management/hedge-market-development/correspondence/correspondence-relating-to-urgent-code-amendment/.

As the following graph shows, trading in the ASX futures market has increased significantly over the last five years:

ASX futures contracts total energy (GWh) traded, July '16 – June 21



Moreover, and as we explain below, the Electricity Authority is working to make the ASX market even more liquid by adding commercial market makers to the mix, paid through levies imposed on electricity industry participants through the Code.

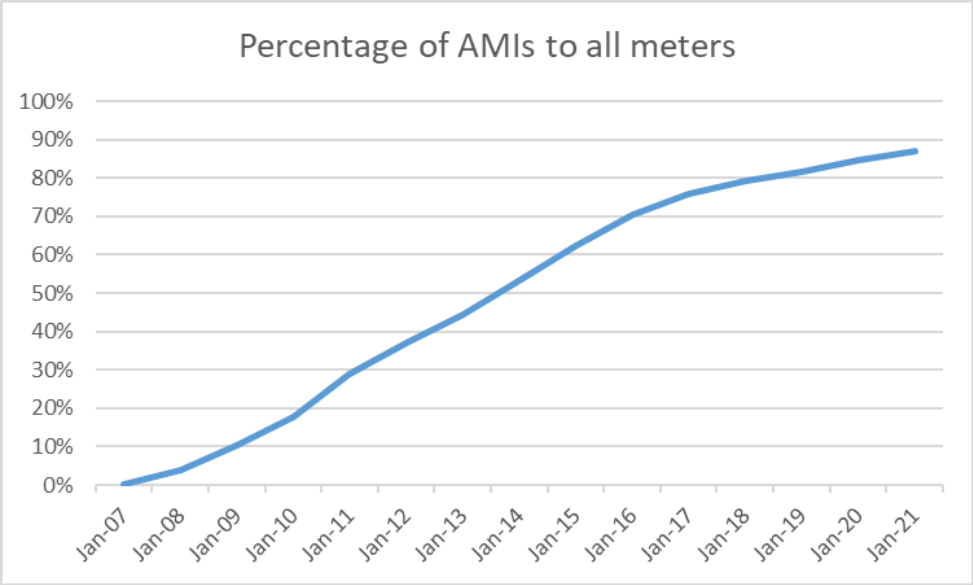
51.5 **Establishing the financial transmission rights (FTR) market**. In 2013, the Electricity Authority established a market to trade financial transmission rights ("FTRs"). FTRs are financial hedges that protect energy retailers from price differences at certain locations around New Zealand. An FTR confers the right to receive the pricing difference between two pricing nodes for which the hedge covers. The FTR market means that retailers can buy and resell electricity across the country at a consistent price.

51.6 **Smart meters.** From around 2007, digital smart meters (also known as advanced metering infrastructure ("*AMI*")) have been rolled out across the country. Unlike old analogue meters (like what the Commission referred to in its *Genesis* decision above), smart meters take digital electricity readings at homes and businesses and send them to retailers remotely.[20] That automation has removed the need for retailers to employ a team of "meter

[20] The readings are sent to a Metering Equipment Provider (MEPs), like ihub and AMS, who then send the readings to retailers.

readers" and has also enabled new entrants to offer innovative pricing structures like *Electric Kiwi's* "free hour of power".[21]

Now over 87% of New Zealand ICPs are connected to a smart meter, with that figure ever-increasing toward 100%. Those trends can be seen in the following graph showing the roll-out of smart meters across New Zealand since 2007.[22]



Further, ~98% of smart meters are owned independently of retailers, with Vector owning the vast majority of smart meters across the country (~58%).[23]

51.7 **The internet** too has come a long way since the Commission's 2002 *Genesis* decision. Now the vast majority of New Zealand homes and businesses have access to broadband and mobile internet. That internet coverage has helped new entrants emerge who do not need localised call centres and, instead, can handle administration of their retail businesses remotely online (along with the ability now to read smart meters digitally too). The internet has also made customer switching easier and raised consumer awareness of the amount of electricity options available to them. As noted above, in 2016, the Electricity Authority revamped its www.powerswitch.org.nz website to make it easy for consumers to compare electricity options and switch retail electricity providers.

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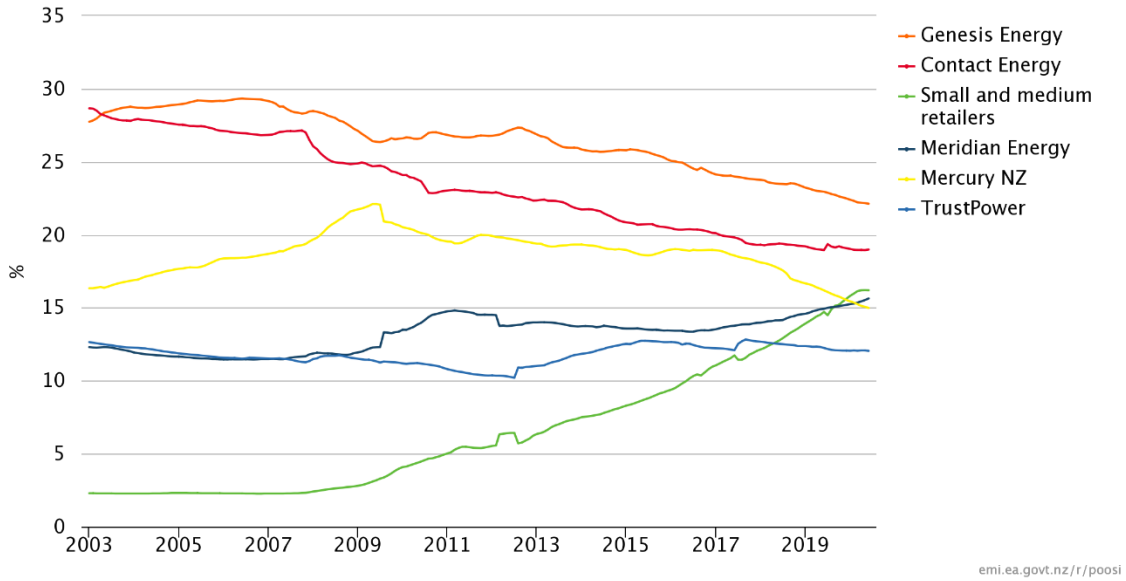
21 https://www.ea.govt.nz/about-us/media-and-publications/market-commentary/outlook/smart-meters-enhancing-competition-and-enabling-new-consumer-technologies/.

22 Electricity Authority data: "metering snapshot".

23 Electricity Authroity data: "metering snapshot".

52 Against those market developments, the New Zealand electricity market is even "more national" than it was in 2002 when the Commission last considered this market in detail.

53 That trend is clearly seen from the convergence of market shares across the national electricity market since that decision and over the last 18 years:



Future market developments

54 Indeed, that trend is expected to continue as Government policies, industry regulation, technology and infrastructure develops and moves the market even further away from the statutory monopolies ESAs once had in the mid-1990s.

55 The Electricity Authority, as the market's regulator, will be the key driver for those policies. As set out above, over the last five or so years the Electricity Authority has, in its words, "successfully reduced barriers to retail participant entry and expansion".[24] Having concluded that step successfully, the Electricity Authority's Statement of Intent for 2021-2025 declares the regulators' focus now turns to the:

> *need to expand across new parts of the supply chain to drive efficiency, reliability, innovation and integrate new technology.*
>
> *[…]*
>
> *We're committed to encouraging participation and reinforcing competition in traditional and emerging markets by putting in place the mechanisms needed to maintain a level playing field. Our regulatory environment needs to enable participants to better manage risk and provide consumers value for money through a growing range of innovative products, services and opportunities to participate.*

[24] Electricity Authority Statement of Intent, 2021-2025.

56 Those new parts of the supply chain the Electricity Authority is referring to, of course, are not affected by this proposed acquisition. Mercury is acquiring only Trustpower's book of existing retail contracts. Trustpower will continue to compete against Mercury in all other parts of the supply chain, including in generation and in the wholesale electricity market.[25]

57 Yet, the Electricity Authority's focus on driving efficiency, reliability, innovation and technology across the supply chain will only further benefit and facilitate competition in the national electricity retail market. With those developments pushing the market even further away from the mid-1990s.

58 To that end, we note, for instance, the Electricity Authority's current Hedge Market Development project.[26]

59 That project seeks to establish a more efficient ASX hedge market through the Electricity Authority sponsoring entry of commercial "market makers" (compensated through a levy charged to electricity industry market participants) to increase trading liquidity. To facilitate the project, the Electricity Authority recently sent out an RFI seeking interest from commercial market makers to provide 20 percent of the scheme's total trading volume obligations (with the remaining 80% left with the existing regulated market makers).[27]

60 The Electricity Authority anticipates that, over time, the commercial market makers will provide more volume to the hedge market than the regulated generators that currently take up that function.

61 We highlight this project, and the Electricity Authority's other inevitable future initiatives, to demonstrate that the electricity industry's regulatory body is highly active in responding to market areas which it considers can be made even more efficient. And those initiatives cement the Commission's 2002 findings that the retail electricity market is: (a) national; and (b) highly competitive.

62 In those circumstances, the Commission can be satisfied that Mercury's acquisition of Trustpower's retail book of mass market contracts will not substantially lessen competition.

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[25] Including continuing to compete for commercial & industrial electricity customers.

[26] https://www.ea.govt.nz/development/work-programme/risk-management/hedge-market-development/.

[27] https://www.ea.govt.nz/assets/dms-assets/28/Request-for-Information-Commercial-Market-Making-Scheme-v2.pdf

63 We expand below.

How sales are made in the retail electricity market in 2021

64 To be a mass market electricity retailer in 2021 you need:

64.1 an office (this can be anywhere around New Zealand like, for instance, Trustpower's Oamaru office);

64.2 staff, IT and billing systems to:

(a) take orders, arrange electricity connections and deal with customer questions;

(b) process customers' digital smart-meter readings; and

(c) manage and process bills and invoices.

64.3 marketing and advertising; and

64.4 a trading/finance/reconciliation team to:

(a) enter supply agreements to connect to New Zealand's electricity distribution network, including with local lines and metering companies;

(b) purchase electricity from the New Zealand wholesale electricity market; and

(c) manage financial risks through hedge arrangements.

65 We expand on those last three trading/finance steps next, as those steps are unique to the national New Zealand electricity market (while the other steps are a standard part of any retail market).

Connecting to the electricity network through lines and metering companies

66 Retailers enter into agreements with electricity lines and metering companies (which can sometimes be the same party) to access their distribution assets.

67 From June 2020, the Electricity Authority requires most lines companies to follow a "Default Distributor Agreement" that standardises the distribution agreement that retailers sign with all or some of the country's 27 lines companies.[28] That move, in turn, made it far quicker, easier and cheaper for electricity retailers to understand

[28] https://www.ea.govt.nz/assets/dms-assets/26/26873Default-Distributor-Agreement-Decision-Paper.pdf. Specifically, EA code requires all distributors that operate under interposed arrangements to follow a DDA.

and enter into distribution agreements with multiple lines companies around New Zealand.

68 The Electricity Authority's draft "DDA" template agreement can be found here: https://www.ea.govt.nz/development/work-programme/consumer-choice-competition/default-distribution-agreement/development/updated-drafts-of-the-dda-material/.

69 Similarly, electricity retailers enter into contracts with metering companies in the areas that they want to supply electricity.

70 There are no barriers to entering into these metering and distribution agreements, and both set of agreements fall under the Code.

Buying electricity from New Zealand's wholesale electricity market

71 Electricity cannot be stored easily.

72 So electricity is generated to match real-time demand from mass market and commercial & industrial electricity customers. That instantaneous trading happens in New Zealand's wholesale electricity market regulated by the Electricity Authority and run through the NZX.

73 The key features of the wholesale electricity market are:

73.1 Trading happens at over 200 "pricing nodes" across the country. A pricing node is a place where generators supply electricity to retailers at that location.

73.2 Trading happens every half hour; 48 times a day.

73.3 Transpower is the market's "system operator". It is responsible for ensuring trading operates smoothly by predicting real-time demand to help generators make supply offers at particular pricing nodes.

73.4 Generators' pricing offers are made to the Electricity Authority through the Wholesale Information and Trading System (WITS) run by NZX.[29]

73.5 A clearing manager takes those electricity supply offers and chooses the best bid (known as the "clearing price"). That chosen bid becomes the electricity spot price at that node for that half hour period.

[29] NZX operates New Zealand capital, risk and commodity markets.

73.6 The Electricity Authority (through WITS) then pays generators for their generated electricity at the market clearing price and invoices all retailers for their offtake.

74 Retailers buy electricity from that market though the WITS system as follows:

74.1 retailers advise the clearing manager how much electricity its customer base has consumed; and

74.2 the clearing manager then balance all retailer consumption before settling the amounts payable to generators by applying the final cleared spot price for that period.

75 To become a "WITS Trader" retailers must fill out an NZX application form which is authorised by the Electricity Authority.[30]

Hedging the financial risks due to electricity price fluctuations

76 Given the instantaneous nature of electricity trading, wholesale spot electricity prices can fluctuate at different times and at different pricing nodes.

77 Price fluctuations in New Zealand's wholesale spot electricity market can come from:

77.1 Supply and/or demand shocks caused by, for instance:

(a) droughts (leading to less electricity generation from the country's main and cheapest power source: hydropower stations);

(b) surging or suppressed electricity demand; or

(c) electricity generation outages.

77.2 Transmission constraints and losses. Not only must electricity be generated, but it must also be delivered to one of New Zealand's 200 pricing nodes. The transmission networks between the generation source and the node can suffer from transmission constraints, faults and/or electricity losses.[31]

78 Against that reality, if all mass market customers were sold electricity at wholesale spot electricity prices then both the retailer and the end-customer would need to be financially prepared for both: (a) very low wholesale spot electricity prices from time-to-time; and (b) very high wholesale spot electricity prices at other times.

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[30] https://www.ea.govt.nz/assets/dms-assets/13/13333WITS-Full-Sign-Up-Form-Nov13.pdf

[31] Electricity transmission over long distances can create power losses. Those electricity losses are typically where the energy is lost as heat along the transmission network.

79 If, in those circumstances, a retailer did not have financial resources to cover the high wholesale spot electricity prices in scenario "(b)", including because end customers might not be able to quickly pay their bill for that high electricity price, then that retailer would risk facing substantial financial losses (as would the end consumer if it had not agreed a fixed electricity price with a retailer).

80 Electricity retailers control and hedge that financial risk to provide relative pricing stability to mass market customers. The key mechanisms used by electricity retailers to manage that financial risk are set out below:

80.1 Electricity retailers and mass market customers enter into "fixed price fixed volume" or "fixed price variable volume" contracts to give pricing certainty to both parties.

80.2 Electricity retailers can enter into bilateral financial risk agreements with generators at particular pricing nodes. Prices under those financial risk agreements are often set on a "contracts for difference" (CFD) basis.[32] As explained earlier, Mercury has agreed to a 10-year financial risk agreement with Trustpower to help cover the financial risk over the supply of the mass market customers that it would acquire with this transaction. That agreement is enclosed at confidential **Schedule A**.

80.3 Electricity retailers can participate in the ASX electricity derivatives market trading futures and options for standardised CFDs at the Otahuhu (North Island) and Benmore (South Island) pricing nodes. That trading platform allows electricity retailers to manage and hedge their future pricing risk by holding different future wholesale electricity positions on the back of those standardised options and futures contracts.

80.4 Lastly, electricity retailers can buy and sell "FTRs" (financial transmission rights) offered by the Electricity Authority to manage differences in wholesale electricity prices at different nodes due to transmission constraints and losses. As we explain above, FTRs are financial hedges that protect energy retailers from relative price separation between where they buy and sell at different locations around New Zealand. An FTR confers the right to receive the pricing difference between two pricing nodes for which the hedge covers.

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[32] A CFD is where a generator and retailer agree to pay (or disburse) the monetary difference between future electricity wholesale prices and the set "strike price", with that mechanism smoothing price volatility. So, for instance, if the wholesale electricity price is below the previously agreed strike price then the retailer will pay the generator more to meet that strike price at that time. Or, if the wholesale price is above the CFD strike price, then the generator will pay the retailer a disbursement covering the amount over the strike price that the retailer had to pay.

81 Collectively, those instruments help electricity retailers manage financial risks to enable them to compete in the national New Zealand electricity market.

82 For completeness, Mercury records that it does not know how different electricity retailers hedge their financial risk (nor other types of commercial risks). Those day-to-day business plans are closely held commercial secrets.

Vertical integration natural hedge

83 At this point we acknowledge that electricity retailers that are vertically integrated with generation assets have a "natural hedge" given they both sell and buy wholesale electricity.[33]

84 However, importantly:

84.1 This acquisition will not change the risk profiles of different electricity retailers, or change how those risks are managed, in any way. That reality is, of course, because Mercury is just acquiring Trustpower's existing mass market contracts and **not** Trustpower's generation assets. So the financial risks faced by all electricity retailers in the country will remain the same as they are today; undisturbed by Mercury's acquisition of Trustpower's retail book of customers.

84.2 As demonstrated by the rise of online electricity retailers, pricing fluctuations can be hedged and appropriately managed by the steps outlined above. Further, in response to higher wholesale spot electricity prices recently, the Electricity Authority said:[34]

> *We have seen people comment that New Zealand has one of the most expensive wholesale markets in the world. This statement is likely to be based on the current supply conditions and is not true over the long term.*
>
> *Generally, New Zealand is at about the middle of the OECD countries in terms of energy prices for industrial consumers. In addition, we have a well-developed forward market where purchasers can get forward contracts that insulate them against high spot prices. In our market these periods of high spot prices are expected at times because our renewable generation has limited storage and is due to the inevitability of dry seasons.*

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[33] In pre-filing correspondence with Mercury, the Commission asked for "the current profile of each gentailer, in terms of how much of their own generation they use and how much they have to buy". Mercury sets out a current estimate of that detail in **Schedule E**.

[34] Electricity Authority "Spot prices and the wholesale market review" available from https://www.ea.govt.nz/operations/wholesale/security-of-supply/spot-prices-and-the-wholesale-market-review/.

If large industrial consumers hedge on a short-term basis, they can be exposed to high prices when they purchase new hedges, or if they decide not to hedge and instead purchase electricity directly from the spot market. The reality is that prudent purchasers insulate themselves from spot prices using forward contracts. Last year, when contracts for 2021 were at times as low as $55, prudent purchasers bought heavily. This resulted in record levels of "open interest" on the futures market, and unusually large amounts of this is for 2022 and beyond. This is an example of parties seeing low prices and acting. That some purchasers chose not to hedge - despite there being a La Niña weather pattern and ongoing issues with Pohokura - is not an issue with the wholesale market.

84.3 Moreover, the Electricity Authority is currently working on hedge market developments to make hedging those risks even more efficient than they are today.

Responding to specific Commerce Commission queries on wholesale market

85 In pre-filing correspondence with Mercury, the Commission asked Mercury why the Commission should consider constraint from smaller retailers to be as meaningful as the constraint exerted by larger incumbents.[35] In asking that question, the Commission noted that MBIE's 2019 Electricity Pricing Review ("**EPR**") says at different parts of the report that:

85.1 "the wholesale contract market isn't working effectively, limiting the ability of independent generators and retailers to manage price risk and undermining confidence in the market";[36] and

85.2 "many independent retailers that have entered the sector face barriers to expanding their market share".[37]

86 Mercury acknowledges the thoughtful EPR report and has no comments on it for present purposes.[38] (That said, Mercury supported the conclusions in the report and

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35 Commerce Commission 21 July 2021 email.

36 EPR, p5.

37 EPR, p5.

38 Similarly, in response to the Commission's pre-filing request for comments on its 22 May 2009 report ("the Wolak report") into, principally, the electricity wholesale market, Mercury has no comment for present purposes. The Wolak report investigated market power in the wholesale electricity market over the period of January 2001 to July 2007. The present application relates to Mercury's 2021 acquisition of Trustpower's retail business only.

Mercury also records that many of the assumptions and conclusions reached by Professor Wolak were critiqued at the time and the report was largely discredited by independent analyses (For example, see: Hogan and Jackson (2010), "A Critique of Wolak's Evaluation of the NZ Electricity Market", NZAE 2010 Conference, available from https://www.nzae.org.nz/wp-content/uploads/2011/08/Jackson_and_Hogan__Critique_of_Wolaks_Evaluation_of_the_NZ_Electricity_Market.pdf).

has worked constructively with MBIE and the Electricity Authority to help them implement the report's priority recommendations).

87 Crucially, it bears emphasis, though, that the EPR did not find that independent retailers face barriers to expansion *because of the fact that* incumbent retailers, like Mercury and Trustpower, have large retail bases or have vertically-integrated wholesale electricity businesses.

88 To the contrary, the EPR report said:[39]

> *We do not favour the option of forcibly separating the generating and retailing activities of vertically integrated businesses. We consider the benefits of vertical integration outweigh the costs, even after the costs of promoting competition in a vertically integrated industry are included. Forced separation would also be disruptive, undermine investor confidence and stall or delay the huge amount of generation investment needed to move to a low-carbon economy. However, the benefits of allowing vertical integration should be shared more widely – hence our recommendation for mandatory market-making.*
>
> *[and]*
>
> *Some submitters proposed an additional step of operational separation, that is, requiring vertically integrated businesses' generation and retailing arms to interact at arm's-length through the contract market. We do not support this because we think other elements of our reform package will be sufficient to mitigate the competition-weakening effects of vertical integration.*

89 Rather, the EPR report identified areas in the electricity industry supply chain which it thought could be improved:

89.1 Under Section D – "reinforcing wholesale market competition" – the EPR found that the "wholesale contract market isn't working effectively, limiting the ability of independent generators and retailers to manage price risk and undermining confidence in the market". And, in response to that finding, the report recommended, amongst other things, the commercial market-making development explained above.

89.2 Separately, under Section C – "increasing retail competition" – the EPR found "many independent retailers that have entered the sector face barriers to expanding their market share" principally because consumers do not shop around as much as they potentially could. And, in response to that finding, the report recommended:

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[39] EPR, p41.

(a) that Electricity Authority and Consumer NZ merge their price comparison websites;

(b) improvements to customer awareness of Powerswitch and Utilities Disputes;

(c) development of a streamlined way to process customer requests for consumption data;

(d) that distributors offer retailers standard terms for network access;

(e) that "saves and win-backs" are prohibited; and

(f) establishment of a pilot scheme to help non-switching consumers find better deals.

90 Importantly, Mercury's acquisition of Trustpower's retail book does not affect the retail issues the EPR saw in the electricity industry in 2019. That is to say with or without Mercury's acquisition of Trustpower's retail book of customers, the EPR's perceived issues will remain or will be resolved over time. Indeed, resolution seems certain given, as set above, the Electricity Authority has addressed, or has taken steps to address, all of the EPR report's recommendations.

91 It follows that, post-acquisition, Mercury's larger book of retail electricity customers does not change the conditions in which other electricity retailers compete in New Zealand's retail electricity market.

92 Further, within that market, Mercury's retail pricing will continue to be constrained by:

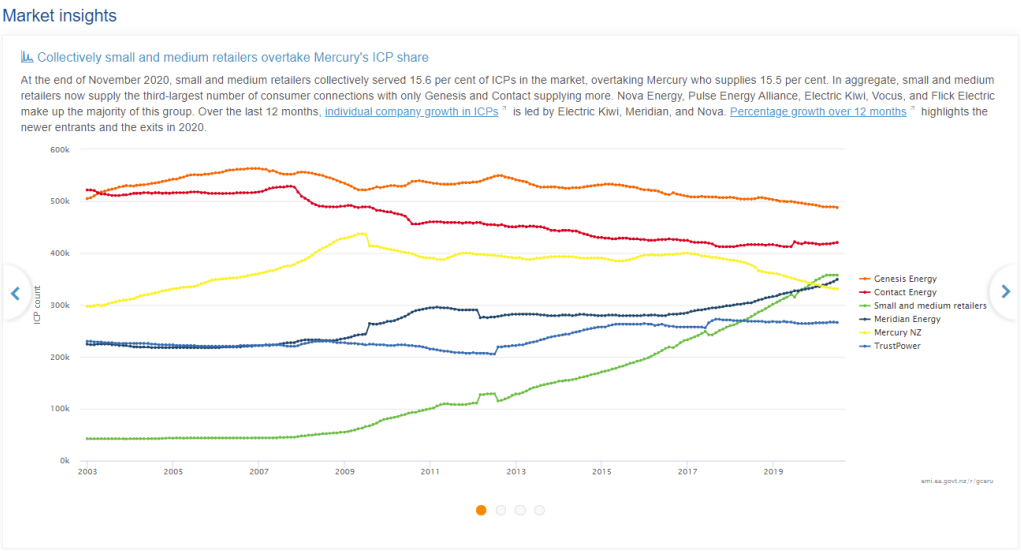
92.1 legacy generator-retailers like Genesis, Contact and Meridian;

92.2 smaller generator-retailers like Nova and Pulse;

92.3 "independent" retailers like Electric Kiwi, Vocus and Flick Electric; and

92.4 the threat of new entry and expansion by the likes of Octopus Energy.

93 Consistent with that submission, the following "market insight" taken from the Electricity Authority's website on 23 July 2021 demonstrates that small and medium retailers can expand in the retail market if they hedge their financial risk and get customers to switch. As the Electricity Authority records "small and medium retailers now supply the third-largest number of consumer connections with only Genesis and Contact supplying more" and "over the last 12 months, individual company growth [i.e., expansion] in ICPs is led by Electric Kiwi, Meridian and Nova".



94 That Electricity Authority insight, and the other data presented in this application, demonstrates that independent retailers can: (a) hedge the financial (and other risks) inherent in conducting business in the retail electricity market; and (b) attract consumers to switch from their existing electricity retailer. Once independent retailers achieve those two steps, as they plainly can, these retailers provide just as much competitive constraint as other vertically integrated retailers. That reality is, of course, because all electricity retailers are retailing the same electricity purchased from the same wholesale electricity spot market.

95 So, against that evidence, there is no reason to treat smaller retailers differently to larger retailers in the competition analysis required by this application.

96 We turn now to profile the electricity retailers in New Zealand.

Electricity retailers in New Zealand

97 There are 10 electricity retailers across New Zealand with over 25,000 mass market customers (residential and SME ICPs),[40] and a tail of 20 smaller electricity retailers. The largest retailers of that smaller tail are Ecotricity with 9,200 customers, followed by Ourpower (2,724).

Top 10 large national retailers

98 In this section we profile each of the country's 10 largest mass market electricity retailers:[41]

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40 Electricity Authority data: "market share snapshot", at 31 May 2021. Customer numbers on Residential + SME ICP connections.

41 Electricity Authority data: "market share snapshot", at 31 May 2021. Customer numbers on Residential + SME ICP connections.

	Parent company (including all intercompany brands)	Mass market customers (by ICP)	Share
1	Genesis	478,835	22.2%
2	Contact	415,658	19.3%
3	Mercury	326,748	15.2%
4	Meridian	324,414	15.1%
5	Trustpower	253,950	11.8%
6	Nova	112,055	5.2%
7	Pulse	84,104	3.9%
8	Electric Kiwi	77,969	3.6%
9	Vocus	38,903	1.8%
10	Flick Electric	26,328	1.2%

99 All ten of these large rivals compete for all mass market customers in all areas across New Zealand:[42]

Genesis

100 Genesis Energy is an NZX-listed company owned 51% by the Crown.

101 Genesis has ~1,640 MW of electricity generation capacity across New Zealand.[43]

102 Genesis sells retail electricity across the country through its Genesis Energy and Energy Online retail brands. Genesis' head office is in Auckland.

103 At 31 May 2021, Genesis had a 22% share of the New Zealand retail electricity market (by residential and SME ICP connections).[44]

Contact

104 Contact is a privately owned company listed on the NZX.

105 Contact has over 1,700 MW of electricity generation capacity across New Zealand.[45]

106 Contact sells retail electricity across the country through its Contact brand. Contact's head office is in Wellington.

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42 Electricity Authority data: "market share snapshot", at 31 May 2021. Customer numbers on Residential + SME ICP connections.

43 https://www.genesisenergy.co.nz/assets.

44 Electricity Authority data.

45 https://contact.co.nz/aboutus/our-story/our-powerstations

107 At 31 May 2021, Contact had a 19% share of the New Zealand retail electricity market (by residential and SME ICP connections).[46]

Mercury

108 As set out above, Mercury is an NZX-listed company owned 51% by the Crown.

109 Mercury has ~1,416 MW of electricity generation capacity across New Zealand.[47]

110 Mercury sells retail electricity across the country through its Mercury and Globug brands. Mercury's head office is in Auckland.

111 At 31 May 2021, Mercury had a 15% share of the New Zealand retail electricity market (by residential and SME ICP connections).

Meridian

112 Meridian is an NZX-listed company owned 51% by the Crown.

113 Meridian has over 2,700 MW of electricity generation capacity across New Zealand.[48]

114 Meridian also has electricity generation assets in Australia.

115 Meridian retails electricity in New Zealand through its Meridian and Powershop brands. Meridian's head office is in Wellington.

116 At 31 May 2021, Meridian had a 15% share of the New Zealand retail electricity market (by residential and SME ICP connections).[49]

Trustpower

117 Trustpower is a NZX-listed company.

118 Trustpower has ~498 MW of electricity generation capacity across New Zealand.

119 Trustpower sells retail electricity through its Trustpower brand. Trustpower's head office is in Tauranga. Trustpower also has a contact centre in Oamaru.

120 At 31 May 2021, Trustpower had a ~11.8% share of the New Zealand retail electricity market (by residential and SME ICP connections).[50]

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46 Electricity Authority data.

47 The Mokai Geothermal station, in which Mercury has a 25 per cent share, is excluded from this total.

48 https://www.meridianenergy.co.nz/who-we-are/our-power-stations.

49 Electricity Authority data.

50 Mercury notes that Trustpower has a comparatively higher share in regions that its business (or businesses it has acquired) originally grew from than elsewhere. As set out above, it is not uncommon for a retailer that began in a particular region (e.g., Trustpower in Tauranga, or Mercury in Auckland) to have a comparatively higher share in that area due to their historical starting

Nova

121 Nova Energy is a New Zealand gas and electricity company owned by the Todd Corporation, including Todd Energy.

122 Todd Energy has over 200MW of electricity generation capacity across the North Island.[51]

123 Todd Energy sells retail electricity through its Nova Energy and its recently-acquired Megatel brands. Todd Energy – and Nova – are based in Wellington.

124 At 31 May 2021, Nova had a 5.2% share of the New Zealand retail electricity market (by residential and SME ICP connections).

Pulse

125 Pulse Energy Alliance is a community owned energy retailer, providing electricity, gas and solar to customers throughout New Zealand.

126 Pulse is owned by Buller Electricity (Buller), Pioneer Energy (Alexandra) and Electra Energy (Levin). Pulse's head office is in Auckland where the company has its most retail customers (15,600 ICP connections).

127 Buller Electricity and Electra Energy are local lines companies. Whereas Pioneer Energy has electricity generation capacity across, mostly, Otago and Southland.[52]

128 Pulse sells retail electricity through the *Pulse* brand across the country.

129 Through high-profile strategic advertising partnerships, including being linked to New Zealand rugby competitions, Pulse has increased its customer base in recent years:

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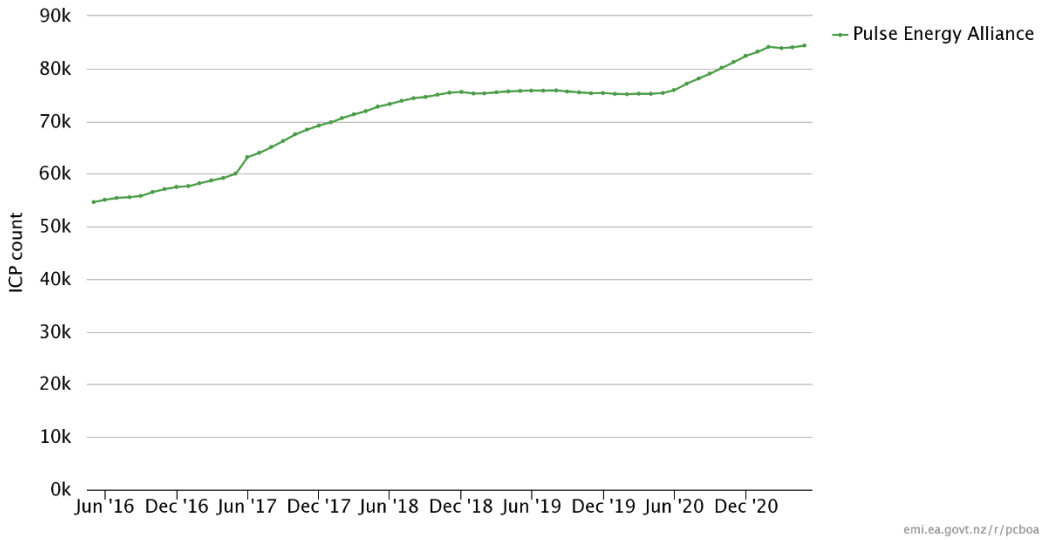
position. But, in keeping with there now being a national electricity market, those historical starting positions are being competed away by customers switching to other national retailers. The Commission will also be aware that the Tauranga Energy Consumer Trust (TECT) has paid the TECT distribution to Trustpower customers (being the Trust's beneficiaries) in the Tauranga area. The Trust will continue to pay the TECT distribution to those existing beneficiaries with and without the transaction under the Trust's revised structure: https://www.tect.org.nz/rebate-payment-options/. To do so, the Trust is amending the distribution structure so that the distribution payment is limited to a person that is currently a Trustpower customer and if that person switches to another electricity retailer then they will no longer be a Trust beneficiary and will not receive the distribution. So, to be clear, post-transaction Mercury would not acquire or have any control over the Trust, although the TECT distribution will be paid to the Trust's beneficiaries (as defined above), namely existing Trustpower customers (who would become Mercury customers should the proposed acquisition proceed). The TECT distribution would not, though, be paid to existing Mercury customers or any new customers that switch to MergeCo after the proposed transaction.

51 https://toddcorporation.com/our-businesses-and-investments/todd-generation/

52 https://pioneerenergy.co.nz/asset-map/



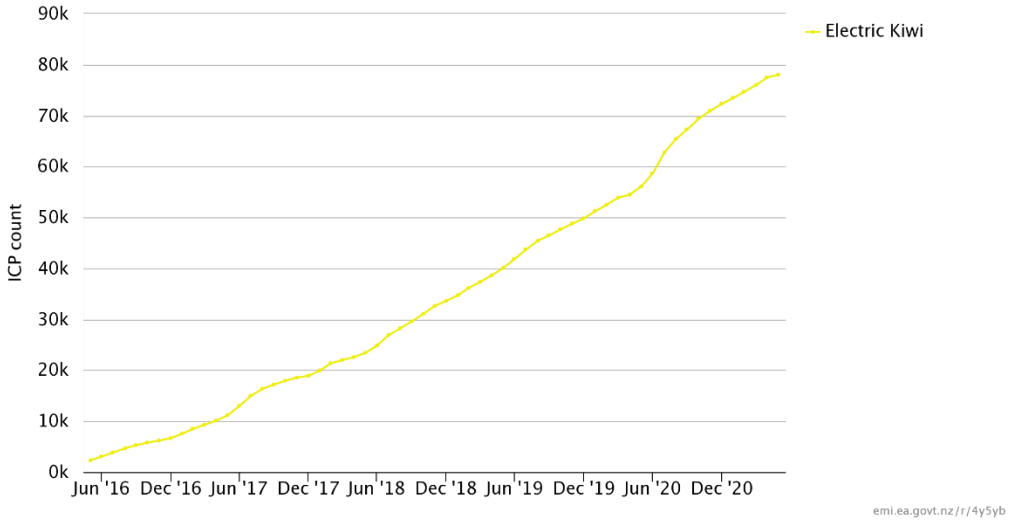
130 At 31 May 2021, Pulse had a 3.9% share of the New Zealand retail electricity market (by residential and SME ICP connections).

Electric Kiwi

131 Launched in December 2014, Electric Kiwi is an Auckland-based specialist online-only electricity retailer.

132 Electric Kiwi operates on a no contract basis and uses smart meters to offer deals like "the Hour of Power" – a promotion where customers get one free hour of off-peak power each day.

133 Electric Kiwi's ICP count has grown steadily since launch:



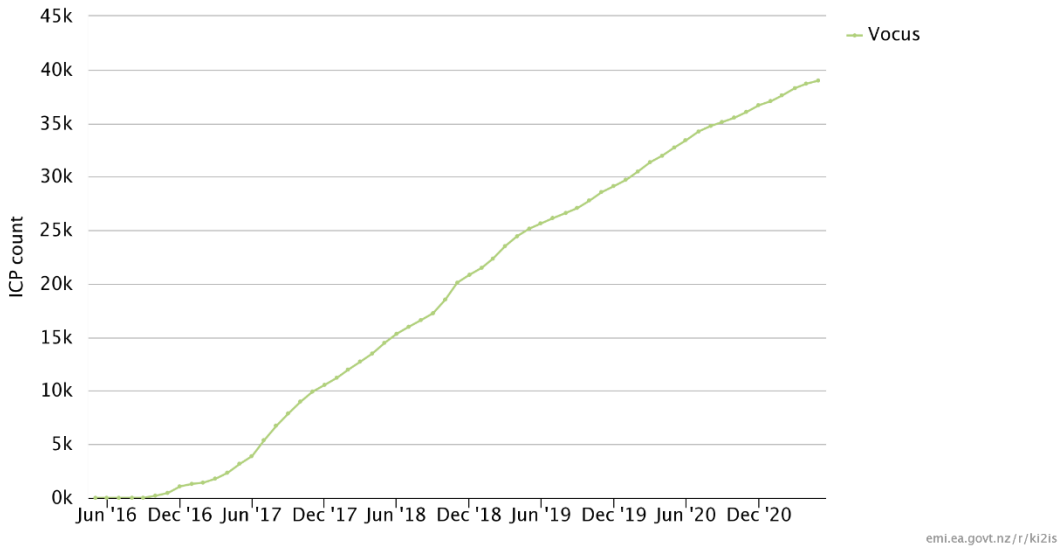
134 At 31 May 2021, Electric Kiwi had a 3.6% share of the New Zealand retail electricity market (by residential and SME ICP connections).

Vocus

135 Vocus is a New Zealand telecommunications company and electricity retailer (through its Slingshot brand).

136 Like Electric Kiwi, Vocus' role in the electricity market is limited to retailing electricity. Vocus has no electricity generation or distribution assets.

137 And, like Electric Kiwi, Vocus' ICP count has increased steadily across the country in recent years:



138 At 31 May 2021, Vocus had a 1.8% share of the New Zealand retail electricity market (by residential and SME ICP connections).

Flick Electric

139 Flick Electric is a specialist only electricity retailer, owned 70% by Z Energy Limited. Z acquired that shareholding in August 2018.[53]

140 Flick's business model is based on offering customers wholesale electricity spot prices through the half-hourly price signals offered on Flick's platform.

141 In March 2021, Z and Flick launched *Z Electric* – a new electricity retailing brand that bundles power with fuel rewards.[54]

142 At 31 May 2021, Flick had a 1.2% share of the New Zealand retail electricity market (by residential and SME ICP count).

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53 https://z.co.nz/about-z/news/general-news/flick-electric-and-z-energy-announce-partnership/.

54 https://zelectric.z.co.nz/.

COMPETITION ANALYSIS (ELECTRICITY MARKET)

143 The proposed acquisition will result in the loss of competition between Mercury and Trustpower in selling retail electricity contracts to residential and SME (mass market) customers.

144 This section explains why Mercury's acquisition of Trustpower's book of retail electricity customers will not substantially lessen competition in any market by:

144.1 defining the relevant **market**;

144.2 explaining why the acquisition will not substantially lessen competition in any electricity market due to **unilateral** effects because of the:

(a) extent of competition from existing market electricity retailers (including the threat of expansion (i.e., winning Mercury's customers post-acquisition)), such as:

(i) Genesis;

(ii) Contact;

(iii) Meridian;

(iv) Nova;

(v) Vocus;

(vi) Pulse;

(vii) Electric Kiwi; and

(viii) others set out in **Schedule D**.

(b) threat of entry by new retail electricity brands emerging, including the likes of Octopus Energy which has recently announced its plans to enter the New Zealand retail electricity market later this year.

144.3 explaining why the acquisition will not substantially lessen competition in any electricity market due to **coordinated** effects because Mercury's acquisition of Trustpower will not make it easier for the combined Mercury and Trustpower retail entity ("***MergeCo***") and its competitors to:

(a) reach agreement on price and/or quality of New Zealand retail electricity prices; and

(b) sustain any such hypothetical agreement by:

(i) detecting deviations from that agreement; and/or

(ii) punishing any deviations from that agreement.

144.4 explaining why the acquisition will not substantially lessen competition in any electricity market due to **conglomerate/bundling** effects because Mercury's acquisition will not give it the ability to offer any new or different utility bundle that is not already available in market.

Market definition

145 Mercury considers that this proposed acquisition is best assessed against a national retail electricity market for mass market customers, consisting of residential and SME customers.

146 The basis for that view is:

146.1 The vast majority of electricity consumed by retail and SME customers comes from the same source: the wholesale electricity market consisting of electricity that is generated and supplied to the national grid by the country's main electricity generators (Contact, Genesis, Mercury, Meridian, Trustpower and Todd Energy).

146.2 All electricity retailers can serve all customers across the country by entering into distribution agreements with each area's respective lines and metering companies. Further, the Electricity Authority's FTR market and the ASX futures market allows all electricity retailers to manage any potential exposure to wholesale electricity price differences in different parts of the country.

146.3 There is no material difference between residential and SME customers such that it would be appropriate, as a matter of fact and commercial common sense, to define separate customer markets on that basis.

147 Mercury notes, though, that its views would not change if the Commission defined narrower geographic and/or customer markets. As the High Court recently observed: "numerous judicial decisions have emphasised that market definitions are but a tool used in various competition law contexts to provide a framework for analysis of the relevant competition law concern".[55]

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[55] *NZME Limited v Fairfax Media Limited* [2017] NZHC 3186.

148 No matter how markets are defined, Mercury will continue to face significant competitive constraints post-transaction from other electricity retailers that, combined, hold 73.1% of all mass market ICPs in New Zealand, including:

148.1 Genesis (22.2%);

148.2 Contact (19.29%);

148.3 Meridian (15.1%);

148.4 Nova (5.2%);

148.5 Pulse (3.9%);

148.6 Electric Kiwi (3.6%); and

148.7 Vocus (1.8%).

149 **Schedule D** includes a full list of New Zealand electricity retailers at 31 May 2021.

150 We expand on the market's product, functional, geographic, and customer dimensions below.

Product dimension

151 Mercury considers the relevant product market to be that for electricity.

Functional dimension

152 Mercury considers the relevant functional market to be electricity retailing (which is typically the resale of electricity purchased in the wholesale electricity market).

153 That view is consistent with the Commission's Decision 476 which held:[56]

> *The Commission has previously defined an electricity product market with functional markets for wholesale electricity supply, transmission, distribution and retailing. The Commission sees no reason to question those functional distinctions in this acquisition.*

Geographic dimension

154 As set out in the Industry Background section, there are no barriers to electricity retailers operating across New Zealand.

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[56] *Decision 476*, at [62].

155 To compete in different regions, electricity retailers just need to enter into a standardised distribution agreement with each area's lines company and electricity metering service agreements with local metering companies.

156 The vast majority of electricity is sourced from New Zealand's wholesale electricity market and pricing differences can be managed by buying and selling Electricity Authority FTRs and the ASX futures market.

157 Indeed, all of New Zealand's top 10 electricity retailers operate across the entire country:[57]

	Market position (Residential + SME) at 31 May 2021									
Regional Council	**GEN**	**CEN**	**MCY**	**MEL**	**TPW**	**Nov**	**Puls**	**El.K**	**Voc**	**Flic**
New Zealand	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**9**	**10**
Northland	2	1	4	3	5	7	6	8	9	11[58]
Auckland	3	2	1	4	5	6	8	7	9	10
Waikato	1	3	4	5	2	6	7	8	9	11[59]
Bay of Plenty	2	6	4	5	1	3	7	8	9	10
Gisborne	2	1	7	6	5	3	4	10	9	8
Hawke's Bay	1	2	5	3	4	7	6	8	9	10
Taranaki	1	6	4	3	5	2	7	9	8	10
Manawatu	1	2	5	3	4	6	7	8	9	10
Wellington	1	2	4	3	5	6	9	7	10	8
Tasman	5	1	6	2	3	8	4	7	10	11[60]
Nelson	5	1	6	3	2	8	4	7	9	11[61]
Marlborough	5	3	6	5	1	7	4	8	9	11[62]
West Coast	5	2	6	3	1	7	4	9	8	11[63]
Canterbury	3	2	5	1	4	8	7	6	10	9
Otago	4	1	6	2	3	8	5	7	9	10
Southland	4	1	5	2	3	7	6	9	8	11[64]

[57] Electricity Authority data: "market share snapshot", at 31 May 2021. Customer numbers on Residential + SME ICP connections. See **Schedule C** for base data.

[58] Ecotricity is #10 in Northland regional council.

[59] Ourpower is #10 in Waikato regional council.

[60] Ecotricity is #9 in Tasman regional council

[61] Ecotricity is #10 in Nelson regional council

[62] Ecotricity is #10 in Marlborough regional council

[63] Ecotricity is #10 in West Coast regional council

[64] Ecotricity is #10 in Southland regional council

158 As set out earlier, the continued convergence of market shares in all regions across New Zealand demonstrates too that the market is national.

159 It follows that if a hypothetical monopolist in any town, city or region of New Zealand sought to implement a SSNIP, that attempted price increase would be very quickly met by retailers from anywhere else in the country expanding into the hypothetical monopolists' area.

160 That view is consistent with:

160.1 the Commerce Commission's 1998 Decision 333 which held:[65]

> *The Commission has considered the changes which have occurred, and are continuing to occur, in respect of electricity retailing, and their implications for defining the relevant markets. The Commission is satisfied that there is clear evidence of electricity suppliers being able to switch supplies between different categories of consumers, including small consumers, depending on market opportunities. Suppliers do not appear constrained to supplying limited geographical areas or to supplying to consumers on particular networks only. Small consumers now have, or will have in the near future, a choice of suppliers. This situation increasingly matches that of larger consumers. Therefore, the Commission concludes that it is no longer appropriate to define discrete markets for the supply of delivered electricity to small consumers and to medium and large consumers.*
>
> *Accordingly, in assessing the Application, the Commission concludes that the relevant market in respect of electricity retailing is the national electricity retail market. (supra, para [41])*

160.2 the Commerce Commission's 2002 Decision 476 which held:[66]

> *"as there are a number of competing electricity retailers in the areas in which [Energy Online] retails electricity, for the purposes of this application, the Commission considers that the appropriate geographic market is national.*

160.3 the High Court's 2007 finding in *Bay of Plenty Electricity Limited v Commerce Commission* that the Commission failed to establish that there was a local Eastern Bay of Plenty electricity market.[67]

161 Moreover, since those decisions, a range of other policy, technology and infrastructure developments have further removed any geographic barrier to

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65 Decision 333.

66 Decision 476, at [60].

67 *Commerce Commission v Bay of Plenty Electricity Limited* [2008] BCL 219, at [551].

electricity retailers competing for customers. And that trend will only continue as the Electricity Authority, policymakers and industry participants continue to develop new and innovative ideas and solutions, like the Electricity Authority's current hedge market development.

Responding to specific Commerce Commission queries on geographic dimension

162 In pre-filing discussions with Mercury, the Commerce Commission said that "it appears to us that the competitive conditions and the barriers to entry/expansion are different in different regions and we would like Mercury to submit more on this".[68] In apparent support of that view, the Commission gave two examples:

162.1 "Tauranga has been a region highlighted to us in the past"; and

162.2 "the NZCC Electricity Investigation report – 22 May 2009 noted that transmission constraints can impact on pricing and we are keen to understand Mercury's current position on the impact of any transmission constraints".

163 In response to the Commission's pre-filing request, Mercury observes:

163.1 First, Mercury is not aware of any region where the competitive conditions and/or the barriers to entry/expansion are materially different such that it would be appropriate to define separate competition law markets using the established SSNIP test. In support of that view, Mercury re-submits the evidence outlined above, which is itself supported by previous decisions of the Commerce Commission and High Court decisions. Mercury also encloses the Sapere report which provides economic evidence for this position.[69]

163.2 Second, Mercury emphasises that merger analysis under the Commerce Act 1986 is a comparative exercise: will the acquisition at hand substantially *lessen* (i.e., negatively change) the level of competition in a market. On that front, for the reasons given in this application, Mercury records that its acquisition of Trustpower's retail book of customers will not substantially lessen competition.

Further, specifically addressing the Commission's two examples:

(a) On Tauranga, Mercury understands that the Commission is referring to the TECT dividend summarised at footnote [50].[70] Mercury has no comment on whether that dividend changes competitive conditions in

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[68] Commerce Commission 21 July 2021 email.

[69] Sapere Report, at [114]-[134].

[70] Mercury notes the EPR report, p40.

Tauranga. What is relevant for this application is whether Mercury's acquisition of Trustpower's retail book, including inevitably some customers in the Bay of Plenty, substantially *lessens* competition in the relevant affected market(s) using the comparative exercise outlined above. On that front, Mercury records that:

(i) any competitive effect of the TECT dividend will exist with or without this transaction;

(ii) like the rest of New Zealand, post-acquisition, consumers in Tauranga will continue to have access to competitive electricity retailing options offered by Genesis, Contact, Meridian, Nova, Electric Kiwi and so on; and

(iii) Mercury is in no better position to compete with Trustpower in Tauranga than those other competitors – such that the loss of competition between Mercury and Trustpower would substantially lessen competition in that area – and to support that view Mercury:

(A) refers to the Sapere report provided with this application;[71] and

(B) observes that, as at June 2021, Mercury had fewer mass market customers in Tauranga (4,462 ICPs) than Genesis (7,977) and Meridian (4,732) and only marginally more than Contact (3,319) and Electric Kiwi (2,499).[72]

(b) On transmission constraints, Mercury, of course, acknowledges that there are electricity losses as electricity travels across transmission infrastructure. Indeed, the Electricity Authority's FTR rights are used to manage differences in locational pricing between the country's main nodes. But those transmission losses are an unpredictable feature of the market undisturbed by this transaction. There are no areas in New Zealand where Trustpower and Mercury are each other's closest competitors because they face less transmission constraints than the national market's other competitors with that fact supported by:

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[71] Sapere Report, at [130]-[136].

[72] Electricity Authority data, market share snapshot. Residential and SME ICPs at June 2021.

(i) the Sapere report;[73]

(ii) Transpower's significant investment in transmission grid capacity over the last decade or so;

(iii) the Electricity Authority's FTR market; and

(iv) the fact that there are no regions or areas of New Zealand where Mercury and Trustpower are the area's two leading retailers (see table above).

164 As set out in the Industry Background section of this application, the electricity industry was, at one time, controlled by regional statutory monopolies that controlled each region's transmission infrastructure. By 2021, though, those historical region-by-region infrastructure constraints have been removed and customers across the country are now observably contestable by electricity retailers across New Zealand.

165 To that end, as discussed above, Mercury cautions the Commission against drawing inferences of "competitive conditions" from static regional share data that still reflects, to a degree, the bygone ESA monopolies. Rather the trend is clear: all New Zealand regions are seeing dynamic and vigorous competition between a range of New Zealand-wide electricity retailers, reflecting the reality that retail competition occurs on a national basis.

166 It follows that even if the Commission were minded to define separate regional, town-by-town or other more narrowly-defined geographic markets, then the competition analysis would not change. As set out above, Mercury faces the same competitive constraints across the country. **Schedule C** sets out, for the Commission's reference, the regional ICP shares as they stood in May 2021.

Customer dimension

167 The proposed acquisition only relates to mass market electricity customers: residential and SME customers.[74] Trustpower will continue to compete independently of Mercury for commercial & industrial customers.

168 The Electricity Authority defines residential, SME and commercial & industrial customers in the following way:[75]

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[73] Sapere Report, at [114]-[134].

[74] Subject to footnote 1.

[75] https://www.emi.ea.govt.nz/Retail/Reports/R_MSS_C?_si=v|3

168.1 Residential: "Residential connections have no ANZSIC[76] [Australian and New Zealand Standard Industrial classification] code".

168.2 SME: "Small and Medium Enterprise (SME) connections are defined as those assigned meter categories 1 and 2 (low voltage up to 500A) with an ANZSIC code excluding those relating to central or local government and other utility services".

168.3 Commercial & Industrial: "Industrial connections have ANZSIC codes from A through E while commercial connections use ANZSIC codes F through Z".

169 Practically speaking, the main difference between residential, SME and commercial & industrial customers is the amount of electricity they each use. Residential and SME ("mass market") customers use a relatively small amount of electricity and, so, are always serviced by retailers from the wholesale electricity spot market using a local lines company's distribution assets. By comparison, commercial & industrial customers typically use much more electricity. The Tiwai smelter is the extreme example. Many of these commercial & industrial customers are sold electricity directly from the grid, bypassing lines companies.

170 Along the same lines as those Electricity Authority definitions, as defined in the SPA, Trustpower's commercial & industrial customers not subject to the transaction are those []:

170.1 []; or

170.2 [].

171 That definition captures commercial & industrial customers [].

172 As set out at the beginning of this application, Mercury is not acquiring Trustpower's commercial & industrial electricity customers (as defined in the SPA).[77] Mercury and Trustpower will continue to compete for commercial & industrial customers.

173 On mass market (residential and SME) customers, that are subject to this proposed acquisition, Mercury is not aware of any mass market customer having materially different competitive options such that it is appropriate to define separate residential and SME customer markets.

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[76] More information on ANZSIC codes is available at www.stats.govt.nz.

[77] Subject to footnote 1.

174 Indeed, the following table shows that the top electricity retailers throughout the country service both residential and SME customers.[78]

May 2021	**Residential (ICP count)**	**%**	**SME (ICP count)**	**%**
Genesis	428,330	22.8%	50,505	18.4%
Contact	363,596	19.3%	52,062	18.9%
Mercury	299,300	15.9%	27,448	10.0%
Meridian	232,768	12.4%	91,646	33.3%
Trustpower	232,117	12.3%	21,833	7.9%
Nova	91,345	4.9%	20,710	7.5%
Pulse	80,709	4.3%	3,395	1.2%
Electric Kiwi	76,674	4.1%	1,295	0.5%
Vocus	36,267	1.9%	2,636	1.0%
Flick	25,674	1.4%	654	0.2%
Ecotricity	7,827	0.4%	1,376	0.5%
Others	5,476	0.3%	1,568	0.6%

175 And, for completeness, each of those electricity retailers service both residential and SME customers in all areas of New Zealand (see **Schedule C**).

Competition analysis: unilateral effects

176 Mercury is confident that the proposed acquisition does not give rise to, nor would be likely to give rise to, a substantial lessening of competition in the national retail electricity market. (Or any more narrowly defined market).

177 Mercury says that because:

177.1 MergeCo will continue to face **strong existing competition** from dozens of retail electricity providers including Genesis, Contact, Meridian, Nova, Pulse, Vocus and specialist online-only retailers like Electric Kiwi;

177.2 That significant competition from a range of electricity retailers is expected to **increase** as the Electricity Authority and other policymakers continue to roll out initiatives to facilitate competition in the retail electricity market, including, for instance, the hedge market developments we describe earlier; and

[78] Electricity Authority data: "market share snapshot", at 31 May 2021.

177.3 at all times, MergeCo would be constrained by the **threat of entry/expansion** by new competitors, like Z Energy and Octopus Energy, given the low barriers to entering the market. (With any barriers, as per the point above, expected to get lower and lower through ever-developing regulatory policies).

178 We expand below.

Existing competition

179 Standing back, this acquisition only involves Mercury acquiring Trustpower's book of existing mass market customer contracts, which comprise just ~11.8% of all ICP mass market connections in New Zealand. Post-acquisition, Mercury would have just ~26.9% of all New Zealand's mass market ICPs.

180 That marginal increase in scale will not give Mercury any greater influence or power over its competitors such that it could increase prices at all.

181 If Mercury attempted (hypothetically) to increase prices or lower service quality, customers would swiftly switch to alternative retail electricity services offered by:

181.1 Genesis;

181.2 Contact;

181.3 Meridian;

181.4 Nova;

181.5 Pulse;

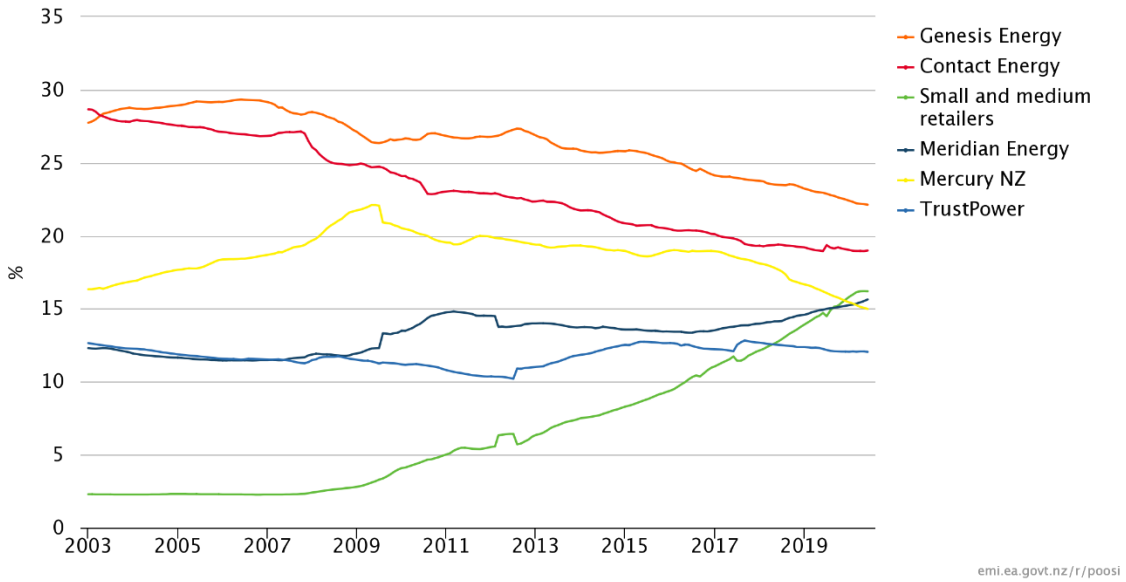
181.6 Electric Kiwi;

181.7 Flick; and

181.8 the other ~20 electricity retailers listed in **Schedule D**.

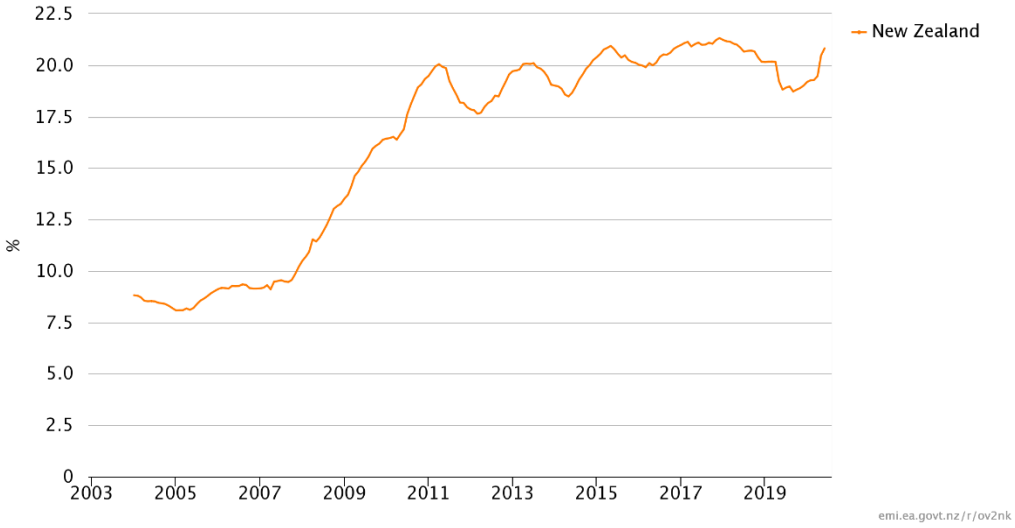
182 The transaction can be considered, at its narrowest, as a "10→9" for competition for mass market electricity customers across New Zealand (if the Commission were to look only at the country's top 10 large electricity retailers, profiled above).

183 The extent of competition in the national retail market is seen in the ever-converging market shares and rise of smaller independent electricity retailers:



184 Those increased customer choices have been met with record levels of customer switching as mass market customers explore the different retail electricity options available to them.

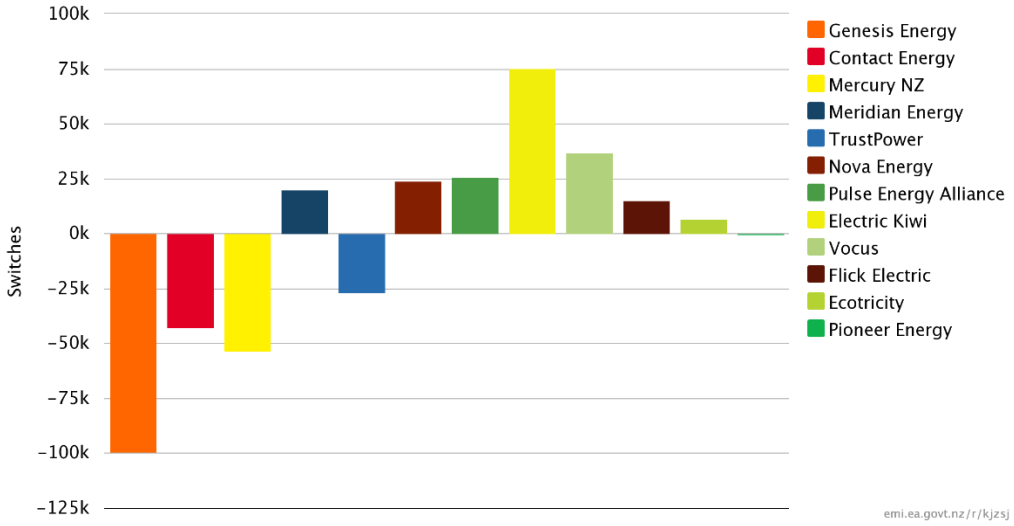
185 The following figure shows that the rolling 12-month switching rate sits at around 20%. And, putting aside the Covid-related dip in 2020, the annual switching rates are trending upwards.



186 Indeed, Mercury has experienced first-hand the significant extent of competition in the national retail electricity market.

187 Over the last five years Mercury has had 65,800 more customers switch away from its retail business than it's won back in return. The majority of those customers are being lost to newer electricity retailers that have entered or expanded in the market to add customer choice over top of the industry's more-established electricity retailers, like Genesis, Contact, Meridian, Mercury and Trustpower.

188 The figure below shows "net switches" over the last five years for residential ICPs (1 June 2016 – 31 May 2021). (To assist reading this graph, which was pulled directly from the Electricity Authority's website: Mercury is the lighter yellow on the left; Electric Kiwi is the slightly darker yellow on the right).



189 The view that there are a range of competitive options in the national retail electricity market has was shared by MBIE in its 2019 Electricity Pricing Review. That review concluded:[79]

> *Retail competition has grown in recent times. A lot of it has been in new products, plans and services, although there have also been better prices for those who shop around.*

190 The recommendations in the EPR report were aimed at promoting that range of competitive options to consumers.

191 Since that report was released, the Electricity Authority has completed five of the report's six recommendations for the retail electricity market, with the last initiative scheduled to start in mid-2021.[80] See table below.

EPR recommendation (retail market)	**EA status**	**Comment**
Merge EA and Consumer NZ price	Complete	The two websites were merged in December 2019.

[79] MBIE Electricity Price Review: Final Report, p31.

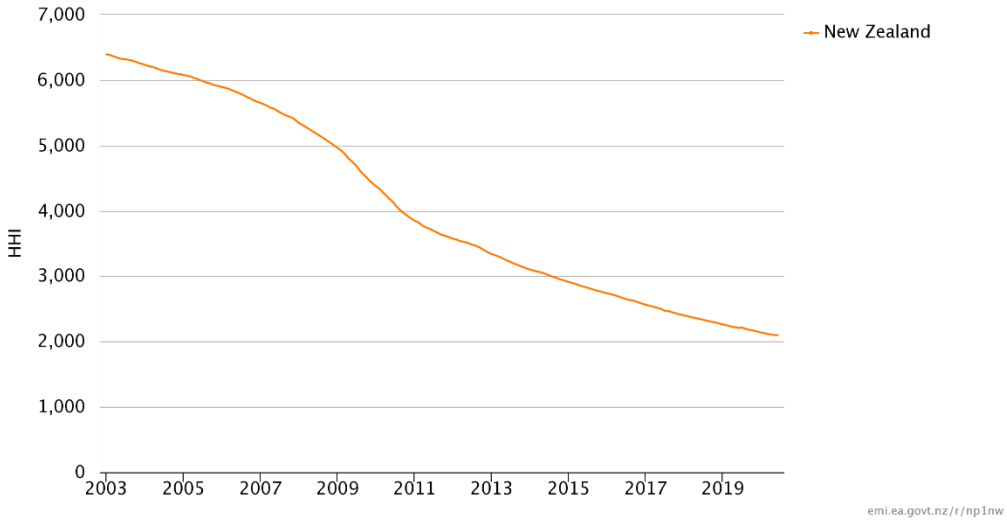
[80] A Electricity Authority update at December 2020 can be found here too: https://www.ea.govt.nz/consumers/the-electricity-price-review-epr/

comparison websites		
Improve consumer awareness of Powerswitch and Utilities Disputes	Complete	On April 2021, clause 11.30A to 11.30E was added to the Electricity Authority Participation Code 2010 which requires electricity retailers to *inter alia* provide information on Powerswitch (being a "electricity plan comparison site") and Utilities Disputes (being a "dispute resolution scheme").
Develop streamlined way to process customer requests for consumption data	Complete	On 1 March 2020, the Authority amended the Code to implement a series of initiatives making it easier for consumers to share their electricity consumption data with businesses and organisations they trust.
Make distributors offer retailers standard default terms for network access	Complete	The Authority amended the Code on 20 July 2020 to require all distributors to develop and publish a Default Distributor Agreement (DDA), with the first agreements being in place December 2020. In the Electricity Authority's words "[the] amendment provides a more level-playing field for traders entering and trading on a distributor's network, which may lead to more choice of electricity services for consumers".
Prohibit saves and win-backs	Complete	The Authority amended the Code to prohibit saves and win-backs for 180 days after a consumer switches. In the Electricity Authority's words: "the amendment supports consumer choice and promotes retail competition, which is intended to place downward pressure on retail electricity prices". The EPR says: "win-backs are arguably one of the bigger barriers independent retailers face in expanding their market share, and we recommend they are banned".
Establish a pilot scheme to help non-switching consumers find better deals	Scheduled	The Electricity Authority says: "planning for this project is continuing with an anticipated start in early 2021".

192 The Electricity Authority's 13 September 2018 "six monthly power market review" demonstrates, too, for instance, that the retail electricity market is increasingly competitive:[81]

> *Our six-monthly health check of the market shows consumers are benefitting from a market that is open to new power companies or brands. Our analysts look particularly at the structure, conduct and performance of the market, using a range of measures.*
>
> *[…]*
>
> *A key measure of market structure is the Herfindahl-Hirschman Index (or HHI), which is based on retailers' share of consumer accounts. A reducing number indicates more companies taking market share, which improves the competitive environment for all consumers. The HHI for the New Zealand residential retail electricity market has continued a significant downward trend during the first half of 2018. It has been going downward since at least 2008, and in a decade it more than halved, from 5509 on 30 June 2008 to 2463 on 30 June 2017.*

193 Indeed, that same HHI index figure has declined further since that Electricity Authority "health check". As the following graph showing the national electricity market's HHI index to May 2021 demonstrates:



194 That HHI indicator is consistent with this proposed merger being within the Commerce Commission's *Merger and Acquisition Guidelines'* concentration indicators (which the Commission formerly called "safe harbours").

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81 https://www.ea.govt.nz/about-us/media-and-publications/market-commentary/market-insights/six-monthly-power-market-review/

195 Those Guidelines say:[82]

> *As an initial guide, a merger is unlikely to require a clearance application if … post-merger the three largest firms in the market have a combined market share of less than 70%, and the combined market share of the merging firms is less than 40%*

196 Here, MergeCo (Mercury + Trustpower) would have a ~27% share of the New Zealand retail electricity market. And the three largest firms in the market, post-merger, would have a combined market share of ~68% (comprising: MergeCo (~27%) + Genesis (~22%) + Contact (~19%)). That is to say that this proposed acquisition falls inside of the Commission's own concentration indicators.

197 Those various indicators support this application's submission that, post-transaction, Mercury would face significant competition in the national retail electricity market from many competitors, including:

197.1 Genesis;

197.2 Contact;

197.3 Meridian;

197.4 Nova;

197.5 Pulse;

197.6 Electric Kiwi;

197.7 Vocus; and

197.8 many others, like Z Electric.

198 The tens of thousands of customers that each of those competitors has across the country demonstrates that each of those firms individually and collectively will act as a significant market constraint on the merged entity.

199 As a result, Mercury submits that the Commission can be satisfied that this proposed acquisition will not substantially lessen competition in the national electricity market due to horizontal (unilateral) effects. Mercury will continue to face significant

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[82] *Merger and Acquisition Guidelines,* at p61.

competition from an array of competitors that, today, collectively hold over 70% of all mass market retail electricity contracts.

The threat of new entry

200 Mercury's position is that existing competition will constrain the merged entity to prevent a substantial lessening of competition.

201 That said, we record that – in addition to existing competition – Mercury will also be constrained by the very real threat of new retail electricity companies quickly, easily and affordably entering the market.

202 As set out in the industry background section, there are no structural barriers to new retail electricity providers entering the market. A new entrant simply needs to enter into contractual relationships with:

202.1 the NZX to trade in the wholesale electricity market;

202.2 the ASX, the Electricity Authority and others to trade financial hedge products, like electricity futures and FTR rights;

202.3 lines companies and metering companies to access their local distribution assets; and

202.4 mass market customers.

203 The significant rise of small to medium electricity retailers in recent years demonstrates that there new entrants can meet those contractual steps to sell retail electricity across New Zealand.

204 Indeed, Z Energy's recent push into electricity – through its "Z Electric" brand – shows that new and diverse competitors can and will compete in the market.

205 And, as set out above, new technology, policy and regulations will only further facilitate competition from new and emerging market competitors.

206 For example, Octopus Energy – *"an electricity retailer with more than 1.5 million customers in the UK and a strategy to expand internationally"* – has recently announced its intention to enter the New Zealand electricity retailing market this year.[83] Octopus Energy has recruited former Powershop head to be its New Zealand Managing Director. Octopus uses its own proprietary, globally scaled, platform

[83] https://www.nzherald.co.nz/business/uk-electricity-upstart-hires-former-powershop-boss-for-new-zealand-launch/3DCHZ2OQKXNRJHSDGJNJBI3ZUQ/

called "Kraken" which allows it to drive "smart grid" solutions to improve efficiency and customer service.[84]

207 Well-resourced international electricity retailers, like Octopus, with proprietary technology platforms will be vigorous competitors in the New Zealand retail electricity market. Indeed, Octopus is said to be the UK's fastest growing energy supplier and has expanded into Australia, Japan, Texas and Germany in the past year.

Coordinated effects

208 The proposed transaction will not, and will not be likely to, increase the potential for coordinated effects to arise in any market. Specifically, there is no element of this proposed transaction that will make it easier for Mercury and its competitors to:

208.1 reach agreement on price and/or quality of New Zealand electricity mass market contracts; and

208.2 sustain any such hypothetical agreement by:

(a) detecting deviations from that agreement; and/or

(b) punishing any deviations from that agreement.

209 We expand below with reference to the Commission's *Guidelines'* "market features that may facilitate coordinated conduct".

209.1 The Commission's *Guidelines* say*:* "in a [homogenous] market, firms generally affect price by varying the quantity of product they produce or make available to the market … for example, a firm that accounts for a large portion of crude oil sales may increase the price of crude oil by restricting its output".[85] That definition does not fit easily with the retail electricity market as electricity retailers have no ability to restrict output because electricity purchased from the wholesale market cannot be stored. By contrast, any electricity retailer can swiftly and cost-effectively expand its output by buying more wholesale electricity that is generated to match real-time demand.[86] Further while there is a degree of homogeneity in retail electricity markets given the

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84 https://octopus.energy/press/octopus-energy-group-boosts-krakens-capabilities-with-innovative-entech-software/

85 Merger and Acquisition Guidelines, [3.67].

86 The Commission's Merger and Acquisition Guidelines record at [3.70] that: "a key consideration is whether the merged firm's competitors have the ability to swiftly and cost-effectively expand their output. This includes the extent to which competitors' capacity is committed to other customers under long-term contract".

electricity itself is the same, Mercury notes that there ways for retailers to use non-price factors to differentiate their retail electricity offerings, for example:

(a) Octopus Energy's technology platform (currently being used in the UK and Australia), gives customers "a vastly simpler experience, with the technology capable of integrating multiple services to a single bill, delivering agile tariffs and easy integration of smart meters, solar, storage and electric vehicles, and accelerating demand-side management capability";[87] and

(b) many retailers bundle electricity with a range of other products, including, for instance, Z Electric offering fuel rewards to its electricity customers.

209.2 The retail electricity market is **not controlled by a small number of competitors**. To the contrary, there are dozens of retail electricity competitors in the market, as described above and set out in **Schedule D**. While it is true that there are five main electricity generators that produce electricity for the wholesale market,[88] there are a significant number of firms that resell that wholesale electricity under a variety of corporate structures – from:

(a) traditional "gentailers": Meridian; Genesis; Contact; Mercury; and Trustpower;

(b) to mid-sized generator-retailers like Nova;[89]

(c) to community owned generator-retailers like Pulse (which is partially owned by generator Pioneer Electricity);

(d) to online-only electricity retailers like Electric Kiwi, Vocus and Z Electric;

(e) to the smaller electricity retailers like Ecotricity, Ourpower, For Our Good, Prime Energy, Paua to the People and so on.

209.3 Retail electricity market participants do **not frequently or repeatedly interact**. Mercury and Trustpower and all other electricity retailers operate independent retail electricity businesses separate from the dozens of other

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87 https://www.originenergy.com.au/blog/strategic-partnership-with-octopus-energy-to-transform-origins-retail-business/

88 This proposed acquisition will, of course, have no effect on the wholesale electricity market.

89 Generator-retailers.

electricity retailers in the market. While it is true that there is some interaction between retailers and generators to secure financial hedge products and the like, those interactions are vertically up the supply chain. There is no market interaction to retail wholesale electricity to mass market customers in the national electricity market.

209.4 The market is **not lacking innovation or dynamism**. The contrary, technology, policies and regulations are ever-evolving to shape and change the retail electricity market. Over the last ten years, for instance, the introduction of smart meters has paved the way for electricity retailers to offer new and innovative power pricing packages (like Electric Kiwi's "Hour of Power" and Globug's "prepaid" power plans). Further, innovative market solutions – like the Electricity Authority's current hedge market development – will continually facilitate competition from a range of different market competitors. Indeed, Octopus Energy's planned New Zealand entry – on the back of its globally-scalable proprietary tech platform – is a good example of what future New Zealand's future electricity market will look like.

209.5 Market participants **cannot observe each other's prices, volumes or capacity**. Electricity retailers cannot store electricity capacity. Nor can electricity retailers observe each other's volumes in any useful sense (the only volume observations would be historical ICP counts on the Electricity Authority's own website). Prices are non-transparent too. A customer's end bill is made up of the wholesale price, distribution costs and back-office charges. Those costs and prices are unique to each of the market's 20+ electricity retailers and are not able to readily or easily comparable. Indeed, such is the opaqueness of retail electricity prices that the Electricity Authority has worked in recent years to make retail pricing *more* transparent for consumers' benefit.[90]

210 Moreover, even if the national retail electricity market was prone to coordination (which it is not), Trustpower is not a competitive "maverick" whose exit from the market would entrench or settle any theoretical market coordination.[91]

211 To the contrary, over the last five years, Trustpower lost 35,433 more mass market customers to competitors than it has gained in return. By contrast, Electric Kiwi,

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[90] https://www.ea.govt.nz/about-us/what-we-do/our-history/archive/dev-archive/work-programmes/market-wholesale-and-retail-work/improving-transparency-charges/.

[91] We make this submission with reference to the Commission's decision in *Z/Chevron* that: "… it is possible that the markets are vulnerable to coordination (and it is possible that there is coordination already occurring), but Chevron is not playing an important role in constraining any coordination such that the merger would not remove an important obstacle to coordination occurring". ([242.4]).

over the same period, gained – on net – over 75,000 residential customers from its competitors.

212 For those reasons, the Commission can be satisfied that the proposed acquisition will not substantially lessen competition in any electricity market due to coordinated effects.

Bundling / conglomerate effects

213 Mercury's proposed acquisition of Trustpower's retail business will allow Mercury to offer a utilities product bundle with broadband and telco products, as follows:

213.1 electricity (Mercury + Trustpower);

213.2 gas (Mercury + Trustpower);

213.3 broadband (Trustpower); and

213.4 mobile MVNO services (Trustpower).

214 While that bundled offering will be new to Mercury,[92] it is not a new dynamic for the market.

215 It follows on that basis that Mercury's acquisition of Trustpower will not give the merged entity any special or particular competitive market advantage that would allow it to foreclose competition from rivals. We compare that reality to, say, the Commission's concerns in *Sky/Vodafone*, where Vodafone's ownership of premium sports rights was seen by the Commission to be an unmatched competitive advantage over other telcos.

216 To be sure, we note that:

216.1 Trustpower already offers that full electricity, gas and telco bundle;

216.2 Todd Corporation's:

(a) MegaTel offers a broadband, mobile (MVNO), electricity and gas bundle;

(b) Nova Energy offers a broadband, electricity and gas bundle;

216.3 Contact offers electricity, gas and broadband;

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[92] Putting to one side Mercury's non-controlling shareholding of Now Broadband which is discussed in the final section of this clearance application.

216.4 Vocus (through its Slingshot brand) offers broadband, power and mobile; and

216.5 Pulse Energy retails electricity, broadband and gas.

217 For those reasons, the Commission can be satisfied that the proposed acquisition will not substantially lessen competition in any electricity market due to conglomerate effects. That is because Mercury's acquisition of Trustpower's retail utilities businesses will not give it any new or greater bundling capabilities than already exist in market.

RETAIL RETICULATED NATURAL GAS INDUSTRY

INDUSTRY BACKGROUND

218 In this section we describe the North Island reticulated natural gas industry.

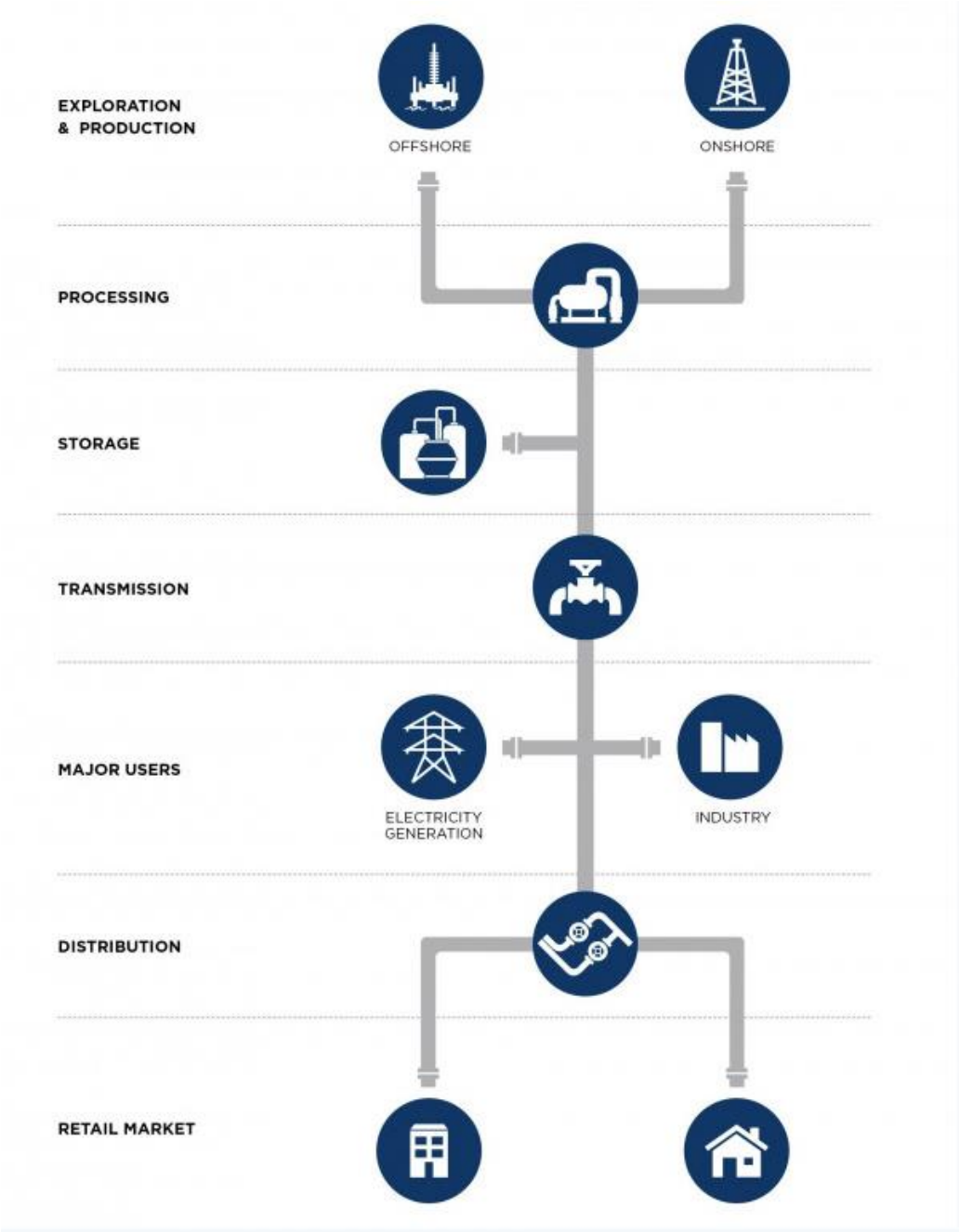
219 This section is limited to the supply of reticulated natural gas (or simply "reticulated gas") in the North Island, being the product that Mercury and Trustpower overlap in supply to retail customers.

220 The North Island reticulated retail gas industry works as follows:

Exploring, producing & distributing natural gas using physical assets	**Exploration & Production:** Gas exploration and production firms own a stake over New Zealand's gas fields, like the Maui, Pohokura, Kapuni, and Kupe fields. The major natural gas production firms are OMV, Todd Energy and a JV between Beach Energy, Genesis Energy and New Zealand Oil & Gas Limited. Those gas producers bring natural gas and liquids from their fields to production stations. From there, the natural gas is injected into the North Island transmission network. In 2018 the Government announced that no new permits would be issued for offshore New Zealand oil and gas exploration. **North Island transmission network (high pressure gas transmission pipelines):** The North Island transmission network of high pressure gas pipelines is the backbone of the distribution network used to transport natural gas from production stations around the North Island. The majority of the North Island transmission network is owned and operated by First Gas. Those high pressure pipelines deliver natural gas to "delivery points" around the North Island – much in the same way that Transpower's electricity transmission infrastructure delivers electricity to substations. And, similarly, the North Island transmission network is subject to Commerce Commission price-quality regulations. **Local distribution network (low pressure distribution pipelines):** The local distribution networks transport and distribute natural gas from "delivery points" of the high pressure transmission network to meters on mass market customers' premises. These distribution networks are

	generally comprised of low pressure gas pipelines laid in trenches. The owners of these local distribution networks are: First Gas; Vector; Powerco; and GasNet. In this sense, distribution networks are just like local electricity lines businesses. And, similarly, distribution networks are regulated by price-quality regulations imposed by the Commerce Commission.
Natural gas retailing	**Natural gas retailers:** North Island mass market customers buy reticulated natural gas from retailers who purchase gas from gas producers directly or via the gas trading market (emsTradepoint). Unlike the exploration/production and distribution part of the industry supply chain, reticulated gas retailers do not require special assets. Rather, retailers participate through contracts with producers (OMV, Todd Energy etc.) and transmission and local distribution network owners (First Gas, Vector and co.). Those costs are then passed on to mass market customers as part of their (typically) monthly bills. There are at least six natural gas retailers in New Zealand.

221 Natural gas retailers – including Mercury and Trustpower – operate "below" the line above by buying gas from gas producers and reselling it in the North Island reticulated gas retail market. Or, seen visually, the last layer (that labelled "retail market") of the following industry graphic:



222 Indeed, Mercury only supplies reticulated gas to residential and (a very small number of) SME customers.

How sales are made in the North Island reticulated gas retailing market

223 To be a North Island reticulated gas retailer you need:

223.1 an office;

223.2 staff, IT and billing systems to:

(a) take orders, arrange reticulated connections and deal with customer questions;

(b) process customers' meter readings; and

(c) manage and process bills and invoices.

223.3 marketing and advertising; and

223.4 a trading/finance/reconciliation team to:

(a) purchase gas from New Zealand producers like OMV, Todd and New Zealand Oil & Gas directly or via the gas trading market (emsTradepoint);[93] and

(b) enter supply agreements to connect to the North Island reticulated gas network, including with First Gas for the transmission network, local distribution network owners and metering companies (for residential and SME customers)[94].

224 Unlike the electricity market, there are no gas derivative contracts traded in New Zealand. Reticulated gas retailers manage their daily financial risk by selling into or purchasing natural gas from the daily gas balancing market.

225 The process of contracting with a gas producer and transmission/distribution infrastructure owners is simple, like any other wholesale/distribution arrangement elsewhere in the economy.

226 Similar to the Electricity Authority, the Gas Industry Company is the gas industry's market regulator that oversees regulatory and industry arrangements to ensure retailers can contract with transmission/distribution network owners.

227 The Gas Distribution Contracts Oversight Scheme is a voluntary, industry-agreed scheme which assesses standard gas distribution service agreements against a set of principles. It was endorsed by the Minister of Energy and Resources in September 2012 and aims to ensure that the core terms and conditions in distribution arrangements are clear and reasonable.

228 The Commerce Commission, too, regulates gas transmission and distribution businesses through price-quality path regulation. Under these regulations, the Commission sets the maximum revenue each distribution company can collect from electricity consumers and the minimum quality standards they must maintain.

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[93] The vast majority of natural gas in New Zealand is bought and sold via bilateral contracts. Only a small amount of gas, ~4% in 2020, is traded on emsTradepoint.

[94] Large commercial and Industrial customers, on the other hand, are often directly connected to First Gas' high pressure transmission network.

229 We turn now to profile the companies that take part in this market by contracting with gas producers and transmission and distribution network owners.

North Island reticulated gas retailers

230 There are at least seven different companies competing in the North Island reticulated gas market, across nine brands:[95]

230.1 Genesis and Energy Online (subsidiaries of Genesis have an ownership stake in the Kupe gas field);

230.2 Contact;

230.3 Mercury;

230.4 Trustpower;

230.5 Nova and MegaTel (subsidiaries of Todd Energy have stakes in the McKee, Mangahewa and Kapuni gas fields);

230.6 Pulse; and

230.7 Hanergy (although Hanergy has a tiny customer base (58 ICP connections at 31 May 2021) and appears to only focus on Auckland).

231 Mercury understands that the top six companies (Genesis/EnergyOnline, Contact, Mercury, Trustpower, Nova/MegaTel and Pulse) each service all North Island customers that have reticulated gas available to them.

232 Indeed, as Gas Industry Co reported in June 2020:[96]

> *Over 99.8 percent of gas customers are connected to a gate where seven or more retailers trade, suggesting that the gas retail sector is generally competitive throughout the North Island*

233 Other than Mercury, each of those gas retailers service residential, SME, large commercial and industrial natural gas customers. Mercury, on the other hand, only services residential and SME customers.

234 The figure below shows market shares by customer segment (based on ICP count):[97]

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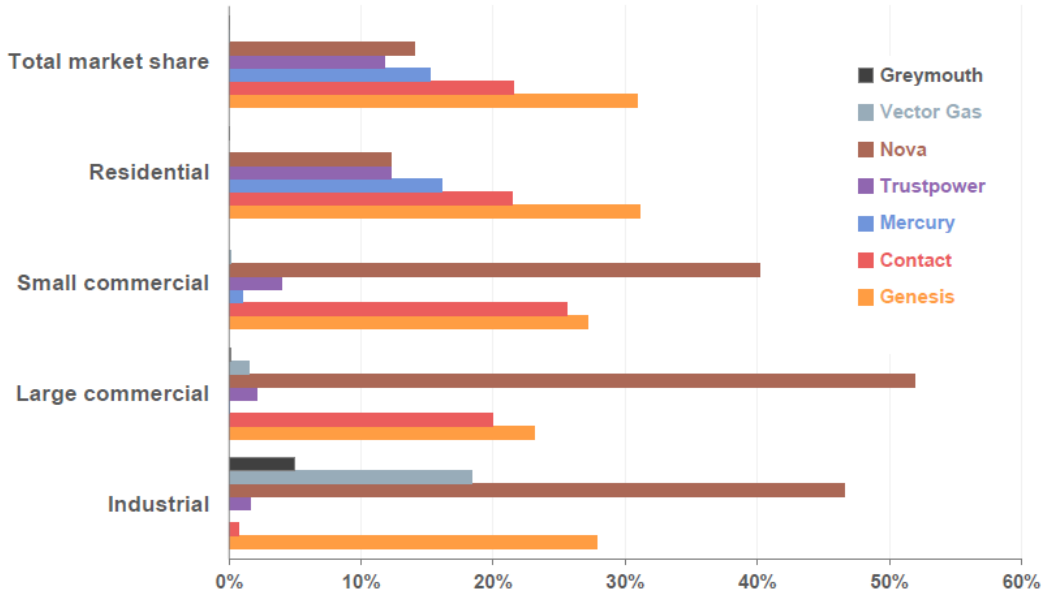
[95] Switch Utilities (now owned by Vocus) also has a small number of reticulated gas ICP connections. But Mercury understands that Vocus no longer offers reticulated gas to new customers.

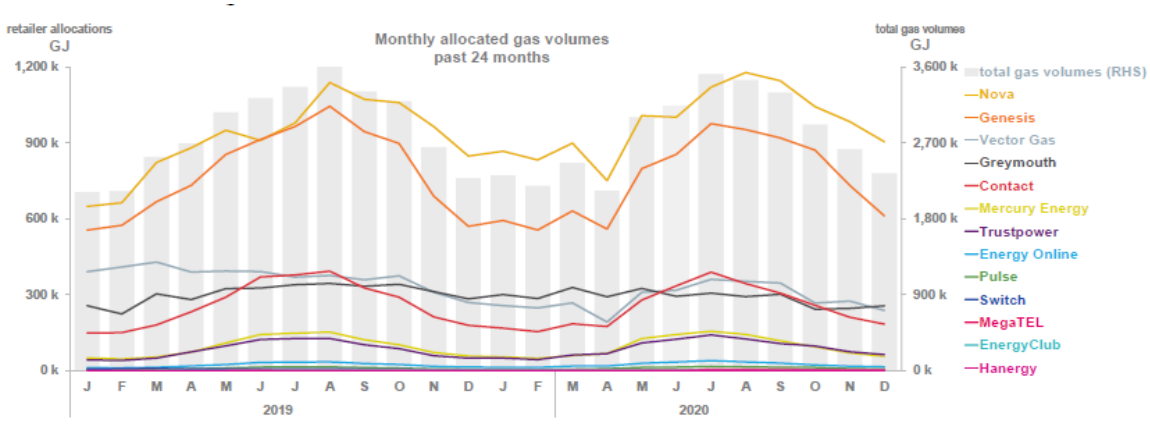
[96] GIC, *Performance Measures Quarterly Report for the period ending 31 December 2020,* https://www.gasindustry.co.nz/work-programmes/performance-measures/overview/

[97] GIC, *Performance Measures Quarterly Report for the period ending 31 December 2020.*



235 The figure above shows that Genesis and Nova are, by far, the market leaders for servicing high-volume customers. That reality reflects that both firms are vertically integrated to gas fields.

236 Consistent with that observation, the following figure shows market shares based on the volume of natural gas sold in the North Island between June 2018 and June 2020:[98]



237 That figure shows, of the top six retailers by volume, Mercury and Trustpower sell the least amount of natural gas by a considerable margin. By contrast, Genesis (including Energy Online) and Todd Energy (both Nova and MegalTel) retail/wholesale the vast majority of natural gas in this country.

238 That reality reflects that residential and SME customers – while large in number by ICP count – only consume around ~5% of all reticulated natural gas volumes

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98 GIC, *Performance Measures Quarterly Report for the period ending 31 December 2020.*

consumed in the North Island. Which explains why the "total market share" graph by ICP count on the last page is out-of-sync with the volume market share graph.

239 That said, even taking the ICP count market shares, the proposed transaction can be considered as a "6→5" consolidation in the North Island reticulated gas market.

240 As the table below shows, post-merger, Mercury would have just a 27.1% share of all ICPs – still well behind vertically-integrated leader, Genesis (34.9%) and with Contact Energy (21.8%) a close third place. All the while the largest natural gas retailer in the country by volume, Todd Energy, has two vertically integrated residential and SME brands that make up 14.3% of all ICPs (Nova and MegaTel).[99]

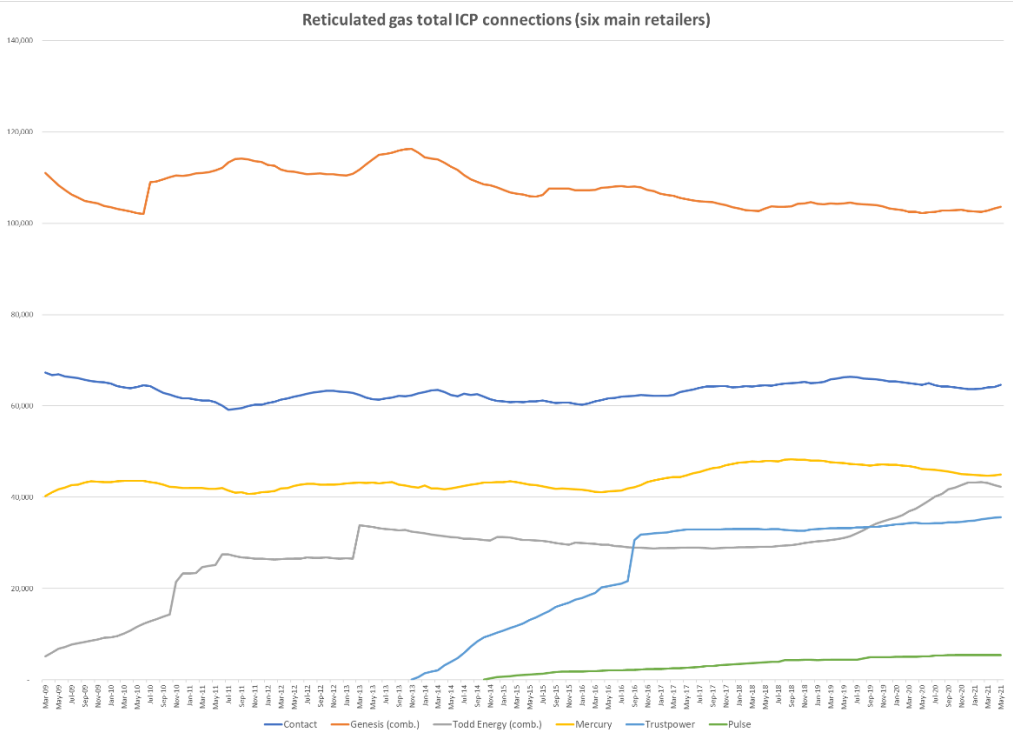
	ICP count (May 2021)	**Share**
Genesis/Energy Online	103,581	34.9%
Contact Energy	64,658	21.8%
Mercury	44,961	15.1%
Nova/MegaTel	42,351	14.3%
Trustpower	35,598	12.0%
Pulse Energy	5,498	1.9%
Others[100]	422	0.1%

241 The following graph shows the change in those ICP counts over time:[101]

[99] Gas Industry Co data, found here: https://www.gasindustry.co.nz/work-programmes/switching-and-registry/current-arrangements/reports/

[100] Consisting of Hanergy, Greymouth Gas, OnGas and Switch Utilities. Mercury understands that, of those four businesses, only Hanergy advertises North Island reticulated gas services and its customer base is very small.

[101] Based on Gas Industry Co data, found here: https://www.gasindustry.co.nz/work-programmes/switching-and-registry/current-arrangements/reports/



242 Next, we profile those six competitors.

Top 6 North Island reticulated gas retailers

Genesis (including Energy Online)

243 Genesis Energy is a vertically integrated North Island reticulated gas retailer.

244 Genesis Energy has a 46% stake in the Kupe oil and gas field.[102] So it is both a natural gas producer and retailer.

245 Genesis sells to residential, small commercial, large commercial and industrial customers.

246 It is the second largest natural gas retailer by volume and largest retailer by ICP count.

247 That strong competitive presence spans across all North Island customers where Genesis is, at 31 May 2021:

247.1 #1 in residential ICPs;

247.2 #2 in SME ICPs;

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102 In January 2021, Genesis announced that it is undertaking a strategic review of its ongoing ownership of its interest in Kupe. That announcement recorded that Kupe's consideration of further development – including drilling additional well and further exploration – changed the risk and opportunity profile of the asset for Genesis. https://www.genesisenergy.co.nz/about/media/news/genesis-undertaking-strategic-review-of-its-kupe-a

247.3 #2 in large commercial ICPs; and

247.4 #2 in industrial ICPs.

Todd Energy (including Nova Energy and MegaTel)

248 Todd Energy is a vertically integrated North Island reticulated gas retailer through its retail brands Nova Energy and new entrant Megatel.

249 Todd Energy advertises itself as "a leading natural gas provider focused on meeting New Zealand's needs well into the future".[103]

250 Todd Energy's business is centred around three onshore natural gas operations, Mckee and Mangahewa in North Taranaki and Kapuni in South Taranaki. Todd Energy describes itself as a "significant and growing contributor to the New Zealand economy … in conjunction with Nova Energy we currently employ over 500 staff in upstream and downstream operations around the country".[104]

251 As set out in the volume graph above, Todd Energy is the largest natural gas retailer by volume as it services:

251.1 ~40% of all SME ICP connections (#1);

251.2 ~52% of all large commercial ICP connections (#1); and

251.3 ~47% of all industrial ICP connections (#1).

252 Todd Energy's historical focus on commercial customers (of all shapes and sizes) appears to be a strategic one given those customers are higher volume users and it has significant volumes of natural gas to sell through its ownership of North Island gas fields.

253 It follows that Nova Energy / MegaTel's smaller share of the residential market (14.3% by ICP count) underrepresents the strong constraint that New Zealand's largest retailer of natural gas imposes on non-vertically integrated retailers like Mercury and Trustpower.

254 In any event, recent data suggests that Todd Energy is making a stronger push into gaining share of low-volume residential customers as the following graphs shows:[105]

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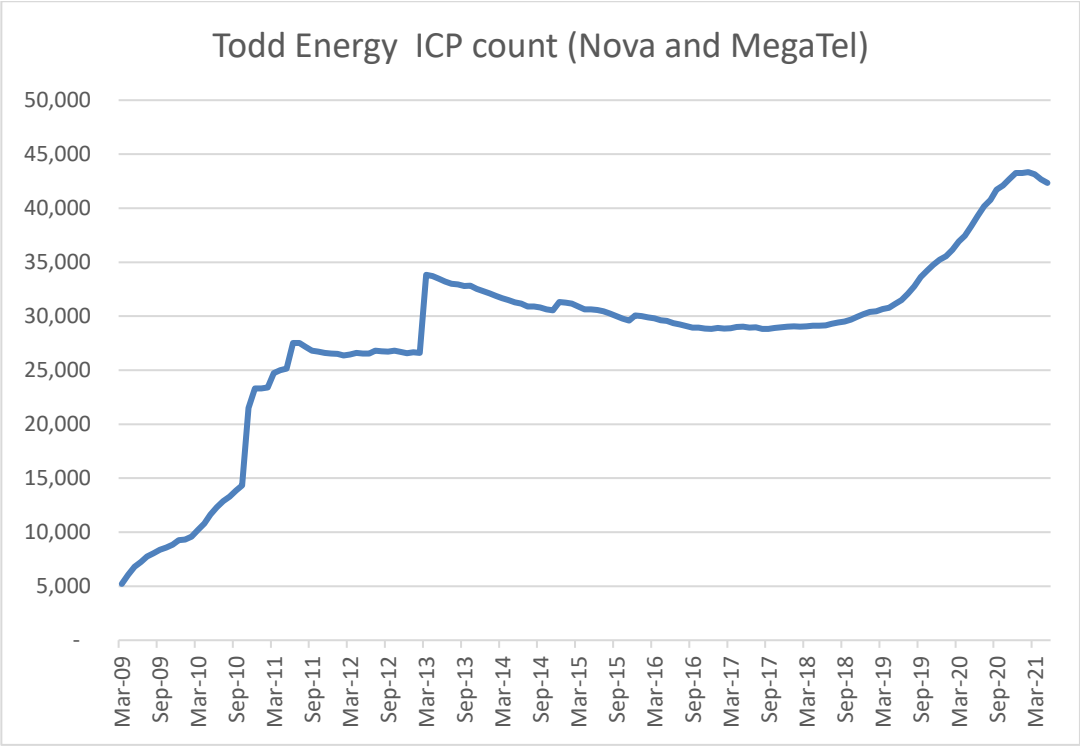
[103] https://www.toddenergy.co.nz/

[104] https://www.toddenergy.co.nz/#

[105] Gas Industry Co data, found here: https://www.gasindustry.co.nz/work-programmes/switching-and-registry/current-arrangements/reports/



255 Mercury observes that that push is likely to increase further in the future given:

255.1 in 2018 the Government announced that no new permits would be issued for offshore New Zealand oil and gas exploration; and

255.2 recent Climate Change Commission draft advice that there should be no new natural gas connections to the North Island network at some point in the future.[106]

256 As a result of that mounting pressure on the industry, Mercury expects that Todd Energy would be incentivised to produce and sell as much gas as it can from its Taranaki fields.

257 Consistent with that prediction, Todd Energy launched its residential-focused Megatel brand – which offers electricity, gas and telco bundle – in July 2019. And, over that two years, Todd Energy has grown 10,863 customers (by ICP connection) made up of:[107]

257.1 1,868 new MegaTel customers; and

257.2 8,433 new Nova Energy customers.

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[106] The Climate Change Commission initially said no new connections after 2025. Although the CCC has stepped back from that draft advice to a degree, it still considers that a deadline should be set.

[107] Gas Industry Co data, found here: https://www.gasindustry.co.nz/work-programmes/switching-and-registry/current-arrangements/reports/.

258 By comparison, over the same period, the total market increased by only 8,967 customers.[108]

Contact Energy

259 Contact Energy is the largest non-vertically integrated gas retailer in the country, by volume and ICP count.

260 Contact resells reticulated North Island gas to residential, SME, large commercial and industrial customers.

261 At 31 May 2021, Contact had 64,658 ICP connections (a 21.8% share). From those, Contact is:

261.1 #2 in residential ICP connections (behind Genesis);

261.2 #3 in SME ICP connections (behind Todd Energy and Genesis);

261.3 #3 in large commercial ICP connections (behind Todd Energy and Genesis); and

261.4 #6 in industrial ICP connections.

Mercury

262 Mercury purchases its natural gas from [].

263 Mercury does not retail reticulated gas to large commercial or industry customers.

264 Mercury instead focuses on residential reticulated gas customers and also has a small number of SME reticulated gas customers.

265 At 31 May 2021, Mercury had 44,961 ICP connections (a 15.1% share). From those, Mercury is:

265.1 #3 in residential ICP connections (behind Genesis and Contact (and now closely followed behind by Todd Energy)); and

265.2 #5 in SME ICP connections (behind Todd Energy, Genesis, Contact and Trustpower).

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[108] Gas Industry Co data, found here: https://www.gasindustry.co.nz/work-programmes/switching-and-registry/current-arrangements/reports/.

Trustpower

266 Trustpower resells reticulated North Island gas to residential, SME, large commercial and industrial customers. Trustpower entered gas retailing in 2013 when it acquired the assets (including 10,000 gas ICP customers) of Energy Direct New Zealand.[109]

267 At 31 May 2021, Trustpower had 35,598 ICP connections (a 12.0% share). From those, Trustpower is:

267.1 fourth equal in residential ICP connections (behind Genesis, Contact and Mercury and approximately equal with Todd Energy (Nova and MegaTel));

267.2 #4 in SME ICP connections (behind Todd Energy (Nova), Genesis and Contact);

267.3 #4 in large commercial ICP connections (behind Todd Energy (Nova), Genesis and Contact); and

267.4 #5 in industrial ICP connections.

Pulse Energy

268 As set out in the electricity industry section, Pulse Energy is a community owned energy retailer, providing electricity and gas throughout New Zealand. Pulse is owned by Buller Electricity, Pioneer Energy and Electra Energy.

269 Pulse Energy launched its reticulated retail gas business in October 2014, along with its electricity and broadband offerings.

270 Pulse Energy, like Mercury, focuses on residential and SME customers.

271 Pulse has steadily increased its market footprint since launch.

272 At 31 May 2021, Pulse had 5,498 ICP connections (a 1.9% share) – #6 position of residential ICP connections.

COMPETITION ANALYSIS (RETAIL RETICULATED GAS)

273 The proposed acquisition will result in the loss of competition between Mercury and Trustpower in selling retail reticulated gas contracts to residential and SME (mass market) customers in the North Island.[110]

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[109] https://www.trustpower.co.nz/getting-to-know-us/company-news/2013/5/15/trustpower-reaches-agreement-to-purchase-key-assets-of-energy-direct-new-zealand

[110] As set out earlier, Mercury will also acquire Trustpower's ~[] commercial & industrial gas customers. The proposed acquisition will not, though, affect the choices available to those large customers as Mercury only services retail and SME gas customers.

274 This section explains why Mercury's acquisition of Trustpower's book of retail reticulated gas customers will not substantially lessen competition in any market by:

274.1 defining the relevant **market**;

274.2 explaining why the acquisition will not substantially lessen competition in any reticulated gas market due to **unilateral** effects because of:

(a) competition from existing reticulated gas retailers (including the threat of expansion (i.e., recognising there is an increased opportunity to win Trustpower's existing customers post-acquisition)), such as:

(i) Genesis;

(ii) Contact;

(iii) Todd Energy (Nova and MegaTel); and

(iv) Pulse Energy; and

(b) the threat of entry by new retail reticulated gas businesses emerging.

274.3 explaining why the acquisition will not substantially lessen competition in any gas market due to **coordinated** effects because Mercury's acquisition of Trustpower will not make it easier for MergeCo and its competitors to:

(a) reach agreement on price and/or quality of New Zealand retail reticulated gas prices; and

(b) sustain any such hypothetical agreement by:

(i) detecting deviations from that agreement; and/or

(ii) punishing any deviations from that agreement.

274.4 explaining why the acquisition will not substantially lessen competition in any gas market due to **conglomerate/bundling** effects because Mercury's acquisition will not give it the ability to offer any new or different utility bundle that is not already available in market.

Market definition

275 Mercury considers that this proposed acquisition is best assessed against a North Island retail reticulated gas market residential and SME "mass market" customers.

276 The basis for that view is:

276.1 All reticulated natural gas used by residential and SME customers comes from the same source: the Taranaki gas fields owned by the likes of, OMV, Todd Energy and Genesis. All of that reticulated gas is transported to residential and SME customers using First Gas's high pressure transmission network and local distribution pipelines.

276.2 All reticulated natural gas retailers can serve all connected customers across the North Island by entering into distribution agreements with each area's respective local distribution pipeline network owner and metering companies. (Although Mercury notes, in practice, that it does not trade on Nova's embedded network).

276.3 There is no material difference between residential and SME customers such that it would be appropriate, as a matter of fact and commercial common sense, to define separate customer markets on that basis. Mercury does not compete for large commercial or industrial customers.

277 Mercury notes, though, that its views would not change if the Commission defined narrower geographic and/or customer markets.

278 No matter how markets are defined, Mercury will continue to face significant competitive constraints post-transaction from the other four reticulated gas retailers that, combined, hold ~73% of all mass market natural gas ICPs in New Zealand, including:

278.1 Genesis (34.9%);

278.2 Contact (21.8%);

278.3 Todd Energy (Nova and MegaTel) (14.3%); and

278.4 Pulse (1.9%).

279 We expand on the market's product, functional, geographic, and customer dimensions below.

Product dimension

280 Mercury considers the relevant product market to be that for reticulated gas.

Functional dimension

281 Mercury considers the relevant functional market to be reticulated natural gas retailing (which is the resale of reticulated natural gas from producers – either directly or through emsTradepoint).

Geographic dimension

282 As set out in the Gas Industry Background section, there are no barriers to reticulated gas retailers operating across the North Island.

283 To compete in different North Island regions, reticulated gas retailers just need to enter into agreements with First Gas, each area's distribution network owner and gas metering companies.

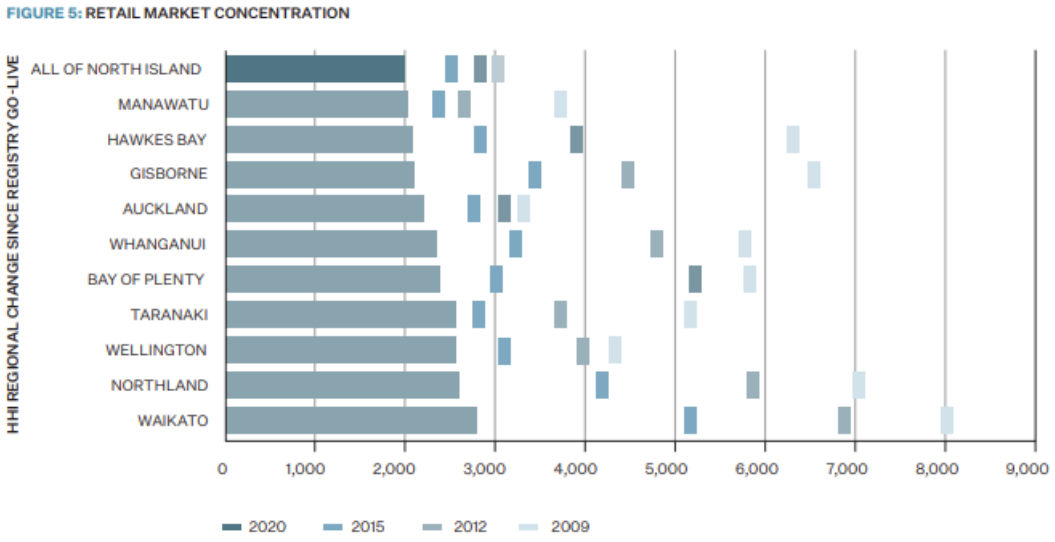
284 All reticulated natural gas is sourced from the same Taranaki gas producers.

285 Mercury understands that Genesis, Contact, Todd Energy (Nova and MegaTel) and Pulse can all serve the same residential and SME customers as Mercury and Trustpower.

286 Indeed, as set out above, Gas Industry Co recently reported that:[111]

> *Over 99.8 percent of gas customers are connected to a gate where seven or more retailers trade, suggesting that the gas retail sector is generally competitive throughout the North Island.*

287 Consistent with that comment, the following Gas Industry Co figure shows relatively consistent HHI index figures across all regions of New Zealand, demonstrating consistent competition across the North Island:[112]



111 GIC, *Performance Measures Quarterly Report for the period ending 31 December 2020,* https://www.gasindustry.co.nz/work-programmes/performance-measures/overview/

112 GIC, *Statement of Intent 2022-2024:* https://www.gasindustry.co.nz/publications/landing-pages/statements-of-intent/document/7289

288 And, on that March 2020 HHI figure, Gas Industry Co remarked: *"the HHI has decreased in all regions since 2009, indicating that the retail market is becoming less concentrated across the North Island".*

289 It follows that if a hypothetical monopolist in any town, city or region of New Zealand sought to implement a SSNIP, that attempted price increase would be very quickly met by reticulated retailers from anywhere else in the North Island expanding into the hypothetical monopolists' area.

290 As far as we are aware, the last publicly available Commission's decision considering the retail gas industry in any detail is the Commission's 2000 *Decision 387*.[113] In that decision, the Commission defined a discrete "Hutt/Mana market for the retailing of gas to residential consumers" on the basis that:[114]

> *The Commission accepts that there is progress being made towards lowering barriers to entry into gas retailing markets and to making residential gas customers contestable. Nevertheless the Commission does not believe that the gas industry is yet at the stage the electricity sector was when the Commission first concluded that there was a national retail electricity market. There are some important difference between the state of the electricity retail markets at the end of 1998 and the state of gas retailing today.*
>
> *For example, relatively few residential gas customers have switched suppliers. Fresh Start, in which Todd Energy has a significant interest, commenced operations in August 1999 and has captured around [ ]% of all small consumers connected to the Taranaki distribution network, [ ]% in Manawatu and [ ]% in Wanganui. Todd has described these areas as "test markets". TransAlta now has around [ ] residential consumers in Wellington, representing [ ]% of those connected to the Wellington network, as a result of a marketing campaign commencing mid way through 1999. In other areas, including the area of relevance to the current application, Hutt/Mana, there is no significant competition for residential customers.*
>
> *By comparison at the end of 1998, Contact and First Electric were marketing electricity to small consumers in competition with incumbent retailers, mainly at that stage in the larger population areas, and First Electric had signalled its intention to be a national retailer.*

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[113] Decision 475 also appears to consider retail gas, but that decision is not available online.

[114] https://comcom.govt.nz/__data/assets/pdf_file/0027/72549/387.pdf

At the end of 1998 the Government had passed the Electricity Industry Reform Act 1998 which required the separation of line and energy in the electricity sector, and it had signalled that it would take further steps after 1 April 1999 if they were necessary to have a competitive retail electricity sector. There is no indication at present that similar legislation is likely for the gas sector.

Having regard to the above, including progress made to date in introducing competition in particular areas, the Commission anticipates that most residential consumers can look forward to more competitive markets. However, the Commission is not satisfied that this situation will necessarily flow through to other areas, such as Hutt/Mana, in a reasonable timeframe. The Commission considers that competitive issues associated with residential retailing on each network must be considered on a network by network basis.

291 Given the changes that have taken place in the last 21 years since this decision, Mercury submits that because residential reticulated gas customers are now contestable across the North Island by all of the main reticulated gas retailers, it is appropriate, as a matter of fact and commercial common sense, to define a North Island market for the supply of reticulated gas to residential and SME consumers.[115]

292 That view was foreshadowed by the Commission in *Decision 387:* "the Commission anticipates that most residential consumers can look forward to more competitive markets". And, indeed, the graphs, figures and comments from Gas Industry Co above demonstrate that the market is now appropriately considered North Island-wide.

293 Further, that view is consistent with the Commission's 2013 *Vector Limited and Contact Energy Limited* decision about reticulated gas meters (used by residential and SME customers) which held:[116]

We agree with Vector, and consider that for the purpose of assessing this application it is sufficient to consider a North Island market for the provision of gas metering on a reticulated natural gas distribution network (the North Island gas metering market). Potential

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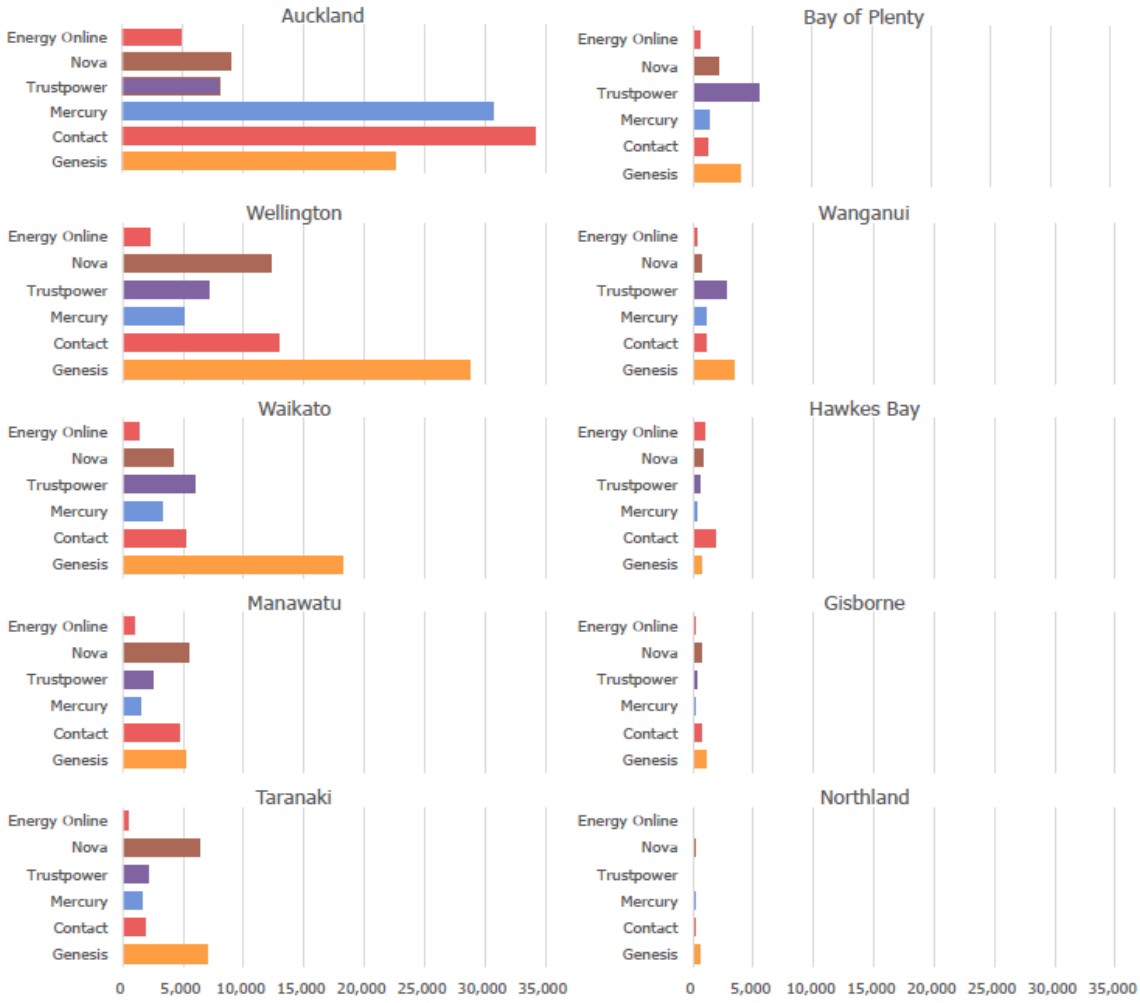
[115] Indeed, in the same Decision 387 the Commission found that there was a North Island reticulated gas market for industrial and commercial customers on the basis that there was a range of competitors for those larger customers.

[116] *Vector Limited and Contact Energy Limited* [2013] NZCC 9.

competitive constraints from either existing gas metering providers or potential entrants can be fully considered in the competition analysis.

294 In saying that, the competition analysis would not change if the Commission defined separate regional markets as all of the main reticulated gas retailers operate in all regions. That reality is demonstrated by the following Gas Industry Company regional data:[117]



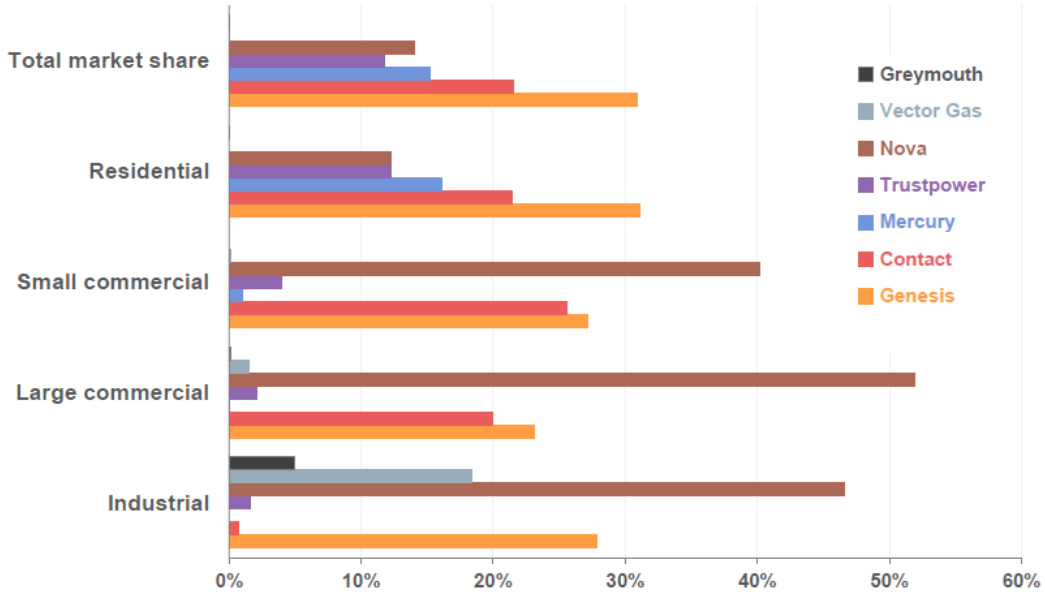
Customer dimension

295 Mercury only supplies reticulated gas to residential and SME North Island customers.

296 For that reason, taking a conservative approach, the Commission can assess the market against the retail supply of reticulated gas to residential and SME customers.

[117] GIC, *Performance Measures Quarterly Report for the period ending 31 December 2020.*

297 As the following graph shows (repeated from above) all North Island reticulated gas retailers compete for residential and SME customers:[118]



Competition analysis: unilateral effects

298 Mercury is confident that the proposed acquisition does not give rise to, nor would be likely to give rise to, a substantial lessening of competition in the North Island retail reticulated gas market. (Or any more narrowly defined market).

299 Mercury says that because:

299.1 MergeCo will continue to face **strong existing competition** from Genesis, Contact, Todd Energy (Nova and MegaTel) and Pulse; and

299.2 that significant competition from four established reticulated gas retailers is expected to increase as demand for natural gas falls in responses to policies like the Climate Change Commission's advice to cease all new gas connections; and

299.3 at all times MergeCo would be constrained by the **threat of entry/expansion** by new reticulated retail gas suppliers given the ease of entering the market.

300 We expand below.

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[118] GIC, *Performance Measures Quarterly Report for the period ending 31 December 2020.*

Existing competition

301 Standing back, this acquisition only involves Mercury acquiring Trustpower's book of existing North Island residential and SME reticulated gas contracts, which comprise just ~12.0% of all reticulated gas connections in the North Island. Post-acquisition, Mercury would have just a ~27.1% market share – still a way behind Genesis, and closely followed by Contact.

302 That marginal increase in scale will not give Mercury any greater influence or power over its competitors such that it could increase prices at all.

303 If Mercury attempted (hypothetically) to increase prices or lower service quality, customers would swiftly switch to alternative retail electricity services offered by:

303.1 Genesis (including Energy Online);

303.2 Contact;

303.3 Todd Energy (Nova and MegaTel); and

303.4 Pulse.

304 It follows that the transaction can be considered, at its narrowest, as a "6→5" consolidation for competition for mass market reticulated gas customers across the North Island.

305 The Gas Industry Co's most recent statement of intent (2022-2024) shares the view that the retail North Island reticulated gas market is competitive. That document from the market's regulator, published in June 2021, records:[119]

> ***The retail market is vibrant and competitive***
>
> *Annual switching rates (an indicator of contestability in the market) have ranged from 14-per cent to 18 per cent in the last five years.*
>
> ***Switches are completed fast***
>
> *Switches take place just over two business days on average. As a comparison, gas switches in the UK take about 18 days for domestic consumers.*
>
> ***Gas customers generally have choice***
>
> *The ten largest retailers are active at gas gates (where gas leaves the high-pressure transmission system and enters the local gas distribution*

[119] https://www.gasindustry.co.nz/publications/landing-pages/statements-of-intent/document/7289

networks) that together represent 87 percent of consumers.

Over 99.8 percent of consumers are connected at a gas gate where at least seven retailers trade.

306 The HHI data above too supports Gas Industry Co's view that the market is vibrant and competitive.

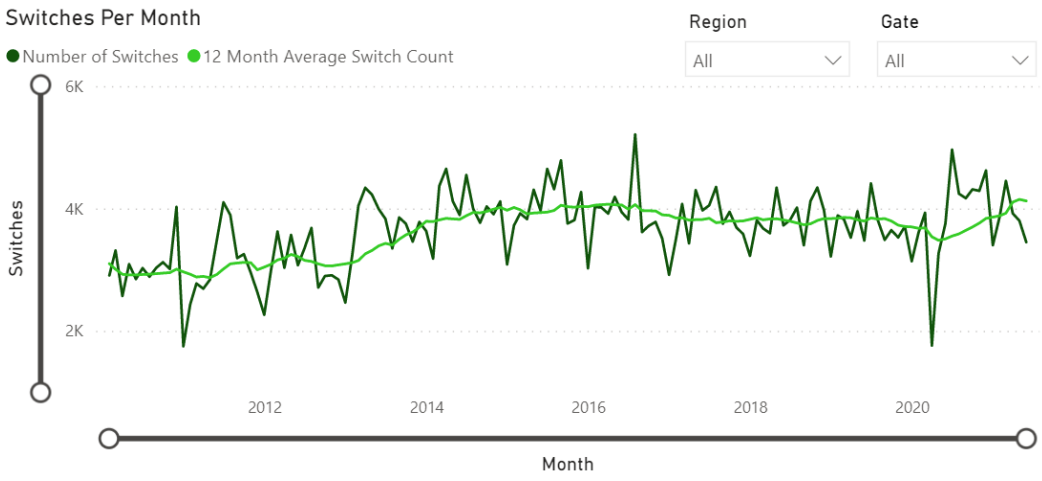
307 Further, in response to MBIE's 2018 Electricity Pricing Review – which, to recall, concluded that competition in the retail electricity market has grown in recent times and suggested consumer-focused recommendations to raise awareness of the options available – the Gas Industry Company applied some of those recommendations to retail reticulated gas.

308 Specifically, the Gas Industry Company is currently developing new gas market guidelines for:[120]

308.1 raising gas consumer awareness of the Utilities Disputes and Powerswitch services; and

308.2 managing "saves" and "win-backs" in the gas market.

309 While it is too early for those consumer-focused initiatives to take effect, Mercury notes that there have been near-record levels of switching in the market in 2021 (after a Covid-related 2020 dip):[121]



120 https://www.gasindustry.co.nz/about-us/news-and-events/consultations/extending-the-electricity-price-reviews-final-recommendations-to-the-gas-market-consultation-on-new-gas-market-guidelines/

121 https://www.gasindustry.co.nz/work-programmes/switching-and-registry/current-arrangements/reports/.

310 Those various indicators support this application's submission that, post-transaction, Mercury would face significant competition in the North Island retail reticulated gas market from four significant competitors in:

310.1 vertically-integrated Genesis;

310.2 vertically-integrated Todd Energy (Nova and MegaTel);

310.3 the largest non-vertically integrated retailer in Contact Energy; and

310.4 Pulse Energy.

311 The thousands of customers that each of those competitors has across the North Island demonstrates that each of those firms individually and collectively will act as a significant market constraint on the merged entity.

312 As a result, Mercury submits that the Commission can be satisfied that this proposed acquisition will not substantially lessen competition in the North Island reticulated gas market due to horizontal (unilateral) effects. Mercury will continue to face significant competition from those competitors that, today, collectively hold over 70% of all residential and SME retail North Island gas mass market contracts.

313 That view is consistent with the Commission's frequent findings that mergers involving a "4→3" consolidation do not amount to a substantial lessening of competition. For instance, in *Z/Chevron*, the Commission only had concerns in retail markets that were "2→1" or "3→2" (other than 5km radius markets where Z and Chevron's petrol stations were particularly close competitors because of the streets those stations were on).[122]

314 That observation is consistent with the High Court's view that a lessening of competition will only be substantial if it is real or of substance.[123]

315 Here, Mercury and Trustpower are not each other's closest competitors. Genesis and Todd Energy, the two vertically-integrated leading market retailers, are Mercury's key competitive constraints today and post-transaction. Behind those two firms is Contact, the largest non-vertically integrated gas retailer in the market.

316 Against that background, Mercury's acquisition of Trustpower's North Island retail mass market gas contracts will not give it any greater market power.

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[122] *Z/Chevron*, Table X2.

[123] *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

Future competition and state of the market

317 Mercury's submission is that the extent of existing competition in the North Island retail reticulated gas market prevents a substantial lessening of competition.

318 That said, Mercury records that climate change policy is going to put significant pressure on existing gas industry participants.

319 Specifically, the Climate Change Commission's recent draft advice said:

> *Setting a date by when no new natural gas connections are permitted, and where feasible, all new or replacement heating systems installed are electric or bioenergy. This should be no later than 2025 and earlier if possible.*

320 In response, the Commerce Commission published an open letter saying:[124]

> *Whether or not this recommendation is adopted by the Government, gas use is likely to come under increasing pressure as decarbonisation efforts progress. At the same time, the Gas Industry Company, at the request of the Minister of Energy and Resources, is currently conducting a study to help ensure that the electricity industry has security of gas supply for electricity generation, and major gas users have sufficient certainty about gas supply for their operations, as New Zealand pursues decarbonisation. Some uncertainty also exists due to the potential future use of gas pipeline assets for alternatives such as biogas and hydrogen blends.*

321 And, it is that disruption and uncertainty that Mercury predicts will spur on competition in the retail reticulated gas market as OMV, Todd Energy and other gas field owners seek to maximise gas supply while there remains a market on foot to service.

322 Indeed, as set out earlier, we observe that Todd Energy, for instance, has made a significant push toward servicing residential reticulated gas customers in recent years as set out in the following graph:

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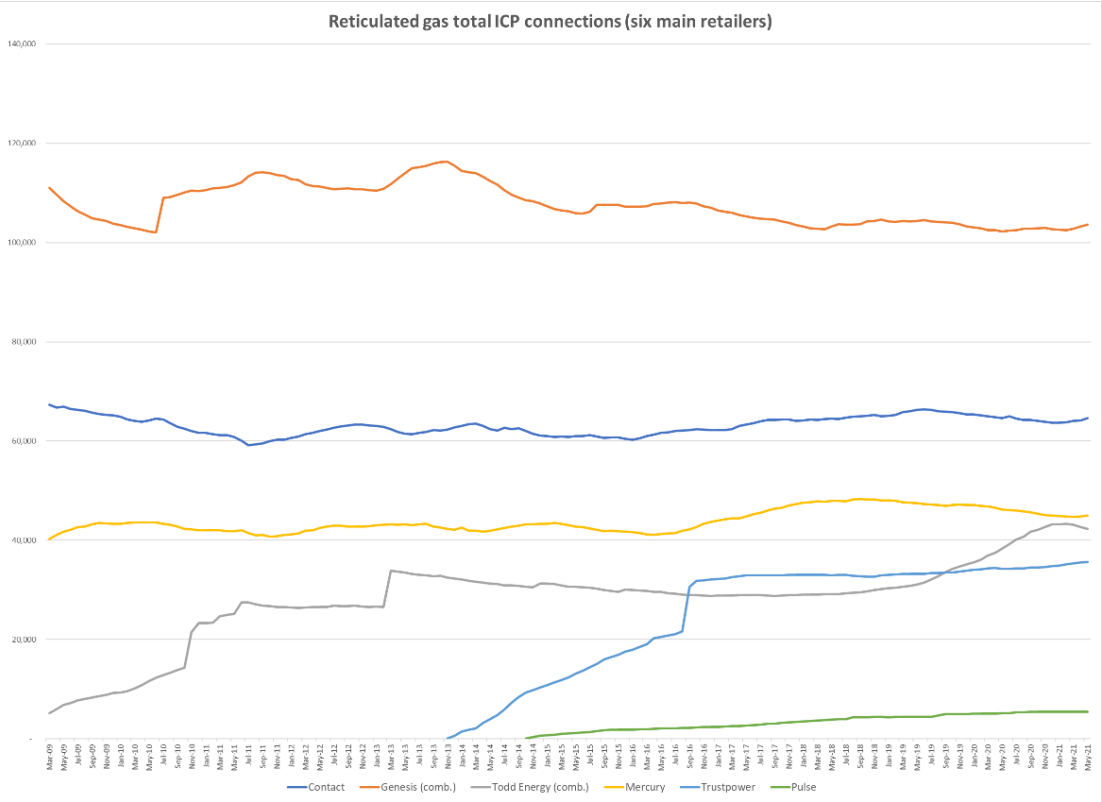
[124] https://comcom.govt.nz/__data/assets/pdf_file/0022/253561/Open-letter-Ensuring-our-energy-and-airports-regulation-is-fit-for-purpose-29-April-2021.pdf



New retail entry

323 On top of that, for completeness, the ability of new reticulated gas retailers to enter the market – essentially just through contracts with gas producers and pipeline distributors – will further constrain the merged entity.

324 That entry could come from, for example, "wholesale" gas suppliers like Greymouth Gas that have traditionally focused on industrial customers or gas producers vertically integrating downstream.

Coordinated effects

325 The proposed transaction will not, and will not be likely to, increase the potential for coordinated effects to arise in any market, including the gas market. Specifically, there is no element of this proposed transaction that will make it easier for Mercury and its competitors to:

325.1 reach agreement on price and/or quality of North Island reticulated gas mass market contracts; and

325.2 sustain any such hypothetical agreement by:

(a) detecting deviations from that agreement; and/or

(b) punishing any deviations from that agreement.

326 While reticulated gas is relatively homogenous and a mature industry, the remaining market features all point against the North Island reticulated gas market being susceptible to coordination in 2021 and beyond. In particular:

326.1 The North Island reticulated gas market is **not controlled by a small number of competitors**. To the contrary, there will remain at least five reticulated gas retailers in the market of different sizes and corporate structures:

(a) two vertically-integrated, high-volume, gas retailers in Genesis and Todd Energy, with four sub-brands between them (Genesis, Nova, MegaTel and Energy Online);

(b) two large non-vertically integrated gas retailers with significantly lower volumes, in Contact and MergeCo; and

(c) a smaller, community-owned, gas retailer owned by three electricity lines companies in Buller, Alexandra and Levin.

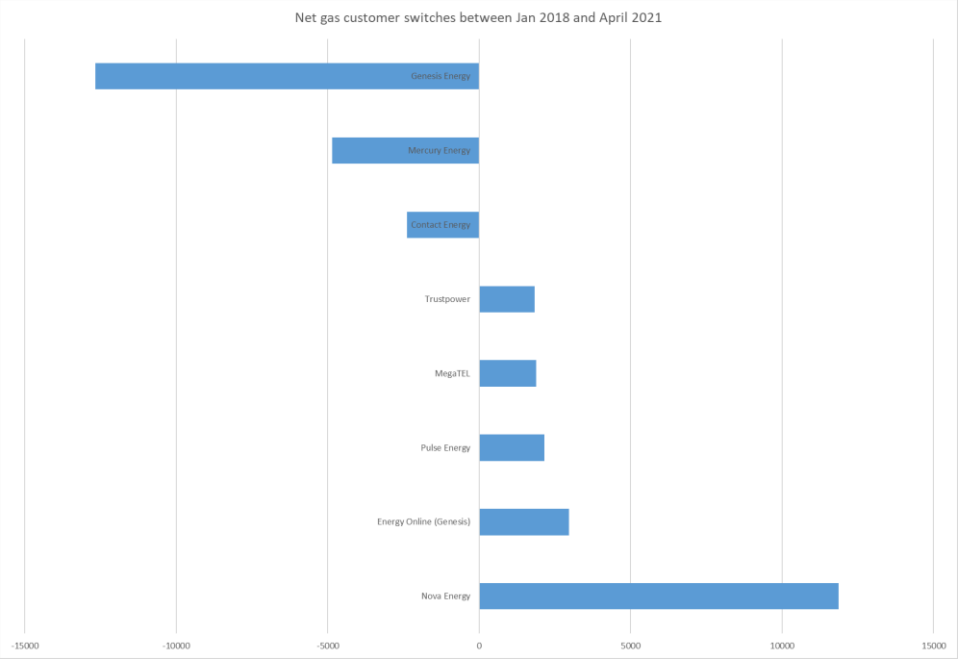
326.2 As the Commission notes "gas use is likely to come under increasing pressure as decarbonisation efforts progress". That **disruption and uncertainty** across the natural gas supply chain would destabilise any theoretical ability for those five reticulated gas retailers to coordinate prices.

326.3 Reticulated gas market participants do **not frequently or repeatedly interact**. Trustpower purchases most of its gas from OMV and Mercury from []. As a result, there is limited interactions between the gas retailers vertically and there is not market interaction at the retail level.

326.4 Market participants **cannot observe each other's prices, volumes or capacity**. Retailers typically enter into bilateral supply agreements with gas producers. Those contracts are agreed and entered into behind closed doors. And, it follows, that the pricing and volume terms remain secret too. Further, a customer's end bill is made up of the wholesale gas price, distribution costs and back-office charges. Those costs and prices are not publicised or readily or easily comparable. Indeed, such is the opaqueness of gas prices that the Gas Industry Co is working on guidelines to promote the Government's Powerswitch website (as set out above).

327 Moreover, even if the North Island reticulated gas market were prone to coordination (which it is not), Trustpower is not a competitive "maverick" whose exit from the market would entrench or settle any theoretical market coordination.[125]

328 To the contrary, as set out in the following figure, Pulse, Genesis' Energy Online and Todd Energy's Nova and MegaTel brands have all, on net, gained more existing reticulated gas customers than Trustpower over the same period:[126]



329 For those reasons, the Commission can be satisfied that the proposed acquisition will not substantially lessen competition in any gas market due to coordinated effects.

Bundling / conglomerate effects

330 Mercury's proposed acquisition of Trustpower's retail gas business will allow Mercury to offer a utilities product bundle with broadband and telco products, as follows:

330.1 electricity (Mercury + Trustpower);

330.2 gas (Mercury + Trustpower);

330.3 broadband (Trustpower); and

330.4 mobile MVNO services (Trustpower).

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125 We make this submission with reference to the Commission's decision in *Z/Chevron* that: "… it is possible that the markets are vulnerable to coordination (and it is possible that there is coordination already occurring), but Chevron is not playing an important role in constraining any coordination such that the merger would not remove an important obstacle to coordination occurring". ([242.4]).

126 Gas Industry Co's data, found here: https://www.gasindustry.co.nz/work-programmes/switching-and-registry/current-arrangements/reports/.

331 While that bundled offering will be new to Mercury,[127] it is not a new dynamic for the market.

332 It follows on that basis that Mercury's acquisition of Trustpower will not give the merged entity any special or particular competitive market advantage that would allow it to foreclose competition from rivals. We compare that reality to, say, the Commission's concerns in *Sky/Vodafone*, where Vodafone's ownership of premium sports rights was seen by the Commission to be an unmatched competitive advantage over other telcos.

333 To be sure, we note that:

333.1 Trustpower already offers that full electricity, gas and telco bundle;

333.2 Todd Corporation's:

(a) MegaTel offers a broadband, mobile (MVNO), electricity and gas bundle;

(b) Nova Energy offers a broadband, electricity and gas bundle;

333.3 Contact offers electricity, gas and broadband;

333.4 Genesis bundles gas and electricity; and

333.5 Pulse Energy retails electricity, broadband and gas.

334 For those reasons, the Commission can be satisfied that the proposed acquisition will not substantially lessen competition in the North Island reticulated gas market due to conglomerate effects. That is because Mercury's acquisition of Trustpower's retail utilities businesses will not give it any new or greater bundling capabilities than already exist in market.

[127] Putting to one side Mercury's non-controlling shareholding of Now Broadband which is discussed in the final section of this clearance application.

BROADBAND INDUSTRY

336 Mercury owns a 49% stake in NOW Broadband, a small fibre broadband provider. While Mercury and NOW Broadband are not interconnected bodies corporate, Mercury accepts for the purpose of this clearance application that the firms are associated for Commerce Act s47(3) purposes.

337 And, taking a conservative approach for competition law analysis, this section treats Mercury and NOW Broadband as one and the same.

338 At June 2021, NOW Broadband has approximately 20,000 fibre broadband customers across New Zealand. Mercury estimates that NOW Broadband's market share is around 1.1%.

339 The proposed acquisition will remove competition between NOW Broadband and Trustpower's retail broadband business of ~109,000 customers (comprising around 6% of the market).

340 Combined, the merged entity would have a market share of less than 10% and face competition in the retail New Zealand broadband market from:

340.1 Spark;

340.2 Vodafone;

340.3 Vocus;

340.4 2degrees; and

340.5 many other smaller broadband providers.

341 For those reasons, Mercury submits that it is clear that the proposed transaction will not substantially lessen competition in any broadband market and therefore does not propose to submit on this aspect of the proposed transaction further.

CONFIDENTIALITY

1 Mercury seeks confidentiality over the information in this application and documents attached at Schedule A that are contained within square brackets and highlighted (Confidential Information).

2 Mercury asks that the Commission notify it of any requests for Confidential Information made under the Official Information Act 1982. Mercury respectfully asks that, in those circumstances, the Commission provide it with an opportunity to submit its views on why the information should not be disclosed.

3 For the purposes of s9(2)(b) of the OIA, Mercury considers that the Confidential Information is:

- commercially sensitive and valuable information which is confidential to it and/or Trustpower; and
- public disclosure of the Confidential Information would be likely to unreasonably prejudice either party's commercial position.

SCHEDULE A: DOCUMENTS []

1 []

SCHEDULE B: COMMISSION REQUESTED INFORMATION AND DOCUMENTS

The following table specifically responds to the information and documents requested by the Commission in its s66 clearance notice form.

<table>
<tr><th>Notice para.</th><th>Commission request</th><th>Response</th></tr>
<tr><td>[1]</td><td>Applicant details</td><td>See body of application.</td></tr>
<tr><td>[2]</td><td>Other party details</td><td>See body of application.</td></tr>
<tr><td>[3]</td><td>Type of transaction, deal rationale, change of control, ancillary agreements, counterfactual.</td><td>See body of application.</td></tr>
<tr><td>[4]</td><td>International notification</td><td>N/A</td></tr>
<tr><td>[5.1]</td><td>Applicant’s view on market definition</td><td>See body of application.</td></tr>
<tr><td>[5.2]</td><td>Each merging party’s total sales revenues, volumes and capacity for the last three financial years.</td><td>
<table>
<tr><th></th><th>FY19</th><th>FY20</th><th>FY21 (YTD)</th></tr>
<tr><td>Mercury mass market retail customer total revenue (electricity and gas)</td><td></td><td></td><td></td></tr>
<tr><td>Mercury mass market retail customer total volume sold (electricity and gas)</td><td></td><td></td><td></td></tr>
</table>
</td></tr>
</table>

[5.3]	Names and contact details of the merging parties' main competitors	See body of application.
[5.3]	Names of any trade or industry associations which either of the merging parties participate	Mercury does not have this information easily at hand. Mercury is a paid member of a number of commercial and industrial organisations, associations and bodies, including trans-Tasman and trans-Pacific and regional organisations, associations and bodies. Mercury joins most of these associations in its capacity as a generator, like the ERANZ and Wind Energy Association. Mercury would be happy to discuss this point further with the Commission if necessary.
[5.4]	Names and contact details of merging parties top 5 customers	Electricity: • [] Reticulated gas: • [] [] are typically considered C&I customers, but they have some parts of their business that fall under Mercury's mass market classification in Mercury's financial systems. So those businesses appear in the top 5 list when extracted for this purpose. However, Mercury reiterates that the vast majority of mass market customers are residential customers and small SME businesses, like local dairies.
[6]	Explain why the deal is unlikely to SLC	See body of application.
[7]	Copies of documents bringing about the merger	See Schedule A.
[8]	Internal applicant documents seen by the Board or senior	See Schedule A.

	management within the last two years that relate to: 342 the transaction; or 343 market conditions.	
[9]	Most recent annual report, audited financial statements and management accounts	Annual report and audited financials found here: https://www.mercury.co.nz/investors/results-reports/annual-interim-reports Management accounts in Schedule A.

SCHEDULE C: ELECTRICITY REGIONAL MARKET SHARE DATA (ICP COUNT AT MAY 2021)

1 In response to an initial notification letter about the proposed transaction, the Commission expressed interest in regional market shares.

2 While Mercury considers that the evidence shows that the retail electricity market is clearly national, for full context, this schedule set outs the disaggregated ICP counts for residential and SME customers by regional council.[128]

Northland						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Contact Energy	17,869	23%	2,943	23%	20,812	23%
Genesis Energy	16,659	21%	2,490	19%	19,149	21%
Meridian Energy	14,033	18%	4,058	31%	18,091	20%
Mercury NZ	13,891	18%	1,711	13%	15,602	17%
TrustPower	4,115	5%	403	3%	4,518	5%
Pulse Energy Alliance	3,701	5%	219	2%	3,920	4%
Nova Energy	2,985	4%	709	5%	3,694	4%
Electric Kiwi	2,757	4%	111	1%	2,868	3%
Vocus	1,367	2%	116	1%	1,483	2%
Flick Electric	272	0%	5	0%	277	0%
Others	832	1%	222	2%	1,054	1%
Total	78,481	100%	12,987	100%	91,468	100%

Auckland						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Mercury NZ	177,221	32%	15,122	22%	192,343	31%
Contact Energy	107,152	19%	13,351	20%	120,503	19%
Genesis Energy	102,960	18%	12,191	18%	115,151	18%
Meridian Energy	48,716	9%	15,763	23%	64,479	10%
TrustPower	40,554	7%	3,354	5%	43,908	7%
Nova Energy	20,228	4%	4,765	7%	24,993	4%
Electric Kiwi	24,318	4%	363	1%	24,681	4%
Pulse Energy Alliance	15,628	3%	940	1%	16,568	3%
Vocus	12,790	2%	861	1%	13,651	2%
Flick Electric	6,054	1%	168	0%	6,222	1%
Others	2,493	0%	1,100	2%	3,593	1%
Total	558,114	100%	67,978	100%	626,092	100%

[128] At 31 May 2021. Electricity Authority data: https://www.emi.ea.govt.nz/Retail/Reports/R_MSS_C?MarketSegment=SME&Percent=Y&RetailEntity=Trader&_si=_dr_MarketSegment|Res,_dr_RetailEntity|Trader,v|4.

Waikato						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Genesis Energy	70,173	36%	11,513	33%	81,686	35%
TrustPower	31,964	16%	4,189	12%	36,153	16%
Contact Energy	25,387	13%	4,380	12%	29,767	13%
Mercury NZ	23,852	12%	3,314	9%	27,166	12%
Meridian Energy	13,964	7%	8,811	25%	22,775	10%
Nova Energy	9,121	5%	2,176	6%	11,297	5%
Pulse Energy Alliance	7,170	4%	226	1%	7,396	3%
Electric Kiwi	6,613	3%	156	0%	6,769	3%
Vocus	3,406	2%	219	1%	3,625	2%
Flick Electric	1,584	1%	49	0%	1,633	1%
Others	3,466	2%	122	0%	3,588	2%
Total	196,700	100%	35,155	100%	231,855	100%

Bay of Plenty						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
TrustPower	53,385	42%	5,230	33%	58,615	41%
Genesis Energy	20,879	16%	1,695	11%	22,574	16%
Nova Energy	12,063	9%	3,525	22%	15,588	11%
Mercury NZ	12,640	10%	910	6%	13,550	9%
Meridian Energy	7,220	6%	2,922	18%	10,142	7%
Contact Energy	7,444	6%	1,282	8%	8,726	6%
Pulse Energy Alliance	6,024	5%	215	1%	6,239	4%
Electric Kiwi	4,801	4%	95	1%	4,896	3%
Vocus	2,152	2%	65	0%	2,217	2%
Flick Electric	1,014	1%	16	0%	1,030	1%
Others	640	0%	73	0%	713	0%
Total	128,262	100%	16,028	100%	144,290	100%

Gisborne						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Contact Energy	4,434	29%	890	44%	5,324	31%
Genesis Energy	3,025	20%	200	10%	3,225	19%
Nova Energy	1,776	12%	258	13%	2,034	12%
Pulse Energy Alliance	1,703	11%	46	2%	1,749	10%
TrustPower	1,572	10%	83	4%	1,655	10%
Meridian Energy	740	5%	386	19%	1,126	6%
Mercury NZ	930	6%	118	6%	1,048	6%
Flick Electric	523	3%	22	1%	545	3%
Vocus	307	2%	24	1%	331	2%
Electric Kiwi	248	2%	5	0%	253	1%
Others	88	1%	3	0%	91	1%
Total	15,346	100%	2,035	100%	17,381	100%

Hawke's Bay						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Genesis Energy	22,822	33%	1,889	18%	24,711	31%
Contact Energy	19,484	29%	3,533	33%	23,017	29%
Meridian Energy	5,014	7%	2,891	27%	7,905	10%
TrustPower	5,009	7%	457	4%	5,466	7%
Mercury NZ	4,647	7%	453	4%	5,100	6%
Pulse Energy Alliance	4,489	7%	195	2%	4,684	6%
Nova Energy	1,696	2%	1,022	10%	2,718	3%
Electric Kiwi	2,538	4%	29	0%	2,567	3%
Vocus	1,409	2%	99	1%	1,508	2%
Flick Electric	751	1%	37	0%	788	1%
Others	291	0%	41	0%	332	0%
Total	68,150	100%	10,646	100%	78,796	100%

Taranaki						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Genesis Energy	16,946	34%	3,260	31%	20,206	34%
Nova Energy	10,453	21%	1,519	15%	11,972	20%
Meridian Energy	3,238	7%	3,561	34%	6,799	11%
Mercury NZ	5,404	11%	914	9%	6,318	11%
TrustPower	5,274	11%	317	3%	5,591	9%
Contact Energy	4,260	9%	588	6%	4,848	8%
Pulse Energy Alliance	1,459	3%	56	1%	1,515	3%
Vocus	820	2%	80	1%	900	2%
Electric Kiwi	861	2%	26	0%	887	1%
Flick Electric	304	1%	9	0%	313	1%
Others	220	0%	29	0%	249	0%
Total	49,239	100%	10,359	100%	59,598	100%

Manawatu-Wanganui						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Genesis Energy	33,271	33%	4,566	28%	37,837	32%
Contact Energy	15,620	15%	2,414	15%	18,034	15%
Meridian Energy	9,756	10%	4,709	28%	14,465	12%
TrustPower	12,901	13%	1,217	7%	14,118	12%
Mercury NZ	10,297	10%	1,250	8%	11,547	10%
Nova Energy	9,416	9%	1,974	12%	11,390	10%
Pulse Energy Alliance	5,135	5%	164	1%	5,299	4%
Electric Kiwi	2,191	2%	51	0%	2,242	2%
Vocus	1,905	2%	110	1%	2,015	2%
Flick Electric	635	1%	16	0%	651	1%
Others	423	0%	62	0%	485	0%
Total	101,550	100%	16,533	100%	118,083	100%

Wellington						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Genesis Energy	73,974	36%	5,785	27%	79,759	35%
Contact Energy	31,787	16%	4,389	20%	36,176	16%
Meridian Energy	27,674	14%	6,880	32%	34,554	15%
Mercury NZ	16,575	8%	933	4%	17,508	8%
TrustPower	16,817	8%	396	2%	17,213	8%
Nova Energy	11,556	6%	2,423	11%	13,979	6%
Electric Kiwi	9,932	5%	66	0%	9,998	4%
Flick Electric	4,923	2%	136	1%	5,059	2%
Pulse Energy Alliance	4,881	2%	130	1%	5,011	2%
Vocus	3,987	2%	190	1%	4,177	2%
Others	1,065	1%	177	1%	1,242	1%
Total	203,171	100%	21,505	100%	224,676	100%

Tasman						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Contact Energy	8,084	42%	1,221	39%	9,305	41%
Meridian Energy	2,421	13%	1,222	39%	3,643	16%
TrustPower	3,046	16%	167	5%	3,213	14%
Pulse Energy Alliance	1,903	10%	84	3%	1,987	9%
Genesis Energy	1,300	7%	86	3%	1,386	6%
Mercury NZ	998	5%	140	4%	1,138	5%
Electric Kiwi	517	3%	9	0%	526	2%
Nova Energy	386	2%	108	3%	494	2%
Vocus	260	1%	22	1%	282	1%
Flick Electric	123	1%	5	0%	128	1%
Others	245	1%	93	3%	338	2%
Total	19,283	100%	3,157	100%	22,440	100%

Nelson						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Contact Energy	7,055	30%	998	30%	8,053	30%
TrustPower	4,145	18%	521	16%	4,666	17%
Meridian Energy	3,241	14%	1,109	34%	4,350	16%
Pulse Energy Alliance	3,089	13%	77	2%	3,166	12%
Genesis Energy	2,084	9%	272	8%	2,356	9%
Mercury NZ	1,252	5%	104	3%	1,356	5%
Electric Kiwi	934	4%	15	0%	949	4%
Nova Energy	704	3%	102	3%	806	3%
Vocus	431	2%	27	1%	458	2%
Flick Electric	282	1%	1	0%	283	1%
Others	354	2%	57	2%	411	2%
Total	23,571	100%	3,283	100%	26,854	100%

Marlborough						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
TrustPower	6,073	28%	848	27%	6,921	28%
Meridian Energy	3,893	18%	1,382	44%	5,275	21%
Contact Energy	3,191	15%	392	12%	3,583	14%
Pulse Energy Alliance	2,571	12%	58	2%	2,629	10%
Genesis Energy	2,285	10%	207	7%	2,492	10%
Mercury NZ	2,196	10%	83	3%	2,279	9%
Nova Energy	572	3%	145	5%	717	3%
Electric Kiwi	578	3%	1	0%	579	2%
Vocus	310	1%	22	1%	332	1%
Flick Electric	114	1%	3	0%	117	0%
Others	145	1%	19	1%	164	1%
Total	21,928	100%	3,160	100%	25,088	100%

West Coast						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
TrustPower	5,755	38%	678	25%	6,433	36%
Contact Energy	2,661	18%	558	21%	3,219	18%
Meridian Energy	1,464	10%	963	35%	2,427	14%
Pulse Energy Alliance	2,316	15%	110	4%	2,426	14%
Genesis Energy	1,257	8%	174	6%	1,431	8%
Mercury NZ	939	6%	92	3%	1,031	6%
Nova Energy	289	2%	67	2%	356	2%
Vocus	221	1%	42	2%	263	1%
Electric Kiwi	115	1%	-	0%	115	1%
Flick Electric	30	0%	1	0%	31	0%
Others	76	1%	32	1%	108	1%
Total	15,123	100%	2,717	100%	17,840	100%

Canterbury						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Meridian Energy	67,221	26%	25,074	60%	92,295	31%
Contact Energy	67,911	26%	7,965	19%	75,876	25%
Genesis Energy	41,635	16%	3,581	9%	45,216	15%
TrustPower	18,878	7%	1,334	3%	20,212	7%
Mercury NZ	16,615	6%	1,045	3%	17,660	6%
Electric Kiwi	14,272	6%	308	1%	14,580	5%
Pulse Energy Alliance	9,078	4%	268	1%	9,346	3%
Nova Energy	7,747	3%	1,100	3%	8,847	3%
Flick Electric	7,676	3%	181	0%	7,857	3%
Vocus	4,830	2%	398	1%	5,228	2%
Others	1,683	1%	430	1%	2,113	1%
Total	257,546	100%	41,684	100%	299,230	100%

Otago						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Contact Energy	25,192	25%	3,844	22%	29,036	24%
Meridian Energy	18,025	18%	6,871	40%	24,896	21%
TrustPower	15,086	15%	2,222	13%	17,308	14%
Genesis Energy	15,065	15%	1,945	11%	17,010	14%
Pulse Energy Alliance	9,307	9%	495	3%	9,802	8%
Mercury NZ	9,099	9%	663	4%	9,762	8%
Electric Kiwi	5,498	5%	78	0%	5,576	5%
Nova Energy	1,203	1%	609	4%	1,812	2%
Vocus	1,397	1%	193	1%	1,590	1%
Flick Electric	1,288	1%	2	0%	1,290	1%
Others	1,102	1%	436	3%	1,538	1%
Total	102,262	100%	17,358	100%	119,620	100%

Southland						
May 2021 (by parent)	Residential	%	SME	%	Residential + SME	%
Contact Energy	16,065	39%	3,314	31%	19,379	37%
Meridian Energy	6,148	15%	5,044	48%	11,192	22%
TrustPower	7,543	18%	417	4%	7,960	15%
Genesis Energy	3,995	10%	651	6%	4,646	9%
Mercury NZ	2,744	7%	596	6%	3,340	6%
Pulse Energy Alliance	2,255	5%	112	1%	2,367	5%
Nova Energy	1,150	3%	208	2%	1,358	3%
Vocus	675	2%	138	1%	813	2%
Electric Kiwi	501	1%	12	0%	513	1%
Flick Electric	101	0%	3	0%	104	0%
Others	180	0%	56	1%	236	0%
Total	41,357	100%	10,551	100%	51,908	100%

SCHEDULE D: ELECTRICITY RETAILERS (BY PARENT), MAY 2021 – BASED ON ELECTRICITY AUTHORITY DATA

1 Genesis Energy

2 Contact Energy

3 Mercury NZ

4 Meridian Energy

5 TrustPower

6 Nova Energy

7 Pulse Energy Alliance

8 Electric Kiwi

9 Vocus

10 Flick Electric

11 Ecotricity

12 Ourpower

13 For Our Good

14 Pioneer Energy

15 Paua to the People

16 Prime Energy

17 Hanergy

18 Ecosmart

19 Stack Energy

20 Plus Energy

21 Platinum Power Retail

22 YES Power

23 ID Power

24 South Pacific Energy

25 Power Edge

26 Kea Energy

27 Deep Energy

28 Orange Services

29 Mons Ampere

30 The Three Tasters

SCHEDULE E: ESTIMATED PROFILES OF MAIN GENERATOR-RETAILERS

Figures in GWh (FY21)	**CEN**	**GNE**	**MEL**	**TPW**	**MCY**	**Nova***
Physical Sales	-4985	-6574	-8829	-2407	-4736	-1429
NZAS			-5013			
Generation	7600	8251	12702	1717	6205	1325

*Nova is an estimate as Todd Energy is privately held so generation/retail volume is not publicly available.