



19 May 2011

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Dear Mr Hansen

## Submissions on Draft Decision on UTS Claims

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Please find attached Genesis Energy's cross-submission in respect of the Electricity Authority's ("**the Authority**") draft decision regarding an alleged undesirable trading situation ("**UTS**") on 26 March 2011.

As you will appreciate, Genesis Energy has committed considerable resources engaging on the Authority's draft decision, as we believe that the final outcome will be critical for the long term integrity of the wholesale electricity market.

In my letter to you dated 13 May 2011, I stated that our submission demonstrated that the events of 26 March 2011 conveyed a broader story about risk management in the New Zealand electricity market. That story centres on the differing risk management choices made by Market Participants both before and on 26 March 2011.

The submissions received by the Authority have only reinforced our perspective. The submissions broadly divide into two camps: on one hand submissions from those on the demand and supply side of the market who adequately managed their commercial risk according to the known and foreshadowed market conditions and, on the other hand, those who did not. The latter group are seeking to mitigate through *ex post* regulatory intervention the commercial consequences of their freely made risk management decisions.

In Genesis Energy's view, the only choice open to the Authority is to apply the market rules as they stand, and reward good risk management behaviour. It should not reward poor decision making with all the consequent moral hazard that that decision would entail.

As we outlined in our 13 May 2011 submission orderly trading on the market continued on 26 March 2011 and has continued since (including through periods where similar transmission constraints to 26 March 2011 existed). No submission received by the Authority argues otherwise.

Genesis Energy acknowledges that some complainants who are not Market Participants may suffer financial loss under the spot market component of their bilateral contracts with their retailer. That is a contractual matter for them to pursue with their retailer and/or the adviser who counselled them to accept spot market exposure. However, it is not a matter relevant to a UTS determination. The submissions reveal that no Market Participant has claimed or adduced evidence that it is unable to settle against the interim prices of 26 March 2011. However, even if a Market Participant could not settle, the clearing and settlement rules are in place to manage that eventuality.

The appropriate method to address any policy concerns that may arise from the event of 26 March 2011 lies in consulting on change to the Code. However, in adjudicating on the current alleged UTS, the Authority must apply the law as it stands now against the facts it has discovered during the course of its investigation. In this regard we note that not one submission has called into question the facts set out by the Authority in its draft decision.

Accordingly, Genesis Energy believes that the draft finding that there has been no manipulative or misleading conduct or breach of law by Genesis Energy must stand. Further, the Authority should find that no UTS exists, as there is no evidence to support a finding that the relevant legal test is satisfied.

### **Process Matters**

As you will appreciate, Genesis Energy's concern is to ensure that it is given a reasonable opportunity to respond to any allegations and/or potential adverse findings regarding its conduct on 26 March 2011. There are, however, a number of important reservations that we have over the Authority's process.

To begin with, we are not aware of any other UTS claim where the Authority's predecessors have consulted publicly on a draft decision. We have assumed that the Authority is relying on clause 5.4 of the Electricity Industry Participation Code to do this, but that provision of course relates only to a situation where the Authority has already found that a UTS is developing or has developed. In Genesis Energy's view, neither situation applies as the Authority has not yet reached a final decision in this instance, and we remain of the view that there is no basis to make a finding of a UTS. This conclusion is irrespective of the views of several submitters who are not, in any event, Market Participants with whom the Authority is required to consult under clause 5.4.

We also have the following additional concerns;

- it is possible that some cross submissions will raise new matters concerning Genesis Energy's conduct on 26 March 2011. As a matter of proper process, Genesis Energy should be given an opportunity to reply to points it has not previously been given an opportunity to respond to. In the absence of this reply, there is a real risk that there will be aspects of the cross submissions that the Authority may rely on to reach its decision and which may simply be wrong. We would be grateful if the Authority would confirm that it will provide this opportunity to Genesis Energy; and
- we believe that Genesis Energy should have the opportunity to respond to all submissions received by the Authority and which it will take into account in its decision making process. We have noted that the Authority has posted reports and submissions on its website at irregular intervals, without notifying participants. For example, the Tusk Legal Service paper, in support of Mighty River Power's UTS claim, was posted on the website some weeks after Mighty River Power's UTS claim was first posted. Similarly, the Sapere Research papers accompanying the Mighty River Power UTS claim were not posted until after the Authority's draft decision was released. Genesis Energy has done its best to ensure that it has located all relevant material on the Authority's website, however, we think it is important for the Authority to confirm that all relevant information that it has had regard to in making its decision has been provided to Genesis Energy (and other participants) for comment.

As you will appreciate, Genesis Energy is taking the Authority's investigation into the events of 26 March very seriously. We would therefore be grateful for an urgent response to the matters raised in this letter.

If you would like to discuss any of these matters further, please contact Malcolm Alexander, General Manager Corporate Affairs, on (04) 495 6353.

Yours sincerely



Albert Brantley  
Chief Executive