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Genesis Energy Limited
155 Fanshawe Street
Auckland 1010
New Zealand

T. 09 580 2094

Submissions
Electricity Authority
Level 7, AON Centre
1 Willis Street
WELLINGTON 6011

By email: inefficientpricediscrimination@ea.govt.nz

Consultation – Inefficient Price Discrimination in very large electricity contracts

Genesis Energy Limited (**Genesis**) welcomes the opportunity to provide feedback on the Electricity Authority's (**Authority**) consultation paper: *Inefficient Price Discrimination in very large electricity contracts* dated 18 August 2022.

The Authority has not determined that the Tiwai contracts gave rise to inefficient price discrimination or that inefficient price discrimination is a systemic issue. In fact, in relation to the latter the Authority seemed to imply – given that the Authority considers the number of contracts which might give rise to inefficient price discrimination would comprise two or three a decade – that there is not a systemic issue. The case for increasing the Authority's oversight and imposing increased disclosure and regulatory approval obligations on market participants, has not been made and we do not believe that regulatory intervention of the scale and nature proposed by the Authority is justified.

If the Authority chooses to proceed despite the above, then we ask that:

1. The materially large contracts regime is designed so that it does not hinder or delay legitimate commercial transactions or investment in new renewable generation.
2. The information disclosure obligations imposed are limited, specific and consistent with the intent of the regime.
3. Timeframes and information disclosure requirements are appropriate for the commercial reality of negotiating large complex transactions.
4. Draft guidelines are prepared and consulted on prior to any permanent changes to the Code taking effect.

We set out in the Schedule to this letter comments and suggested changes to the draft Code provisions reflecting the above principles, and to clarify or correct drafting issues.

Please contact me should you have queries or wish to discuss our submission further.

Yours sincerely

A handwritten signature in blue ink that reads "Williams". The signature is written in a cursive, flowing style.

Warwick Williams
Senior Regulatory Counsel and Group Insurance Manager

SCHEDULE 1
FEEDBACK ON
PROPOSED PART 13 SUBPART 7 CODE PROVISIONS

13.267 Contents of this subpart

This subpart provides for—

- (a) restrictions on giving effect to materially large contracts; and
- (b) information disclosure requirements to support compliance with this subpart; and
- (c) a clearance regime for materially large contracts.

13.268 Definition of materially large contract

(1) A materially large contract is—

- (a) a contract that—
 - (i) is not entered into through a derivatives exchange; and
 - (ii) relates to the physical consumption of electricity; and
 - (iii) relates to a net quantity of electricity that equals or exceeds 150 MW consumed at a point in time; or

(b) two or more contracts that each satisfy paragraph (a)(i)–(ii) and when taken together satisfy paragraph (a)(iii) and meet one of the following descriptions:

- (i) two or more contracts between a generator and a buyer; or
- (ii) at least one contract between a generator and a buyer and at least one contract between that generator or its related company and that buyer or its related company; or

(iii) at least one contract between a generator (“first generator”) and a buyer and at least one contract involving the first generator and a second generator where the contracts are entered into contemporaneously with each other, and which rely directly on each other or are otherwise interdependent; or [Note to Authority: Amendments made to ensure directly related contracts captured. Note, a generator may decide to structure its portfolio differently when a PPA for existing generation comes up for renewal. For example, by selling to more than one buyer or by entering into PPAs for different volumes and at different times (e.g. where it chooses to leave a portion unsold and subsequently decides to sell this volume through a PPA because that is a better commercial outcome than selling through spot). The Guidelines should clarify that arrangements which fall within

this scenario (and which are not conditional or dependent on the others), are not intended to be captured by the MLC regime.]

(iv) any other arrangement that is substantially of the same kind as that described in any of subparagraphs (i)-(iii).

(2) For materially large contracts made up of two or more different generators' contracts, any reference to materially large contract in the following clauses must be read as only referring to an individual generator's contract(s) that forms part of a materially large contract, rather than as a reference to the multiple generators' contracts.

(3) Where a materially large contract allows for the possibility of varying quantities of electricity consumption at any one time, the maximum quantity of electricity consumption possible under the contract at any one time is to be used for the purpose of determining whether the MW threshold in subclause (1)(a)(iii) is met.

(4) 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 the maximum possible~~ MW that can be expected to be consumed at a point in time from [new generation] built ~~as a consequence of~~ in connection with the contract.

[Note to Authority: Amendment to clarify calculation and the replacement of "as a consequence of" with "in connection with" is to reflect that: (1) there is more than one driver of new generation; and (2) reduce the risk that a narrow reading of the clause would exclude new generation supported by the MLC. A definition of "new generation" is also required and should deal with scenarios such as where (a) generation is to be built in stages, with PPAs (or options) to support these; or (b) existing plant is refurbished/repowered.]

(5) For the purpose of this subpart, related company has the meaning set out in section 2(3) of the Companies Act 1993.

13.269 Restriction on materially large contracts

(1) A generator must not give effect to a materially large contract unless—

(a) the net value of the materially large contract to the generator calculated in accordance with clause 13.270 is a positive value; or

(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 under the contract than if it had consumed the relevant quantity itself; or *[Note to Authority: Amendment to clarify that it is the terms of the contract i.e., penalties or onerous terms that are the relevant consideration.]*

(c) the Authority has provided a clearance under clause 13.273 in respect of the materially large contract and that clearance remains effective and applicable.

(2) Nothing in this clause prevents a generator entering into a materially large contract that provides that it is conditional on the Authority providing a clearance under clause 13.273.

(3) This clause only applies to materially large contracts entered into, extended or modified on or after the date this clause came into force.

13.270 Calculation of net value of the materially large contract to the generator

(1) The net value of the materially large contract to the generator is the value of the contract to the generator less the value of the generator's best alternative.

~~(2) The calculation of the value of the generator's best alternative must take into account the generator's reasonable expectations as to whether in the absence of the materially large contract the buyer would have exited completely, reduced consumption, not expanded, or not entered the domestic market. [Note to Authority: Not relevant and this is speculative as the generator is not privy to the buyer's commercial and strategic objectives, or the principal factors driving those factors and their relative weighting.]~~

(3) The calculation of the value of the contract to the generator and the calculation of the value of the generator's best alternative must take into account any direct value components that are reasonably relevant to the calculation, which may include (without limitation)—

(a) contract price:

(b) prices for baseload futures contracts over the period covered by the materially large contract and, where a materially large contract covers a period in time not yet covered by base load futures contracts, the generator's reasonable expectations as to base load forward prices over this period:

(c) node location:

(d) load profile differing from base load:

(e) demand response provisions:

(f) price separation provisions:

(g) contract price pegged to an index provision:

(h) value of maintaining an uninterrupted commercial relationship with the buyer:

(i) relative counterparty risk:

(j) any other financial inducements or benefits associated with the materially large contract.

(4) For the avoidance of doubt, indirect effects of the materially large contract on the generator's wider portfolio (for example, revenues from other customers) must not be taken into account when calculating the value of the contract to the generator and the value of the generator's best alternative.

(5) Each value component used under subclause (3) must be assigned a monetary value that reasonably equates to its value to the generator.

(6) Each assigned monetary value for a value component must be aggregated to derive the value of the contract to the generator and the value of the generator's best alternative (as applicable).

(7) The relevant point in time at which the generator's reasonable expectations at subclause (2) and any assumptions relied on under subclause (3) are to be assessed is the duration of the ~~30-~~120 business days immediately preceding the generator (as applicable)—

(i) entering into the materially large contract; or

(ii) seeking a clearance from the Authority for the materially large contract.

[Note to Authority: A longer period is appropriate to recognise the time, relative to other contracts, that MLCs can take to negotiate and enter into.]

13.271 Disclosure of materially large contracts where clearance is not sought

(1) Except where clause 13.276 applies, a generator must provide the information specified in this clause to the Authority in the form and by the means specified by the Authority no later than 5 business days after—

~~(a) entering into a materially large contract;~~

~~(b) changing a materially large contract's price, volume, term or re-selling arrangements or any other provision of a materially large contract that may affect the calculation of is reasonably likely to result in the net value of the materially large contract to the generator ceasing to have a positive net value if the generator is relying on clause 13.269(1)(a) to give effect to the materially large contract;~~

~~(c) changing a materially large contract's re-selling arrangements if the generator is relying on clause 13.269(1)(b) to give effect to the materially large contract.~~ *[Note to Authority: While disclosure of a MLC may be appropriate, disclosure of changes that would not change the clearance decision are not. This imposes ongoing and additional obligations that have no bearing on the clearance decision made. See also comments below on clause 13.273(6).]*

(2) The information to be provided must consist of the following in relation to the materially large contract:

(a) a copy of the materially large contract signed by the parties; and

(b) a statement of the generator's reasons as to how the materially large contract satisfies either clause 13.269(1)(a) or clause 13.269(1)(b); and

(c) evidence to support the generator's reasons at paragraph (b); ~~and~~

~~(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.~~ *[Note to Authority: This obligation has been deleted for the reasons set out in relation to clause 13.271(1). Further, the information sought in clause 13.271(2)(d) is far too broad and ambiguous (what does "broader financial performance and strength mean"?). In any event, the potential impact on EBITDAF or financial performance or strength is not relevant for the purposes of the assessment. What is relevant is the information supporting the MLC valuation and the applicable counterfactual.]*

(3) Where a generator seeks to rely on clause 13.269(1)(a), the evidence under subclause (2)(c) must include—

(a) the generator's calculation of the net value of the materially large contract to the generator in accordance with clause 13.270, including—

(i) the generator's calculation of the value of the contract to the generator and the generator's best alternative in accordance with clause 13.270; and

(ii) the value component(s) taken into account by the generator when calculating the value of the contract to the generator; and

(iii) the value component(s) taken into account by the generator when calculating the generator's best alternative; and

(iv) the monetary value assigned to any value component taken into account by the generator; and

(v) a justification for the monetary value assigned to any value component, including any assumptions relied on ~~and (if available) evidence to show whether those assumptions are consistent with similar assumptions being made elsewhere in the generator's business in the 30 business days immediately preceding the date the generator entered into the materially large contract; and~~ *[Note to Authority: Relative to other contracts, MLCs can take time to negotiate and enter into and that once certain terms or risk allocations are agreed in principle, these can be difficult to change without damaging the ongoing commercial negotiations e.g. giving rise to allegations of bad faith or of reneging on previously resolved issues. Accordingly, there may be scenarios where the assumptions used for an MLC and non-MLC differ and it is unduly onerous for participants to disclose assumption changes for contracts that bear no value as a counterfactual -or have any relevance to the MLC (whether because of size, counterparty risk, etc). What is relevant is the assumptions underpinning the MLC and the counterfactual.]*

(i) the generator's reasonable expectations taken into account under clause 13.270(2) and an explanation of the basis for these expectations and (if available) evidence to support those expectations; 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)(a). *[Note to Authority:*

Amended to remove uncertainty. Generators can decide what is material and disclose accordingly.

(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). *[Note to Authority: Amended to remove uncertainty. Generators can decide what is material and disclose accordingly.]*

13.272 Application to the Authority for clearance of a materially large contract

(1) A generator may submit an application to the Authority for clearance of a materially large contract that—

(a) is expressed as conditional on the Authority providing a clearance under this subpart; or

(b) has not yet been signed by the parties.

(2) Where a generator has not provided the information specified at clause 13.271 in respect of the materially large contract the application must include all information specified in clause 13.271 that would otherwise be required to be provided by the generator after entering the materially large contract.

(3) The application must be submitted in the form and by the means specified by the Authority.

13.273 Authority may provide clearance for a materially large contract

(1) Where the Authority receives an application that complies with clause 13.272 the Authority shall either—

(a) provide a clearance by notice in writing in respect of the materially large contract if it is satisfied that either clause 13.269(1)(a) or 13.269(1)(b) is met, in which case the Authority must specify which clause it is satisfied in respect of; or

(b) decline by notice in writing to provide a clearance in respect of the materially large contract if it is not satisfied that either clause 13.269(1)(a) or 13.269(1)(b) is met, in which case the Authority must give the generator reasons for its decision.

(2) The Authority may use the information provided to it in the application and any other information the Authority considers relevant for the purposes of its decision, including any further information the Authority requests from the generator.

(3) The Authority must make a decision on the application and notify the generator of the outcome of its application no later than ~~45-20~~ business days after the date on which the generator has provided the Authority with all required information (including any further information requested by the Authority for the purpose of making its decision), or such longer period as the Authority and the generator agree. *[Note to Authority: These are commercially significant transactions and assuming all relevant information has been provided, a month is a reasonable amount of time to assess the transaction. The Authority's review should be assessing the reasonableness of the calculation rather than substituting its view of the commercial merits of a transaction and the risk allocation decisions made by the parties to the MLC.]*

~~(4) 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 clearance.~~ *[Note to Authority: This clause has been deleted as it is inconsistent with the obligation to notify in clause (3) above. Alternatively, it should be amended so that clearance is deemed to have been made. Having sought to regulate despite not having made a clear determination on whether the Tiwai Contracts gave rise to inefficient price discrimination or finding that there is a systemic issue of price discrimination, this would ensure that the Authority is incentivised to act in a timely and efficient manner and reduces the risk that this process hinders commercial transactions.]*

~~(5) The Authority may publish the outcome of the application.~~ *[Note to Authority: The parties are subject to wholesale disclosure information obligations, and so the relevant disclosures can be made by those parties once the MLC is entered into. Publication by the Authority is therefore not required and may be premature, prejudicing the commercial interests of the parties. Including this obligation would add yet another regulatory process to go through where the Authority proposes to publish, and a party is concerned that disclosure may prejudice their commercial position.]*

(6) A clearance provided by the Authority under this clause does not apply to a materially large contract if after clearance is provided —

(a) any changes are made to the price, volume, term, re-selling arrangements or any other provision of the materially large contract that ~~may affect the calculation of results in~~ the net value of the materially large contract to the generator ceasing to be a positive value when calculated in accordance with clause 13.270 and the Authority provided its clearance on the basis of clause 13.269(1)(a); or

(b) any changes are made to the materially large contract's re-selling arrangements that results in the buyer being subject to any worse terms under the contract than if it had consumed the relevant quantity itself and the Authority provided its clearance on the basis of clause 13.269(1)(b).

[Note to Authority: As proposed, this would cause considerable uncertainty. Further, for clearance to cease for changes that may impact the calculations or resale restrictions but would not have resulted in clearance or the MLC meeting the requirements of clause 13.269(1)(b) is inappropriate and unduly onerous. Proposed amendments made to remove this uncertainty and clarify that the clearance falls away if the MLC is changed post-clearance so that it would no longer have a positive value versus the relevant counterfactual.]

(7) Where the Authority provides a clearance in respect of a materially large contract not yet signed by the parties, the clearance will expire and be of no effect if the contract is not signed by the parties within 20-60 business days of the Authority providing the clearance. *[Note to Authority: A longer period is to allow time for other approvals that may be required (e.g. listed company shareholder approvals) or approvals required to related transactions (e.g. approvals linked to project financing). We also query the assertion that a long period provides option value to transact below the next best alternative. We would expect the factors driving the MLC valuation down to have a similar impact on the valuation of the next best alternative.]*

(8) The Authority may revoke a clearance if it was based on information provided by the generator that was false or misleading in a material particular.

13.274 Reconsideration by Authority of clearance decision

(1) Where the Authority declines to provide a clearance, the Authority may, at its discretion, reconsider its decision if—

(a) the generator provides further information or reasons (which may include making changes to the materially large contract) to the Authority in support of its position no later than 10 business days after notification of the Authority's decision under clause 13.273; and

(b) the Authority considers that the further information or reasons may alter or affect the Authority's decision under clause 13.273.

(2) The Authority must make any decisions under this clause within such timeframes as it reasonably considers appropriate.

13.275 Right of appeal against clearance decision

~~(4)~~ (4) A party to a materially large contract may appeal to the Rulings Panel a decision by the Authority under clause 13.273 not to provide a clearance in respect of the materially large contract.

(2) Despite subclause (1) a party to a materially large contract may not appeal to the Rulings Panel where the reason for the decision not to provide clearance relates to a failure by the generator to provide required information.

(3) The appeal must be made to the Rulings Panel no later than 20 business days after the Authority notifies the generator of its decision under clause 13.273.

(4) The Rulings Panel, in determining an appeal, must ~~either~~ (i) approve the decision of the Authority; or (ii) direct the Authority to provide clearance of the materially large contract; or (iii) direct the Authority to reconsider the decision in full or by reference to specified matters. *[Note to Authority: The Authority has no ability to fetter the Panel's powers. Any proposed change should be undertaken through an amendment to section 54 of the Electricity Industry Act 2010 and the enforcement regulations. In our view, the Panel should be entitled, where the evidence in submissions justify it, to direct the Authority to clear the transaction. This provides the appropriate incentives on all parties to the proceedings and reduces the potential for uncertainty and undue delay.]*

13.276 Disclosure of cleared materially large contract

(1) This clause applies to a materially large contract that has been provided with a clearance under clause 13.273 provided the clearance remains effective and applicable.

(2) Where this clause applies, a generator must provide to the Authority a copy of the materially large contract signed by the parties in the form and by the means specified by the Authority no later than 5 business days after entering into the materially large contract.

13.277 Requirement to provide complete and accurate information

(1) In addition to the requirements of clause 13.2, the generator must take all practicable steps to ensure that the information that the generator is required to provide under this subpart is complete and accurate as at the date it is required to be provided under this subpart.

(2) If the generator later becomes aware that any information provided under this subpart was not complete or accurate as at the date it was required to be provided under this subpart, it must as soon as practicable provide to Authority such further information as is necessary to make the information complete or accurate as at the date it was required to be provided under this subpart.

13.278 Authority must keep information confidential

The Authority must keep all information provided to it under this subpart confidential except to the extent that disclosure is required to enable the Authority to carry out its obligations and duties under the Electricity Industry Act 2010, the Code or the Electricity Industry (Enforcement) Regulations or is otherwise required by law.