

By email

15 April 2014

Mr Rob Jamieson
Chief Executive Officer
Orion New Zealand Limited
PO Box 13896
CHRISTCHURCH 8141
Email: [REDACTED]

Dear Rob

Orion New Zealand Limited – Breach of Default Price-Quality Path – 2011 Assessment Period – Warning

1. We refer to our discussion with David Freeman-Greene on 15 April 2014 in which we advised that the Commission has confirmed its decision on the resolution of Orion New Zealand Limited's (Orion) 2011 non-compliance with the price path under the Electricity Distribution Services Default Price-Quality Path Determination 2010.
2. The Commission considers that Orion has breached section 87(1)(a) of the Commerce Act 1986 by contravening a price-quality requirement applying to regulated goods or services.
3. The Commission may take Court proceedings seeking a financial penalty and compensation under the Act for this type of breach. However, on this occasion, due to the exceptional circumstances of the Canterbury earthquakes and the effect this had on Orion's actual revenues during 2011 to 2014, we have decided against taking any Court action or seeking an agreed settlement with Orion.

Background to the Commission's enforcement decision

4. Part 4 of the Commerce Act 1986 provides that all suppliers of electricity distribution services are subject to default/customised price-quality regulation unless they are exempt.
5. Orion is not exempt from price-quality regulation and at the time of the breach was subject to a default price-quality path determination that restricted the amount of notional revenue that Orion was allowed to earn in each annual assessment period.

AUCKLAND

L19, ASB Building
135 Albert Street
P.O. Box 105-222
AUCKLAND 1143, NEW ZEALAND

1611525

WELLINGTON

L6, 44 The Terrace
P.O. Box 2351
WELLINGTON 6140, NEW ZEALAND
Tel: (04) 924 3600 Fax: (04) 924 3700
Main Office

CHRISTCHURCH

9 Radley Street
Woolston
P.O. Box 10-199
CHRISTCHURCH 8145, NEW ZEALAND

6. The default price-quality path for Orion was set by the Electricity Distribution Services Default Price-Quality Path Determination 2010 and applied to the regulatory period from 01 April 2010 to 31 March 2014.¹
7. Orion is required to provide the Commission with an annual self-assessment against the Price Path following each annual assessment period, called a compliance statement.
8. Orion's compliance statement for the assessment period beginning on 1 April 2010 and ending on 31 March 2011 stated that it breached its price path by \$125,600 (or 0.09% of its allowable notional revenue).
9. The Commission considers that the breach of the price path amounts to a contravention of section 87(1)(a) of the Act in that it is a contravention of a price-quality path requirement applying to regulated goods or services. For a breach of section 87(1)(a), a Court may impose a pecuniary penalty of up to \$500,000 in the case of an individual or up to \$5,000,000 in the case of a body corporate.

The Commission's assessment of the appropriate enforcement response

10. The Commission's starting point in considering the appropriate enforcement response to a contravention of a price requirement under section 87(1)(a) of the Commerce Act is that a supplier should not be allowed to retain any amount recovered in excess of its price path (the 'gain' resulting from the breach). At a minimum, this requires that a breaching supplier intentionally divests the gain resulting from the breach plus a time value of money adjustment.
11. Wellington Electricity Lines Limited (WELL) committed a similar breach to Orion but in respect of the 2012 assessment period. Like Orion's 2011 breach, WELL's 2012 breach was due to inaccurate forecasting of pass-through costs. In that case, the Commission entered into an out-of-court settlement in which WELL acknowledged the contravention and undertook to price below its allowable notional revenue in the 2015 assessment period to remove the gain resulting from its breach.²
12. Under normal circumstances we would have sought a similar repayment from Orion. However, we acknowledge that Orion has earned considerably less than expected over the past three years due to the impact of the Canterbury earthquakes, and that this lower recovery was not addressed in the customised price-quality path determined last November for Orion.³

¹ On 1 April 2014, Orion moved from a default price-quality path determination to a customised price-quality path determination (see *Orion New Zealand Limited Customised Price-Quality Path Determination 2013* [2013] NZCC 21).

² For more information on our settlement with WELL, see <http://www.comcom.govt.nz/default-price-quality-path-enforcement-responses/>.

³ In our final decision on Orion's CPP application, we estimated Orion's revenues over the period 2011–2014 to be approximately \$59.4m lower than that allowed under the price path (see *Setting the customised price-quality path for Orion New Zealand Limited* [2013] NZCC 21 at [B69]).

13. Given this exceptional circumstance, we have decided to depart from our starting point, and instead issue this warning. We do not consider, in the context of Orion's ongoing and significant earthquake response, that seeking recovery of this relatively minor gain would promote the Part 4 purpose. Further, we are satisfied that, in this case, a warning letter is consistent with our aim of deterring future price-quality path breaches.
14. While we will not be taking any further action against Orion at this time, we will take this warning into account in exercising our enforcement discretion if Orion fails to comply with regulatory requirements again in the future. Accordingly, in the event of a second contravention of the price requirements, Orion would likely face Court proceedings. We may also draw this warning to the attention of a Court in any future proceedings brought by the Commission against Orion for a similar contravention.

Publication of our decision

15. This warning letter is public information and may be published on the Commission's website. We may also make public comment about our decision, including issuing a media release or making comment to media.
16. Please contact Simon Wakefield on [REDACTED] or by email at [REDACTED] if you have any questions about this letter.

Yours sincerely,



Sue Begg
Deputy Chair