Electricity Authority's proposed code amendments to address inefficient price discrimination in very large electricity contracts

Contact Energy Submission

31 October 2022

Introduction and Summary

1. Thank you for the opportunity to provide our views on the consultation paper on establishing a Major Contracts Regime.
2. Major electricity generators in New Zealand are long-sighted businesses who operate in a competitive market, and highly value their reputation with consumers and government. It is not consistent with our actions, or our values to act in ways that harm consumers.
3. Within that context, below cost 'inefficient' contracts are highly unlikely to be a feature of the New Zealand electricity market. While some customers may pay less than others if they are willing to commit to large base-load volumes for an extended period of time, these contracts are always above the cost to serve. Offering below cost contracts would not be in our long-term interest.
4. The Electricity Authority (the Authority) has also been unable to provide any examples of below-cost contracts or show that there is a strong theoretical case that it could occur in the future.
5. We therefore do not consider that the Major Contracts Regime is necessary and will not improve outcomes for consumers. There is just not a sufficient fact base to support the need for the new regime.
6. However, if the Authority wishes to retain this regime, it is important that it does not inadvertently hinder the development of legitimate large contracts and that the resulting drafting is unequivocal in its meaning and its potential application. Large long-term contracts will be increasingly necessary to drive decarbonisation of New Zealand's energy requirements, and to provide greater price stability for major users in a market with a greater proportion of renewables.[1]
7. In this submission we show:
    a. the importance to Contact Energy of acting consistently with New Zealand's long-term interests;
    b. there is no evidence that below-cost pricing is (or is likely to become) a feature of the New Zealand electricity market; and
    c. that the regime as currently drafted will be unnecessarily difficult to comply with. We recommend six amendments that must be made to reduce this risk.

[1] https://www.ea.govt.nz/about-us/media-and-publications/market-commentary/market-insights/electricity-price-volatility-an-emerging-feature-in-an-increasingly-renewable-market/

Contact Energy places a high value on being a good corporate citizen

8. We reject in the strongest terms possible the assertion from the Authority that '[p]rofit motivated generators generally do not face incentives which align with the national interest'.[2]

9. As correctly noted by the Authority elsewhere, 'competition is most likely to get the best outcomes for consumers'.[3] As we showed in our last submission, the New Zealand electricity market performs well on many of the measures of competition that the Authority has investigated, indicating a good outcome for consumers. The HHI shows a moderate amount of concentration and is declining, there is no evidence of vertical integration issues, new generation is being built, and prices typically reflect underlying market conditions.

10. Furthermore, our 'Contact 26' strategy places environmental, social and governance outcomes (ESG) at the core of everything we do. We know that our families, our teams and our communities expect us to be good corporate citizens, and that investors consider sustainability-based measures alongside traditional financial measures, when assessing a company's performance.

11. To achieve this, we have to walk the talk by treating New Zealanders fairly and providing access to affordable and reliable power. You can read about all our ESG work in our Integrated Report,[4] but some of the highlights include:

    - committing to ambitious science-based emissions targets that will see us reduce Scope 1 and 2 emissions by 45 percent by 2026 compared to 2018;
    - being the first company in New Zealand to sign up as a supporter of the Task Force on Climate-related Financial Disclosures, and a founding member of the Climate Leaders Coalition;
    - supporting numerous community initiatives (over 100 in 2021/22);

CLIMATE LEADERS COALITION
ON A MISSION TO REDUCE EMISSIONS IN NEW ZEALAND

NEW ZEALAND ENERGY EXCELLENCE AWARDS 2022
ENERGY RETAILER OF THE YEAR

[2] Electricity Authority, Inefficient Price Discrimination in very large electricity contracts: Proposed Code Amendment – Consultation Paper 18 August 2022, P31.
[3] Electricity Authority, Promoting competition in the wholesale electricity market in the transition towards 100% renewable electricity: Issues Paper, 12 October 2022, p6.
[4] https://contact.co.nz/aboutus/investor-centre/report

- entering into a major new partnering with Women's Refuge that will see 40 Women's Refuges and 40 safe houses receive free electricity, sponsorship for fundraisers, research support and other ad hoc support;
- partnering with tangata whenua, including a ground-breaking agreement with Te Pae o Waimihia Trust to develop a clean energy business park, and our Ka Hiko ai te iwi training and employment programme; and
- establishing commitments to biodiversity and sustainable water use.

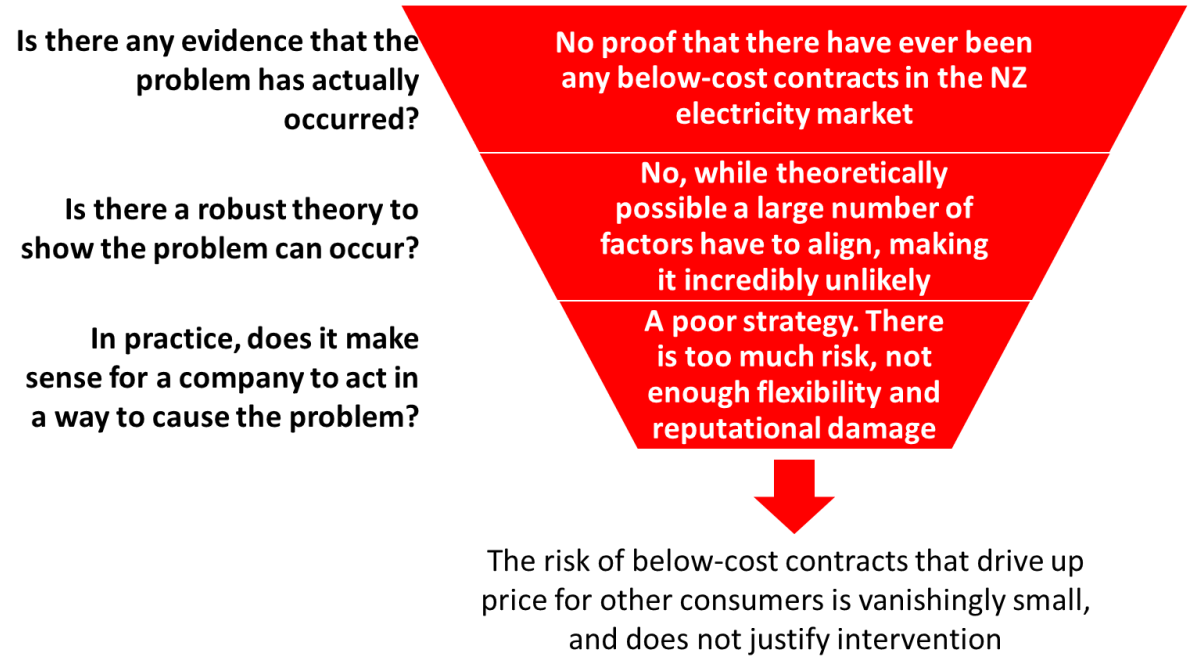
12. We also work hard to ensure we provide our customers with a great service at competitive prices. As a result, in 2022 we were recognised by winning the coveted Energy Retailer of the Year award as well as four NZ Compare Awards, including the Supreme Champion Award.
13. This commitment extends to our staff. In February this year we announced that we will be the first company in the world to introduce the new Wellbeing Tick framework across all staff.[5] This will ensure we are accountable, on track, and leading the way in providing the best environment for our people to work in.
14. None of these efforts would make much sense if we were willing to tarnish our reputation by entering into below-cost agreements that purposefully drive-up costs for New Zealanders. Such actions are simply inconsistent with our values and our actions.
15. The Authority's assertion that '[p]rofit motivated generators generally do not face incentives which align with the national interest' suggests a complete lack of understanding of competition, commercial incentives, and a deep mistrust of market mechanisms.
16. Such unfounded assertions are inappropriate from a government regulator. Statements to this effect can have an outsized impact on investor confidence. When the regulator suggests a lack of trust in market mechanisms it can create the perception that regulatory decisions may be unpredictable and hostile to investment.

No evidence of below-cost pricing

17. The Authority has not established that below-cost contracts are either a feature of the market, or a problem that needs to be solved. Our view is summarised in

[5] https://contact.co.nz/aboutus/media-centre/2022/02/10/contact-energy-focused-on-leading-the-way

the figure below. In short, the Authority has not established any examples of below-cost contracts and has a weak theoretical case. Even if such an opportunity did arise the Authority has not shown such an approach would be a sensible long-term strategy.



No examples of below-cost contracts

18. Major regulatory interventions, such as the Major Contracts Regime implemented by the Authority, should ideally be based on observed problems, rather than theoretical issues. The market and the incentives of different market participants are far too complex to replicate in a petri dish and identify problems with no other supporting evidence.

19. We were therefore surprised that the Authority asserted throughout the consultation paper that its focus was not on determining whether the 2021 New Zealand Aluminium Smelter (NZAS) contracts were inefficient. As a result, the Authority is unable to show any evidence of an actual problem it wants to solve, just a simplified theoretical model that may or may not reflect reality.

20. Furthermore, submissions on the last round of consultation showed that the 2021 NZAS contracts were not below-cost. These submissions highlighted many factors not considered by the Authority such as an over-estimation of the price of the next best alternative, uncertainty regarding grid upgrades, option value, and many others.

21. The Authority appears to agree with most of the additional factors raised in submissions.[6] However, the Authority has not updated its model to incorporate this more comprehensive set of information. That means that there is no evidence base to support the conclusion that 'the generators had the incentives to sell below the best alternative value in the event of an exit'.[7]

22. The actions of other generators not party to the NZAS contract are also not the smoking gun the Authority suggests. Some of these generators considered (but ultimately did not proceed with) a contract to provide a 'transmission underwrite' to reduce the uncertainty of the transmission pricing reforms.

23. It is likely that these generators were not attempting to artificially inflate prices, but trying to avoid a significant market imbalance, that would not have been in the long-term interests of consumers.

24. The sudden exit of NZAS would have caused a demand-side shock, resulting in an over-supply of electricity that would lead to spill. The Authority estimated that the price under exit would have reduced by roughly $20/MWh. However, even if that is a true estimate of the most likely outcome, there was significant uncertainty as the market had never reacted to such a dramatic change before. There was a very real chance that the impact could have been much more significant than estimated by the Authority, potentially even putting at risk the ability for generators to earn a normal return for a sustained period.

25. In a 2017 paper for Applied Energy, Su et. al. considered the effect of over-supply of electricity in hydro dominated markets.[8] They show that over-supply can lead to dramatic financial losses for the entire energy system. This effect is even further pronounced in markets with a large amount of wind capacity, as New Zealand is likely to be in the future.

26. It is vitally important that major infrastructure providers have an expectation that they will earn a normal return. Without such an expectation, there is little incentive to invest, and there is a risk of firm failure and wide-spread disruption. Recovering from this sort of disruption could take years or decades as firms, and the regulator slowly regain the trust of international capital markets. As a result, in the medium term the disruption may also cause a supply-side imbalance with a whole other set of implications for consumers. Because of these risks the ability to earn a normal return is widely accepted as necessary for the long-term benefit of consumers of critical infrastructure.[9]

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[6] Electricity Authority, Inefficient Price Discrimination in very large electricity contracts: Proposed Code Amendment – Consultation Paper 18 August 2022 pp 25-26.
[7] Ibid, para 3.7(a).
[8] https://kern.wordpress.ncsu.edu/files/2018/08/su-2017.pdf
[9] Commerce Commission, Part 4 Input Methodologies Review 2023: Framework Paper, 13 October 2022, pp 46-56. https://comcom.govt.nz/__data/assets/pdf_file/0034/294793/Input-methodologies-2023-Decision-Making-Framework-paper-12-October-2022.pdf

27. It is possible that the major generators who considered entering into the 'transmission underwrite' were trying to avoid even a small chance of a catastrophic outcome, which would have affected all market participants. In doing so they were acting consistently with the long-term interests of consumers, and acting consistently with the purpose of the Authority to support the efficient operation of the market.

The theoretical concern relies on a very unlikely set of circumstances

28. Given that there is no proven example of below-cost pricing, we must then consider the theoretical possibility of it occurring. While NERA confirmed that such a possibility exists,[10] we consider it to be vanishingly small.

29. As shown in our last submission the circumstances surrounding the 2021 NZAS contracts are unlikely to ever be repeated. The factors we pointed to were:

    a. significant transmission constraints;

    b. a credible threat of exit;

    c. no viable alternative demand opportunities;

    d. a one year exit clause in the previous contract; and

    e. ongoing uncertainty about transmission pricing.

30. The Authority responded to this part of our submission by agreeing that the circumstances were unique but asserted such circumstances will persist. The Authority pointed to three reasons why the opportunity for below-cost pricing will become part of the electricity market, which we consider in the table below.

Response to Authority's reasons for why below-cost will become a part of the electricity market

Authority's reason	Contact Energy response
Generators continue to have a commercial incentive to price electricity on very large contracts tied to consumption at below opportunity cost, rather than risk losing the demand	We consider the incentives to enter into below-cost pricing in the following sub-section and show that there is far too much uncertainty for it to be a good commercial strategy.
Contracts of sufficient size to be of a possible concern are currently being contemplated.	Contract size alone is not a sufficient criterion to create an opportunity for contracts below the cost to serve to be profitable. As shown in the following section, larger contracts will be critical as part of New Zealand's decarbonisation journey and should not in and of themselves be a concern to the Authority.

[10] https://www.ea.govt.nz/assets/dms-assets/29/Contact-Energy-submission.pdf

Authority's reason	Contact Energy response
The resolution of transmission constraints won't mitigate the risk of inefficient outcomes fully.	Further transmission upgrades would be required to eliminate the risk of spill in the event a large user at the edge of the network exits. Again, on its own this is not sufficient to determine that generators will enter into contracts below the cost to serve.

31. The Authority did not respond to the most material of the points we raised. No case has been made that there will be ongoing cases of a large user with a credible threat of rapid exit, and no alternative demand, or supply response. The Authority has a responsibility to show why it considers that these circumstances will ever align in the future.

Even where the opportunity arises, below-cost pricing is a bad commercial strategy

32. Many of the factors necessary for below-cost contracts to increase overall revenue are inherently uncertain. In particular, there is no way to be certain about the nature of the demand or supply response to a major demand shock. For example:

    a. it is possible that in response to the exit of a major load user, some marginal plant may shut down, bringing the market back into equilibrium; and

    b. it is possible that users may adjust their demand behaviour to bring the market back into equilibrium. This does not have to be a single large user but could be the response of hundreds or thousands of smaller users.

33. For below-cost pricing strategy to be effective a generator must have a high degree of confidence in the market response. While the ASX provides a guide as to a likely response, it does not provide certainty. The risk of predicting the market response incorrectly could be significant, putting the generator in a much worse position than if they didn't enter into the contract.

34. Participants in the New Zealand electricity market are highly risk adverse because of the long-term and critical nature of their investments. It is simply not feasible to reach the degree of certainty required on the factors above for the sector to act on any rare opportunities that arise.

35. Furthermore, acting on such an opportunity could have a significant reputational risk. This is inconsistent with the motives of generators, who are long-lived firms with a key role in New Zealand's economy and society. Such strategies could put our license to operate at risk. It is simply not worth it.

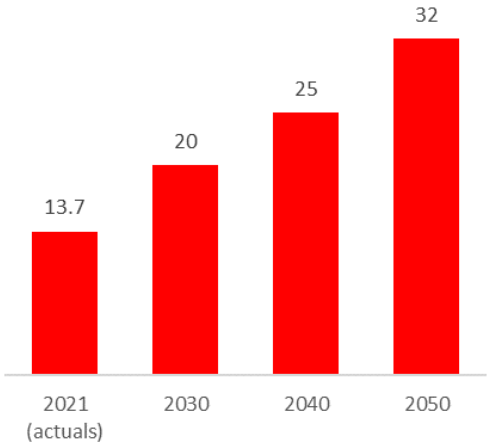
36. Contact Energy also disagrees with the statement that below-cost pricing is 'a more sophisticated and lower cost way of implementing economic withholding' akin to the spilling of water.[11] Even in the simplified model that allows below-cost pricing to improve revenue, it has few of the characteristics of spilling water. Major contracts are in place for years and provide little flexibility to take advantage of favourable market situations. Even if it were possible, it would make little sense for us to consistently spill a set value of water for years. It would simply reduce our capacity, which is inconsistent with the substantial efforts by all major generators to increase capacity.

The Major Contracts Regime creates an unnecessary compliance burden

37. In the previous section we demonstrated that the Major Contracts Regime established by the Authority has no practical benefit as the risk of below-cost pricing is vanishingly small. However, if the Authority continues to believe the regime is needed, it is important that it creates as little friction as possible on the efficient operation of the market.

38. While the Authority considers that this regime may only be used a few times each decade, it may prove to be far more commonly used as demand for electricity increases to meet New Zealand's decarbonisation goals. Transpower's Te Mauri Hiko – Energy Futures estimates that industrial demand will more than double by 2050.[12] They also show the majority of this change will come from sector growth,[13] suggesting that we are likely to see many more major contracts in the years to come. Unnecessary complexity in these contracts could have a major impact on the efficient operation of the market and hold back the decarbonisation of the energy sector.

Industrial electricity demand (TWh) in 2021 and forecasts from Te Mauri Hiko



39. There is no precedent in electricity markets domestically or globally on how this regime will be implemented or play out. It is therefore to be expected that the

[11] Electricity Authority, Inefficient Price Discrimination in very large electricity contracts: Proposed Code Amendment – Consultation Paper 18 August 2022, para 4.47.
[12] https://www.transpower.co.nz/sites/default/files/publications/resources/TP%20Energy%20Futures%20-%20Te%20Mauri%20Hiko%2011%20June%2718.pdf, p20.
[13] Ibid, p21.

industry will approach it with caution, and this may result in underinvestment in electrification.

40. We are also concerned about the impact that this regime may have on price discovery of demand response in large contracts. This is an emerging market with a lot of uncertainties currently. It is not appropriate for a regulator to influence this process.

41. There are four areas where changes must be made to the Major Contracts Regime to mitigate the risk to the efficient operation of the market:

    a. clarifying the scope of what contracts are captured by the regime;

    b. ensuring that the emerging renewable PPA market is not stifled;

    c. clarifying what is required to demonstrate unused MW can be on-sold;

    d. only requiring disclosure of information necessary to assess compliance with the regime; and

    e. setting firmer deadlines for assessing clearance applications.

42. We make six recommendations to address these challenges and provide specific drafting changes to implement the recommendations.

The scope of the regime must be clarified

43. There is considerable uncertainty as to what contracts are actually captured by this regime. Because of the risk-adverse nature of the sector, the uncertainty will result in caution in entering into any large contracts, potentially even where they are not intended to be captured. This could create a substantial barrier to electrification and decarbonisation, as well as influence price discovery for demand response.

44. We have two concerns regarding scope:

    a. the ‘relates to physical consumption’ test; and

    b. how it will be determined if contracts are interrelated.

45. Clause 13.268(1)(a)(ii) stipulates that only contracts that ‘relate to the physical consumption of electricity’ are within scope. As currently drafted this clause is difficult to apply by practitioners and does not reflect the Authority’s intent from the body of the paper.

46. In practice, large load users regularly enter into fixed or variable volume CFDs to hedge their exposure to wholesale prices. Following the Code amendment, a variable volume CFD where settlements are determined by reference to a party’s electricity consumption might be said to “relate to physical consumption of electricity”. Moreover, it would also be arguable that a fixed volume CFD relates to a load user's physical consumption as the user would be entering into the CFD with its future consumption in mind.

47. In the consultation paper the Authority appears to be primarily concerned with contracts which penalise large load users for underconsumption. For example, in paragraph 1.10 of the consultation paper, the Authority notes (highlighting added by Contact):

> *1.10 […] The particular concern is that in the absence of an expectation of a timely and competitive response, generators have incentives to enter, modify, or extend inefficient arrangements with respect to contracts: (a) which involve a 'credible threat to consumption' – that is, they relate to a customer likely to otherwise exit or not enter the market (ie, not be attracted to locate domestically) or a customer who otherwise would reduce or not expand consumption, (b) where the contract price is conditional on the consumption of a quantum of electricity by the designated large load user; and (c) where the quantum of electricity involved is sufficiently large to materially increase prices being faced by other consumers (ie, that are not party to the arrangement).*

48. The Authority makes similar statements throughout the consultation paper, including paragraphs 1.16, 1.17, 4.17, 4.18 and 7.10.

49. We would propose that the Code is amended as follows to reflect this intent:

Recommendation 1: clarify what types of contracts are captured by the Major Contracts Regime

We recommend amending clause 13.268(1)(a) as follows:

(a) a contract ~~that —~~

(i) that is not entered into through a derivatives exchange; and

*(ii) in which the effective price per MWh payable by the **buyer** to the **seller** is increased if the **buyer's** physical consumption decreases ~~relates to the physical consumption of electricity~~; and*

(iii) that relates to a net quantity of electricity that equals or exceeds 150 MW consumed at a point in time; or

50. The Authority must also provide further guidance on how it will assess whether two or more contracts are interdependent. The Code includes within scope contracts that together exceed 150MW and 'rely on each other or are otherwise interdependent'. There are broadly two ways to interpret this clause.

    a. It only relates to contracts that explicitly reference another contract, for example where the contract only comes into force if other load is also procured.

b. Irrespective of the drafting of the contract, if there are two or more generators providing load to a single user which together add up to more than 150MW, then the contracts are considered interdependent.

51. The second interpretation is not workable. It would require us to know the load and nature of a second contract, which may often be completely unknown to us. Furthermore, requiring us to assess the content of another contract may put us in breach of competition laws.

Recommendation 2: clarify when two contracts are considered to rely on each other

We recommend amending clause 13.268(1)(b)(iii) as follows

(iii) at least one contract between a generator and a buyer and at least one contract involving a second generator where the contracts contain interdependent terms in relation to any matter relating to price, volume or effectiveness ~~rely on each other or are otherwise interdependent~~; or

The regime must not stifle the emerging renewable PPA market

52. Power purchase agreements (PPAs) are a form of contract where a load user buys a fixed amount of electricity at a fixed price. This insulates the load user from the volatility of the spot market and provides generators with certainty of demand. These contracts are beginning to become more common as a way of supporting new renewable developments.

53. MBIE describes the benefits of PPAs as:

> PPAs provide a steady and certain stream of income for new generation projects. A PPA reduces the project risk so investors may accept a contract price at a discount to average spot prices. This provides the off-taker with a steady, certain and competitive price and secures their electricity supply over the long term. PPAs can also attract a different class of investor, such as pension funds or other institutional investors, looking for less risk, steady returns, portfolio diversity and reduced exposure to emissions prices.[14]

54. PPAs were also promoted in the Government's first Emissions Reduction Plan where one of the key initiatives was to help government agencies enter into PPAs. This is intended to support the growth in renewable generation projects.[15]

[14] https://www.mbie.govt.nz/assets/discussion-document-accelerating-renewable-energy-and-energy-efficiency.pdf, p74.
[15] Aotearoa New Zealand's first emissions reduction plan | Ministry for the Environment, p212.

55. We were pleased to see that the Authority has recognised the importance of these contracts. We agree that where PPAs (or other similar contracts) result in new renewable generation being built that they cannot be examples of inefficient price discrimination, because they have no impact on the volume of capacity available to other consumers.

56. Because of the critical role of PPAs (and other similar contracts) in supporting new renewable generation, the Authority has created an exemption at clause 13.268(4) for contracts that support new build. We consider this to be one of the most important clauses in the regime, and we want to ensure that it operates as intended.

57. As currently drafted, the regime may still impede contracts that support new builds. This is because there is a lot of uncertainty about how the Authority will assess whether the generation is built "as a *consequence"* of the contract. Specifically, we are unsure:

    a. whether the clause would capture both contracts linked to physical load such as variable volume CFDs, as well as those that do not change with load such as fixed volume CFDs;

    b. what impact timing of the contract may have, for example whether it has to be in place prior to an investment decision for the new generation;

    c. whether the contract can relate to an existing demand source; and

    d. whether there are any particular conditions on the contract that may preclude it from being considered as essential to renewable generation build.

58. For example, in the expert report from Concept Consulting accompanying the Authority's wholesale market competition review issues paper, they note that some "developers are signalling willingness to take a degree of offtake risk – a notable difference to the past".[16] One of the reasons given for this shift is "[g]reater comfort based on market soundings that customers will be willing to enter into contracts once a project is completed".

59. This shows that the timing of an offtake agreement should not diminish its importance in supporting new build. Even though a contract may be entered into well after a final investment decision, the investment was only undertaken because of an expectation of being able to reach an offtake agreement at a later date. Under the current drafting there is no certainty how timing of contracts will be treated.

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[16] https://www.ea.govt.nz/assets/4-Monitoring/Information-paper-Generation-Investment-Survey-2022-Concept-Consulting-report-for-the-Electricity-Authority.pdf p22

60. To resolve these uncertainties we propose that the Code is amended as follows:

> **Recommendation 3:** provide greater guidance on the conditions that have to be met to prove that a contract was necessary to support new generation build.
>
> We recommend replacing clause 13.268(4) with the following:
>
> *For the purpose of subclause (1)(a)(iii), the net quantity of electricity is the total MW consumed at a point in time (calculated in accordance with subclause (3)) less any MW contracted in respect of new generation where the contract, or the anticipation of a fixed price power purchase agreement or CFD with the **buyer** or a third party, must be a material factor for the **generator** in constructing the new generation. In determining whether this clause 13.268(4) applies:*
>
> *(i) the contract can relate to a **buyer's** new or existing demand for **electricity**; and*
> *(ii) the timing of the execution of the contract will not be relevant.*

Clarifying what is required to demonstrate unused MW can be on-sold

61. Clause 13.268(1)(b) allows for materially large contracts if the contract allows unused MW to be on-sold without incurring any penalties. It is likely that this clause will be heavily relied upon as clause 13.269(1)(a) brings too much uncertainty for most commercial negotiations. It is therefore critical that this clause is simple to apply and administer.

62. In practice on-selling unused MWh is a simple matter. The buyer can either enter into a back-to-back CFD, or similar instrument, or reduce volume purchased on the spot market (in effect selling back at the spot market price). The primary contract does not require any particular special terms to allow for on-selling to occur. Nor would there be any way for a seller to attempt to change a contract's terms following a back-to-back CFD being set up.

63. We would like the Authority to clarify that the absence of any clause prohibiting on-selling of unused MW meets the requirements of clause 13.268(1)(b).

64. Further, we consider that the disclosure requirements in clause 13.271(4) can be simplified to reflect commercial realities.

    a. 13.271(4)(a) does not require an explanation of the terms under which unused MW can be on-sold because no special terms are required for this to happen.

    b. 13.271(4)(b) can be deleted. There is no means for a seller to amend the terms of a contract after it has been signed on the basis that another contract has been entered into to on-sell unused MW. Our compliance with this is already sufficiently enforced by existing contract law.

Recommendation 4: clarify what is required to demonstrate that unused MW can be on-sold, and simplify the disclosure requirements.

We recommend amending clause 13.269(1)(b) as follows:

> *(b) the materially large contract allows the buyer to on-sell any un-used MW quantities under the materially large contract without the buyer being subject to any worse terms than if it had consumed the relevant quantity itself;*
>
> > *(i) for the avoidance of doubt this requirement can be met by the absence of any clause in the contract prohibiting on-selling of unused MW*

Clause 13.271(4) should also be amended as follows:

> *(4) Where a generator seeks to rely on clause 13.269(1)(b), the evidence under subclause (2)(c) must include—*
>
> > *(a) a statement of the buyer's rights to on-sell any un-used MW quantities under the materially large contract ~~and an explanation of the terms on which it can do so; and~~*
> >
> > *~~(b) all other information and documents that are in the possession, or under the control, of the generator and that are or may be material to an assessment of a generator's compliance with clause 13.269(1)(b).~~*

Disclosure requirements must be aligned to assessing whether a contract is compliant with the regime

65. Clause 13.271 requires that for all materially large contracts (whether or not clearance is sought[17]) generators must disclose:

> *any information or documents, including any financial modelling, that are in the possession, or under the control, of the generator that discuss or show the impact of the materially large contract on the generator's and its related companies' group-level earnings before interest, taxes, depreciation, amortisation and fair value adjustments or on the generator's and its related companies' broader financial performance and strength.*

66. This is an extremely onerous disclosure requirement requiring combing through all documents, emails, chat messages and more. It would cause months of internal work to collect and provide to the Authority. We are unaware of any other clearance regime that requires such extensive disclosure as the default before the regulator has even identified a prima-facie case to consider.

[17] Clause 13.271(1) only requires this disclosure provision in cases where clearance is not sought. However, clause 13.272(2) requires this disclosure provision for clearance applications too.

67. We are particularly concerned about the application of this provision in cases where a major contract is justified on the basis that the buyer can on-sell any unused MW without any penalties. The information required in clause 13.271(2)(d) about EBIDTAF, financial performance or strength are irrelevant to any assessment of whether unused MW can be on-sold.
68. The disclosure requirements at 13.271(3) and 13.271(4) are sufficient for the assessments required by the Authority. We therefore recommend deleting 13.271(2)(d) entirely.
69. This change must be made under urgency to ensure it does not interfere with upcoming major contracts.

Recommendation 5: ensure that disclosure requirements do not require more information than necessary for the Authority to perform its assessment of compliance with clause 13.269(1).

We recommend deleting clause 13.271(2)(d)

> ~~*any information or documents, including any financial modelling, that are in the possession, or under the control, of the generator that discuss or show the impact of the materially large contract on the generator's and its related companies' group-level earnings before interest, taxes, depreciation, amortisation and fair value adjustments or on the generator's and its related companies' broader financial performance and strength.*~~

Setting a firmer timeframe for the clearance of materially large contracts

70. Clauses 13.273(3) and 13.273(4) work together to effectively give the Authority an unlimited timeframe for the clearance of a materially large contract. 13.273(3) has a timeframe of 45 days for clearance, but this can be extended by agreement of both parties. 13.273(4) states that if the Authority passes the 45 day deadline without making a judgement, the clearance is deemed to be declined. Parties wishing to see a contract cleared must then always agree to extensions.
71. This provides significant risk to generators acting in good faith and seeking clearance of a materially large contract. A significant delay in assessing clearance could mean the window of opportunity for a deal passes, particularly if enticing a new load user to New Zealand (and the associated economic benefits).
72. The Authority themselves have proven that the risk of substantial delay is very high. The Authority has been considering the 2021 NZAS contracts for over a year at this point, and in this consultation is still unable to come to a definitive view on whether they are an example of below-cost pricing. A year long delay

could put even the most patient investors off placing their capital in New Zealand, or alternatively put off decarbonisation projects.

73. We therefore ask that the Code has a firmer timeframe on assessment. A simple way to achieve this would be to change clause 13.273(4) so that the default in the case where the Authority is unable to meet its deadlines is for clearance to be granted. This is consistent with the discussion above showing that the likelihood of below-cost pricing to be vanishingly small.

Recommendation 6: set a firmer timeframe for assessment of clearance applications so that it does not create an unjustified barrier to investment in New Zealand.

We recommend amending clause 13.273(4) as follows:

> If the period specified in subclause (3) expires without the **Authority** having provided a clearance for the **materially large contract** and without having given a notice under subclause (1)(b), the **Authority** shall be deemed to have ~~declined to give a~~ approved clearance