

COMMERCE COMMISSION

DECISION 474

Determination by the Commerce Commission (the Commission) pursuant to the Commerce Act 1986 (the Act) in the matter of an Application for authorisation of a restrictive trade practice. The Applicant is:

**THE MARKET ADMINISTRATOR OF THE NEW ZEALAND
ELECTRICITY MARKET - THE MARKETPLACE COMPANY
LIMITED**

The Commission: M J Belgrave, Chair
P R Rebstock, Deputy Chair
D R Bates
D F Curtin
P J M Taylor

Summary of Application: The Applicant has applied for authorisation of an Arrangement, proposed to be entered into by participants in the New Zealand Electricity Market (NZEM). Under the Arrangement, within 24 hours of the end of each day, the Applicant will make publicly available all final bids to buy electricity and final offers to sell electricity for each of the NZEM trading periods of the day two weeks prior. It is proposed that the Arrangement will be implemented by way of a change to the rules of the NZEM as set out in the resolutions in Appendix 1 of this Decision.

Determination: Pursuant to ss 58 and 61(1)(b) of the Act, the Commission determines to decline the Application for authorisation on the grounds that the Commission is not satisfied that the Arrangement either lessens competition or is deemed to lessen competition in a market. The Commission considers that authorisation is neither required by the Act, nor is within the jurisdiction of the Commission.

Date of Determination: 23 December 2002

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EXECUTIVE SUMMARY¹

The Application:

- the Application is for authorisation under s 58 of the Commerce Act of a proposed change to the current rules of the New Zealand Electricity Market (NZEM);
- the Applicant is the Market Administrator of NZEM, the Marketplace Company;
- the proposed rule change will require the Market Administrator to disclose the identities of market participants making bids or offers in NZEM, together with the quantities and prices bid or offered, that information to be disclosed *two* weeks after the event;
- the proposed new rule may be compared to the current rule which requires disclosure of such information *four* weeks after the event;
- this proposed rule change arose from the Government Policy Statement on Electricity of February 2002;

The Commission's Investigation

- Seventeen interested parties were interviewed to obtain their views on the matter. One written submission was received prior to the releasing of the Draft Determination. Three parties made written submissions on the Draft Determination;
- the Commission found that there is already a large amount of information disclosed to market participants under the NZEM rules such as pre-dispatch schedules; dispatch prices and quantities schedules; supply and demand curves; average power dispatched and consumed by node; final market price and location; and bids and offers;
- using this information, market participants appear to be able to accurately model the short and long term behaviour of their market participant competitors;
- no person interviewed had any qualms about disclosure of bids and offers after a two week delay and were universally in favour of that occurring. Contact Energy, Comalco and the Major Electricity Users Group favoured disclosure of bids and offers after a 24 hour delay;

¹ This Executive Summary is provided for the assistance of readers. It does not purport to completely encompass all details of the Application, the Commission's investigation of the facts, the Commission's analysis of those facts and the reasons for the Determination. Readers are referred to the body of the Decision for a complete picture

Deemed Lessening of Competition

- the Commission considers the proposed new rule is a horizontal arrangement between market participants who variously compete to generate and sell electricity at wholesale; to purchase electricity at wholesale; and to retail electricity;
- the Commission considers the proposed new rule does not have the purpose of fixing, maintaining or controlling prices, its actual purpose being to respond to the Government's policy of disclosure of bids and offers after two weeks (and with a secondary purpose to increase the transparency of the NZEM price discovery process);
- absent the Arrangement, a large amount of information about forecast and actual electricity spot prices and quantities is currently disclosed to market participants under the NZEM rules. The Commission considers that the disclosure of such information does not have the effect of fixing, maintaining or controlling prices. The Commission further considers that the small amount of additional information available, as a result of the more timely disclosure of bids and offers under the Arrangement, will be subsumed into the information currently available to competitors under the NZEM rules and will not materially change matters. Therefore, the Commission considers the proposed new rule does not have the effect of fixing, maintaining or controlling prices;
- that being the case, the Commission concludes the Arrangement does not breach s 30 of the Commerce Act and does not result in a deemed lessening of competition.

Actual Lessening of Competition

- the Commission considers that the relevant market is the national wholesale electricity market;
- given the Minister of Energy's position and the recent vote of the Rules Committee of NZEM in favour of a rule permitting disclosure of bids and offers after a four week delay, the Commission considers the counterfactual is the current situation whereby disclosure of bids and offers occurs after a four week delay;
- as to whether the Arrangement will result in a lessening of competition vis a vis the counterfactual, the Commission, after examining the current information disclosed to competitors; the high degree of vertical integration of market participants; the local knowledge of industry executives; the oligopolistic nature of NZEM; and the large analytical resource available to market participants, concludes that disclosure of bids and offers two weeks earlier than in the counterfactual would not lessen competition;
- the Commission considers there may be some pro-competitive effects likely as a result of the Arrangement due to the more timely revelation of the use of temporary market power by market participants;
- therefore, the Commission's conclusion is that the Arrangement does not lessen competition in the relevant market vis a vis the counterfactual.

Conclusion

- the Commission's general approach to authorisation applications is to first satisfy itself that the relevant contract, arrangement or understanding or provision would, would be likely to, or would be deemed to, result in a lessening of competition (which need not be substantial). If the Commission is not satisfied that competition will be lessened, the Commission considers that authorisation is neither required by the Commerce Act, nor is within the jurisdiction of the Commission.
- in this case given that, in its view, the Arrangement is neither deemed to lessen competition nor in fact lessens competition, the Commission considers that it does not have jurisdiction, in terms of s 61(6) of the Commerce Act to consider whether to authorise the Arrangement and declines to authorise the Arrangement.

THE APPLICATION

- 1 The Applicant is The Marketplace Company Limited (M-co) acting in its role as the Market Administrator of the New Zealand Electricity Market (NZEM). On 22 May 2002, the Applicant applied to the Commerce Commission (the Commission) for authorisation under ss 58(1) and (2) of the Commerce Act 1986 (the Act) to enter into and give effect to a proposed Arrangement to which ss 27 and 30 of the Act might apply. The subject of the Application is the timing of the disclosure of information concerning bids to purchase, and offers to sell, electricity through NZEM (bids and offers).
- 2 The Applicant was appointed Market Administrator of the NZEM by the Rules Committee of NZEM (the Rules Committee).² The Applicant's role in that respect is to provide analytical and administrative support to the Rules Committee, the Market Surveillance Committee of NZEM and also to various NZEM working groups.
- 3 The Applicant states that it wishes any authorisation that the Commission may grant in response to its Application to apply, in terms of s58B of the Act, to existing and future participants in NZEM and also to existing service providers to NZEM.³
- 4 The Applicant states:

The arrangement will increase the amount of information available to market participants in the wholesale electricity market by releasing bid and offer information two weeks after the bids and offers apply (the Arrangement)
- 5 If the Arrangement is implemented, it will be by a change to the rules of NZEM.⁴ The rule change will require the Applicant to arrange to disclose publicly, within 24 hours of the end of each day, the final bids and offers received by NZEM for all the trading periods⁵ of the trading day two weeks earlier.
- 6 Although the Applicant does not consider that Part 2 of the Act applies to the Arrangement, it does consider that other parties might consider Part 2 applies to the Arrangement. The Applicant has, therefore, applied for authorisation.

COMMISSION PROCEDURES

- 7 The Application was registered by the Commission on 22 May 2001. In accordance with s 60(2)(c) of the Act, Notice of the Application was given to 19 parties who were considered likely to have an interest in the Application. The Commission also gave public notice of the Application in all national newspapers. Submissions were requested by 5 July 2002. One written submission was received from The Major

² The Rules Committee is the governing body of NZEM. It oversees the rule changing processes and recommends rule changes for market participants to vote on.

³ Existing service providers to NZEM are M-co, Transpower, d-cypha and Jade Direct.

⁴ Before any rule change is possible, the process specified in the NZEM rules, including consideration by the Rules Committee and, if necessary, a vote on the rule change by market participants, must occur.

⁵ Under the NZEM rules, prices are discovered for each of 48 half hourly electricity trading periods.

Electricity Users Group (MEUG).

8 Information and opinions on the issues were obtained from the following parties:

- the Applicant;
- Transpower;
- Comalco;
- MEUG;
- Contact Energy;
- Genesis Power;
- TrustPower;
- Todd Energy
- Carter Holt Harvey;
- Mr Lincoln Gould
- EWN Publishing;
- Meridian Energy;
- Mighty River Power;
- the Australian Competition and Consumer Commission (ACCC);
- the Australian National Electricity Code Administrator (NECA);
- the Australian National Electricity Market Management Company (NEMMCO);
- and
- Delta Electricity.

9 The Commission released its Draft Determination on 1 November 2002. Written submissions were sought from interested parties on the Draft Determination by Monday 18 November 2002. Three submissions were received from:

- the Applicant;
- MEUG; and
- Meridian Energy.

10 Under s 62 of the Act either:

- the Commission may, of its own motion, determine to hold a conference in relation to the Draft Determination; or
- the Applicant and each person to whom a copy of the Draft Determination was sent may within 10 days of its receipt request the Commission to hold a conference in relation to the Draft Determination.

11 No such person requested a conference. The Commission considered the issues raised by the Application were sufficiently narrow in scope that it was able to finally determine matters without the necessity for a conference. It, therefore, determined not to hold a conference in respect of the matter.

SCOPE OF THE ARRANGEMENT

The Arrangement

- 12 The Arrangement is in the form of a change to the rules of NZEM. The resolutions that will implement the rule change are attached as Appendix 1. In summary the Arrangement provides for:
- the Market Administrator, within 24 hours of the end of each day, to make available all final bids and offers by market participants to buy and sell electricity through NZEM, received for all the trading periods of the day two weeks earlier;
 - the final bids and offers to be made available through the proprietary COMIT market information system⁶ and also on COMIT free to air, a publicly accessible web site; and
 - the Market Administrator to make available on request, in a manner and for a fee that it considers reasonable having regard to the nature and size of the request, any additional revised or cancelled bids and offers for any trading period at least two weeks prior to the date of the request.

The Parties to the Arrangement

- 13 The parties to the Arrangement are the generator class market participants (GCMP) and purchaser class market participants (PCMP) in NZEM. They are listed in Appendix 2. The Applicant has also requested that any authorisation of the Arrangement granted by the Commission should include existing market participants, current service providers, and any person who may become a party to the NZEM rules in the future. Current service providers to NZEM are also listed in Appendix 2.

BACKGROUND

General

- 14 The Commission has recently considered an application by Electricity Governance Board Ltd (EGBL) for authorisation of certain provisions of a proposed new electricity trading Rulebook. The reasons for the final determination of the Commission are found in Decision 473⁷.
- 15 In Decision 473, the Commission agreed to authorise certain provisions of the Rulebook, an arrangement between electricity industry participants, whereby an industry appointed Electricity Governance Board will oversee the functioning of the wholesale electricity market in New Zealand together with aspects of the transmission services market. The Commission's authorisation was subject to conditions and was for a limited period.

⁶ COMIT, the electricity trading platform and source of information for the NZEM and service providers, is owned and operated by The Market Place Company Ltd.

⁷ *Commerce Commission Decision 473*, 30 September 2002.

16 This Application for Authorisation does not concern the Rulebook; rather a change to an existing rule of NZEM although it is anticipated that changes to the existing rules of NZEM, prior to the Rulebook coming into effect, will be incorporated into the Rulebook as part of the EGBL's processes. Much of the background material relevant to the Commission's consideration of EGBL's application for authorisation is also relevant to this Application. Decision 473 describes:

- the history and current nature of the electricity industry;
- the nature and operation of the markets for the sale and purchase of electricity;
- the participants in electricity markets; and
- relevant agreements between participants in electricity markets.

17 Given the contemporaneous nature of Decision 473, the Commission is satisfied that it is appropriate to rely on the background material in Decision 473, rather than to repeat that material in this Decision. The most relevant aspects for the purposes of this Decision are the description of the NZEM including its history, development and current operation.⁸ Although an appeal has been lodged against the Commission's Decision 473 the subject matter of the appeal does not concern the background material.

18 Decision 280⁹ is also relevant. That Decision was the Commission's final determination of an application from the Electricity Market Company Ltd¹⁰ for authorisation of, amongst other things,¹¹ two proposed rules which would establish the pricing mechanism of NZEM. In Decision 280, the Commission determined that the two rules neither lessened competition, nor were deemed to lessen competition, and it consequently did not, therefore, have jurisdiction to authorise them.

19 Following Decision 280, electricity industry participants agreed on the remainder of the rules which now comprise NZEM and the market has functioned on the basis of those rules for six years. There has been no challenge under the Act in respect of the NZEM rules during that time.

The Government Policy Statement

20 In December 2000, the Commission received a government policy statement (GPS) under s 26 of the Act, entitled "Further Development of New Zealand's Electricity Industry". On 19 February 2002, the Government transmitted a revised GPS to the Commission which replaced the December 2000 GPS. The only policy change in the February 2000 statement was recorded in paragraph 15, which now states:

Release of Wholesale Market Information

15. The Governance Board should ensure that information on offers by generators for dispatch (including ancillary services) is released publicly after *two weeks* [emphasis added].

⁸ Paragraphs 37 to 52 of Decision 473

⁹ *Commerce Commission Decision 280*, 13 September 1996.

¹⁰ The predecessor of the Applicant in the present case.

¹¹ The other rules included in that application concerned common prudential requirements and metering standards.

- 21 The revised GPS, amended the delay after which bids and offers information was to be released from three months to two weeks. Interested parties are referred to Decision 473 for further background to both GPSs¹².
- 22 The Commission is required, in terms of s 26 of the Act, to have regard to relevant government policy statements in reaching its decisions¹³. The Commission may not ignore a relevant statement. It must give it genuine attention and thought, and such weight as the Commission considers appropriate. During its consideration of this Determination, the Commission has given careful consideration to, and has had regard to, the statement transmitted to it by the Government.

The Industry's Response to the two GPSs

- 23 On 7 December 2001, on the anniversary of the December 2000 GPS, the Minister of Energy wrote to the Chairman of the Rules Committee:
- to urge greater progress on the release of information on generator offers;
 - to request bi-monthly progress reports; and
 - to state that he believed the market would have functioned more effectively during the 2001 Winter if the release of information on generator offers had been fully implemented.
- 24 On 11 December 2001, the Minister of Energy announced that
- ... in light of concerns about high spot prices, I intend to amend the Government Policy Statement to require public disclosure of generator offers into the wholesale market after 2 weeks instead of 3 months. This will give consumers and other interested parties an early opportunity to seek explanations from generators if questions arise about offer behaviour and prices

¹² Paragraphs 56 to 74 of Decision 473

¹³ In *Foodstuffs (South Island) Ltd v Christchurch City Council* [1999] NZRMA 481 the High Court held that the term "shall have regard to" in s 104 of the Resource Management Act requires decision-makers to give genuine attention and thought to the matters set out in s 104, but they must not necessarily be accepted. The words "shall have regard to" were not to be elevated to "shall give effect to". In *Te Runanga O Raukawa Incorporated v The Treaty of Waitangi Fisheries Commission* (unreported) 14 October 1997, Court of Appeal, CA 178/97 the court held that in the context of s 8(a) of the Maori Fisheries Act 1989 the words "have regard to" mean simply that the [Fisheries] Commission must consider the statutory criteria in making its decisions under that section. What, if any, weight the [Fisheries] Commission gives to a particular criterion in the particular case is for the [Fisheries] Commission to decide. All that is necessary is for the [Fisheries] Commission to turn its mind to each criterion in considering whether to grant assistance. The court cannot review how the [Fisheries] Commission weights the three criteria inter se. Nor can it review a decision by the [Fisheries] Commission to prefer one criterion over one or both of the others unless the [Fisheries] Commission's ultimate decision is unreasonable or irrational in administrative law terms.

However, the Commerce Commission notes the decision of *re Dr Ken Michael Am, Ex Parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231. The Supreme Court of Western Australia considered a number of cases which interpreted the meaning of the phrase "have regard to". It is capable of different meanings, depending on its statutory context. While it can mean to give consideration to something in some cases it was found that it required the decision-maker to take the specified matters into account and to give weight to them as a fundamental element.

- 25 On 23 January 2002, the Rules Committee received legal advice that disclosure of bids and offers after a two week delay might trigger an investigation by the Commission to determine whether such disclosure breached ss 27 or 30 of the Act. The legal advice further stated that disclosure of bids and offers information after a four week delay would not be likely to lead to the same risks.
- 26 On 12 February 2002, the Minister of Energy again wrote to the Chairman of the Rules Committee formally advising of the change to paragraph 15 of the December 2000 GPS and stating that the Cabinet considered that the NZEM should implement the rule change as soon as possible.
- 27 An exchange of information then occurred between the Market Administrator and Government Officials about the legal advice the Rules Committee had received. On 20 February 2002, Mr Mike Lear, Deputy Secretary (Resources and Networks Branch of the Ministry of Economic Development) advised the Market Administrator that:
- the purpose of the earlier disclosure of generator offer information was to prevent the risk of gaming behaviour in NZEM by reducing the delay period before market transparency occurred;
 - a revised GPS had been sent to the Commission;
 - the ACCC had authorised the disclosure of generator bids¹⁴ after a delay of only one day;
 - the disclosure after a two week delay was the only policy change consequent to the Winter 2001 Review and that the Minister of Energy took the matter very seriously; and
 - disclosure of generator offers after a one month delay should be implemented and an application should be made to the Commission for authorisation of the disclosure of generator offers after a two week delay.
- 28 On 7 March 2002, the Rules Committee agreed to ask market participants to vote on a rule change which provided for the release of final bids and offers information four weeks after the day on which the bids and offers applied. On 2 May 2002, market participants were notified that the postal vote amongst them had been in favour of the rule change. The first disclosure of bids and offers for 29 May 2002 occurred on 27 June 2002.

INFORMATION SHARING UNDER THE NZEM RULES

Introduction

- 29 The following section is a description of the information currently provided to market participants under the rules of NZEM. The section covers descriptions of information available to market participants both before and after real time. Later in this Decision,

¹⁴ In the NZEM generators *offer* into the pool. In the Australian National Electricity Market, generators *bid* into the pool. This is a semantic difference only

the Commission makes comparisons between the information currently available described in this section and the additional information to be disclosed under the Arrangement.

Prior to Each Trading Period

Pre-dispatch Schedule

30 The NZEM “Scheduling/Pricing/Dispatch” (SPD) algorithm is used to create a pre-dispatch schedule (PDS) for each of the 48 daily half hour trading periods. A PDS is a list of forecast prices and forecast electrical loads¹⁵ at 244 nodes of the national grid for a trading period, calculated on the basis of:

- bids and offers for energy and reserves that the market information system has received;
- transmission losses; and
- any transmission constraints that may exist for that trading period.

A PDS for a trading period is produced every two hours, beginning 36 hours before the trading period,¹⁶ and ending two hours before the trading period.¹⁷ The first PDS is produced at 1 pm and ends at midnight the next day. The end time of the schedule does not change until 1 pm the next day.

31 Two lines, by way of example, of a PDS of Contact Energy (with fictitious electrical loads) is shown below. The complete PDS for Contact Energy for that trading period contains a line for each node for which Contact Energy either has submitted a bid or an offer. Contact Energy, as a PCMP submits bids and as a GCMP submits offers. Each market participant receives a similar PDS but only receives load information in the PDS that relates to its own bids or offers. Therefore, the PDS provides market participants with the forecast price at each of 244 nodes and their own forecast generated or purchased electrical loads.

Node	Trader	Trading Date	Trading Period	Power Megawatt	Forecast Price \$	Constraint
ADD0111	Ctewlg	6/17/02	37	-10	35.21	N
CYD2201	Ctewlg	6/17/02	37	200	31.8	N

(ADD is Addington in Christchurch, CYD is Clyde Power Station)

32 A generator will be dispatched only if its offer price for the relevant tranche of electrical load is below the forecast price (assuming that the forecast price reflects the

¹⁵The electrical loads forecast to be added to the grid at generators’ nodes are shown as positive loads on the PDS. The electrical loads forecast to be removed from the grid at purchasers’ nodes are shown as negative loads on the PDS.

¹⁶In reality PDSs are produced at 1 pm each day using the bids and offers in the system. That is, information is published at 1 30 pm for each trading period that day and each trading period the next day until midnight. Further PDS’s are produced at two hourly intervals, ie 3 00 pm, 5 00 pm and so on, the time frame covered by the PDS gradually shortening until the final PDS is produced two hours prior to the trading period.

¹⁷Gate closure occurs at this time. Gate closure is the NZEM term used to describe the time after which market participants are not permitted to vary their bids or offers.

actual demand during that trading period). Hence generators may use the PDS, until gate closure, to refine their offers to ensure they will be dispatched.

Dispatch Prices and Quantities Schedule

- 33 The NZEM SPD algorithm is also used to produce the dispatch prices and quantities schedule (DPQS). The DPQS differs from the PDS in that expected energy demand for each node inputted into the algorithm is established by Transpower, rather than by purchasers' bids. Transpower carries out a load forecast of its own using its analysis of the weather, historical load demand, and the grid security situation for every trading period. The DPQS is published for eight trading periods at any one time, i.e. for the trading period that begins half an hour after the latest iteration of the DPQS together with the following seven trading periods. As for the PDS, generators are provided only with their own anticipated load likely to be dispatched, given their current offers into the NZEM.
- 34 The DPQS provides generators with more frequent and more accurate pricing signals as real time approaches to allow them to finalise their offers. The final iterations of the DPQS more closely reflect the likely final price. After gate closure, the NZEM rules prevent market participants from varying their bids or offers except in closely constrained circumstances such as emergencies. However, because they have received the initial DPQS four hours ahead of real time, market participants may use the DPQS for two hours for every trading period to finally optimise their bids or offers¹⁸ using the most accurate information available.
- 35 A DPQS, which shows only their own anticipated dispatch levels, is provided to generators.

Supply and Demand Curves

- 36 After every two hours, a new aggregate supply and demand curve for the North and South Island reference nodes for each trading period is published together with the PDS, which is available to all market participants. Offers by generators are sorted for each island on the basis of increasing price and are rounded to the nearest dollar. This forms the basis of forecasted high voltage direct current (HVDC) link load flows, which are then added or subtracted from the stack of generators formed for each island (depending on HVDC link flow direction). Where more than one offer is made at the same price, the quantities are aggregated. As the price increases, the quantities are then cumulated. For example, if there is an offer for 10 megawatts (MW) at \$12 and 5 MW at \$15 then this will be cumulated to give a table showing \$12 – 10 MW, \$15 – 15 MW. Therefore the published data set shows North and South Island price offers and the cumulative quantity offered at that price or less. A small sample of the supply data set for each island is shown below:¹⁹

¹⁸ Except that a variation of less than 20 megawatts or 10% of an individual bid or offer at each node is permitted by the NZEM.

¹⁹ The figures given as an example are a small part of the supply stack for that trading period. The entire stack for each island covers all tranches of generation offered at prices between zero and about \$21,000 per megawatt.

NODE	TRADING DATE	TRADING PERIOD	PRICE \$	SUPPLY MW
BEN2201	6/17/02	37	32	605
BEN2201	6/17/02	37	33	1502
HAY2201	6/17/02	37	5	2561
HAY2201	6/17/02	37	31	3229
HAY2201	6/17/02	37	43	3264

(BEN is Benmore in the South Island, HAY is Haywards in the North Island)

37 This data, available to all participants, shows:

- for the trading period 6 pm to 6.30 pm on 17 June 2002, South Island generators offered to supply an 897 MW (1502 – 605) tranche at \$33 per MW; and
- for the same trading period North Island generators offered to supply a 668 (3229 - 2561) MW tranche at \$31 per MW.

Subsequent to Each Trading Period

Average Power

38 Transpower's Information Exchange (TPIX) database and associated information dissemination software provides all market participants, one hour after real time, with information on the:

- quantity of electricity generated during each trading period at each of the 59 grid injection points at which generators are connected to Transpower's national grid;
- load at each of 183 grid exit points for each trading period; and
- the energy flows through the HVDC link.

Price and Location

39 A set of final ex post prices for each node and trading period is available by midday on the following day. If an issue has arisen with the input data used for final pricing, provisional prices will be published by midday.

Bids and Offers

40 Final bids and offers are available on a publicly accessible web site (www.comitfree.co.nz). Each day contains about 80 A4 pages of information in Microsoft Notepad format concerning bids and offers for each trading period by each generator and purchaser class market participant for the trading day four weeks previous.

41 Information disclosed for generators includes identification of the generating unit, its owner and location, and the final offer price for a specified level of generation in up

to five separate tranches. The bids and offers are available four weeks after the day they were submitted. Four weeks information is retained on the public web site.

AUTHORISATION UNDER THE COMMERCE ACT 1986

42 The Commission's jurisdiction to authorise the entry into certain arrangements or to give effect to certain provisions of an arrangement is found in s 58 of the Act, the relevant provisions of which provide:

58. Commission may grant authorisation for restrictive trade practices—

- (1) A person who wishes to enter into a contract or arrangement, or arrive at an understanding, to which that person considers section 27 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so and the Commission may grant an authorisation for that person to enter into the contract or arrangement, or arrive at the understanding
- (2) A person who wishes to give effect to a provision of a contract or arrangement or understanding to which that person considers section 27 of this Act would apply, or might apply, may apply to the Commission for an authorisation to do so, and the Commission may grant an authorisation for that person to give effect to the provision of the contract or arrangement or understanding.
- (5) A person who wishes to enter into a contract or arrangement, or arrive at an understanding to which that person considers section 29 of this Act would apply, or might apply, may apply to the Commission for an authorisation for that person to enter into the contract or arrangement or arrive at the understanding
- (6) A person who wishes to give effect to an exclusionary provision of a contract or arrangement or understanding to which that person considers section 29 of this Act would apply, or might apply, may apply to the Commission to do so, and the Commission may grant an authorisation for that person to give effect to the exclusionary provision of the contract or arrangement or understanding.

43 Section 61 details the factors that the Commission must satisfy itself of before granting an authorisation:

61. Determination of applications for authorisation of restrictive trade practices—

- (1) The Commission shall, in respect of an application for an authorisation under section 58 of this Act, make a determination in writing—
 - (a) Granting such authorisation as it considers appropriate:
 - (b) Declining the application.
- (2) Any authorisation granted pursuant to section 58 of this Act may be granted subject to such conditions not inconsistent with this Act and for such period as the Commission thinks fit.
- (3) The Commission shall take into account any submissions in relation to the application made to it by the applicant or by any other person.
- (4) The Commission shall state in writing its reasons for a determination made by it.
- (5) Before making a determination in respect of an application for an authorisation, the Commission shall comply with the requirements of section 62 of this Act.

- (6) The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(1) to (4) of this Act unless it is satisfied that—
- (a) The entering into of the contract or arrangement or the arriving at the understanding; or
 - (b) The giving effect to the provision of the contract, arrangement or understanding; or
 - (c) The giving or the requiring of the giving of the covenant; or
 - (d) The carrying out or enforcing of the terms of the covenant— as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in a benefit to the public which would outweigh the lessening in competition that would result, or would be likely to result or is deemed to result therefrom.
- (6A) For the purposes of subsection (6) of this section, a lessening in competition includes a lessening in competition that is not substantial.
- (7) The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(5) or (6) of this Act unless it is satisfied that—
- (a) The entering into of the contract or arrangement or the arriving at the understanding; or
 - (b) The giving effect to the exclusionary provision of the contract, or arrangement or understanding— as the case may be, to which the application relates, will in all the circumstances result, or be likely to result, in such a benefit to the public that—
 - (c) The contract or arrangement or understanding should be permitted to be entered into or arrived at; or
 - (d) The exclusionary provision should be permitted to be given effect to.
- (8) The Commission shall not make a determination granting an authorisation pursuant to an application under section 58(7) or (8) of the Act unless it is satisfied that -
- (a) The engaging in the practice of resale price maintenance to which the application relates; or
 - (b) The act or conduct to which the application relates- as the case may be, will in all the circumstances result, or be likely to result, in such a benefit to the public that -
 - (c) The engaging in the practice should be permitted; or
 - (d) The act or conduct should be permitted.

44 The Commission's approach is to first satisfy itself that the relevant contract, arrangement, or understanding or provision would or would be likely to result in a lessening of competition.

45 Section 61(6A) provides that the lessening of competition includes a lessening that is not substantial. Once the Commission is satisfied that the relevant contract, understanding, arrangement or provision would result, or would be likely to result, in a lessening of competition or is deemed to result in a lessening of competition it will go on to assess the benefits and detriments that would, or would be likely to, result from the relevant arrangement or provision. Conversely, if the Commission is not satisfied that there would be a lessening, a likely lessening, or deemed lessening the

Commission considers that authorisation is neither required by the Act, nor is within the jurisdiction of the Commission and will decline to grant authorisation.

46 The Commission's approach is summarised in Gault on Commercial Law²⁰. The Commission asks the following six questions:

- (i) What is the relevant market (or markets) in which the effect of the practice upon competition is to be evaluated?
- (ii) Is the practice for which approval is applied for, one to which the applicant considers s 27 (or other appropriate section) of the Act would apply, or might apply? At this point the Commission may still wish to determine whether any of the exemptions in ss 43, 44 or 45 apply. Also, is it a practice to which s 36 applies — in which case authorisation cannot be granted.
- (iii) To what extent does the contract or arrangement in question result in a 'lessening of competition' in the market or markets affected by the practice?
- (iv) What are the effects caused by the lessening of competition referred to above?
- (v) Does the contract or arrangement result or will it be likely to result in a benefit to the public? (The applicants have an evidential onus to show benefit or benefits to the public)
- (vi) Does the net public benefit which is found to exist from the practice outweigh any net competitive detriment from the lessening of competition in the relevant market?

47 In summary, the Commission first considers the relevant markets. It then considers whether any of the provisions of an arrangement are likely to result in a lessening of competition in any of those relevant markets. If some of the provisions lessen competition, or contain exclusionary provisions, the Commission then considers the benefits and detriments that are likely to result from parties entering into the arrangement or giving effect to the provisions.

48 In considering the current Application the Commission has first considered whether there are any provisions in the Arrangement that are deemed to result in a lessening of competition. The Commission has then proceeded to consider whether the Arrangement and its provisions lessen competition and the extent of such a lessening when compared to the counterfactual. Given the conclusions reached in those analyses, the Commission has not in this Decision gone on to assess the benefits and detriments that would, or would be likely to, result from authorising parties to enter into the Arrangement or to give effect to the provisions.

IS THE ARRANGEMENT DEEMED TO LESSEN COMPETITION BY THE APPLICATION OF SECTION 30?

Introduction

49 The Commission has considered whether any of the provisions are deemed to breach s 27 of the Act because they fall within s 30. If the Commission considers that the provisions of the new rules, relating to disclosure of bids and offers after a delay of

²⁰ At paragraph 61.06

two weeks,²¹ breach s 30 because they fix, control or maintain prices in the national wholesale electricity market, there will be a deemed lessening of competition and the Commission will have jurisdiction to consider whether to authorise the provisions.

50 Central to this consideration is the interpretation of s 30. For convenience it is helpful to set out the statutory provisions.

51 Section 27 of the Act provides:

27 Contracts, arrangements, or understandings substantially lessening competition prohibited.

- (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
- (3) Subsection (2) of this s applies in respect of a contract or arrangement entered into, or an understanding arrived at, whether before or after the commencement of this Act.
- (4) No provision of a contract, whether made before or after the commencement of this Act, that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market is enforceable.

52 Section 30 of the Act provides:

30 Certain provisions of contracts, etc, with respect to prices deemed to substantially lessen competition:

- (1) Without limiting the generality of section 27 of this Act, a provision of a contract, arrangement, or understanding shall be deemed for the purposes of that section to have the purpose, or to have or to be likely to have the effect, of substantially lessening competition in a market if the provision has the purpose, or has or is likely to have the effect of fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining, of the price for goods or services, or any discount, allowance, rebate, or credit in relation to goods or services, that are—
 - (a) Supplied or acquired by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them, in competition with each other; or
 - (b) Resupplied by persons to whom the goods are supplied by the parties to the contract, arrangement, or understanding, or by any of them, or by any bodies corporate that are interconnected with any of them in competition with each other.
- (2) The reference in subsection (1)(a) of this section to the supply or acquisition of goods or services by persons in competition with each other includes a reference to the supply or acquisition of goods or services by persons who, but for a provision of any contract, arrangement, or understanding would be, or would be likely to be, in competition with each other in relation to the supply or acquisition of the goods or services.

²¹ Appendix 1.

- 53 There are two questions to ask to help establish whether a provision or arrangement might fall within s 30, namely:
- (a) Is the provision part of a contract, arrangement or understanding between competitors (or persons who would be in competition but for the provision)? and
 - (b) If so, does the provision have the purpose, effect or likely effect, of fixing, controlling or maintaining the price of goods or services (or does it provide for the fixing, controlling or maintaining the price of goods or services)?
- 54 If the answer to both questions is yes, s 30 deems the provision to substantially lessen competition, and a competitive assessment as to whether it does substantially lessen competition in terms of s 27 is not required.
- 55 Often the answer to the first question is straightforward. The significant issue in s 30 is the meaning given to “fix, control or maintain” in the second question of paragraph 53 and, in particular, whether those words should be given their broad literal meaning, or whether they should be interpreted in a more contextual or purposive manner.
- 56 The Commission considers that while the Act is neither pure law nor pure economics, it is a statute that is built on and incorporates economic concepts. The Commission considers that the Act attempts to follow a very pragmatic path²². While any analysis must be economically plausible, the Act should be interpreted and applied in a pragmatic or “real world” way.
- 57 The Commission considers that a purposive interpretation of the Act is required by the Interpretation Act 1999. Section 5(1) of the Interpretation Act 1999 provides:
5. Ascertaining meaning of legislation—
 - (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose
 - (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
 - (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.
- 58 Accordingly, an interpretation that best promotes, or assists in the achievement of, the objective(s) of the Act should be adopted where required.
- 59 For the purposes of this Decision, this requires a consideration of the mischief at which s 30 is directed, and the consequences that flow from adopting one possible interpretation over another.

²² For instance the definition of competition as “workable or effective competition” in s 3(1) and the reference to a market for goods as encompassing goods “that, as a matter of fact and commercial common sense, are substitutable for them” in s 3(1A).

- 60 Further to this, the Commission considers that it is significant that s 30 creates a *per se* breach²³. This *per se* element demonstrates that conduct, which falls within the section, was seen by Parliament to strike at the heart of the competitive process. It is conduct that is to be viewed seriously. If an interpretation of s 30 were to be adopted that brought conduct within the scope of the section that was plainly, in competition terms, commonplace and unobjectionable²⁴, that would be a strong indication that such an interpretation was wrong.
- 61 While the Commission notes that the authorisation process is available, the Commission considers that it is unlikely that Parliament intended participants in commonplace and competitively innocuous commercial arrangements would have to constantly go to the Commission for authorisation.

Legal Framework

- 62 In Decision 473, the Commission reviewed the interpretation of s 30 of the Act in terms of the relevant case law²⁵ and concluded:
- the competitive effect of the provision is irrelevant in respect of the deeming provision. That is, an arrangement which comes within s 30(1) of the Act is deemed to have the purpose or effect or likely effect of substantially lessening competition. Whether it, in fact, has that effect is irrelevant;
 - the degree of control of price, although relevant to penalty, is not relevant to the issue of contravention. However, it is possible for the degree of control to be so insignificant as to be *de minimis*; and
 - a price will be fixed, controlled or maintained for the purposes of s 30 where there is some artificial interference with, or constraint on, the finding of a price or prices by competitive forces or processes (in particular the interaction of supply and demand).

The Commission's Analysis

Is the provision part of an arrangement between competitors?

- 63 The Applicant has submitted that the relevant provisions are a new (or revised) NZEM rule. NZEM rules are an arrangement between GCMP and PCMP competitors on the supply and demand sides of NZEM. The Applicant submits, as a result, the answer to the first question in paragraph 53 is clearly yes.
- 64 The Commission agrees. The NZEM rules require market participants to agree to be bound to the arrangements inherent in the rules. There are eight market participants who, as generators, are suppliers into NZEM and seven market participants who as purchasers are acquirers from NZEM. The generators compete to generate and sell electricity in the wholesale market. The purchasers compete to acquire electricity in

²³ It deems such arrangements to have anti-competitive effect for the purposes of s 27.

²⁴ For example tender or auction processes that effectively set market prices for a line of goods and/or for a period of time, or exchanges for products like futures or shares, which establish rules-based markets.

²⁵ Paragraphs 133 to 144 of Decision 473.

the wholesale market and also to sell electricity in the retail market. The NZEM rules are an arrangement between either suppliers or acquirers in a market who are competitors.

65 As well as being an arrangement between suppliers or acquirers, the NZEM rules are also an arrangement between suppliers *and* acquirers in the wholesale market. In these respects the NZEM rules are both a vertical and a horizontal arrangement. Section 30 refers to horizontal arrangements between suppliers *or* acquirers. There is no need for the Commission to consider, for the purpose of this Decision, whether s 30 applies to vertical arrangements.

66 Given these conclusions, the second question in paragraph 53 must be examined by initially considering whether the disclosure of bids and offers after a two week delay has the *purpose* of fixing, controlling or maintaining the wholesale electricity price

Does the provision have the purpose of fixing, maintaining or controlling?

67 The Applicant has submitted that:

- the Arrangement does not have the purpose to fix, maintain or control prices in the NZEM and will not breach s 30 of the Act;
- the purpose of the Arrangement is to balance information asymmetries in NZEM (the supply side currently has more access to information than the demand side) which will lead to more efficient price determination in NZEM; and
- the advocacy for the introduction of the Arrangement by MEUG, whose members would be adversely affected by any fixing, controlling or maintaining of prices, is consistent with the Applicant's submissions;

68 The Minister of Energy wrote to the Chairman of the Rules Committee on 12 February 2002. In that letter he referred, amongst other things, to the early disclosure of generator offers:

You will be aware that Cabinet recently approved an amendment to the GPS. The amendment arises out of the Post Winter Electricity Review and calls for public disclosure of generator offers after 2 weeks (instead of 3 months). Cabinet also agreed that NZEM be requested to implement this as soon as possible

69 Mr Lear explained the Government's purpose in adopting such a policy in an e-mail to the Applicant on 20 February 2002:

(a) the purpose of disclosure is to reduce the risk of gaming behaviour and any exercise of market power, because generators will know that their offers will be transparent after a short period. Transparency enables analysts, commentators, consumers and the Government to ask questions if and when there are any instances of apparently unusual offering behaviour. Our understanding is that generators themselves currently have a very good idea of what other generators are offering, so the risks of facilitating collusion would seem to us to be relatively low, and should be significantly outweighed by the self-discipline encouraged by transparency

70 The Commission considers that the purpose of the rule change, that will lead to the introduction of disclosure of bids and offers after a two week delay, is not to fix, maintain or control wholesale electricity prices. Instead, the Commission considers that the purpose of the NZEM market participants is to respond to the Government's GPS generally, and more particularly, to the imperative in the Minister of Energy's letter.

71 The broader purposes of the GPS in this respect, as explained by Mr Lear, appear to be to:

- increase the transparency of the NZEM price determination process;
- reduce information asymmetries between stakeholders in NZEM; and
- ensure the NZEM determines the most efficient wholesale electricity price.

Does the provision have the effect, or likely effect of fixing, maintaining or controlling

72 The Applicant has submitted:

- whether the disclosure of bids and offers after a two week delay fixes, controls or maintains the wholesale price of electricity should be analysed in the context of the disclosure as a subset of various information exchanges that occur in NZEM;²⁶
- information exchange arrangements do not fix or maintain prices, although in some circumstances they may control prices. To determine whether a particular case is one such circumstance, the facts should be tested against the criteria the Commission developed in the *Re NZ Medical Association*²⁷ case ;
- the disclosure of bids and offers after a two week delay satisfies all the Commission's criteria in *Re NZ Medical Association*, other than anonymity. However, to prevent disclosure of the identity of bidders or offerers would defeat the purpose of the Arrangement;
- while the disclosure of bids and offers after a two week delay will provide NZEM participants with additional historical information concerning their competitors' prices, past competitor behaviour is merely one of a myriad of variables determining generator offer prices. Appendix two of the Application describes 14 variables (of which competitor behaviour is one), the application of which will determine individual generator's price offers for any particular trading period; and
- given this number of variables, the availability of a certain amount of additional information about competitors' historical pricing behaviour will not control prices in the sense that it will lead to generators "exercising restraint or direction on the free action (or competitive determination) of price setting"²⁸.

²⁶ See paragraphs 30 to 41

²⁷ Commerce Commission Decision in *Re NZ Medical Association* (1988) 1 NZBLC (Com) 104,369.

²⁸ *Commerce Commission v Caltex New Zealand* (1999) 9 ICLR 305.

- 73 Taken together, Decisions 280 and 473 confirm the Commission's views that existing information sharing between market participants, as a result of the publication under the NZEM rules of pre-dispatch schedules, dispatch schedules, supply and demand curves, average power dispatched, and price and location information, is not deemed to lessen competition.
- 74 In his e-mail quoted in paragraph 69, Mr Lear alludes to the knowledge that generators, absent disclosure of bids and offers after two weeks, already possess concerning the offering strategies of their competitors. The primary source of that existing knowledge is the market information already available under NZEM rules and described in paragraphs 30 to 41 above. Individual generators have the resources and expertise to incorporate this information into models of NZEM, which can be used to predict market behaviour.
- 75 These models provide market participants with the ability to make accurate predictions about the short and long term strategies of their competitors. The market participants interviewed during the Commission's investigation universally acknowledged this to be the case. This view was also held by parties who are not NZEM participants such as administrators of the National Electricity Market (NEM) in Australia, Transpower and Mr Lincoln Gould, a former senior executive of the The Market Place Company. In this respect, the following statements made to Commission staff are typical.
- 76 Mr Bruce Cameron of NEMMCO²⁹ Market Development Unit said:
- Generators (in Australia) commit vast IT resources to analysing competitor behaviour. They can identify where their competitors' financial positions lie, cost structures, their abilities to sustain market price levels over time and the short term sustainability of different price outcomes. Generators look at bid sets and analyse them over numerous time periods. From this they can extract components of bids, identify competitor's cost and contract structures and un-contracted blocks of energy. The delay after real time until disclosure of bids and offers occurs is irrelevant to this analysis³⁰
- 77 Mr Richard Spearman, Operations Manager of Trustpower said:
- We can figure out effectively what is going on. We pretty much deduce it within a day of it happening, not two weeks or four weeks, so the value in the information either two weeks or four weeks out is limited. You look at the TPIX volumes for every power station in the country and look at the step changes and the cause and effect with price. I don't believe there are any generators, which effectively means the major retailers, who don't know what is going on and they know now. Pulling it apart in two weeks time or four weeks time, I don't think that is going to give them any extra information.
- 78 Mr Toby Stevenson, General Manager, Electricity Trading of Contact Energy said:
- I would support the release of the bidder and offerer identity information after 24 hours. . . . Everybody can see the supply curve. It shouldn't matter who the offerers are. I don't care who the offerers are, never have, never will. . . . I care what the supply curve looks like. I look at the supply curve every half hour. . . . We know within 30 minutes what everybody is producing³¹, so if I wanted to collude with Huntly, I could keep a running total

²⁹ National Electricity Market Management Company of Australia

³⁰ In the Australian national electricity market disclosure of bids and offers occurs after a delay of 24 hours.

³¹ From Transpower's TPIX

of their generation. I could know at any one time the amount of gas they would use, the amount of megawatt-hours they have produced. How is identifying bids and offers going to change that? It's not going to change it one iota.

79 MEUG and Comalco submitted that:

... bid and offer information should be released with 24 hours... In our view large electricity suppliers can, if they wish, already determine within 24 hours a reasonable idea of the bid and offer strategies of their peer vertically integrated suppliers by using available COMIT and TPIX information and netting off their own position. The average time of use customer does not have easy access to TPIX and COMIT data to make the same assessment. Explicit release of bid and offer information with 24 hours will create a more level field for generators, end consumers and independent retailers.

80 Finally, Mr David Swift, Associate Director of NECA stated:

We think that post-dispatch information is far less important. By the time you [the generators] get through dispatch, what you didn't know wasn't worth worrying about.

81 No person interviewed by Commission staff disagreed with the general thrust of these statements.

82 The Applicant has raised the general principles in the Commission's Decision in *Re NZ Medical Association* (1988) 1 NZBLC (Com) 104,369, 104,375 in support of its view that the Arrangement does not breach s 30 of the Act. In this respect the Commission notes that *Re NZ Medical Association* was decided 14 years ago, on very different facts to the current Application, at a time when the application of s 30 was still untested in the courts. Therefore, the Commission has given little weight to *Re NZ Medical Association* in arriving at its determination on this Application.

83 Absent the Arrangement, a large amount of information including forecast and actual electricity spot prices and quantities is currently shared amongst market participants, in terms of the NZEM rules.³² The Commission's view is that the disclosure of such information does not have the effect of fixing, maintaining or controlling prices. The Commission considers that the small amount of additional historical information available to competitors, as a result of the more timely disclosure of bids and offers under the Arrangement, will be subsumed into the information currently available to competitors under the NZEM rules and will not materially change matters. Therefore, on these facts, the Commission considers that the proposed new rule does not have the effect, or likely effect, of providing market participants with any ability to fix, maintain or control prices.

84 The more common example of information disclosure between competitors raising competition law concerns is that where members of a trade association arrange to exchange pricing information amongst themselves. By contrast, the Arrangement, if implemented, is intended to lead to the release of information (after a two week delay) to consumers and other parties interested in the pricing outcomes of the NZEM who are not parties to the Arrangement.

³² Which is described in paragraphs 30 to 41.

- 85 The Applicant has submitted that competitor behaviour is just one of 14 variables which determine generators' pricing strategies. Some of these variables are pre dispatch and dispatch schedules, supply and demand curves, hydro storage lake levels and predicted inflows, transmission constraints, hedge contracts held, the reserve markets and competitor behaviour³³. These variables appear to the Commission to be accurately described in the Application, with some of course being more important than others in determining the offering behaviour of market participants.
- 86 It appears to the Commission that the additional increment of information about competitor behaviour disclosed under the Arrangement, if implemented, will not add, other than to a minimal extent, if at all, to the apparently almost complete knowledge which the competitors in NZEM already have concerning each others' behaviour. Furthermore, even if it did, as the Applicant has argued, there are a myriad of important drivers which radically influence the pricing behaviour of market participants which will remain unaffected by the Arrangement.

The Commission's Conclusion on Section 30

- 87 On the information available to it:
- the Commission considers that the rule change to implement the public disclosure of bids and offers into NZEM after a two week delay is an Arrangement between competitors;
 - the Commission does not consider the Arrangement has the purpose, effect, or likely effect, of fixing, controlling, or maintaining the price of electricity discovered in the NZEM.
- 88 Given this conclusion that the Arrangement is not *deemed* to lessen competition, it is necessary for the Commission to additionally determine whether the Arrangement *in fact* will, or is likely to, lessen competition vis a vis the counterfactual.

DOES THE ARRANGEMENT IN FACT LESSEN COMPETITION?

Market Definition

- 89 The Commission adopts its approach to market definition as set out in Decision 473. Interested parties are referred to the relevant paragraphs in that Decision³⁴.
- 90 In Decision 473, the Commission determined that the following markets were relevant:
- the wholesale market for electricity, which includes the generation, sale and purchase of electricity;
 - the market for the transmission of electricity;
 - the markets for the distribution of electricity;

³³ See page 3 of Appendix 2 of the Application for a full list.

³⁴ Paragraphs 201 to 207 of Decision 473

- the retail market for electricity;
- the market for the provision of ancillary services, including instantaneous reserve, frequency control reserves, over-frequency arming, voltage support, and black start; and
- the market for other services, including administrative services, pricing services, clearing services, system operator services, regulatory services, meter services and information services.

- 91 The Applicant has submitted that the markets that could possibly be considered relevant to consideration of this Application are the national wholesale and retail electricity markets for each half hourly electricity trading period. This is because while both GCMPs and PCMPs sell and purchase electricity in the wholesale electricity market, the latter also trade in the retail electricity market. However, the Applicant considers that the Application does not raise competition law issues in the retail electricity market and that it is not a relevant market.
- 92 The subject matter of the present Application is less swingeing than that considered in Decision 473. The matter in hand concerns only more timely disclosure of bids and offers into the *wholesale* market.
- 93 Therefore the Commission considers that, of the markets described in Decision 473, only the national wholesale market for electricity, which includes the generation, sale and purchase of electricity, is relevant to this Decision.
- 94 The Applicant has suggested that the relevant market should include a temporal dimension corresponding to each half-hour trading period in which price discovery occurs in NZEM.
- 95 The Commission acknowledges that when defining markets, in certain circumstances it is helpful to introduce a separate time dimension into the market definition. However, the Commission does not consider a time dimension is necessary for the purposes of the matter in hand.

The Counterfactual

Introduction

- 96 As the Commission has stated in previous decisions,³⁵ in carrying out an assessment of an application under s 58 of the Act, it is necessary to compare the likely competitive effects of the arrangements in question, and the public benefits and detriments likely to result from the arrangement, with those that arise in the “counterfactual”. The Commission makes a “with” and “without” comparison rather than a “before” and “after” comparison.

³⁵For instance, Commerce Commission Decisions 280 and 473

97 The counterfactual is not necessarily the arrangement which might be preferred by the Commission or by particular groups or individuals in the industry. The counterfactual is the Commission's pragmatic and commercial assessment of what is likely to occur in the absence of the proposed arrangement.

Suggested counterfactuals

98 The Applicant has proposed two alternative counterfactuals in the Application:

- the current situation, where as part of the NZEM rule change described above, market participants have agreed that bids and offers made since 29 May 2002 would be disclosed after a four week delay;³⁶ or
- in the event that the Commission was to decline EGBL's application for authorisation of a new Rulebook,³⁷ the most likely alternative scenario, would be that the Government will regulate to provide rules for competition in the electricity industry under the Electricity Amendment Act 2001. The Government would establish the Crown EGB, which would recommend to the Minister that disclosure of bids and offers information should occur after a delay of two weeks, according to the GPS.

99 On 30 September 2002, the Commission announced that it had determined to grant authorisation of the Rulebook subject to certain conditions. While that would appear to dispose of the Applicant's second suggested counterfactual, in any event, the NZEM rules will cease to exist under either an industry or Crown appointed Electricity Governance Board. Either way, what is in the Electricity Governance Board rules is irrelevant to the present Application which concerns a change to the rules of NZEM.

100 MEUG and Contact Energy suggested as an alternative counterfactual that disclosure of bids and offers could occur after a delay of 24 hours. However, there is currently no such proposal afoot either in industry or government circles. All other parties interviewed by Commission staff supported the current situation as the most likely counterfactual, absent the Arrangement.

The Commission's choice of counterfactual

101 As discussed above, the Commission in selecting a counterfactual must determine what is the most likely alternative to the Arrangements; not what is the arrangement that others might prefer.

102 It is the view of the Commission that the position of the Government is central to the choice of any counterfactual in this case. Along with its considerable ownership position in the industry, it has passed the necessary legislation to regulate key aspects of the industry and has expressed a willingness to use that regulatory power as a fallback position.

³⁶Such disclosure began on 27 June 2002 and has been occurring since that date

³⁷The date of this Application was between that of the release of the Draft Determination on EGBL's application for authorisation and the release of the final Determination

- 103 In this respect, the Commission notes the passages in the Minister of Energy's letter to market participants already quoted above, but worth repeating, in part, at this stage of the analysis:

The amendment ... [to the GPS] ... calls for public disclosure of generator offers after 2 weeks (instead of 3 months). Cabinet also agreed that NZEM be requested to implement this as soon as possible

- 104 The Government subsequently appeared to moderate its position on the issue. In his e-mail, already quoted in part, Mr Lear wrote:

As I said to you, the Minister takes the issue of disclosure of generator offers very seriously. This is particularly the case given that it is the only policy change consequent on the review of the 2001 winter situation. We [officials] have discussed the situation with him. He agrees that if NZEM is convinced that there is a material risk of breaching the Commerce Act if disclosure is after two weeks but not after one month, he will live with one month provided that NZEM proceeds forthwith to seek clearance or authorisation from the Commission for disclosure after two weeks

- 105 So on one side of the issue, the Government's position is that it will live with disclosure after four weeks absent the Arrangement currently under consideration. On the other side are a majority of market participants, whose position is that disclosure after four weeks is appropriate.

Conclusion on Counterfactual

- 106 Given that relative unanimity, the Commission considers that the proper counterfactual is the existing NZEM rules which require the public disclosure of bids and offers after a delay of four weeks.

- 107 The Commission has been provided with a legal opinion commissioned by the Applicant. Bell Gully opined that disclosure after a four week delay would not raise competition law concerns (but that disclosure after two weeks may).³⁸ Public disclosure of bids and offers after a four week delay has occurred for approximately four months. This appears to have worked efficiently with some market participants reporting plans to analyse the material and some expressing a lack of interest. To the Commission's knowledge, no competition or other concerns have been raised concerning disclosure of bids and offers after a four week delay.

Comparison of the Arrangement and the Counterfactual

Introduction

- 108 The proposed Arrangement will be implemented by deleting the existing rule 13.3 of Part 1 of the NZEM rules and substituting the provisions shown in Appendix 1 of this Decision. Currently, disclosure of bids and offers after a delay of four weeks is required under rule 13.3 of Part 1. The provisions proposed to implement disclosure after a delay of two weeks identically mirror the existing rule, other than the amendment of the words "four weeks" to "two weeks" where relevant.

³⁸ Bell Gully's conclusions were reached before regular disclosure of bids and offers had commenced

- 109 Therefore, consideration need only be given to the question of whether the two week delay before disclosure, when compared with the counterfactual of four week delay before disclosure, lessens, or is likely to lessen, competition in the wholesale electricity market.
- 110 In assessing the competitive implications of the Application, the Commission is required to “net out” any pro and anti-competitive effects. If the net effect is to promote competition, then there can be no lessening of competition.³⁹
- 111 Therefore, when considering the competitive impact of the Arrangement, the Commission has considered the following questions:
- would the disclosure of bids and offers after a delay of two weeks lead to the potential for increased tacit collusion in relation to the counterfactual? and
 - are there any pro-competitive effects from such a disclosure that occurs two weeks earlier than the counterfactual?

The Applicant’s submissions

- 112 The Applicant has submitted that:
- there is a minimal risk that the earlier disclosure of bids and offers might increase the risk of collusion between NZEM participants by enabling them to more frequently observe each other’s behaviour and detect cheating on any tacit understanding not to compete aggressively;
 - this risk is minimal because of the volatility of wholesale market conditions, in particular, inflows into hydro power station catchments, the requirement for 6 and 60 second generation capacity reserves, and any dislocations in the national grid;
 - such volatility means that the more timely historical information available to a market participant under the Arrangement is, competitively, of little relevance, given its competitors’ adjustments to the different market conditions inevitably prevailing two weeks later;
 - the more timely information available under the Arrangement is of far less competitive significance to NZEM participants than the existing pre and post dispatch information available to NZEM participants very close to real time;
 - the Arrangement will increase the visibility of market participants’ behaviour to non market participants by reducing the time delay until the behaviour is exposed. Such transparency will discourage both tacit collusion and the use of any market power that might arise in conditions of weak competition. As such the Arrangement will have pro-competitive effects;

³⁹ *Fisher and Paykel Ltd v Commerce Commission* [1990] 2 NZLR 731.

- the provision of more timely information to consumers will permit them a more accurate demand side response to market prices, which is also pro-competitive;
- any anti-competitive effects of the Arrangement are balanced by pro-competitive effect. There is no lessening of competition as compared to the counterfactual; and
- this conclusion is reinforced by the support of consumer groups for the Arrangement. Therefore, the Commission should decline jurisdiction.

Views of other parties

- 113 In Mighty River Power's view, the disclosure of bids and offers after two weeks, while useful to consumers and others, will provide generators with no additional information concerning the strategies of their competitors:

...it seems to us that the non-industry groups that were going to be the biggest beneficiaries [of disclosure after a two week delay] because they're on the outside... So if you looking at this from their perspective you would have to say that they are going to be better armed with more relevant and recent information with a two week bid than a four week bid

The industry [market participants], I think is in a different category. It's living with it day and night and every sensible trader has built up systems. It's a small country so there is not a lot going on which people who are doing their job well aren't aware of. I mean positions taken.

The actual supply and demand curves are published with the dispatch schedule. The two hours before gate closure is the period when we may alter our strategies. Disclosure after two weeks will give us no additional information that will change the way we do business. We imagine that is the case for all generators

The background to the disclosure of bids and offers is that it has been debated for years. Mighty River Power was the only generator on the first round that ever supported disclosure. Our position has always been that the disclosure is not for the market, as such, it is for technically external parties, large users, academics, economist who may come back to the market and ask "why are you doing that, it doesn't look very good?"

As far as disclosure of bids and offers are concerned, we won't even look at it.

- 114 Mr Gould provided his personal views on this matter. The principle underlying his comments was that the greater the transparency of a commodity market, the greater the efficiency of the price discovery process. In respect of the disclosure of bids and offers, Mr Gould was most in favour of real time disclosure. He said:

There may be some potential for an argument about whether disclosure should occur in real time or after a delay like two weeks, but to be debating whether there is any difference between disclosure after delays of either two or four weeks seems naïve.

- 115 Of the NZEM, Mr Gould commented that there were a limited number of players, each player was aware of its own situation, and players understood the market from the powerful information, other than historical bids and offers, already available to them.
- 116 MEUG submits that bids and offers should be disclosed after a 24 hour delay. It does not support the Arrangement if that support negates the potential for a future change

of the rules to allow disclosure after a 24 hour delay. However, to the extent that the proposed rule change represents an improvement on the existing four-week delay, it supports it. MEUG stated:

In our view, the large electricity suppliers can, if they wish, already determine with 24 hours a reasonable idea of the bid and offer strategies of their peer vertically integrated suppliers by using available COMIT and IPIX information and netting off their own position

Consumers and affected [independent non vertically integrated] retailers need to be able to quickly identify any behaviour that might contravene the Commerce Act and then be able to seek immediate relief by way of any legal, political or commercial options available.

The quicker consumers and independent retailers can assess the changing offer strategies of the large vertically integrated sellers, the more effective countervailing demand side responses and strategies will be

Comparison with the Australian NEM

- 117 In 1997, the ACCC authorised the arrangements which resulted in the formation of the NEM⁴⁰. Part of the arrangements were a proposal that information on bids and offers be released after a 24 hour delay. The ACCC in its Decision said:⁴¹

A major concern in the proposed arrangements is the scope for strategic behaviour and/or tacit collusion between competitor generators in the market, and the information flows that may facilitate this.

Each of the information disclosure issues discussed must be considered together with other issues, including the key factor of the ability of competitors to revise their offers into the market, the number and size of participants in the market and the extent of demand flexibility. The combination of forecast information, data on competitors, offering strategies and knowledge of competitor's intentions provides generators in the market with an opportunity to adjust their behaviour to ensure profit maximisation. This will impact upon the efficiency of the market.....

- 118 However, the ACCC considered there were, on balance, sufficient benefits resulting from information disclosure to authorise the proposals subject to the requirement of daily monitoring of the NEM by NECA.
- 119 The ACCC has recently (3 July 2002) revisited the issue of information disclosure in its Draft Determination on "Amendments to the National Electricity Code - Changes to Bidding and Rebidding rules". The ACCC noted:

It is clear that information disclosure can play a pivotal role in the exercise of market power. The amount of offering information that should be revealed to offerers, and the timing and method of disclosure are questions the Commission [ACCC] assessed in its original authorisation of the code in December 1997. Many of the arguments still apply

the release of information can be used to facilitate tacit collusion or to aid the exercise of market power, particularly where bidder identities are revealed or can be inferred.

⁴⁰ Authorisation of the National Electricity Code (A40074, 75 & 76) 10 December 1997

⁴¹ In the Australian NEM generators "bid" and purchasers "offer". The terminology in NZEM is the reverse. In the material quoted from the ACCC Decisions, the NZEM terminology is used to avoid confusion.

The Commission [ACCC] suggests that changes to the information disclosure arrangements should be investigated, as a possible alternative mechanism through which to mitigate against tacit collusion in the marketplace

120 The ACCC clearly has concerns about the level of information disclosure in the NEM. However, the NEM is one of the most transparent electricity markets in the world, much more so than NZEM. For example, bids and offers are disclosed after 24 hours. Further, and probably more relevant to the ACCC's concerns, price sensitivities in the NEM are disclosed. The market administrator provides 35 alternative scenarios in real time for electrical load and price. Market participants know, for example, that one scenario is that if the load in a particular region is, say, 3% higher than predicted, given the current bids and offers in the NEM, the market algorithm has determined that the energy price will be 50% higher if that higher demand occurs. Thirty four other scenarios are provided to market participants describing alternative prices for alternative demands above and below the prediction. The NZEM rules do not provide for the calculation of price sensitivities in NZEM.

The Commission's analysis

121 The Commission considers that the NEM, mostly supplied by large coal fueled generators, is an inherently less volatile market than the NZEM where a major factor determining the discovered price is the vagaries of rainfall and hydro catchment inflows. For example, in June 2002, average daily wholesale electricity prices discovered in NZEM dropped from about 7 c/kwh to about 2.5 c/kwh during the first two weeks of the month; rose sharply to 5.5 c/kwh over two days; then fell to about 2 c/kwh at the end of June. The less volatile a market is, the more useful historical pricing information will be to competitors.

122 The additional information disclosed in NEM (price sensitivities and bids and offers after a 24 hour delay) together with the differences between the two markets leads the Commission to conclude that the ACCC's concerns that information disclosure may fuel tacit collusion and high spot prices in NEM do not necessarily apply in NZEM.

123 The evidence that the Commission has obtained is that the major generators, absent any disclosure of bids and offers whatsoever, have an intimate knowledge of their competitors' offering strategies. This knowledge has its genesis in:

- market information already disclosed under the NZEM rules (discussed above);
- the vertically integrated nature of the participants in NZEM, with all except one being both GCMPs and PCMPs and receiving information from both the supply and demand sides of the NZEM;
- the oligopolistic nature of the NZEM⁴²;
- the intimate knowledge the generators have of each others' equipment as a result of the employment of many of their executives in ECNZ, the former SOE

⁴² See Page 21 of the Memorandum of the Market Surveillance Committee to NZEM dated 17 July 2001 entitled "Re Claimed Undesirable Situation Arising From High Spot Prices May/June 2001".

generator which owned 96% of New Zealand's then generating capacity; and

- the analytical resources market participants are able to bring to bear.

124 Given this degree of existing knowledge (absent any disclosure of bids and offers), the Commission considers that the usefulness, in a competitive sense, of additional information available to market participants as a result of the disclosure of bids and offers after a two week delay when compared to the counterfactual situation of disclosure after a four week delay is likely to be minimal.

125 During the investigation of the Application, allegations have been made to Commission staff concerning the use of temporary market power by electricity generators in the context of:

- the existence of transmission grid constraints;
- transmission grid failures;
- generator planned outages;
- generator failures; and
- unusual hydrological conditions leading to low hydro lake catchment inflows.

126 If the Arrangement allows conditions of temporary market power to be removed earlier and in a more substantial manner, the Commission considers there are likely to be some pro-competitive effects of the Arrangement in comparison with the counterfactual. As Trustpower⁴³ said in the context of using the information disclosed under the Arrangement:

I think an advantage of it is that it comes back to this whole lobbying thing. We can produce what we like from our models [of the market]. However, it is better to be able to go down to the Minister and say "there, that is the hard evidence [of the use of temporary market power]"

127 Comalco also believes that the more timely disclosure under the Arrangement will assist in constraining the use of temporary market power by early public exposure:

...it's not just for consumers, this information, it is for other stake holders and its for media as well. We have had situations where there were high spot prices in local regions and I have had it put to me by a generator that they don't want someone, a reporter from the Dominion ringing up asking them to justify why they were charging that in Auckland versus that in Wellington. It is a good discipline on generators if the media are interested in their behaviour. But disclosure after four weeks is boring to the media. After two weeks it may still be an issue

128 MEUG explains its view of the benefits of early disclosure (it proposes a disclosure after 24 hours delay) as follows:

⁴³ Trustpower is a net purchaser of electricity. Its position as a retailer in the Bay of Plenty region can be affected by high electricity prices when certain transmission lines into the region constrain.

In the space of a day or even a few hours, events and spot price spikes can severely affect end users or net retailers' cost structures. The sooner information such as bids and offers is available the sooner strategies to stop these adverse effects can be put in place. A delay of two weeks could be past the point at which the end consumer or retailer is even viable.

- 129 These likely effects of the Arrangement, described by Trustpower, Comalco, MEUG and others are pro-competitive effects. Earlier disclosure of bids and offers will aid the early identification, and possible constraint, of the use of temporary market power. The Commission's view is that pro-competitive effects of the Arrangement appear to outweigh any minimal anti-competitive effects.
- 130 Finally, the Commission notes the 18 month period after the GPS first recommended disclosure of bids and offers until routine disclosure first occurred. Prevarication in respect of the matter is not the type of response to be expected of market participants who wish to obtain information to allow them to tacitly collude and maximize their revenue. Rather the reverse; it is the type of response that would be expected to a pro-competitive rule change. Supporting that supposition is the strong support for the Arrangement from consumers. As the Applicant says:

Attached ... is a copy of a letter from MEUG which supports a two week rule over a four week rule. They are the group most likely to be disadvantaged ...

Conclusion on Comparison with Counterfactual

- 131 The Commission considers that the Arrangement, compared to the counterfactual does not lessen competition and might in fact, be pro-competitive because:
- it is unlikely to provide market participants with additional information of a kind which could promote tacit collusion and a lessening of competition in NZEM; but
 - it is likely to provide those parties, other than market participants but who also have an interest in the functioning of the NZEM, with more timely information which they will be able to use in a pro-competitive manner.

CONCLUSION ON COMPETITION ANALYSIS

- 132 On the basis of information available to it, the Commission concludes that the Arrangement is neither deemed to lessen competition, nor does it in fact lessen competition.

DETERMINATION

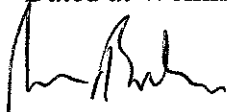
- 133 As discussed, under s 61(6) of the Act the Commission may not make a determination, under s 58 of the Act, granting an authorisation to an arrangement unless it is satisfied that the arrangement:
- would result in a deemed lessening of competition in a market because it fixes, controls or maintains prices in a market and is in contravention of s 30 of the Act; or

- would have the purpose of lessening competition or would result or be likely to result in a lessening of competition. For the purposes of this inquiry the lessening of competition need not be substantial

134 On the basis of the information available to it, the Commission has determined that it cannot be satisfied that the Arrangement either lessens competition or is deemed to lessen competition in a market. This being so, the Commission has not considered whether the public benefits of the proposed Arrangement are likely to outweigh the lessening of competition.

135 Therefore, the Commission considers that authorisation of the Arrangement is neither required by the Act, nor is within the jurisdiction of the Commission and, pursuant to s61(1)(b) of the Act, it declines to grant authorisation.

Dated at Wellington this 23rd day of December 2002



John Belgrave
Chair

APPENDIX 1 – THE ARRANGEMENT

APPENDIX 1: RESOLUTION []

RELEASE OF BIDS AND OFFERS INFORMATION RULE CHANGE

It is noted that the resolutions implementing this Rule Change are drafted on the basis that, at the time of implementation, the NZEM Rules will have already been amended pursuant to Resolution [] One Off Release of Bids and Offers Information Rule Change.

It is resolved that, with effect from [1 April 2002], the NZEM Rules be amended as follows:

- 1 By deleting existing rule 13.3 of Part 1 and substituting the following new rule 13.3:
 - 13.3 **Rule does not apply to certain information**
The provisions of this rule 13 do not apply to information that:
 - 13.3.1 **Independently acquired or developed**
Has been acquired or developed by a **service provider** or the **Market Administrator** resulting from activities of those persons that are not the subject of these rules; or
 - 13.3.2 **Bids or offers submitted between 1 January 2001 and 31 August 2001**
Is a final **bid** or final **offer** submitted by a **Market Participant** for any **trading period** between 1 January 2001 and 31 August 2001 (both inclusive) and made available in the manner prescribed in rule 5 of section D of part 2; or
 - 13.3.3 **Bids or offers submitted after [31 March 2002]**
Is a **bid** or **offer** submitted by a **Market Participant** for any **trading period** after [31 March 2002] and made available in the manner prescribed in rule 6 of section D of part 2
- 2 By inserting immediately after rule 1.3 of section B of Part 2 the following new rule 1.4:
 - 1.4 **The Scheduler to retain bids and offers**
The **Scheduler** will retain in a form that it considers appropriate all **bids** and **offers** for **electricity** submitted by all **Market Participants** pursuant to this Section B after [31 March 2002], including all revised **bids** and **offers** and all cancelled **bids** and **offers**.
- 3 By deleting existing rule 1.1.2 of section D of Part 2 and replacing it with the following new rule 1.1.2

1.1.2 Information to be made available

The following information is to be made available:

- 1.1.2.1 The final **bids** and final **offers** submitted for any **trading periods** between 1 January 2001 and 31 August 2001 (both inclusive); and
- 1.1.2.2 All **bids** and **offers** submitted for any **trading period** after [31 March 2002].

4. By inserting immediately after rule 5 of section D of Part 2 the following new rule 6:

6. AVAILABILITY OF FINAL BIDS AND FINAL OFFERS

6.1 Market Administrator to make available final bids and final offers

The **Market Administrator** will, within 24 hours of the end of each day, make available all final **bids** and final **offers** received for the **trading periods** of the **trading day** exactly two weeks prior.

6.2 Transmission of information

All information to be made available by the **Market Administrator** pursuant to this rule 6 will be:

6.2.1 Market information system

Transmitted to **Spot Market Participants** through the electronic facilities contained in the **market information system**; and

6.2.2 Publicly accessible website

Placed on a publicly accessible website,

and will remain available for inspection through the electronic facilities contained in the **market information system** and on the publicly accessible website for a period of no less than four weeks.

6.3 Backup procedures if the market information system is unavailable

In the circumstances where the **market information system** is unavailable to send information pursuant to rule 6.2.1, the **Market Administrator** will follow the backup procedures that will be specified by the **Market Administrator** from time to time.

6.4 Backup procedures to be in place and the subject of consultation

The backup procedures referred to in rule 6.3 will be put in place by the **Market Administrator** in consultation with **Spot Market**

Participants. The **Market Administrator** will ensure that there is always some form of backup procedure notified to the **Spot Market Participants**.

6.5 No backup procedure required

In the circumstances where the publicly accessible website upon which information is placed pursuant to rule 6.2.2 is no longer available the **Market Administrator** is not obliged to follow any backup procedures, but the **Market Administrator** must make available that information as soon as practicable once the publicly accessible website becomes available once more.

6.6 Bids and offers available on request

Any person may request that the **Scheduler** make available any **bids** and **offers** submitted by any **Spot Market Participants** for any **trading period** that took place at least two weeks prior to the date of the request and after [31 March 2002]. For the avoidance of doubt, requests may relate to revised **bids** and **offers** and cancelled **bids** and **offers**. The **Scheduler** will make available the requested **bids** and **offers** in a manner, and for a fee that it considers reasonable having regard to the size and nature of the request.

APPENDIX 2 - NZEM MARKET PARTICIPANTS

Generator Class:

Contact Energy Ltd,
 Genesis Power Ltd,
 Meridian Energy Ltd,
 Mighty River Power Ltd,
 Todd Energy Ltd
 On Energy Ltd,
 TrustPower Ltd.
 Tuaropaki Power Ltd.

Purchaser Class

Contact Energy Ltd,
 Genesis Power Ltd,
 Meridian Energy Ltd,
 Mighty River Power Ltd,
 Todd Energy Ltd,
 On Energy Ltd,
 TrustPower Ltd,

NZEM Service Providers

Market Administrator
 Grid Operator
 Scheduler
 Dispatcher
 Pricing Manager
 Reconciliation Manager
 Clearing Manager
 Registry

M-co Ltd,
 Transpower Ltd,
 Transpower Ltd,
 Transpower Ltd,
 M-co Ltd,
 d-cypha Ltd,
 M-co Ltd,
 Jade Direct Ltd.