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1 between this next session and the Shell session. So, I'll  
2 come back to that at that point.

3 But anyone who is an external legal advisor or other  
4 advisor, if you wish to attend the confidential bit of that  
5 session you'll need to sign an appropriate undertaking. But  
6 I still am reserving my position on that before our own  
7 legal advisor has a chance to advise me on it, so thanks for  
8 that.

9 I just want to say that we do need to speak a bit more  
10 slowly today than what probably all of us did yesterday, so  
11 I may have to remind people throughout the day, and I'm  
12 sorry if it breaks your thought processes, but if you could  
13 try to do that I'd be grateful.

14 Other than that I'd like to welcome Ballance and if you  
15 could start by stating your name again, then you can please  
16 present your submission.

17 **MR HOUWERS:** Thank you Commissioners, actually probably talking  
18 slowly will actually help my thinking come to think of it.  
19 My name is Len Houwers, I'm the site manager for Ballance  
20 Agri-Nutrients (Kapuni) Limited. Others might know it as  
21 the ammonia urea plant in South Taranaki, it was one of the  
22 first Think Big projects that came on-stream in 1982.

23 I'm here to represent the view, if you like, from the  
24 demand-side, probably one of the submitters that's probably  
25 not essentially enamoured with the application, and so our  
26 position is to effectively oppose it.

27 I think you might have to excuse me, I actually did  
28 spend some time preparing this, but over the last two days I  
29 think I've had the opportunity to reflect on what's said and  
30 perhaps target it more to the Commission's concerns. So if  
31 I'm sort of flitting around a little bit I do apologise to

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1 try to put it altogether this morning.

2 **CHAIR:** That's just fine. I mean I think we all understand  
3 that -- and I think it's appropriate that people adjust  
4 their positions and thoughts in response to submissions  
5 heard, so that's perfectly fine.

6 **MR HOUWERS:** Thank you. So, as I was saying, I think one of the  
7 advantages of being last in the line-up is that it has  
8 offered me the opportunity to both observe and listen to the  
9 debate, to arrive at perhaps a more considered perspective  
10 on the arguments.

11 I therefore propose to deviate from my originally  
12 prepared submission in a way that might better assess the  
13 Commission, gather the information it needs to reach its  
14 decision.

15 I propose to first off cover our interest in the  
16 submission in a little bit more detail, and then move on to  
17 the main point I believe in this application, which is the  
18 issue of delay.

19 I'll approach it actually from two directions. Firstly  
20 I'll assume that it's all really just essentially a big  
21 bluff, and then secondly actually maybe credit the  
22 applicants with a rational approach, and assume that they're  
23 correct. Unfortunately I think my conclusion to both  
24 scenarios is essentially the same, joint marketing in fact  
25 should not be allowed with or without conditions.

26 First of all in relation to our nation concern, our  
27 ammonia-urea plant is critically dependent on long-term  
28 reasonably priced gas supply. The plant currently has two  
29 years left to run under its gas contract. The issue of  
30 dominant market power by the JV is seen by us as not just a  
31 potential to lose profit, I think some of the debate's

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1 actually focused on transfer of wealth from one party to the  
2 other.

3 I think for us it's actually more critical than that.  
4 What we're actually risking, if you like, in this whole  
5 scenario is the effective closure of the business. If we're  
6 unable to secure economic long-term benefit, as I said we'll  
7 essentially have to shut it down. And to put it in a bit of  
8 perspective, last year Ballance Kapuni site made \$15 million  
9 worth of profit; that represents about \$2 a gigajoule on  
10 gas. In other words if gas went up by that amount,  
11 effectively our profit would be wiped out.

12 So what are the consequences, if you like, of our  
13 closure. First of all as far as New Zealand farmers are  
14 concerned which essentially we supply both the rural sector  
15 and also partly industry with our product, we'd have to  
16 import 265,000 tonnes of urea annually. That represents a  
17 cost of \$78 million of foreign exchange revenue. It also  
18 represents less money in the pocket of farmers as well,  
19 because effectively out of our profit we pay a rebate.

20 More personally I think this is where the application  
21 becomes personal for me is it's a loss of 115 direct full-  
22 time jobs. These are young families, people close to  
23 retirement, in South Taranaki which is not exactly the place  
24 where you can sort of pick up jobs. That represents about  
25 \$8.1 million in wages and benefits annually.

26 We also spend about \$5 million per annum on other  
27 spending in the regional and national economy. We  
28 represent, because of the nature of our plant which is a  
29 fairly high capital intensive petrochemical facility, if you  
30 like; we represent a reasonably significant volume of  
31 engineering work for the local economy and we actually like

3 July 2003

*Ballance Agri-Nutrients (Kapuni) Limited*

1 to believe it helps sustain the Taranaki heavy engineering  
2 cluster, which is where Taranaki has some expertise, if you  
3 like, in the country. On top of all that we've got the  
4 whole multiplier effect of all those spendings as well.

5 I think if you're talking about detriments potentially  
6 out of the application, that's one example which we can  
7 personally attest to.

8 The problem for us is that the ammonia-urea plant  
9 actually performs well relative to overseas plants. It's  
10 fairly old technology and not particularly efficient in that  
11 sense, but we're able to sustain ourselves in what's  
12 essentially a global competitive market.

13 We're a very small part of that market, essentially  
14 price takers in the market, we basically have to price our  
15 products based on overseas commodity prices and of course  
16 that's affected by the exchange rate. So, we don't actually  
17 have the ability just to ratchet up our price if our costs  
18 go up.

19 We can, of course, make some investments in terms of the  
20 facility, but as I said this is a capital intensive  
21 industry, so the investment in terms of plant efficiency and  
22 improvements are actually fairly significant. We also won't  
23 do that -- because of the long payback periods we can't do  
24 that without having some security around gas supply and  
25 price.

26 We've actually gone to market and looked for gas, but  
27 nobody's willing to sell any. There is none available at  
28 the moment. That's actually affecting our investment  
29 decisions at the moment.

30 **CHAIR:** Can I just interrupt you for a minute on this matter. I  
31 think for us to take account of any detriments in this case

*Ballance Agri-Nutrients (Kapuni) Limited*

1 we would have to establish that they arise because of --

2 **MR HOUWERS:** I'll come to that.

3 **CHAIR:** You'll come to that, all right.

4 **MR HOUWERS:** I think basically, I suppose in summary of our  
5 position, we do have a critical concern around the gas  
6 market, in fact it is excessively dominated, we believe, by  
7 the applicants and I guess the view, if you like, is that  
8 what's essentially being targeted here is a means of  
9 establishing a monopoly in the market.

10 Now I don't actually have the same grounding as  
11 Professor Evans in economics, but from a practical  
12 perspective I'd say one seller in the market represents a  
13 monopoly. Of course essentially a monopoly, I guess we  
14 would view that as extracting monopolistic rents, if you  
15 like, out of the market which essentially means price.

16 So, I guess if you're asking the question, Commissioner  
17 Rebstock, about how this application introduces a detriment  
18 for us, we see it as a potential -- creating this dominant  
19 position, if you like, as a way of increasing price actually  
20 represents a very real risk for us.

21 I think maybe to just move away from our perspective on  
22 this, I started the submission initially with a quotation  
23 that the rest of the people won't be able to see, but it was  
24 by Samuel McChord Crothers. I think when I was sort of  
25 preparing for this I thought what he essentially said was;  
26 "the trouble with facts is that there's so many of them."

27 I actually think it's the wrong quote to use. I think  
28 the problem with this application is that there are very few  
29 facts. Most facts I think that have been presented here are  
30 essentially beliefs. Facts I guess are being presented in a  
31 way that would suit the parties, and I guess Ballance is no

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1 different from that.

2 There's some simple statements of fact, if you like;  
3 separate marketing won't work. Timetable for separate  
4 marketing is seven years, or none as the case may be. Even  
5 supposedly observable facts like what is the gas supply in  
6 this country. I'd actually contend that it's not a fact  
7 because there's so many variables involved. Reserves are  
8 issues of price, there's stuff under the ground that people  
9 are trying to predict, we're talking P50, P90, P10, who  
10 actually holds the information? What do we know? I don't  
11 think it's too much.

12 Even the economic arguments that have been presented, I  
13 think we've had a fairly intensive course in economics over  
14 the last two days, but essentially they're theories, and I  
15 guess we sort of talk about markets in a very sort of grand  
16 sense in New Zealand, but from my perspective a market is  
17 sellers and buyers.

18 So who are the sellers in the market, there's only  
19 three, OMV, Todd and Shell. Who are they? There's about  
20 probably half a dozen people, so six people is the market in  
21 New Zealand.

22 I actually think it would be more helpful if the  
23 applicants had brought psychologists rather than economists  
24 into the debate because essentially economics is driven by  
25 behaviour, and what the theories try to do is predict human  
26 behaviour. In a very grand sense it my work, the theories,  
27 in terms of trying to predict it, but I think in terms of  
28 the New Zealand context we're trying to predict the  
29 behaviours of six people.

30 So I guess what is the truth? What is measurable? I  
31 think it's a bit of a dilemma for all of us. However, I

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1 think it is actually possible to observe behaviour, and I've  
2 taken the opportunity over the last few days to do that and  
3 draw some reasonable conclusions which I think might  
4 actually help guide the Commission in some of its questions.

5 Of course I'd like to add that from our perspective we  
6 don't support joint marketing, so all my statements are  
7 obviously coloured by that view, but I guess our suggestion  
8 for the Commission is that to adopt a cautionary principle  
9 in the final deliberation. I think the precautionary  
10 principle suggests that the actual proposal is anti-  
11 competitive overall, otherwise why would the applicants be  
12 applying for an exemption of the Commerce Act. I think the  
13 thing you've got to be careful about is the unintended  
14 consequences of actually allowing this decision to proceed  
15 in terms of -- and the precedents that it allows to be set.

16 So I actually think the reason that, the burden of  
17 proof, if you like, is actually greatest on the applicants  
18 to prove there are actually benefits in their proposal. I  
19 guess it's our contention that they fail to do that and I'll  
20 elaborate on that through the submission.

21 **CHAIR:** Can I ask you a question at this point. If you were to  
22 be convinced that there would be significant delays, whether  
23 it's one year or seven, as a result of not authorising this  
24 arrangement, would you still believe that the proposal  
25 should not be authorised.

26 **MR HOUWERS:** Yes, I do and I'll cover that in the argument here,  
27 if you like. I'm sorry I'm taking so long to get to it, I'm  
28 just trying to lay the ground work here.

29 **CHAIR:** No, that's fine.

30 **MR HOUWERS:** Just moving on to the main point, I think to start  
31 I'll make several key assumptions which hopefully aren't too



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1 contestable. First of all the assumption I make is that the  
2 parties act rationally, and by rational means basically  
3 self-interest within the constraints of economic framework.  
4 In other words they want to obey the law even though they  
5 may wish to be granted an exemption from it.

6 And thirdly the key point in which the whole application  
7 hinges is the issue of delay. I think if there's no delay  
8 there's no benefits; the application will fail.

9 So allow me to focus on that. If I look at the issue of  
10 delay there really are only two possibilities. First, delay  
11 is just a big bluff designed to coerce the Commission into  
12 supporting the application. I know it's rather  
13 uncharitable, but it's probably rational if you can get away  
14 with it.

15 Second possibility is that the application is absolutely  
16 serious and the Commission should actually pay attention to  
17 that. So, let's deal with the first one; which basically  
18 says look there really is no delay. Why do I say that? If  
19 you look at -- I guess I base that on a couple of points.

20 Firstly, I think if you look at their timetable  
21 associated with separate marketing, it essentially doesn't  
22 look credible from a couple of point of views. Firstly, the  
23 consequences of such a lengthy delay represents a  
24 significant risk for the applicants in terms of reduction on  
25 the demand-side that's clearly not in their self interests.  
26 In 2010 Methanex won't be operating in New Zealand. Genesis  
27 will have developed Kupe giving it sufficient supply without  
28 Pohokura, and I think the timetable I think proposed for  
29 Kupe is about 2008 tentatively at the moment. I'm aware  
30 Genesis is effectively looking for partners to develop the  
31 field at this stage.

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1 Other generators may well have configured their station  
2 s to run on coal or other fuels, and smaller on-shore field  
3 developments and possible field extensions at Kapuni and  
4 Maui will have overtaken Pohokura's supply source.

5 I mean the applicants do make a big point about the  
6 reality of the commercial world and risk management, but if  
7 I was, I guess, on their Board of Directors I'd be seriously  
8 questioning why you should allow so much value to erode.

9 So that's the first point. The second point I think, if  
10 I actually look at their timetable, and I appreciate that  
11 it's all conjecture, and I think the point was well made  
12 yesterday that, you know, it could be whatever people want  
13 it to be. And I'm sure the applicants themselves could  
14 certainly make that timetable happen.

15 But again, if I look at the timetable myself, the first  
16 thing I would actually note is that the appeal process  
17 doesn't appear rational. It's taken two years before  
18 anything else happens. There's only two outcomes to an  
19 appeal, you're either successful or you're not. If they are  
20 successful, then they have to implement their joint  
21 marketing timetable, and there's a bit of maths in the notes  
22 there I'll slowly take you through.

23 So if they did that, there's 730 days of delay for the  
24 appeal process, another 483 days to implement their joint  
25 marketing scheme, so we're already up to 1213 days. If  
26 they're unsuccessful their current estimate shows about 2806  
27 days. Let's drop that out for the moment, okay, so now it  
28 becomes 2076 days.

29 A couple of other points to note, the applicants haven't  
30 actually allowed the same timetable under their two  
31 timetables for similar activities. For example, the

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1 evaluation selection or completion for gas, I guess GCAs,  
2 whatever that means; includes board approval of 15 days in  
3 separate marketing and only 5 under joint.

4 The separate marketing case also adds 390 days of  
5 critical path activity to project redesign, where there's no  
6 allowance under joint marketing. Given that the  
7 counterfactual actually allows for co-ordinated production,  
8 it is difficult to see why there should be a critical path  
9 activity at the end of the appeal process. So, if we took  
10 that out, which makes it comparable to the joint marketing,  
11 there's now only 1686 days, and remember we're starting with  
12 1213 as their best case scenario.

13 Then I look at the time estimates under the separate  
14 marketing scenarios for various activities, and I don't  
15 dispute the steps that they've put in there, I do have some  
16 difficulty with the rather pedestrian approach to matters.

17 For example they've allowed two months for an  
18 information memorandum preparation. This is a project  
19 that's bleeding \$5 million a month according to Mr Salisbury  
20 yesterday. That requires quite a lot of facilitation, or  
21 marriage guidance I think as one of the parties put  
22 yesterday. So given that the activities are essentially  
23 within the control of the applicants, it does suggest a  
24 certain lack of urgency on their behalf to progress matters.

25 If I took a rather conservative, I think quite generous  
26 view, if you said, well look let's cut all that by a third,  
27 it's really not necessary to spend two months preparing an  
28 application. In fact some of the steps are not necessary at  
29 all. One of the things they talk about is well we suddenly  
30 have to go away and rush and do our own separate subsurface  
31 work. Subsurface work, I mean, if you haven't got the best

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1 subsurface work in your JV, what are you going to achieve by  
2 going away and doing it separately? If that information is  
3 going to be better, they should have already done it under  
4 the JV.

5 If I did that, the whole process now only takes 1124  
6 days, which is actually 89 days earlier than a successful  
7 court appeal. So, there's no value in the Court process. I  
8 can only presume that perhaps the timetable was actually put  
9 together by a lawyer. This still leaves a difference of 641  
10 days between the two scenarios.

11 However, with the best case scenario under their joint  
12 marketing, production isn't expected until February 2006,  
13 which is actually 950 days out from the present, or 467  
14 days, just over a year, beyond the joint marketing  
15 agreement.

16 Now the whole thing apparently also hinges on financing.  
17 But as I'll explain a little bit below, I think the  
18 applicants can actually be assured of their finance  
19 arrangements well before the finish of this process. I  
20 think it's actually feasible that production, under separate  
21 marketing, can actually commence in 1124 days time. So, now  
22 we've only got a difference of 174 days or six months.

23 Now, the applicants have stated a number of times, quite  
24 emphatically I believe, what prudent risk managers they are.  
25 I'd actually note that Joint Venture Partners actually took  
26 over Pohokura in March 2001, it's over two years ago. The  
27 JV that was amended, I believe it came up on the first day's  
28 submission, allowed for the possibility that joint marketing  
29 might not occur. They were confident they were going to get  
30 it, but there was a possibility there.

31 If you're a prudent risk manager wouldn't you have plan

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1 B ready in case the Commission said no? Wouldn't you  
2 actually be working on some of the activities? We sit here  
3 for six months in this appeal process, you can't tell me  
4 they've actually sat there and not considered an outcome  
5 that says they're not going to get it.

6 Given there's a huge amount of work in front of them, I  
7 don't think it's unreasonable to assume they actually might  
8 have started some of that. So, if we take that into account  
9 why should there even be 174 days difference.

10 Furthermore I think we remain a bit skeptical with  
11 regards to this extension, not the least of which that the  
12 partner's exploration permit actually expires on the 30th of  
13 November 2005. Now under the Crown Minerals Act, they're  
14 either required to surrender it or convert it to a mining  
15 permit.

16 Now, from what we understand for the process to include  
17 to actually get a mining permit you need to -- it's not an  
18 automatic right you actually need to present a development  
19 plan, including production profiles, to the Crown Minerals  
20 area. And even though I believe that they're required to do  
21 that by the 30th of November 2005, our understanding is that  
22 they're actually looking to acquire that before the end of  
23 the year.

24 Now if you're going to apply for a mining permit with a  
25 development path along it, including profiles, you'd think  
26 you'd be assured of your financing arrangements before you  
27 actually did that. Why go and apply for it, make a  
28 commitment to the Crown and not believe that you're actually  
29 going to be able to achieve that.

30 In terms of the financing aspect of it, I think the  
31 Partners have already said the field will get developed one

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1 way or another, the financing will be there.

2 So I guess we suggest that the applicants are very  
3 assured and confident of their financial arrangements to  
4 fund a development before the end of the calendar year, this  
5 calendar year. Of course there's a more fundamental issue  
6 as I've touched on, why take the excuse of delay as a reason  
7 at all? I mean it's not something caused by anybody other  
8 than the applicants, so why should we actually have to  
9 consider it as a valid reason altogether?

10 So that's the first aspect. I think if you go through  
11 that sort of logic, essentially saying well there's no  
12 delay, so no benefit, no authorisation.

13 **CHAIR:** What happens with a mining permit if a party does not  
14 meet the production profiles that they put in the  
15 development plan? Are there any consequences?

16 **MR HOUWERS:** I couldn't comment. As I say I'm not familiar  
17 enough with the whole process. I just enquired and got some  
18 feedback on what is required to get it. My understanding is  
19 it's actually a commitment to the Crown and if you're going  
20 to vary from that then there has to be some sort of process  
21 whereby that variation is allowed. It's not just a  
22 question, I believe, of actually putting forward something  
23 and deciding to do something else.

24 **MS BATES QC:** I just turn to the question of detriment for a  
25 moment, which is the other side of the coin. And you no  
26 doubt yesterday would have heard the argument advanced that  
27 in fact there is very little difference between Scenario 1  
28 and joint marketing, and if we turn specifically to price,  
29 Professor Evans' evidence was that there was going to be  
30 very little difference in price whichever way you went.

31 So that led to the argument well, there really was no

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1       detriment if you compared the counterfactual to the  
2       application. We need to be able to find that there is some  
3       detriment and it's not a matter that can just be assumed.  
4       I'd like you to address that a little further.

5   **MR HOUWERS:**     Sure, it was actually the second part to my  
6       scenario.

7   **MS BATES QC:**    Sorry, you always have that answer.

8   **MR HOUWERS:**     That sort of concludes the first part of the  
9       argument, it's all just smoke and mirrors and we shouldn't  
10      believe them at all.

11           The second part of the argument actually says we should  
12      look at it seriously, and say these are rational people,  
13      they've sat together and come up with this timetable that  
14      suggests seven years. And more importantly it's not just  
15      the applicants who are saying that, obviously their board  
16      must believe it, it's not just a question of one irrational  
17      person saying "this is what it's going to be." you'd have  
18      to have a whole lot of irrational board members behind them  
19      saying the same thing, and I don't believe that's the case.  
20      The seven years may be very feasible in terms of their  
21      thing. So, what does it actually mean?

22           We've already got a rough estimate, they're saying this  
23      project is eroding value at \$5 million per month. That's  
24      \$60 million a year. Take a seven year time delay, that's  
25      \$420 million of value being eroded. These are rational  
26      people. So, where does the actual \$420 million actually go?

27           Well, it can't be from the volume of the fields. The  
28      co-ordinated production, you know, avoids the common pool  
29      problem, so whatever's in the grounds is going to get  
30      extracted one way or the other and the volumes essentially  
31      won't be any different. Can't be from the condensate.

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1 They're price takers in the market, so essentially they go  
2 out and get whatever value they can independently.

3 So the only place where they can lose value is in the  
4 price of the gas, because the quantity is the same; it's the  
5 price, \$420 million.

6 So, if you're asking I think in terms of to quantify the  
7 value, I believe the question came up yesterday with NGC;  
8 what is actually the best estimate for the difference  
9 between the factual and the counterfactual? The difference  
10 is \$420 million. That's essentially in the price of the gas  
11 because the quantity is fixed. So, I think that's actually,  
12 as good an estimate, if you like, as you're likely to get  
13 under this analysis.

14 **MS BATES QC:** I understand the point you're making from the  
15 seller's perspective, although they might prefer to have the  
16 420 where they can use it rather than sunk in the ground.  
17 There's some benefit to getting your money early, wouldn't  
18 you agree?

19 **MR HOUWERS:** Yeah, but I think when we talk about, there was  
20 some discussion around pricing and the JV and so forth; I  
21 think the point was made fairly early on day one about what  
22 are the games, if you like, the players themselves could  
23 actually play?

24 And I think you need to look a little bit wider than  
25 Pohokura in this. I mean all the partners have a portfolio  
26 of gas fields and it's very plausible that a partner might  
27 take a supposed loss, if you like, on Pohokura but then you  
28 sort of interchange values if it actually maximises the  
29 value of their portfolio.

30 **MS BATES:** I understand, that's another matter again. Let me  
31 take you back to the question I asked you in the beginning.



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1 I want you to address that from the point of view of the  
2 buyer; the argument that Professor Evans put forward that  
3 there's going to be very little difference in the price to  
4 the buyer.

5 **MR HOUWERS:** Well, I think that's the point I'm making. In  
6 terms of the buyer, right, if a party independently selling  
7 is able to offer a price that's lower than the JV because it  
8 maximises their portfolio, then from the buyer's perspective  
9 that's the price that they'll see.

10 **MS BATES QC:** So you don't accept that the Joint Venturers would  
11 act in the best interests of the Joint Venture, that they'll  
12 all take their own agenda?

13 **MR HOUWERS:** I think judging from the reaction yesterday wasn't  
14 that the case? We've had -- Mr Tweedie made a very adamant  
15 point; separate marketing, all deals are off.

16 **MS BATES QC:** I'm just exploring this, because, you know, we  
17 need to understand the situation. But that was -- the  
18 argument was put by Professor Evans that the Joint Venture  
19 would lead to, in effect, lead to ringfencing; you don't  
20 accept that?

21 **MR HOUWERS:** I've got another point of view. I'm not a  
22 professor in economics, but I guess I'm just trying to  
23 approach it from what I believe is a rational perspective.

24 **MS BATES QC:** So you don't accept in fact the argument that if  
25 there is joint marketing in terms of -- not joint marketing,  
26 separate marketing under Scenario 1 that there will be very  
27 little price differential between that and joint marketing?

28 **MR HOUWERS:** There may be, but I think it's equally plausible to  
29 suggest that it won't be. As I say it comes down to the  
30 behaviour of the applicants. I guess my view on the whole  
31 application is it's actually the partners trying to restrain

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1 each other in terms of anti-competitive effects, you know,  
2 and the only reason they'd do that is because they think  
3 somebody's going to thief more value out of the field than  
4 the other.

5 **MR STEVENS:** Can I pick up on a point that you mentioned  
6 previously, and it came down to the rational behaviour, I  
7 guess, of people. And one part of your application you  
8 stressed how important the gas was to your company and how  
9 your company is under serious threat for delay.

10 Assuming that there is even the potential of delay then,  
11 would you agree that risk management would say that you  
12 wouldn't want any possibility of any delay, therefore would  
13 you support joint marketing to actually manage that risk?

14 **MR HOUWERS:** It's a fair question, but I think from Ballance's  
15 point of view we're in a bind in both ways. Either we don't  
16 have gas or we can't afford it. I think from Ballance's  
17 risk management point of view we shouldn't just be relying  
18 on Pohokura. We're actually -- from Ballance's perspective,  
19 7 PJUs, probably have more scope to try and acquire gas from  
20 somewhere, even if we had to go out and dig a hole in the  
21 ground ourselves. On-shore Taranaki fields are reasonably  
22 small, probably of little interest to some of the major  
23 users, but perfectly feasible for ourselves.

24 **MR STEVENS:** So you don't believe that additional gas coming on-  
25 stream would actually help the price? So having additional  
26 supply you don't think will actually help at all?

27 **MR HOUWERS:** I think it will help under separate marketing. I  
28 don't think it will actually help under joint marketing.

29 **MR STEVENS:** And why won't it help under joint marketing?

30 **MR HOUWERS:** Because even under joint marketing the demand  
31 exceeds the supply. We've got Methanex wanting at least 20

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1 PJs, preferably 90 if they can get it at a reasonable price.  
2 This field is only ever going to produce, according to the  
3 applicants, about 70 PJs, Maui does about 190 something at  
4 the moment, it's going to be well short.

5 **MR STEVENS:** Would you agree, though, that a price for any  
6 product which would be directly related to the scarcity of  
7 that product, and therefore if there was more gas available,  
8 there is a potential for that price to either remain static  
9 or to reduce?

10 **MR HOUWERS:** There is if it's a competitive market. I guess our  
11 whole application is based on the fact that it's not a  
12 competitive market and the application itself actually  
13 ensures it's even less so.

14 **MR STEVENS:** Thank you.

15 **MR HOUWERS:** So I guess --

16 **CHAIR:** Can we just -- one more question please.

17 **MR TAYLOR:** Were you following up on that last?

18 **MR HOUWERS:** No, no.

19 **MR TAYLOR:** Just take you back to the discussion a moment or so  
20 ago about the series of contracts, we've got intra-JV  
21 contracts that would have to be put together, so I just want  
22 to be clear I understood -- I think I do -- where you're  
23 coming from. You're downplaying considerably the argument  
24 we heard yesterday about the difficulty of the JV partners  
25 putting together the series of documents and agreements they  
26 need to put together, such as this time scale is seriously  
27 compressed.

28 **MR HOUWERS:** On the contrary actually. That was one position it  
29 took, but the counter position I actually took was it is  
30 actually perfectly reasonable. I just -- but I think the  
31 consequences of that, because one of the things of interest

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1 to the Commission is how does the factual compare to the  
2 counterfactual in terms of detriments, public detriments in  
3 that respect.

4 If we actually agreed with the timeframe it takes for  
5 them to do that, then, as I said, the actual detriments is  
6 quoted at about \$420 million, by their own account because  
7 they're saying \$5 million a month value erosion on the  
8 field, and a detriment -- and the value erosion essentially  
9 comes out of the price differential in the gas.

10 **MR TAYLOR:** Sure, I don't think anybody can argue a delay will  
11 have a price reduction. If it was just your view on the  
12 time scale itself.

13 **MR HOUWERS:** I think the view I was presenting was that the time  
14 scale, if you like, is within the control of the applicants,  
15 so they can push it as hard or as slow as they think is  
16 rational. If I was looking at it from the outside I'd  
17 question why things should take that long if so much value  
18 is being eroded each month. I know from Ballance's  
19 perspective if that was the case I'd expect the board to be  
20 leaning pretty heavily on me to speed things up.

21 **MR TAYLOR:** Sure. The implication of the FID decision being a  
22 decision to spend somewhere between \$800 million and  
23 \$1 billion, does that impact materially on your view?

24 **MR HOUWERS:** I think they'll make the investment when they think  
25 they're gonna get a return out of it. It's an economic  
26 equation for the applicants. They've got to decide,  
27 \$800 million has got to give them an economic return  
28 somewhere.

29 **MR STEVENS:** Just to follow up again, I'm having a little bit of  
30 a problem, and maybe I'm misunderstanding you; it's with  
31 regard to the \$420 million. Are you suggesting that given

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1 that that is a potential opportunity cost of a seven year  
2 delay, are you suggesting that that will be -- that that  
3 cost will be borne by the purchasers of the gas as opposed  
4 to the sellers?

5 **MR HOUWERS:** Yeah, what I'm saying is that the gas supply is  
6 fixed because it's co-ordinated production. So under both  
7 scenarios the volume of liquids and gas that comes out of  
8 the ground is the same. The value erosion won't occur in  
9 the condensate because that's sold in the overseas  
10 international market. So the only value loss, \$420 million,  
11 can come out of price differential in the gas. And that's  
12 sort of a rough, obviously, gross estimate of what it is.  
13 If you equate it to the 700 PJs as reported to be in there,  
14 that represents about 60 cents a gigajoule.

15 **MR STEVENS:** If that was the case, though, wouldn't you think  
16 that the sellers would be encouraging alternative fuels, or  
17 the production would be going elsewhere? So effectively  
18 they'll be damaging their own positions if they adopt that  
19 approach?

20 **MR HOUWERS:** Exactly. That was the point I was saying. I was  
21 approaching it from two directions, I was saying is it  
22 rational or is it not rational? That was the argument that  
23 the first year of the seven year delay is actually not a  
24 rational decision. Why would they do that?

25 I guess I'm not trying to second-guess the applicants on  
26 it, I mean they'll have a belief about how long certain  
27 things take, who am I to say it's not?

28 But if I go down both routes, if you like, saying well,  
29 it's overestimated or it's correct, the outcome for me is  
30 the same, you know, in terms of the conclusion as far as the  
31 Commission is concerned.

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1           The first one says, well, if it's all overstated, all  
2           right, and rational thing and it's destroying value, they're  
3           not going to do that, then there's not going to be any delay  
4           at all, so therefore there is no benefits in their  
5           application.

6           Second argument says, well, there is all this delay,  
7           right, and that's worth \$420 million in the gas market, or  
8           as I said about 60 cents a gigajoule price differential.

9   **MR STEVENS:**    So would you see that there are benefits in  
10          avoiding that delay then?

11 **MR HOUWERS:**    Absolutely. Depending on what the context is.

12 **MR STEVENS:**    So on that basis you'd support joint marketing  
13          then?

14 **MR HOUWERS:**    No.

15 **MR STEVENS:**    If we could avoid the delay.

16 **MR HOUWERS:**    The point is, I don't believe that joint marketing  
17          is actually necessary to avoid delay in the first instance.  
18          In the second instance, if there is a delay, the actual  
19          detriment, if you like, is \$420 million, so why allow it at  
20          all? That's the whole issue in front of the Commission,  
21          surely, about measuring the detriments and benefits of the  
22          factual versus the counterfactual.

23 **MS BATES QC:**    Still puzzled. The detriment is \$420 million, is  
24          that what you're saying?

25 **MR HOUWERS:**    What I'm saying is that there's a difference of  
26          \$420 million in terms of field value just in rough terms  
27          associated with a seven year delay. The only -- where that  
28          value is being lost, if you like, is under separate  
29          marketing potentially you have a lower price than under  
30          joint marketing. So, that's actually a benefit, if you  
31          like, to the public, notwithstanding a seven year delay.

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1 **MS BATES QC:** So does it hinge on your conclusion that separate  
2 marketing leads to lower price?

3 **MR HOUWERS:** That's right. What I was hoping, and I see there's  
4 still some puzzled expressions there, but what I was trying  
5 to show, if you like, is the whole argument in front of the  
6 Commission is this issue of delay, because all the  
7 detriments and benefits associated with this application  
8 revolve around that. I've taken the two points of view, one  
9 that says well, it's grossly overstated --

10 **MS BATES QC:** I think everyone understands that one.

11 **MR HOUWERS:** The other one says that it's actually real, but in  
12 terms of it being real, then what is the actual difference  
13 in value between the factual and the counterfactual?

14 What I'm saying is the applicants have said the value of  
15 the field is being eroded at \$5 million a month, rough  
16 numbers, I'm not sure whether that was the party themselves  
17 or the whole JV, but let's just assume it's the whole JV  
18 overall, \$5 million a month being eroded, so that's \$60  
19 million a year, times seven years is \$420 million; and  
20 they're prepared to accept that, so it's rational from their  
21 point of view. Because if it wasn't acceptable they'd be  
22 accelerating that timetable.

23 **MR TAYLOR:** Do you see a difference between a time series of \$5  
24 million over seven years as opposed to a one hit cost of  
25 \$400 million in the decision-making sort of process?

26 **MR HOUWERS:** I've used rough round numbers.

27 **MR TAYLOR:** No, I accept that, I'm talking scale rather than  
28 detailed number.

29 **MR HOUWERS:** Sorry, are you asking whether a \$5 million a month  
30 loss is small change to these guys and they don't mind or --

31 **MR TAYLOR:** I didn't exactly mean it in that way, but I can

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1 understand that -- I'd put it to you that the decision-  
2 making process of an \$800 million decision, companies and  
3 boards would want to have their nuts in a row, and that a  
4 \$5 million delay on a monthly basis is not the same thing in  
5 the argument as saying there's a cost of \$400 million to  
6 compare against the \$800 million cost to the eventual  
7 benefit from the field.

8 **MR HOUWERS:** I think if the applicants decide to invest  
9 \$800 million they're going to be doing everything they can  
10 to get stuff out of the ground and paying for it as quickly  
11 as they can.

12 **MS BATES QC:** Let's just get back to it so I can be sure that  
13 we've all -- that I've got it. On the scenario that you  
14 accept the delay as being rational, so you're not  
15 criticising the delay, not saying it could be better, it's  
16 seven years and that's rational; that gives a \$420 million  
17 erosion of the field?

18 **MR HOUWERS:** [Nods]

19 **MS BATES QC:** And you're saying that's the detriment?

20 **MR HOUWERS:** For the applicant, surely, but --

21 **MS BATES QC:** Yes, for the applicant.

22 **MR HOUWERS:** Yeah.

23 **MS BATES QC:** What about the argument that the delay is actually  
24 a detriment for the country because it's left there with  
25 insufficient gas supply because it's still in the ground?

26 **MR HOUWERS:** Yeah, that's a valid position to take. I guess I  
27 would argue, and this is purely a personal point of view,  
28 take away the option of joint marketing and you might be  
29 surprised how focused things become in terms of actually  
30 progressing very quickly.

31 **MS BATES QC:** That's a separate argument; I was just taking you



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1 through the consequence of the scenario you put forward. I  
2 just suggest that still leaves us with finding that there's  
3 a detriment in terms of the delay in getting the gas out of  
4 the ground for the buyers.

5 **MR HOUWERS:** Yeah, I guess we're talking about detriment. I  
6 think essentially what we're talking about is, well Methanex  
7 are busy scrambling out trying to get some gas at the  
8 moment, you might assume that they leave and there's a  
9 detriment associated with that. You know, we've got the  
10 issue of power stations, but there are alternatives --

11 **MS BATES QC:** You said yourself demand exceeds supply.

12 **MR HOUWERS:** It does at the moment, yes.

13 **MS BATES QC:** And presumably you want the gas yourself.

14 **MR HOUWERS:** Yeah, at a reasonable price, yeah.

15 **MS BATES QC:** But you don't want it to be delayed.

16 **MR HOUWERS:** As I said before, there's two scenarios for us,  
17 either we don't have gas and we don't survive, or we're  
18 faced in the market of having to pay more for the gas than  
19 we can actually afford and therefore still don't survive.

20 **MS BATES QC:** That part of your argument depends on -- getting  
21 back to price, the basic point you're making is it's going  
22 to be dearer gas under joint marketing isn't it?

23 **MR HOUWERS:** That's right.

24 **MS BATES QC:** Really, if you boiled it all down that's where  
25 you'd get to.

26 **MR HOUWERS:** Yeah, I guess what I was trying to do is give some  
27 estimation on what that value might be, because I think  
28 that's a fairly relevant point for the Commission.

29 **MS BATES QC:** You mean you'd give some estimation on what the  
30 price differential might be?

31 **MR HOUWERS:** Mmm.

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1 **MS BATES QC:** Just go through that little bit again. What do  
2 you say it is?

3 **MR HOUWERS:** It's very rough economics, if you like; but if I  
4 said \$420 million, so understand the argument about  
5 \$5 million a month times 12 times 7, right, \$420 million,  
6 and accept the argument that there's a fixed volume of gas  
7 and condensate in the ground, and the condensate price is  
8 not going to be different under joint or separate marketing  
9 because they're price takers in the global market. So the  
10 only -- where value is being lost, if you like, is in the  
11 price of the gas. So, there's roughly 700 PJs of gas in the  
12 fields, say. \$420 million divided by 700 gives 60 cents a  
13 gigajoule.

14 **CHAIR:** You're basically assuming that all of the value loss to  
15 the players will be passed on in price increases of the gas,  
16 is that your -- without any constraint on their ability to  
17 do that? Is that what you're basically saying?

18 **MR HOUWERS:** Essentially. I mean we're saying a competitive  
19 market, but yeah.

20 **CHAIR:** Can I just ask -- our advisor John Bay would like to put  
21 a question to you if he could.

22 **MR BAY:** I'm just again trying to clarify this \$420 million, and  
23 I think it relates to the question that Commissioner  
24 Rebstock just asked you. You're saying that the  
25 \$420 million that the applicants say that they're going to  
26 lose is going to be made up effectively in a pricing  
27 differential. So in other words they won't lose it  
28 ultimately, they'll pass it through higher prices when they  
29 do bring the gas on-stream, or do you --

30 **MR HOUWERS:** What I'm suggesting is that under joint marketing  
31 there's no effective competition. Under separate marketing,

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1       judging by the reaction yesterday, you know, from the  
2       applicants around the table, we can't make the JV work,  
3       we've got to go back and consider our own positions, all  
4       right.

5               What they're actually saying is they're prepared to  
6       compromise the value of the gas out of that field in their  
7       own interests, because they have a portfolio, if you like,  
8       of other gas fields. They actually might like to play in  
9       terms of this.

10 **MR BAY:** But essentially what you're saying is they won't lose  
11       the \$420 million, whether they do it through a price  
12       increase at Pohokura, or they do it through price increases  
13       of their other holdings, they'll claw that money back  
14       somehow. I mean is that what I'm --

15 **MR HOUWERS:** I think what you're asking is whether as a  
16       consequence of that they'll increase their prices in their  
17       other gas fields.

18 **MR BAY:** That's exactly what I'm asking.

19 **MR HOUWERS:** What would they actually increase it to? Probably  
20       to the same value as the JV price might be, in which case  
21       why have a reaction at all about not being able to separate  
22       market? Essentially what I'm saying is there's more  
23       competition with separate marketing, and competition drives  
24       to lower price.

25 **MR BAY:** And you're saying that competition is going to create a  
26       lower price which is where the \$420 million is calculated?

27 **MR HOUWERS:** That's right.

28 **MR BAY:** You don't accept then one of the costs that's  
29       generating the \$420 million is just the time value of money  
30       of delaying the start of the project by seven years?

31 **MR HOUWERS:** As I said that's very rough economics. If you want

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1 to sit down and do an MPV on it all I'm sure I'll come up  
2 with a slightly different number. I'm just trying to put a  
3 bit of scale of context around what it is. I'm not saying  
4 it's exactly \$420 million. That's the scale we're talking  
5 about, I believe we're talking about.

6 **MR BAY:** Thank you.

7 **MR ADAM:** Can I ask just a question on price, you accept, I take  
8 it, that the amount of gas produced under separate marketing  
9 and joint marketing will be the same.

10 **MR HOUWERS:** Sorry?

11 **MR ADAM:** The amount of gas --

12 **MR HOUWERS:** Yes.

13 **MR ADAM:** -- under either scenario is the same. So you have 70  
14 petajoules of gas you produce each year. Why -- normally  
15 price is very much a function of supply, I would have  
16 thought. Why do you think that under separate marketing the  
17 individual Joint Venture Partners would be prepared to take  
18 a lower price than they could get by selling that quantity  
19 of gas jointly? Why would they not seek to extract,  
20 individually, the same maximum price they could get for that  
21 gas?

22 **MR HOUWERS:** First of all I don't necessarily believe that  
23 supply actually sets price in this market. We're talking  
24 about one seller. Price, you know, is almost independent of  
25 supplying in that particular case.

26 **MR ADAM:** You don't accept there's a market clearing price for a  
27 particular quantity of gas?

28 **MR HOUWERS:** Well, again, coming down to the modelling of it  
29 all, the old supply/demand picture, under a perfectly  
30 competitive situation, which this market is not, that might  
31 be the case. But now we start to get the argument about

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1 economic models on this. So I'm not familiar enough to go  
2 through all that sort of detail. But sorry, I missed the  
3 question again, can you rephrase it?

4 **MR ADAM:** I'm just trying to work out why you would get lower  
5 prices under -- where you've got to constrain supply. But  
6 if you gave a particular quantity of gas to three people to  
7 sell rather than the one person, you would necessarily get a  
8 lower price as a buyer.

9 **MR HOUWERS:** As I say, I think it's partly driven out of  
10 observation around behaviour. Why react so violently to the  
11 notion of separate marketing, because if -- how can I put  
12 this? If there's no difference in price as far as the field  
13 is concerned, then you're probably indifferent as to whether  
14 you're separate or joint market.

15 The reason you want to joint market, I believe in this  
16 particular case, is actually you want to stop or constrain  
17 the other competitors in the market to game their portfolio  
18 in terms of their investment. Everyone is sinking this \$800  
19 million in different proportions, if you like, but they also  
20 have other assets.

21 So there is a potential -- it's a bit like a cartel  
22 arrangement, I guess that's why they break down because  
23 there's actually different drivers associated with each  
24 partner, and there's actually a reason to cheat, if you  
25 like, in the arrangement if that's at all possible. So this  
26 whole arrangement of joint marketing trying to tie it up  
27 contractually is to essentially constrain each other's  
28 behaviour in that sense.

29 **CHAIR:** I think we'll let you proceed with your presentation if  
30 you would please.

31 **MR HOUWERS:** I'm essentially closing, I guess, in terms of the

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1 arguments I've got to put today. I mean I did have bits  
2 about Pohokura GPS and what all that meant.

3 **CHAIR:** Please don't feel you can't cover it if you'd like to go  
4 through it. We have the time to consider it.

5 **MR HOUWERS:** Okay thank you. I mean it's almost incidental. I  
6 mean I'd like to emphasis the bits that I've covered are  
7 essentially the main points of our submission. But the  
8 Pohokura GPS I think is something that's also thrown a slide  
9 up, and I guess the Commission is charged with taking into  
10 account the Government direction from time to time and  
11 accord proper weight to it.

12 I guess if I looked at the Pohokura GPS, and I think  
13 timing is obviously unfortunate and I think did create an  
14 impression, if you like, in our mind that perhaps that was  
15 maybe a determining factor in the original Draft  
16 Determination that swung it the way it did.

17 But I actually would submit that the Minister in the  
18 Pohokura GPS merely outlined the importance of early  
19 development of Pohokura without specifying how this was to  
20 be done. And our submission actually suggests that the GPS  
21 actually creates far greater pressure on the applicants to  
22 resolve their internal difficulties than it creates pressure  
23 on the Commission to approve the application.

24 **CHAIR:** Can I interrupt you just for a minute. I note in the  
25 written submission that you've given us there's an  
26 indication of a view that the timing of that Statement of  
27 Government Policy raises questions of political pressure on  
28 the Commission, and I'd just like to indicate -- and I'm  
29 going to do this, it's unusual for us to do this, but it's  
30 an important matter for the Commission.

31 Section 26 statements to the Commission are the

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1 appropriate means for the Crown to indicate to the  
2 Commission what its policy is. And the caselaw on this  
3 point is very clear and the Commission is very clear itself  
4 that we must have regard to those statements of Government  
5 policy. They are not directions to the Commission. The  
6 Commission does not treat them that way. We do give them  
7 full consideration and the weight that we think is  
8 appropriate, and in doing that we're guided by the Statute  
9 under which we have our authority.

10 So I think it's really important for all parties to  
11 understand that Section 26 statements are the appropriate  
12 means for the Crown to indicate Government policy to the  
13 Commission. They are not directions to the Commission and  
14 the Commission does not handle it that way.

15 **MR HOUWERS:** Thank you for the clarification. I apologise if I  
16 caused any offence in this --

17 **CHAIR:** It didn't cause offence, but it's such an important  
18 matter to the Commission that I think it's important for us  
19 to make it very clear to all parties how we approach Section  
20 26 statements.

21 **MR HOUWERS:** Okay, well, I think really just in closing, I mean  
22 I hopefully outlined a particular interest in the  
23 application and how that could potentially affect us. I  
24 guess our argument, if you like, is that the application  
25 introduces an extension, if you like, on the dominance of  
26 the market power of the applicants with risk for ourselves,  
27 you know, in terms of price increase.

28 I've actually gone through two scenarios on this; one  
29 suggesting a seven year delay, and one suggesting zero. And  
30 I'd actually conclude from our point of view that both lines  
31 of reasoning would actually lead to the same outcome, you

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1 know, that joint marketing doesn't generate any benefits in  
2 the application, and therefore would submit that, you know,  
3 the Commission might like to view the separate marketing as  
4 a very reasonable conclusion to the application.

5 Other than that I just want to thank the Commission and  
6 Commissioners for the opportunity to present our arguments  
7 and we'll look forward with interest to the final outcome.  
8 Thank you.

9 **CHAIR:** Thank you very much. I'll just see if there are any  
10 further questions from anybody. [No comments]. Thank you  
11 very much for your submission in taking questions from the  
12 Commission.

13 I now want to return to the matter of how we handle the  
14 next presentation from Shell. We've had a request from  
15 Shell that part of the session be handled in a confidential  
16 session. I'd like an indication of any other views from any  
17 other parties on that request. Does anyone wish to add?

18 **MR BIELBY:** I do apologise I wasn't here this morning but I  
19 understand what transpired. I just have one practical  
20 issue; I don't have legal counsel instructed on this matter.  
21 I haven't had the chance to talk to my friends from Shell  
22 about the matter to be helpful. Perhaps what I could  
23 suggest is that in so far as I understand it they want to  
24 talk about some matters in terms of the relationship between  
25 themselves and Todd. I would expect that to be dealt with  
26 confidentially and we would not ask to be in the room at the  
27 time.

28 If there are then matters which they wish to address  
29 which flow into this application, particularly if there's  
30 any matters that touch on any of the things that we're  
31 interested in as we address the Commission on last night, I



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1 would prefer to be in the room to hear that.

2 And my final comment would indeed be to note that, I  
3 don't know what they're proposing to say, but in the order  
4 of the Commission's procedure they should probably have  
5 preceded us, and subject to what they're going to say there  
6 might be some matters we may wish to comment on.

7 **CHAIR:** I have taken the request to mean that they intend it to  
8 cover the nature of their relationship. I will endeavour,  
9 in that session, to ensure that it doesn't stray beyond  
10 that. It may be perhaps beneficial to do that session first  
11 and then have -- part of their session will be an open  
12 session, so if there are matters that need to be heard in  
13 the open session I will be able to ensure that happens.

14 Can I assume that if we proceed on that basis that at  
15 this point you are not going to object to the confidential  
16 session to the extent that it deals purely with the  
17 Shell/Todd relationship?

18 **MR BIELBY:** I'm very happy with that and I'm happy to be  
19 available, so we're in the building, as you may know, to be  
20 available if called on.

21 **CHAIR:** Any other comments on this matter?

22 **DR HODGSON:** I just note the Contact advisors are just over the  
23 road, so perhaps I should group those members.

24 **CHAIR:** Just a minute. In order to comment now or in order to  
25 sign undertakings?

26 **DR HODGSON:** They've actually signed undertakings.

27 **CHAIR:** For the next session?

28 **DR HODGSON:** Yeah.

29 **CHAIR:** We're going to break for a few minutes in order to allow  
30 this to happen in an orderly fashion. Right now I just want  
31 to know if there is any objection to the suggestion that the

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1 discussion on the Shell/Todd relationship should be held in  
2 a confidential session.

3 If not then I will agree to that request and I will take  
4 that matter first before we go into the open session to  
5 discuss the other matters that Shell wish to submit on. We  
6 will take a.

7 15 minute break and I'll ask that only those parties  
8 that have signed the required undertakings return in 15  
9 minutes in order to handle the first part of that  
10 discussion. Thank you very much.

11 **MR DAVID:** The first part of our discussion will probably only  
12 take 15 minutes.

13 **CHAIR:** Thank you for that. I would anticipate that that is  
14 correct. So, I think all other parties should be available  
15 to reconvene the open session in 30 minutes time. Thank you  
16 very much.

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19 **Adjournment taken from 10.15 to 10.30 am**

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22 **[Confidential Session proceeds and concludes at 11.30 am]**

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## PRESENTATION BY SHELL

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3 **CHAIR:** Okay, I'd like to reconvene this session please. Okay,  
4 I will reconvene this open session of the Conference and I  
5 would ask that Shell start by restating names please,  
6 Mr David, and then proceed with your submission.

7 **MR DAVID:** Yes, thank you Ms Rebstock, I'm Grant David from  
8 Chapman Tripp representing Shell; on my far left I've got  
9 Peter Hazledine the Commercial Manager at Shell, and next to  
10 me the Legal Manager at Shell.

11 I should perhaps explain that Murray Jackson is not with  
12 us because he's -- although he's been here on behalf of  
13 Shell through the presentation and is here, the point that  
14 we're dealing with here relates specifically to the  
15 statements made by Shell during the process of acquiring FCE  
16 and one of the assets that Shell acquired in the acquisition  
17 process was Mr Jackson himself, so he has no firsthand  
18 knowledge of what Shell said, or why we said it at that  
19 time. So, that's just by way of clarification.

20 The point that we -- the particular part of the Draft  
21 Determination that we're addressing here is simply the  
22 statement -- expression of concern that the Commission makes  
23 at paragraph 285; that is that while the Commission has  
24 sought and obtained explanations from Shell and Todd with  
25 regard to why their views may have changed with regard to  
26 feasibility of separate marketing of gas as opposed to joint  
27 marketing of gas, and the Commission has some difficulty in  
28 reconciling the current view argued by the applicants.

29 What I want to do here is put into context the  
30 statements that were made by Shell during the acquisition  
31 process some two years ago.

*Shell*

1           And to take you back to that process, what I need to  
2 explain is that in terms of seeking to acquire FCE, which  
3 was then the major player in the gas industry in  
4 New Zealand; Shell, having had its first application  
5 declined on the basis of the Commission's concerns as to  
6 dominance, we then looked at making, or offering further  
7 divestments, in particular the divestment of 10% of Maui and  
8 the divestment of 3.3% of Pohokura.

9           We endeavored to explain that the pro-competitive effect  
10 of those divestments were that they gave entitlement to  
11 whoever the purchasers were of any residual gas that there  
12 might be in Maui and there would be an entitlement to the  
13 equity share of the gas in Pohokura.

14           We said that both of those changes increased the  
15 uncommitted gas that would be available for sale by third  
16 parties other than the merged entity, that is other than by  
17 Shell FCE. In particular we said that separate sales could  
18 be made by such third parties.

19           We didn't say that separate sales would be made. That  
20 is, we alluded to the possibility of separate sales, not  
21 necessarily the likelihood. We said that that possibility  
22 of separate sales of gas, uncommitted gas by third parties,  
23 would provide for an additional constraint on the merged  
24 entity.

25           I should stress at that time that we didn't know who  
26 those third parties would be because we hadn't entered into  
27 the divestment process. We only knew that the 10% of Maui  
28 wasn't going to go to Todd, because the Commission wouldn't  
29 let it.

30           Now, I'd make three points, I think, in relation to what  
31 we said then. We said that separate sales were only ever

3 July 2003

1 contemplated at the margin. We didn't argue that separate  
2 sales of all the gas, that is all of the equity entitlement  
3 that a joint venture party would have, would be sold  
4 separately.

5 In response to express questioning by the Commission's  
6 own legal advisor, Mr Millard QC I think it was, we  
7 explained that we took the view that there would be a  
8 cornerstone purchaser of the gas, that that cornerstone  
9 purchaser would be supplied jointly by the parties and that  
10 such a joint sale would be necessary to underwrite the  
11 development of the Pohokura field; but that beyond that  
12 cornerstone purchaser, there was the possibility of separate  
13 sales by the individual Joint Venture Parties.

14 Secondly, and we are to a degree at fault here, there is  
15 confusion as to what we meant by "separate sales". What we  
16 meant by separate sales, was that in all likelihood that  
17 there would be sale of the gas, the residual gas to one of  
18 the parties, who would then go on and separately sell that  
19 gas that it acquired jointly from the joint venture.

20 The third was that it needs to be borne in mind that we  
21 were responding to questioning very quickly in the context  
22 of a second clearance process, and a clearance process, of  
23 course, is vastly different from an authorisation process.  
24 The Commission is acting under a time constraint. We were  
25 responding to questions from the Commission staff and the  
26 Commission's legal experts.

27 And when we were asked to point out where separate sales  
28 had occurred, did they occur anywhere in the world, we  
29 sought the advice from people elsewhere in the Shell  
30 network; Shell's global experience was that separate sales  
31 were possible and separate sales did occur, and we gave the

1 Commission examples of where separate sales had occurred.

2 **CHAIR:** So you didn't ask your -- the local people whether that  
3 applied to New Zealand conditions?

4 **MR DAVID:** No, we didn't ask our local people, we were  
5 specifically asked by the Commission; did separate sales  
6 occur anywhere. And we put that request through Shell's  
7 international organisation and the response came back that  
8 separate sales were possible, separate sales did occur.

9 We didn't ask the further question, which with the  
10 benefit of hindsight we should have, and that was how  
11 difficult were these separate sales, what did they require,  
12 what level of maturity was required in terms of the local  
13 gas industry; we didn't ask the question and consequently we  
14 didn't get the answer and we didn't have the information to  
15 put forward.

16 Now, with the experience of the two years that have  
17 occurred and with the work that has been done with -- by the  
18 Pohokura Joint Venture Partners, there is a far greater in-  
19 depth knowledge on behalf of Shell and the other Joint  
20 Venture Parties of precisely what separate sales would  
21 involve and what they would require in terms of gas  
22 balancing arrangements in order to make them practicable.

23 **MR LAUNDER:** I would just like to ask Shell, I think that  
24 they've indicated in correspondence to us in the past, or it  
25 might have been correspondence that they had, that they were  
26 under the distinct impression that one of the other Joint  
27 Venture Partners, and I think it was aimed at Todd at the  
28 time, was -- did intend to take gas in kind. Could you just  
29 comment on what your understanding of that was at the time?

30 **MR HAZLEDINE:** Yes, Guy, at the time there was an indication by  
31 Todd, and I would say by Shell, I think Preussag were fairly

*Shell*

1 neutral -- Preussag, now OMV -- were neutral, that it would  
2 be nice to have gas to deal with on your own. I think on  
3 Tuesday Murray Jackson pointed out that it would be quite  
4 nice to be able to do that, to deal with your customer one-  
5 to-one.

6 However, I think in just reiterating the point Grant  
7 made, I think at the time there was a certain looseness in  
8 the terms "separate selling", "equity selling" type of  
9 thing. I know, and being the only Shell person here who was  
10 involved in that transaction, that what was specifically in  
11 mind when we talked about separate selling, and because of  
12 the problems of keeping an equity balance in the reservoir,  
13 that that was envisaged to be a sale by the Joint Venture to  
14 an individual joint venturer. So, the individual joint  
15 venturer having some rights through its ownership of the  
16 asset, that it would be able to access gas and then deal  
17 with it itself.

18 I still hold that that may be something which could  
19 happen, I don't know. Certainly the issues that have  
20 transpired as we've looked at this more, in the last year I  
21 suppose perhaps, that it is a lot more difficult than we  
22 envisaged at the time. Yes, we did ask internationally what  
23 were the, you know, the constraints and problems and did it  
24 happen, and yes, we did get advice that it does happen  
25 internationally, but you have to look at the market  
26 conditions.

27 In the US and Europe predominantly where this happens  
28 you have a very large market, and you can sort of pump a  
29 product into it and it will be taken up and you can  
30 eventually choose not to if the price drops. But we just  
31 simply don't have that luxury here, we just don't have any

*3 July 2003*

*Shell*

1 form of spot market at all. And in a much larger market in  
2 Australia, they have, I would say, failed to achieve a  
3 separate selling or an equity selling type arrangement.

4 So hindsight is a wonderful thing, we were a little,  
5 might even say naive in expecting that we could -- yes, we  
6 wanted to do it so it would just happen. There are a lot of  
7 practical problems in doing it. I'm not going to reiterate  
8 those, you've had chapter and verse on that in the last  
9 couple of days. But that's where we were.

10 I really don't see -- I have personally no -- I have no  
11 conflict with what we said at the time of the Fletcher  
12 acquisition with what we had in mind and what we're saying  
13 now. I don't believe we said anything at that time which we  
14 didn't actually believe as an expedient to get through the  
15 process, and certainly what we did have in mind was that  
16 equity had to be -- equity balance had to be maintained at  
17 all times from production. So, I find no conflict, I can  
18 see that we perhaps were a little loose in some of the  
19 terminology.

20 **MS BATES QC:** I just want to be clear about something Mr David  
21 said and I put the question to you and see if you can  
22 confirm it. That's that it was only ever contemplated that  
23 there would be separate sales at the margins. When the  
24 advice was given to the Commission, albeit that you were  
25 better informed now, at that stage was it explained to the  
26 Commission that it was only a small part of the field that  
27 separate sales were contemplated in respect of, or not?

28 **MR HAZLEDINE:** We certainly imagined that there would have to be  
29 a joint underwriting contract, or contracts, just simply to  
30 get the project off the ground, and you've heard a lot of  
31 comment about project financing. So, we certainly envisaged

3 July 2003



*Shell*

1 a joint underwriting contract or contracts, and that any  
2 separate selling -- using that term loosely -- would be on  
3 volumes over and above that.

4 **MS BATES:** Which would be --

5 **MR HAZLEDINE:** Well, I don't know that we actually had, I like  
6 it was 50% joint, 50% separate, 60/40, 55/45, we just hadn't  
7 gone into that level of analysis.

8 **MS BATES QC:** You hadn't at that stage?

9 **MR HAZLEDINE:** No.

10 **MS BATES QC:** But you thought that it would only apply when you  
11 had your cornerstone shareholders, but I suppose what I  
12 wanted to clarify was what you actually told the Commission.

13 **MR DAVID:** That; in response to the Commission's question.

14 **MR HAZLEDINE:** I would support that.

15 **MS BATES QC:** Who advised the Commission?

16 **MR DAVID:** I think it would have been me in response to  
17 questioning from Ian Millard QC.

18 **MS BATES QC:** Okay, thank you.

19 **MR TAYLOR:** Could I just come back to a comment that you made  
20 Mr Hazledine and Mr David. I picked up from Mr David that  
21 when the inquiry was made with Shell's international network  
22 that it wasn't qualified with what are the circumstances  
23 necessary for separate marketing to be relevant; I thought  
24 you were saying that -- I thought you just said that you  
25 didn't make some inquiry along those lines. And if I got it  
26 wrong I'd just like to be straightened up.

27 **MR DAVID:** We were asked does this happen anywhere? And we  
28 asked that question, can you give us examples of where  
29 separate marketing is occurring, and we got back some  
30 examples of where separate marketing was occurring and we  
31 provided those examples to the Commission, and said yes, it

3 July 2003

1 is possible.

2 I suppose I should say, for the sake of completeness,  
3 lest anybody think that the Commission were misled or  
4 disadvantaged by the lack of information, our argument that  
5 constraint would be exercised in this way by the  
6 availability of gas was paid very little credence by the  
7 Commission in either determination.

8 **MR LAUNDER:** I think in some correspondence that was provided to  
9 the Commission, I'm testing my memory here, I think it might  
10 have been a September 2000 document which mentions that a  
11 separate off-take committee was formed, and that it was  
12 instructed to look at the possibilities, or to look at that  
13 possibility of finding out how that may work; I think that  
14 was probably in response to Todd's stated intentions at the  
15 time. Are you able to just confirm that was correct and  
16 perhaps where that went?

17 **MR HAZLEDINE:** The off-take committee I think is the -- refer to  
18 as -- the committee was put together for looking at gas  
19 marketing. At the time, I think this was before the  
20 acquisition had been completed, and Fletchers were the  
21 operator of Pohokura, and Fletchers undertook a marketing  
22 study, and I'm going a little from memory here because I  
23 don't have this thing in front of me. But I understand the  
24 conclusion of that report was that separate selling was  
25 going to be very difficult.

26 Now whether that envisaged -- meant just like literally  
27 taking equity, and referring to Mr Tweedie's comment about  
28 that allows people to perhaps overtake their entitlement,  
29 and somebody else says it's obviously undertaking, and  
30 that's the grief that was going to be caused.

31 And so for that reason is why when we talked about

*Shell*

1 separate selling we envisaged that it would be as a joint  
2 sale to an individual party, and to some extent that means  
3 the individual parties are no different to anyone else in  
4 the market, except that they have some ownership rights.

5 **MR BAY:** You indicated that in your initial answer to the  
6 Commission you went back to Shell International to see if  
7 separate marketing was feasible and if it had been done in  
8 other countries of the world and indicated that you did get  
9 a reply that said that it was being done in certain areas  
10 and primarily the American States, or the North American  
11 market and the European market. You just indicated they  
12 gave a list of examples. Were any of those examples outside  
13 of those two markets and is Shell separately selling, and  
14 what other countries outside of the two North  
15 American/European markets?

16 **MR DAVID:** Our question wasn't was Shell separately selling, but  
17 were separate sales occurring. From memory the separate  
18 sales were in the North American market and the North Sea.

19 **MR BAY:** So they did not provide you any examples, or you're not  
20 aware that Shell sells anywhere outside of those two markets  
21 separately?

22 **MR HAZLEDINE:** I'm not aware of it, John, at all.

23 **MR DAVID:** No, I can't recollect.

24 **MR LAUNDER:** Just one further one I think. Am I correct that  
25 Shell has an equity stake in Woodside which has been one of  
26 the areas that we've looked at as to which I think they  
27 intend to separately sell in Australia?

28 **MR HAZLEDINE:** Yes, Shell owns 34% of Woodside.

29 **CHAIR:** Okay, thank you very much. Just before we close this  
30 session, Mr David referred to a question about whether the  
31 Commission felt it had been misled or disadvantaged, and I

*3 July 2003*

*Shell*

1 just want to say, and it's not in reference to this  
2 particular matter, but generally if the Commission were of  
3 the view that it had been misled it would be pursued  
4 vigorously and there are provisions in the Commerce Act with  
5 respect to this and the Commission takes it very seriously.

6 And coming back to the matter before us, I am  
7 appreciative that Shell's taken the effort to try to address  
8 the matter and put it beyond doubt, because the Commission  
9 needs to have confidence in the material that is provided to  
10 it, and I do appreciate the fact that Shell has taken the  
11 initiative to address the matter directly. So, unless there  
12 are any further comments, Mr David, I will bring this  
13 session to an end, thank you.

14 **MR DAVID:** Thank you Ms Rebstock.

15 **MR HAZLEDINE:** Thank you.

16 **CHAIR:** Now, before we move to the final session there is a  
17 matter that I would like to raise with all parties here.  
18 I'll just let the people have a seat before I proceed.

19 It has brought to our attention that some confidential  
20 information has in error been made available through the  
21 Commission's website. The Commission has investigated this  
22 issue and has consulted with the party that provided the  
23 information.

24 The Commission received a confidential and public  
25 version of a submission. The Commission posted the public  
26 version provided on its website. The material had not been  
27 provided in a way that ensured that it would remain  
28 confidential. The Commission has now placed a new public  
29 version on its website.

30 This incident serves as a reminder to parties supplying  
31 the Commission with electronic copies of public versions of

*Shell*

1 documents, parties need to take special care as to how  
2 confidential material is deleted to ensure that it is  
3 actually deleted, and not simply whited out. The  
4 responsibility lies with the parties supplying the  
5 information. The party in this case has freely acknowledged  
6 that it did not ensure that the information was actually  
7 deleted.

8 I would like to emphasise, however, that this material  
9 remains subject to the confidentiality order in place. If  
10 anyone has obtained confidential information other than  
11 through our official processes, then I would like to remind  
12 you that this material cannot be used for any purpose. In  
13 addition the material must be returned to the Commission or  
14 destroyed.

15 Now, I'd like to ask if there's any questions on this  
16 matter? [**No comments**]. If not we will proceed to the final  
17 session which is the applicant's reply. We'll take about  
18 two minutes just to allow them to set up.

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3 July 2003

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3 **APPLICANTS' REPLY**

4 **CHAIR:** I would like to resume this session, if people would  
5 please be seated. The final session of this Conference is  
6 to allow the applicants a final right of reply and the  
7 custom of the Commission is to allow that without pursuing  
8 new matters with the party, though if we simply need  
9 clarification in terms of understanding, if we miss what you  
10 said we may pursue that, but generally it is a session where  
11 the applicants are allowed to make any final comments. It  
12 shouldn't be an opportunity to raise new material except for  
13 where it relates to matters that other parties have  
14 addressed in the proceedings.

15 So on that note I would like to ask Dr Berry to please  
16 submit on behalf of the applicants.

17 **DR BERRY:** Thank you. Our presentation will largely follow  
18 through the submissions we've already made, so we will make  
19 it relatively brief and try not to be repetitive. But I  
20 thought at the end of this hearing it is helpful to once  
21 again reiterate what we see to be the key decision points  
22 the Commission must take into account.

23 There are in essence two questions before the  
24 Commission. The first one, is there any lessening of  
25 competition under the proposal compared with the  
26 counterfactual? That's the first inquiry.

27 The second inquiry is that if there is lessening of  
28 competition, which we say there is not, but if the  
29 competition was to reach such a view then we say that the  
30 public benefits are so overwhelming that authorisation ought  
31 to be granted.

Dealing with the first of those submissions the first

*Applicants' Reply*

1 decision point relates to the counterfactual and the  
2 position of the applicant has been throughout this hearing  
3 that Scenario 1 is the appropriate counterfactual. We note  
4 that that was the view in the Draft Determination, and it's  
5 not apparent to us from the submissions of others that that  
6 conclusion is under any significant attack.

7 It's important to understand what Scenario 1 marketing  
8 really means. It's not strictly speaking separate selling  
9 in the way that a lot of people may immediately think it is.  
10 There is inherently definitional confusion over these terms.

11 It is a fact that Scenario 1 will involve a high degree  
12 of co-ordination. All parties will have to cooperate on all  
13 aspects of field development and operation under Scenario 1.  
14 There will need to be complex contractual arrangements put  
15 in place to achieve Scenario 1 marketing.

16 Now, these complexities and uncertainties just simply  
17 should not be underestimated. It's never been done in  
18 New Zealand before and it will inevitably lead to delay.  
19 We'll come back to that later, but there are real  
20 transaction costs associated with the negotiation costs in  
21 this.

22 I'd have to say from a personal perspective, having  
23 lived through this process with the applicant for some time,  
24 I've actually seen the thinking unfolding, because when  
25 we've been talking about what the counterfactual might be,  
26 there's been real uncertainty as to, you know, we've never  
27 done it, how could we do it, and it really has been a  
28 process of evolution to get the thinking to the point that  
29 we have it now. And as you've heard from the applicants,  
30 they have no certainty yet that they would fully understand  
31 everything. We've used our best endeavors to explain it to

*3 July 2003*

*Applicants' Reply*

1 you, but inevitably there'll be a lot of unknown things that  
2 we haven't hit upon.

3 It needs to be truly appreciated that there are critical  
4 contractual arrangements under Scenario relating to  
5 production and to supply. For example, the gas contracts  
6 that the parties would look to enter into will be dependent  
7 upon whatever their agreed production rate may be. The  
8 volumes under the contracts that they propose to enter into  
9 will need to be co-ordinated, because buyer requirements  
10 will not necessarily match joint venturer entitlements to  
11 the field.

12 There will be circumstances where under a separate  
13 selling mechanism such as Scenario 1 inevitably the parties  
14 will get out of balance and will need to align, and again  
15 the parties have to agree contractually how they will do  
16 that before they can go to market with gas under Scenario 1.

17 Another important issue that they'd have to work out, as  
18 we've described and you've heard from various parties, are  
19 the cash balancing implications that follow through. How  
20 would the parties have confidence in reaching a market price  
21 for the purposes of a gas balancing agreement. And  
22 inevitably there would need to be significant sharing of  
23 information relating to contracts proposed to be entered  
24 into in terms of details pertaining to volume, price, and so  
25 on.

26 So, at the end of the day the result is that if Scenario  
27 1 marketing was to be followed, there would be a lot of  
28 effort and absolutely nothing would be achieved at the end  
29 of it. It would not be three separate sellers in the sense  
30 that people might simplistically think that there are --  
31 there would be three highly co-ordinated sellers sourcing

*3 July 2003*



*Applicants' Reply*

1 from the same common pool.

2 **MS BATES QC:** Could I just ask you to clarify whether you're  
3 arguing that there would be no price differential, or  
4 whether there would be little price differential.

5 **DR BERRY:** Perhaps if I could defer to Professor Evans on that  
6 point because that was the key evidence that the Professor  
7 opined on.

8 **PROF EVANS:** I think as a consequence there would be very little  
9 price differential. It would be hard to predict exactly  
10 what the price differential would be. And some of the price  
11 differential would reflect the fact that -- the narrower  
12 range of contracts that would be available under separate  
13 selling versus joint selling.

14 As was mentioned, I think that the separate selling  
15 arrangements, in order to make them consonant with drawing  
16 off from the pool, would require specific arrangements with  
17 respect to those contracts; it would limit them as opposed  
18 to contracts that would be available under joint selling,  
19 and that may well be reflected perhaps in the prices  
20 ultimately. But I would -- that aside I would say there  
21 would be no difference.

22 **CHAIR:** Dr Berry.

23 **DR BERRY:** That is the information, or rather the submission so  
24 far as the counterfactual, we support the Commission's draft  
25 conclusion that the counterfactual is Scenario 1.

26 Moving on from that, our position is that there is no  
27 lessening of competition, looking at the proposal compared  
28 with the counterfactual, and again I remind the Commission  
29 to look through the testimony of Professor Evans on that  
30 issue.

31 The formation of a joint venture such as this will

*Applicants' Reply*

1 create an additional different entity in the market, and  
2 each of the Joint Venture Parties will have very different  
3 and actual potential business interests. And co-ordination  
4 between the field would in fact be enhanced by separate  
5 marketing in comparison. The quantity of output is set  
6 jointly under both forms of marketing.

7 There is no rationale that justifies the proposition  
8 that annual field output would be larger under Scenario 1  
9 than under joint marketing. Indeed you've heard from  
10 Professor Evans that output may even be lower or sub-optimal  
11 under the counterfactual.

12 As Professor Evans has just pointed out, freedom to  
13 price independently is illusory because the parties would  
14 have to agree on transfer price, comparing the two, the  
15 proposal and the counterfactual.

16 Another key issue is the one of price determination, a  
17 matter that was of some concern to the Commission and its  
18 Draft Determination. Again price discrimination is at least  
19 as likely under Scenario 1 as it is under joint marketing.

20 There's a few other points that I'll just touch upon  
21 from the submissions we've made relating to this issue of no  
22 lessening of competition. Scenario 1 marketing could only  
23 lead to less flexibility and variation in non-price terms  
24 offered under that proposal compared to joint marketing.

25 Joint marketing is more likely to stimulate new  
26 exploration and the development of a more competitive gas  
27 market. And again we'll come through to this further in  
28 relation to delay, but joint marketing will unquestionably  
29 result in earlier extraction of gas.

30 So, our submissions are on the record as to all of those  
31 issues. So, for those reasons we say that the proposal

*Applicants' Reply*

1 involves no lessening of competition compared with the most  
2 likely counterfactual, and it's our position, as a matter of  
3 law, that if the Commission reaches the same conclusion,  
4 that it ought to decline jurisdiction to this application.

5 So those are our closing submissions on the first of the  
6 key issues before the Commission.

7 Turning to the alternate line of argument, if, however,  
8 the Commission was to find some detriment we say that the  
9 benefits are overwhelming, and that this would be an obvious  
10 case for the grant of authorisation.

11 Now, you've heard that the main benefit relating to this  
12 application is the question of delay, the earlier production  
13 of gas. There are other benefits that perhaps the  
14 Commission has not attached quite as much weight to from the  
15 Draft Determination in terms of the incentives and benefits  
16 that bringing Pohokura will have on to further exploration  
17 in trying to find further reserves, and it's difficult to  
18 quantify, but other parties have made some significant  
19 supporting comments to that effect and I refer in particular  
20 to PEANZ's submission and also other written submissions  
21 made previously by Indo-Pacific and Swift.

22 And so there is a view that development of Pohokura is  
23 important in the process of keeping in place the right  
24 incentives to achieve exploration, and it's only through  
25 that that the market will grow.

26 The first critical issue relating to the public benefit  
27 assessment is the time period for delay between the proposal  
28 and the counterfactual. And we have suggested throughout  
29 this application, the application and in submissions since,  
30 that three years is an appropriate timeframe to use for  
31 current purposes for the purpose of analysis, and it was on

*Applicants' Reply*

1 that basis that the CRA report calculations were made.

2 Again, as with the way that the parties' thinking  
3 unfolded as to what would need to be done to enter into  
4 balancing arrangements and other things to achieve Scenario  
5 1 marketing, likewise the thinking has had to come together  
6 to think about what time delay would genuinely be involved  
7 under Scenario 1. The applicant has undertaken considerable  
8 effort in identifying what it believes to be at least 94  
9 tasks that would need to be undertaken to achieve Scenario 1  
10 marketing.

11 Now we accept it's not an exact science, you've heard  
12 that from yesterday's presentation. But the view that we  
13 hold firmly is that the supporting evidence around the  
14 additional tasks that would need to be undertaken clearly  
15 justify a conclusion of three years as a conservative delay.

16 By way of comment to other submissions on that issue,  
17 they have been more, I believe, by way of assertion and not  
18 supported by the kind of detailed analysis that the  
19 applicants have attempted to undertake. And again it's this  
20 process again of just having to stop there and think through  
21 this chart of additional activities that need to be  
22 undertaken. It's not until you try and do that and you're  
23 in the frame yourself having to think about it that you, I  
24 believe quite genuinely, get to that position.

25 I'd just like to reflect for a moment on something  
26 Mr Agostini raised yesterday that touched on it as well. He  
27 referred to the attitude of the ACCC to thinking about, you  
28 know, what weight they attached to evidence that is not  
29 necessarily providing the solution, or an answer, or  
30 indicating a true understanding of how you get there. The  
31 ACCC invited parties to tell them how separate marketing

*3 July 2003*

**Applicants' Reply**

1 should be done, or could be done, bearing in mind that they  
2 were making those submissions.

3 I think it's a sense of approach that having put the  
4 onus on those people they couldn't come forward with a  
5 solution. I think that's an appropriate way to look at the  
6 relevant weight of the evidence on issues such as these. So  
7 we say that three years delay is conservative, could well be  
8 longer.

9 I'll just briefly address a legal point that was raised  
10 yesterday, and I indicated I would get back to it. It  
11 relates to the AIPN survey. I'll deal with it very briefly  
12 because I think it can be dealt with briefly.

13 On my reading of section 99 that deals only with the  
14 question as to admission of evidence, and it is clear that  
15 the Commission has relaxed rules in that regard, and so I  
16 accept, as I stated yesterday, there are no questions about  
17 the admissibility of the AIPN survey. But in my submission  
18 s.99 is limited to the question of admissibility, and in the  
19 ordinary course of reviewing evidence the issue of weight is  
20 a subsequent and separate issue. And it's my submission  
21 that it is on that basis that the Commission must look at  
22 this evidence, and because of the defects in the survey that  
23 no weight can be attached to the evidence.

24 And just by way of a caselaw reference which I think is  
25 helpful if you want to have a look at it further, I'd invite  
26 you to have a look at the decision of what was then the  
27 Supreme Court, now the High Court, the judgment is *Custom*  
28 *Glass Boats*, and at page 42 of that judgment there's a  
29 statement there that -- it first of all deals with the  
30 question about admissibility, so the judge had to think  
31 first of all about that issue and ruled that the survey

*Applicants' Reply*

1 evidence was in and then went on to discuss the question of  
2 weight, and the particular considerations that must be had  
3 regard to. And a summary of those principles appears in our  
4 submission in reply to the Draft Determination dated the 9th  
5 of June.

6 There's just a few other thoughts in terms of  
7 detriments. The conditions that the Commission proposes to  
8 impose would mean that there would be more up-front  
9 contingency planning required through the negotiations.  
10 They would entail additional complexity and delay. So there  
11 is this link about the conditions also impacting upon delay  
12 considerations. I think that probably is as much as I need  
13 to say about the three -- delay period for the time being.  
14 I think we've articulated that fully for the purposes of the  
15 record.

16 Flowing on from that there is the question of  
17 quantification. Again I'll deal with that very briefly.  
18 The quantification has been undertaken through CRA and we  
19 believe that all of the assumptions that they have made are  
20 supportable. As well as a three year delay period they have  
21 assumed welfare past 2009 should be treated as stationary.  
22 They've also taken the position that it is inappropriate to  
23 attempt to estimate demand and supply conditions past that  
24 point. It just seemed a sensible way to bring together the  
25 data that needed to be assessed in that setting.

26 Their conclusions are that the benefits are in the range  
27 between \$414 million and more than \$1 billion, depending  
28 upon the assumptions about the demand elasticity, the price  
29 of alternative fuels, and the presence or absence of a dry  
30 year. The largest benefits arise when a dry year occurs and  
31 when the price of alternative fuel supplies of gas are limit

*3 July 2003*

**Applicants' Reply**

1 priced against diesel and an elasticity demand of minus 0.2.

2 Our position is that clearly there are overwhelming  
3 benefits in that range of figures. Those are big numbers.  
4 And in contrast, as you've heard previously, we say that the  
5 detriments equal zero.

6 So, clearly it is our submission that if, however, there  
7 is some finding of minor detriment, that there is an  
8 overwhelming case for the grant of authorisation.

9 The final issues I'd like to touch upon are the issues  
10 of conditions which the Commission has indicated it may be  
11 of a mind to impose. Again I'll deal briefly with this. We  
12 argued it fully yesterday and I'll just add some further  
13 perspectives that develop on what was argued yesterday.

14 Conditions must not be inconsistent with the Act. There  
15 is the express limit contained in s.61(2) and nor may  
16 conditions be inconsistent with principles imposed by  
17 administrative law. And a theme that must come through the  
18 identification of appropriate benefits is that they -- for  
19 them to be consistent with this exercise they must enhance  
20 the achievement of benefits if in fact that is necessary.  
21 Conversely, in some circumstances they may serve to minimise  
22 detriments and again this is a balancing exercise on the  
23 facts.

24 The submissions I made yesterday were in fact centred  
25 around the early decision of the Commission I think back in  
26 1987 of the Commission in *Kiwifruit Exporters* and the  
27 submissions that we are making are, I believe, entirely  
28 consistent with that decision.

29 In that case the Commission stated that conditions could  
30 be appropriate to achieve benefits or to minimise  
31 detriments, depending on the facts. I note that it quite

**3 July 2003**

*Applicants' Reply*

1 clearly stated that they could be appropriate.

2 What was at issue in that case was actually a tipping of  
3 the balance situation. The matter before the Commission in  
4 that case was a very finely balanced call in terms of the  
5 way the Commission seemed to be coming to its conclusion.

6 So, it was just thinking if there aren't quite enough  
7 detriments maybe we have to do something to reduce those so  
8 that the benefits outweigh the detriments. That was the  
9 context in which the discussion was followed.

10 So based on that decision I submit that it is consistent  
11 with that case to say here, as we do, that the benefits are  
12 so overwhelming compared with the detriments that there is,  
13 in this case, no need to impose conditions at all.

14 The benefits in this case, primarily the early  
15 development of the field, will be achieved without the need  
16 for any conditions. The parties are, as you have heard,  
17 incentivised to achieve early production. It is inevitable  
18 that Scenario 1 would impose a delay of at least three  
19 years.

20 One thing that I would just like to remind the  
21 Commission of when they're asking themselves this question  
22 is to come back to the relevant legal test, and to focus  
23 upon the appropriate standard of proof.

24 S.61(6) states that the question is will the benefits in  
25 all the circumstances be likely to result. What you must do  
26 in asking that question is to impose the ordinary civil  
27 standard of proof. The question is whether on the balance  
28 of probabilities this benefit of early development is likely  
29 to result.

30 So we say that applying those general principles  
31 relating to the plain and ordinary meaning of the words



*Applicants' Reply*

1 within s.61(6), that there is no need for conditions to be  
2 imposed in this particular case. It's not a close run  
3 thing. The benefits outweigh the detriments. That's the  
4 end of the story.

5 In any event, I'd just like to go through the  
6 Commission's proposed conditions and the other proposed  
7 conditions, because even if the Commission was not to accept  
8 that submission and begin to look at the other potential  
9 conditions, including their own, there are problems with  
10 each one.

11 Before I begin to go through each of the Commission's  
12 proposed conditions I think it is significant to note that  
13 Contact has joined in with the applicants in saying that all  
14 four are unworkable. And as I understand NGC they say that  
15 three conditions are unworkable, and they have all but  
16 abandoned the other ringfencing condition which they were  
17 proposing.

18 Taking each of the Commission's conditions in turn  
19 first; the proposed five year time limit. You've heard  
20 evidence that this will frustrate start-up because of the  
21 difficulties relating to funding. There will be  
22 insufficient revenue flow to support the kind of funding  
23 mechanism that certain of the participants will inevitably  
24 have to enter into.

25 I've had a chance to reflect a little more on the  
26 argument I advanced yesterday relating to section 65, the  
27 alternate argument that where the Commission's concern  
28 appeared to be that we put this five year limit in place,  
29 because we don't know what the market looks like in five  
30 years, and I took it to mean that if, for example, for some  
31 reason separate marketing was possible you wouldn't want to

*Applicants' Reply*

1 lock in joint marketing with that potential factual matrix  
2 unopening.

3 Section 65 has this ability to reopen matters where  
4 there is a material change in the market at a later point in  
5 time. But to follow that through logically thinking about  
6 the competition concerns the Commission has, a revocation  
7 would only seem to be on the table potentially if the market  
8 moved to such a position that separate marketing was going  
9 to be happening.

10 So in other words the market would have had to have  
11 moved to such a point of maturity that separate marketing  
12 was feasible and achievable. And in those circumstances the  
13 question about section 65 was whether this would actually be  
14 a deterrent to financiers and others.

15 One assumes if in fact the market would truly move to  
16 that, and as you'll know from our submissions it's most  
17 unlikely, there would be the ability of the Joint Venture  
18 Parties to engage in separate sales and thus contain their  
19 revenue flows. So, I think that's an answer to support the  
20 question that was further raised in relation to s.65  
21 yesterday.

22 The second of the Commission's proposed conditions was  
23 the requirement that the field be brought into production  
24 early in 2006. And again we stand by our submissions  
25 yesterday, the uncertainty of meeting that date, the severe  
26 consequences of even a slight delay will again frustrate the  
27 achievement of the benefits we say will result.

28 The third of the Commission's proposed conditions, the  
29 assignment of the benefit of the authorisation to successors  
30 is, in our submission, a matter which requires the exercise  
31 of a discretion by the Commission under s.57(B)(ii) and

**3 July 2003**

*Applicants' Reply*

1       there are reasons why that discretion ought to be exercised.  
2       It is pro-competitive. The beneficiaries of the assignment  
3       of the authorisation will be new entrants to the joint  
4       venture. And the Commission has a genuine safeguard through  
5       the merger provisions of s.47.

6       The last of the Commission's proposed conditions was  
7       ringfencing, and we discussed that at some length yesterday,  
8       and I don't think there's a need to go over that territory.  
9       But again we note that NGC's primary advocate has now, as I  
10      understand it, withdrawn support for the condition, and we  
11      maintain the submission that it would in any event be an  
12      illegal condition if imposed.

13      Dealing briefly by way of final comment on the other  
14      conditions proposed by the other submitters to this  
15      Conference, you will recall yesterday that we first of all  
16      referred to three of the conditions being in the nature of  
17      an attempt to put into future contracts provisions, the  
18      question about contracts yet to be negotiated was very much  
19      in the mind of the parties making submissions in relation to  
20      those points yesterday. I'm referring particularly to the  
21      questions about on-sale avenue for acquirers to appeal  
22      unreasonable contract terms and the questions about high  
23      take obligations and so on.

24      I note that other parties have not challenged the  
25      argument that we advanced, that future contracts are the  
26      proper subject matter of separate assessment at a later time  
27      under s.27. That was a key argument that we advanced in  
28      making submissions, and that submission has not been  
29      challenged by other submitters.

30      All of the conditions that I've just mentioned will fail  
31      because again the overwhelming benefit of the delay being

*3 July 2003*

*Applicants' Reply*

1       disentitled will achieve the necessary benefits.

2             Another kind of problem relating to these conditions is  
3       that there is insufficient definition around them for us in  
4       one sense to have a proper look at them at this particular  
5       point in time, and again it became apparent in the course of  
6       the discussion yesterday that these are actually moving  
7       conditions.     Some of the parties were thinking about  
8       amending or adjusting what was here and it is in fact not  
9       entirely clear to me exactly what these other range of  
10       conditions in fact are.

11            And there would need to be a clear articulation as to  
12       what the proposed conditions are and an appropriate chance  
13       to respond on that, that would simply have to be done as a  
14       matter of course.     But again that exercise is likely to  
15       demonstrate just how difficult it would be for the  
16       Commission to get comfort around the kind of appropriate  
17       condition in this situation, because it would put the  
18       Commission in a supervisory role.     It relates largely to the  
19       future behaviour of parties, and as the Commissioners  
20       rightly addressed in questions to the other submitters,  
21       there would be serious questions about enforcement relating  
22       to these other conditions.

23            By way of final comment on the other conditions, there  
24       were two others, and I'll mention them very briefly.     The  
25       question about the quantity of gas being locked in as a term  
26       or a condition; we got to the position yesterday of saying  
27       that really that plays out analytically the same way as the  
28       Commission's proposed five year time limitation, it has the  
29       same analysis attaching to it.

30            And finally the proposed condition about binding gas  
31       contracts by certain dates, again that carries with it the

*Applicants' Reply*

1 same analysis. That pertains to first production being  
2 required by 2006 in terms of the Commission's own proposed  
3 conditions.

4 So those in summary are our submissions on the condition  
5 issues. Again they have been fully argued yesterday and  
6 I'll spare you going through them in further detail.

7 By way of one last final remark before I conclude, the  
8 question still remains about the Section 26 Statement that  
9 is before the Commission, and we outline that to the  
10 Commission at the very start of our presentation, and again  
11 we accept the position that the Commission has stated today  
12 in the first session, that the Government Policy Statement  
13 is not a directive to the Commission.

14 But having said that, we do remind the Commission to  
15 have regard to the specific content of the Pohokura Policy  
16 Statement. It is a matter of true national interest that  
17 the Pohokura field be brought to development as soon as is  
18 practicable and we invite the Commission to attach  
19 appropriate weight to that Policy Statement. Those are my  
20 submissions.

21 **CHAIR:** Thank you Dr Berry, any further comments from the  
22 applicants? [**No comments**]. Thank you very much for that.  
23 I'd like to just cover off a few remaining matters if I may.

24 First of all there have been a number of items at the  
25 Conference where the Commission has requested that parties  
26 bring back certain material to the Commission. There were  
27 three items that I have noted down. The first was an offer  
28 by Mr Jackson of Shell to provide financial analysis that  
29 Shell has done on the economics of developing the Pohokura  
30 field. I'd just like to confirm that the Commission would  
31 like to receive that material on a confidential basis.

*Applicants' Reply*

1 Dr Berry undertook to provide the Commission with the  
2 legal arguments that have been presented in a written form,  
3 and I'm sure Dr Berry will be mindful of not taking it  
4 beyond that which we have covered in the proceedings.

5 And finally in the confidential session yesterday on the  
6 MED submission the Commission sought an assurance that some  
7 material would be provided to it. I received a phone call  
8 last night giving me that assurance, and if any party thinks  
9 to the contrary on that I would like to be advised of that  
10 at this time. **[No comments]**.

11 On these three matters, these are the only three matters  
12 that the Commission wishes to receive material on post-  
13 Conference. And this is an important matter for us in order  
14 to bring these proceedings eventually to an overall  
15 decision. And I would ask that those three different bits  
16 of information be provided to the Commission within five  
17 working days at the end of this Conference.

18 Does anyone have any questions or comments on that  
19 requirement? **[No comments]**.

20 **MR JACKSON:** In terms of the economic model, my intention is to  
21 provide information to support the context of a discussion  
22 at the time about the necessity for gas revenues for the  
23 project.

24 **CHAIR:** Yes, I want you to restrict yourself to that bit of  
25 information that we were discussing at that time, and not  
26 take it any further than that please.

27 **MR JACKSON:** Thank you.

28 **CHAIR:** Thank you for that clarification. Any other comments or  
29 questions on the requests for those three pieces of  
30 information? Can I confirm there was no other information  
31 that was requested from any party just to make sure I've got

*Applicants' Reply*

1 a complete list? **[No comments]**.

2 Upon behalf of the Commission then I would like to thank  
3 all participants for their contribution to these  
4 proceedings. The Commission will now deliberate on the  
5 submissions that we've received during the last three days  
6 as well as the earlier material that was provided with the  
7 intention of reaching a decision as quickly as practicable  
8 as we know that the matters before us are pressing.

9 Nevertheless, urgency cannot and should not get in the  
10 way of sound decision-making. I think it is clear to all  
11 parties here that there's considerable interest and concern  
12 in this decision, both by the applicants, other interested  
13 parties, and most importantly to the wider public of  
14 New Zealand.

15 I indicated at the beginning that our intention is to  
16 make a final determination on this matter by the 7th of  
17 August 2003. That remains our intention.

18 I'd like to thank the Commission staff for the work they  
19 have already done on this matter and undoubtedly there will  
20 be a significant amount of work yet to do. Also our  
21 transcribers and our communications people have been very  
22 cooperative in helping me to get through the proceedings in  
23 a timely manner and I'm grateful to them for that.

24 If there are no further questions or matters that anyone  
25 would like to raise, and I'll just pause for a minute to  
26 establish that that is the case. **[Pause]**. Then it is left  
27 for me to formally declare the Conference closed, and thank  
28 you once again.

29

30

31

**Conference Concluded at 12.30 pm**

**3 July 2003**