Outlook

Consultation – RPCA guidance

From Robert Allen <[redacted]>
Date Thu 2026-03-26 8:35 AM
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2 attachments (667 KB)
Independents - NDOs - Supplementary 2026 03 25.pdf; Appendix B - Specific Code changes.pdf;

Please find attached the joint submission of 2degrees, Electric Kiwi, Octopus Energy, Pulse Energy and the Independent Electricity Generators Association (IEGA) (jointly, the Independents).

No part of the submission is confidential, and we are happy for it to be publicly released.

Please let me know if you have any queries etc.

Regards,

Robert Allen
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[redacted]

25 March 2026

The revised NDO proposals are a step in the right direction, but more work is required

2degrees, Electric Kiwi, Octopus Energy and Pulse Energy (the Independent Electricity Retailers) and the Independent Electricity Generators Association (IEGA) (the Independents) consider the Electricity Authority's revised NDO and RPCA proposals to be a modest but inadequate improvement on the October 2025 iteration.

Access to hedge products – in terms of price, quantity and terms and conditions – is critical to a successful, competitive wholesale and retail electricity market. The Authority's proposals do not give independent generators and retailers confidence they will have access to fairly priced risk management (hedging) products. The more uncertain access is, the less confidence independent generators and retailers will have – and the smaller the competition benefits from these reforms.

We do not consider the revised proposals will deliver a level playing field, or healthy competitive wholesale and retail markets, where generation investment occurs when it is needed, and which drives affordable and reliable electricity supply for the long-term benefit of consumers. We appreciate the Authority's eagerness to demonstrate progress on this matter, however we urge the Authority to take the additional time needed to improve the clarity of the proposed arrangements.

The current consultation proposals embed significant uncertainty and information asymmetries regarding whether incumbent gentailers are violating the proposed rules through discrimination, predatory pricing, or subsidising their retail arms. The Electricity Authority's approach of high-level principles and Guidance exacerbates this uncertainty.[1] This is problematic for all participants and undermines the potential value of these reforms.

There seems to be a disconnect between the approach the Authority is taking to regulation of what is supposed to be a competitive retail market and regulation of access services/market power. The Authority has shown a clear willingness to adopt highly prescriptive mandatory regulation on things like what retail bills should look like, but the Authority seems to prefer a high-level principles-based approach with Guidance for wholesale access services. We are of the view that more prescription is warranted here – improving wholesale access and transparency will deliver more materially beneficial consumer outcomes.

Corporate separation should be on the table

The Independents continue to advocate for corporate separation of the incumbent gentailers as the most appropriate regulatory intervention to ensure a true levelling of the playing field is achieved.[2] At a minimum, work should progress in parallel to ensure that corporate separation is fully developed and ready as a back-stop option ready to deploy if it becomes clear the NDO regime as a

[1] If the Authority's expectation is that the incumbent gentailers will adhere to the Guidance, this expectation should be made explicit both in the Code and upfront in the Guidance. If the Authority wants to provide flexibility for departure, then it should be clear about why and what the risks and benefits would be.

[2] As noted by Electric Kiwi in its submission on the earlier consultation "even with substantial amendments and enhanced monitoring, we have grave concerns that the NDO framework alone will prove inadequate. Ultimately, only a structural solution such as corporate separation combined with non-discrimination will address the root cause and ensure enduring, effective competition."

whole has failed to achieve its objectives of promoting even-handed supply, market liquidity, competitive pricing and a genuine level playing field.

Submission content

In this submission, we outline substantial changes that will be needed to have a chance at achieving the Authority's intent of creating a genuinely level playing field, to meet its statutory objectives and promote a stronger and more competitive electricity market that benefits consumers. We provide general comments as well as specific answers to the consultation questions.[3] These are provided in Appendix A. Drafting suggestions for the Code changes/response to Question 22 are provided in Appendix B. We have also attached an expert report from Link Economics.

Link Economics report

The Independents commissioned Link Economics to provide expert advice to assist with key aspects of the Authority's proposed RPCA regime. Link Economics are specialists in competition analysis and regulatory economics, with particular expertise in price squeeze and economic replicability tests by vertically integrated incumbents operating in competitive downstream markets, both in New Zealand and internationally.

We support the following improvements

The improvements we consider the Authority has made to its NDO/RPCA proposals, in the current consultation, are modest and include:

- Expansion of NDO internal policy requirements to include "methodologies, processes and accountabilities", and to ensure it "is of a reasonable standard", including the matters covered in clause 13.236(Q)(4).

- The addition of a requirement for incumbent gentailer NDO audits. However, without sufficient prescription/standardisation including by way of benchmarks for cost of supply and categories for retailing, the ability of an auditor to apply a test of compliance will be limited. For the avoidance of doubt, we support the adoption of the existing Code requirement that the auditor be approved or appointed by the Authority to carry out the audit and the application of Part 16A of the Code more generally.[4]

- The explicit requirement that RPCA costs include a contribution to shared and common costs.

- The increase in RPCA reporting from once a year to bi-annually. The Independents **recommend** addition of a requirement that RPCA reporting occurs whenever retail tariffs are amended or new retail tariffs are introduced. It is orthodox and standard for regulators to require economic replicability testing before new tariffs are introduced.

- The requirement for aggregated and disaggregated RPCA testing, including at network reporting region level. We support RPCA testing being applied in each of the separate, individual electricity

[3] There are some consultation questions which are relevant to retailers only where we have clarified the views are IER views.

[4] We also consider that Part 4 Commerce Act/Part 6 Telecommunications Act provides useful precedent with the requirement that Transpower/Chorus procure an independent assurance report by an assurance auditor in respect of the annual compliance statement in relation to price-quality regulation.

retail markets for mass market/residential customers. We do not consider that the Authority has provided any good reason as to why commercial customers should be excluded from RPCA testing.

- The requirement that RPCA testing will be made public [A1.38] and that the reporting will be provided on an itemised basis for each of the individual components of the RPCA assessment as stated in A.145.

The NDO and RPCA regime should be based tightly on NZ and international precedent

Market access arrangements featuring non-discrimination obligations are used in lots of regulated markets. We encourage the Authority to draw on New Zealand and international precedent and practice as much as possible as there is a large, existing body of experience and precedent.

The Commerce Commission's Equivalence and non-discrimination – guidance and the good-faith provisions in the Grocery Industry Competition Regulations 2023, for example, provide robust orthodox regulation, drawn from international precedent, that the Authority could use as an 'off-the-shelf' solution to discrimination issues in the electricity industry. Using existing precedent would have allowed the Authority to implement the new regime much sooner than the Authority's proposals.

The more the Authority adopts novel or bespoke arrangements the greater the level of inefficiency and unnecessary regulatory uncertainty that will result. The more the Authority deviates from existing approaches to access regulation, in both NZ and overseas, the less precedent there will be to draw on as to how the regulations should be interpreted and applied.

Regulatory uncertainty needs to be reduced through further design work to deliver on intended benefits of NDO/RPCA regime

Regulatory uncertainty seems to be a design feature of the proposed NDO/RPCA regime.

The high-level, and in our view under-defined, principles-based approach to regulation, coupled with heavy reliance on Guidance, is likely to create considerable uncertainty and cost for both Access Seekers and Access Providers and is highly likely to lead to inconsistency in application that will render enforcement and monitoring challenging to impossible.

It could take a long-time to build up precedent and clarity over how the Authority expects the NDO rules to be interpreted and what conduct is permissible/not permissible. Experience shows that relying on Guidance or voluntary Guidelines has proved ineffective and we would prefer that clear codified rules are developed. We refer the Authority to its own explanation of why it shifted from Consumer Care Guidelines to mandated Consumer Care Obligations. Additionally, the experience with the Internal Transfer Prices (ITP) and Segmented Profitability Reporting requirements highlights how a lack of specificity resulted in ineffective regulation. We have no interest in burdening the sector with additional reporting requirements that are not going to yield the transparency needed to deter and address competition problems in the market.

The "objectively justifiable reason" limitation should be defined and Codified

We share Mercury's concern that "objectively justifiable" is not defined beyond being an evidence-based approach that is "reasonable, consistent and transparent"" and agree "A shared understanding of this concept will be very important to avoid unnecessary uncertainty."[5]

We were surprised the Authority has not made any reference to the Commerce Commission's Equivalence and non-discrimination – guidance in relation to how non-discrimination and "objectively justifiable" should be interpreted. It is inexplicable to us why the Commerce Commission Guidance has not been picked up in the Authority proposals including the standard two limb approach for decisions to be both "objectively justified" and "not likely to harm competition". We had sought to understand the Authority's thinking, so we could respond to it.[6]

Furthermore, if there is no clarity of the bright-line limit on what acceptable/unacceptable application of the NDOs is, then it will be a lot more difficult for the Authority to monitor or ensure compliance. Having an undefined test with no bright-line limit for further investigations is likely to erode confidence in the market and ultimately the Authority's ability to regulate the industry in a fair and transparent manner. We feel that the Authority has, at times, expressed over-confidence in its ability to detect discriminatory behaviour.

The Independents **recommend** that "objectively justifiable reason" be defined and Codified, including that: (i) the Code exclude departures that would, or are likely to lessen competition, and (ii) the Authority draw on or reference the Commerce Commission Guidance on how "objectively justifiable" should be interpreted.[7]

The Independents oppose the "intolerable risk" and "uncommitted capacity" options

We consider that narrowing and clarifying the "objectively justifiable reason" limitation would be superior to the option to include the "intolerable risk" concept in the Guidance or to adopt either of the "uncommitted capacity" options. The NDOs should apply to all supply and should not permit self-supply in a preferential manner.

Each of the "intolerable risk" and "uncommitted capacity" options is problematic and should be rejected:

- The objections already raised about "uncommitted capacity" apply to "intolerable risk". The "intolerable risk" Guidance the Authority has provided aligns with the "uncommitted capacity" concept. There is minor wording difference only.

  ""intolerable risk" … may arise where the gentailer's reasonable forecast ability to back the requested risk management contract with generation is insufficient having regard to: (a) the amount of generation that the gentailer reasonably expects to need to supply electricity to its existing end customers (b) the gentailer's wholesale commitments, comprised of gentailer market making commitments (regulated or voluntary) and existing risk management contracts entered into with buyers."

[5] Mercury Energy, Level Playing Field Measures Code Amendments, 2 December 2025.
[6] We queried this with the Authority on 12 March but didn't receive an explanation. Instead, the Authority advised we should raise the point in submission.
[7] Commerce Commission, Equivalence and non-discrimination – guidance on the Commission's approach for telecommunications regulation, 30 September 2020.

"Uncommitted capacity means a gentailer's reasonable expectation of its ability to offer risk management contracts in future periods, calculated as a gentailer's expected gross forecast ability to offer risk management contracts, less: (a) the amount of generation that could otherwise be used to back risk management contracts that the gentailer reasonably expects to use to supply electricity to its end customers (b) a gentailer's wholesale commitments, comprised of gentailer market making commitments (regulated or voluntary) and existing risk management contracts entered into with buyers."

- We have detailed our concerns with the pre-existing proposed definition of "uncommitted capacity" in the December submissions.[8]

- The refined definition of "uncommitted capacity" in option 1 is worse than the October draft. The updated definition of "uncommitted capacity" widens the provision to include "(d) any other reasonable operational or risk management considerations specifically documented in the gentailer's non-discrimination policy" which would further serve to water-down the NDOs. This would allow the incumbent gentailers to deduct additional generation for 'reasonable operational or risk management considerations' documented in their NDO policy e.g. maintenance buffers, portfolio balancing.

Even if the Authority does not Codify "uncommitted capacity" provisions it would still potentially be open to the incumbent gentailers to interpret the NDOs as permissive to adoption of NDO policies which only provide access to "uncommitted capacity" (however the incumbent defines this). As noted above, the Authority's definition of "intolerable risk", for example, mirrors its original definition of "uncommitted capacity". The Authority clarified at the 5 March zoom meeting "they are conceptually two sides of the same coin".[9] The Independents **recommend** that the Authority explicitly prohibit the "uncommitted capacity" approach to the NDOs, including by following NZ grocery and supermarket precedent that "objectively justifiable" does not include conduct or activity that could harm competition.

The Independents also **recommend** that if the Authority adopts the "intolerable risk" concept it includes in the Code the draft Guidance "... that, if a gentailer cannot offer hedges to a third party due to an intolerable risk position, it will also not be able to provide its own retail business units with new implied or actual hedges of comparable duration, volume and shape". This would minimise the risk of variable interpretations and promote greater regulatory certainty for access providers and access seekers.

Examples of matters that the Authority should explicitly clarify would not qualify as "objectively justifiable reason" or, if adopted, "intolerable risk"

We welcome that the Authority has been clear it needs to map out what would be "black and white breaches from the start"[10] and consider that a priority for the Authority should be to clarify what discriminatory conduct is and is not permissible. The following are examples of circumstances which should not be treated as constituting an "objectively justifiable reason" or qualifying as "intolerable risk" for the purposes of the non-discrimination obligations:

1. Commercial credit requirements and balance sheet support

[8] For example, see page 6 of Electric Kiwi's submission which provides recommended changes to the definition of "uncommitted capacity" in the event that the concept is retained.
[9] https://youtu.be/c8LvLJ9uPVY?si=ek2kSGyvzWYjglo9
[10] https://youtu.be/c8LvLJ9uPVY?si=ek2kSGyvzWYjglo9

The imposition of stringent credit terms on independent retailers (including large letters of credit or balance sheet guarantees for long-dated hedges) should not be permissible. Incumbent gentailers routinely manage equivalent credit exposure within their own retail businesses and should not rely on credit settings as a justification for refusing supply to independent retailers.[11]

2. Hydrology uncertainty or generation availability risk

Uncertainty regarding hydrological conditions or future generation availability is an inherent feature of electricity generation and does not amount to "intolerable risk" or an "objectively justifiable reason" for departure from the NDOs. Incumbent gentailers regularly manage this uncertainty when supplying their own retail arms. Allowing hydrology uncertainty to qualify as a reason to depart from the NDOs would effectively excuse refusal to supply whenever market conditions are uncertain, undermining the purpose of the non-discrimination regime.

3. Misalignment with an incumbent gentailer's generation stack or portfolio preferences

Assertions that a particular hedge product, shape, or term does not "suit" an incumbent gentailer's generation stack should not meet the "objectively justifiable" or "intolerable risk" thresholds. Portfolio optimisation and generation-retail alignment are strategic and commercial considerations. Where an incumbent gentailer can serve its own retail customers with equivalent shape and volume, it should not be permitted to deny comparable access to independent retailers on this basis.

4. Potential loophole created by the draft Guidance

The consultation states that "Where a gentailer is not able to offer a risk management contract because providing it would place the gentailer in an intolerable risk position this would need to be done on the basis of a robust, evidence-based process outlined in the gentailer's non-discrimination policy" and "This approach is intended to reflect feedback that the ability of gentailers to offer risk management contracts involves dynamic assessments of generation capacity alongside other factors." (paras 4.34 and 4.35)

This guidance appears to allow for gentailers to adopt a non-discrimination policy that permits offers being withheld on a risk-adjusted basis as long as it is codified in their non-discrimination policy. One example is a policy which codifies dynamic risk tolerance levels, where external sales are allocated risk premiums well above internal sales within risk level calculations. This could be included in the policy as one of the 'other factors' incorporated into the dynamic assessment of the risk position.

5. Constructive refusal to supply

The consultation states that "We expect gentailers to primarily signal risk and scarcity through price rather than availability" (para 4.40(c)). If the Code is not clear on what an "intolerable risk position" is, this effectively opens the door for constructive refusal to supply, particularly if the Authority is relying on a non-discrimination policy as the control on constructive refusal to supply, but the policy itself justifies much higher risk premiums for external sales. The same test for constructive refusal to supply that the Commerce Commission applies should apply here.

[11] See also Electric Kiwi's December 2025 submission for a discussion on credit issues. The Independents support the Electric Kiwi views on this matter.

Treatment of credit risk

We note that, as recently clarified by the Authority, no changes are currently proposed to the Code's objective credit assessment provisions in this round of consultation. However, the Authority has confirmed that further amendments – including to credit-related clauses – may still be made as part of the final decision without another round of consultation. We urge the Authority to take this opportunity to address the serious shortcomings in the current credit assessment framework in its final Code changes. If these gaps are not fixed at this stage, the regime will fail to deliver on its promise of fair access and will leave the door open for gentailers to continue using credit requirements as a barrier against independents. Now is the time to make the changes that will ensure these reforms have real impact.

We note that although the current consultation proposes no change to clause 13.236P(6) "Objective credit assessments" from the October draft, the draft Code now includes a new requirement at clause 13.236Q(4)(d) for gentailers to maintain a credit terms and collateral arrangements policy consistent with 13.236P(6). We also note related commentary in the draft RPCA guidance at A.93 regarding credit and other risk premia.

Our concerns on this issue remain as stated in Electric Kiwi's submission to the October consultation.

The current drafting of 13.236P(6) is problematic because it relies on inherently subjective and undefined terms such as "reasonable", "consistent" and "transparent" and does not anchor these to any clear, objective standard. Without clear minimum criteria, robust documentation, and explicit disclosure requirements, this provision leaves wide scope for the incumbent gentailers to adopt divergent and changeable approaches to credit—both between firms and over time—while still claiming compliance.

We are particularly concerned that the current drafting leaves it open for the incumbent gentailers to determine their own methodologies for assessing credit risk and setting collateral requirements, both under RPCA guidance (A.93) and in the Code itself. For example, incumbent gentailers could require independent retailers – or any party that is not a government agency or major institution – to meet collateral requirements equivalent to those on the ASX (such as margining standards), and argue that this is "objectively justifiable" because it is easily understood and replicable. In practice, this would make it impossible for many independent retailers to access risk management products, effectively shutting us out of this critical market. Such a result would be completely contrary to the policy goal of facilitating a level playing field and enabling genuine competition.

The new requirement at 13.236Q(4)(d) that the incumbent gentailers must document their credit terms policy offers only marginal improvement in transparency, but without accompanying minimum requirements or disclosure standards, we do not expect it to drive material change in practice. Without proper guardrails, the incumbent gentailers could continue to apply overly conservative or opaque credit methodologies to particular classes of buyers, justifying higher collateral or refusal to deal based on internal, self-determined views of what is "reasonable". This provides significant scope for strategic behaviour and ongoing barriers to entry for independent retailers and smaller participants.

Further, the lack of a mandated minimum level of disclosure to the Authority or to buyers themselves (for example, publication of high-level credit policies, regular reporting of collateral metrics, or documentation of key assumptions) makes it difficult for the regulator or market participants to assess whether differences in treatment are genuinely risk-based, or a reflection of

strategic or exclusionary conduct. The risk is increased by the ability of the incumbent gentailers to change their frameworks over time without meaningful external scrutiny or explanation.

To address these concerns, the IERs **recommend** that the Code and guidance be strengthened to:

- Define "reasonable, consistent and transparent" by reference to objective, documented criteria, and observable risk factors;

- Require the incumbent gentailers to maintain and publish high-level descriptions of their credit and collateral frameworks, including main factors considered and any categorisations applied to different buyers;

- Require similar buyers in similar circumstances to be treated similarly, with material deviations documented and justified by reference to a clear, demonstrable difference in risk;

- Require the incumbent gentailers to provide justifications for credit-related decisions to affected buyers on request; and

- Provide for regular reporting and/or review by the Authority to ensure that credit practices do not drift or diverge in ways that undermine competition or access.

Absent these changes, we remain concerned that the current drafting of credit-related obligations will be largely symbolic and fail to deliver real improvements in access to risk management products for independent market participants. In particular, if the incumbent gentailers are permitted to set insurmountable credit or collateral barriers for independent or non-institutional buyers, the RPCA and NDO frameworks will not achieve their intended outcomes of promoting a level playing field and effective wholesale and retail competition.

The RPCA test is too subjective and lacks specificity

From the independent generators' perspective hedge contract disclosures of arrangements between an incumbent gentailer's internal generation and retail will be critical to reveal the price of these contracts and to understand that there has been no price discrimination in third party trades. The electricity cost in the RPCA reporting is unlikely to provide a relevant comparator for independent generators.

However, independent generators have an interest in an effective RPCA regime given the objective of this regime is to improve retail competition. A vibrant independent retail segment in the market will provide long-term benefits for consumers.

The proposed RPCA regime is far too light-handed and would rely far too much on the subjective judgment of the incumbent gentailers. We consider that there is a very real risk that there will be a repeat of the mistakes with the ITP disclosure regime where the flaws in the regime were identified to submitters (and the Authority) before the regime was adopted, but were not addressed or fixed in the implementation.[12]

[12] Notably, for example, allowing 'accounting' ITPs to be disclosed rather than the ITPs (internal electricity cost(s) (used to set retail prices. The Independents remain of the view that the ITP regime should be retained with amendment so that ITPs that are used for retail price setting are disclosed rather than 'accounting' ITPs. This would address the clear problems with the ITP regime and be complementary to the RPCA regime.

We are concerned, for example, that the incumbent gentailers could manufacture artificially low costs through determination of a "hypothetical" portfolio and cost allocation. The RPCA regime is entirely silent on matters such as treatment of depreciation and cost of capital.

A central weakness of the proposed RPCA is the absence of an independently determined wholesale electricity cost benchmark.

Without an independently determined wholesale electicity benchmark, the Authority or auditors will not have any way of assessing the RPCA for whether discrimination is occurring or not

A related problem the Authority's proposals create is that the results of different incumbent gentailers RPCA testing, including whether one is negative and another is positive, could come down to differences in the approach each has taken to cost allocation, specification of a "hypothetical" risk management portfolio etc and not just factors such as whether the incumbent gentailer has actually discriminated against Access Seekers or is running its retail business at a loss.

We reiterate from the Link Economics' expert view that "For the RPCA obligation to provide an effective tool in detecting and deterring discriminatory practices, it needs to be the case that: … the Code and RPCA Guidance must be sufficiently specific that RPCAs cannot be materially manipulated; … there is sufficient clarity on how the results of the RPCA will be interpreted".[13]

RPCA and Segmentation for Commercial & Industrial Customers

We see no valid reason for commercial & industrial customers to be excluded from RPCA testing. The consultation document (at 3.46) acknowledges that there is not currently a level playing field for independent retailers seeking to serve commercial and small industrial customers, yet the Authority does not provide any rationale for completely excluding this segment from oversight. These customers – except for the very largest users such as Tiwai and NZ Steel – play a critical role in the competitive landscape.

We **recommend** that the Code require each gentailer to complete a separate RPCA for its C&I customer base, excluding only the largest industrial users. This is necessary for transparency, effective monitoring, and to ensure competitive pricing dynamics and potential instances of discrimination are not hidden by aggregated mass market or SME reporting. Appendix B of our submission contains proposed drafting changes to clause 13.236V(1)(b) to give effect to this recommendation.

Standardised methodologies for cost to serve should be embedded into the RPCA regime

In financial reporting, there currently a wide range of methodologies applied for cost to serve allocations. These should be standardised for comparability. The Authority could look to the work completed by the ACCC on cost to retail.[14]

[13] Link Economics, Implementing NonDiscrimination Obligations, 2 December 2025.

[14] https://www.accc.gov.au/about-us/publications/serial-publications/inquiry-into-the-national-electricity-market-2018-26-reports/inquiry-into-the-national-electricity-market-report-december-2024 - Refer Appendix C - supplementary data> tab 11. Retail costs and margins > table C11.19b

The Authority should determine what is commercially sensitive information, not the incumbent gentailers

The Independents **recommend** that the Authority determine what information is "commercially sensitive or otherwise confidential" and not leave it to incumbent gentailer discretion to determine what "it reasonably considers to be commercially sensitive or otherwise confidential". This could include a process whereby the incumbent gentailers can apply to the Authority that certain information be treated as "commercially sensitive or otherwise confidential" and are required to submit the grounds for why the Authority should treat the information as such.

Active monitoring will be required

The Authority has been clear that the RPCA testing does not provide a bright-line test. Even if the issues we have raised are addressed, the RPCA disclosures only address one element of discrimination: price.

Just as a negative RPCA (based on the Authority's commentary) does not necessarily mean there is a problem, a positive RPCA does not necessarily mean there isn't a problem.

We consider that disclosure needs to require active demonstration of non-discrimination.

The regime will require proactive monitoring of behaviour. Taking RPCA disclosures at face value will not be sufficient. They will require careful interrogation and analysis. The Authority needs to be an active assessor, not a passive recipient of information.

In this respect, we are concerned that some of the Authority commentary and Guidance will effectively 'tie the Authority's hands' and limit what the Authority can and will do.

There is no reason for the proposed Guidance to restrain the Authority from "test[ing] or mak[ing] any judgment on the accuracy of recorded expectations by looking at outturns, unless there are material doubts about the credibility or good faith of the recorded expectations. We are open to reconsidering this stance in the future" (clause A.12). We do not see any benefit in the Authority signalling limits in advance of its monitoring and enforcement or the scrutiny disclosed information will be subject to.

This clause is inappropriate, unnecessary, and well outside the intent of the Guidance: "This guidance is intended to assist the four large gentailers (gentailers) with undertaking and reporting retail price consistency assessments (RPCAs) by explaining the intent of the RPCA and setting out the Authority's current expectations on methods."

We consider the framing of the Authority's intentions at clause 3.11 to be helpful but this level of monitoring does not go far enough to meet its statutory objectives. We would expect that, and believe NZ consumers would expect that, the relevant regulatory body will not only actively monitor and enforce these obligations but routinely perform their own assessments of the RPCA reports (as well as other pro-competition objective evaluations). This should include, for example, running simulated tests using standardised benchmarks to test whether the incumbent gentailers have acted in a non-discriminatory way or presented their self-assessments in a manner that might mask discriminatory behaviour or actions that may harm competition.

Equal treatment is not the same as non-discrimination

The Authority suggests (at para 4.39) that "For the avoidance of doubt, the proposed obligation is not intended to require that risk management contracts supplied to buyers must be of the same duration, volume and/or shape as actual or implied risk management contracts supplied to gentailers' internal business units." If the requirements are genuinely non-discriminatory then contracts with the same duration etc must be made available to Access Seekers, but (as we assume the Authority intended) this does not preclude an Access Provider and Access Seeker agreeing alternative variations that better meet the Access Seeker's requirements.

Housekeeping

The Independents appreciate the responses to our queries, and the Authority's engagement including the 5 March Zoom meeting.[15]

The Independents continue to be of the view that the Authority should include cross-submissions as part of the consultation process, consistent with the Authority's consultation charter and good regulatory practice. Also, a technical drafting consultation should be undertaken after the Authority makes final decisions on NDO/RPCA testing reforms.

Concluding remarks

In summary, we remain seriously concerned that the Authority's proposed change fall well short of what is required to restore competition, improve hedge product access, and prevent discrimination by incumbent gentailers.

The Independents support the Authority's intent "to improve the confidence of anyone buying electricity risk management contracts, by requiring fairness, consistency and transparency in how generation is sold" and "to ensure that retailers aren't squeezed by high wholesale prices, and can profitably operate if they are at least as efficient as gentailers' retail arms."[16] The Independents welcome that the Authority is making some changes to its proposals.

However, the current proposals lack the necessary prescription and safeguards and risk perpetuating a market where incumbent gentailers can continue to discriminate in favour of their own internal retail business units. Much more substantive further change is needed if they are going to have a chance at being effective in limiting the incumbent gentailers' ability to discriminate in favour of their own internal retail business units, and if they are going to be effective at promoting an effective, workably competitive market.

The Authority should not settle for NDO rules that are watered down or an inferior version of orthodox and standard regulatory precedent, including the rules that apply in the NZ grocery and telecommunications markets.

[15] https://youtu.be/c8LvLJ9uPVY?si=ek2kSGyvzWYjglo9

[16] https://www.ea.govt.nz/news/press-release/electricity-authority-launches-new-consultation-on-non-discrimination-obligations/

Yours sincerely,

Independent Electricity Generators Association	Independent Electricity Retailers			
IEGA INDEPENDENT ELECTRICITY GENERATORS ASSOCIATION		Electric Kiwi	pulse energy	octopus energy

Appendix A: Consultation paper questions

Questions	Comments
Retail Price Consistency Assessment	
Q1. Do you agree with the Authority taking a forward-looking approach to the RPCA? If not, why not?	Yes, but the Guidance should not preclude both ex post and ex ante assessments of RPCAs. The IERs are cautious about the clause A.11 commentary that "A gentailer decides its retail pricing for the next period based on (among other factors) expected demand and costs" and that "As the RPCA relies on these expectations, the assessment avoids having to adjust actual outturns for, say, the effects of demand or supply shocks" etc. Electricity retailers can be expected to adjust for shocks in the market so ex ante RPCA disclosures may become out-of-date.
Q2. Do you agree with the Authority applying an as-efficient standard, including an allocation of common costs, to the retail cost component of the RPCA? If not, what standard should be applied and why?	See report from Link Economics. See also response to Q14 and 18.
Q3. Do you agree that the Authority should not be publishing benchmarks for the cost of electricity, the as if portfolio of hedges and retail costs, and should instead provide higher level guidance to gentailers (eg, their cost of electricity should be calculated to minimise the risk adjusted cost of supply)? If not, please explain why and set out how you consider that benchmarks should be constructed.	No. This would create incentives for the incumbent gentailers to game the regime by constructing artificially low electricity/hedge costs for their "hypothetical" portfolio. We note that by definition "hypothetical" is divorced from the incumbent gentailers actual practices – in an analogous way to how the "hypothetical efficient operator" concept in TSLRIC pricing is divorced from Chorus' actual costs – so there is no particular reason why the Authority would need to rely on the incumbent gentailers' own subjective judgment about how "hypothetical" risk management strategies should be constructed. This could be determined by the Authority through a consultation process. If the Authority wants to test whether the incumbents' retail businesses could operate profitably if they were subject to the electricity cost faced by independent retailers, the incumbent gentailers aren't the best placed organisations to make an assessment about what this cost would be. See also Link Economics' reports.
Q4. Do you have any comments on our	It is clear that competitive market outcomes vary considerably amongst different regional markets and customer groups. The IERs have provided various submissions to the Authority that

proposed approach to geographic and customer segmentation? If you don't agree, please explain why and set out the alternative segmentation that you think the Authority should apply. Whether or not we require geographic segmentation, we would also be interested in your views on the best regional classification to apply when the Authority analyses the RPCAs (NRRs, EDB areas, GXPs or something else).	detail the difference between different regional (network area) retail markets, and customer groups, including in terms of market concentration, switching rates and the extent to which incumbent retailer market share has reduced. The IERs **recommend** that more granular segmentation is needed to ensure that differences in pricing and competitive dynamics between residential, SME, and larger commercial and industrial customers (except the very largest end of town) are visible and not masked by aggregate reporting.[17] The IERs support the approach to regional segmentation,
Q5. Do you have any comments on our proposed approach to price smoothing? If you disagree with our approach, please set out your preferred alternative, and how it is consistent with ensuring that there is a 'level playing field' to promote competition between gentailers and independent retailers.	The Authority should be cautious not to overstate the benefits or efficacy of "price smoothing" and the extent it "should be expected to be offered in a competitive retail market". Price smoothing requires market power (inconsistent with a workably competitive market) and can harm competition, contrary to the Authority's statutory objective. It should not be automatically assumed "retail price smoothing" provides a justification for failed RPCA tests particularly if it would also result in failure when using orthodox subsidy-free/predatory pricing tests. The Authority should also consider where it sees the boundary between "smoothing" and cross-subsidisation/predatory pricing. This should provide a clear 'bright line' of what would not be acceptable conduct. We agree with the Authority that "a claim of price smoothing cannot be a "get out of jail" free card". The longer the price smoothing goes on for the longer the period and higher the level retail prices will need to be elevated compared to wholesale prices to recoup the losses and the less likely this is to meet the definition of workably competitive market outcomes, including that "prices are not too much or for too long significantly above costs."[18] We refer the Authority to Pulse's December submission in which Pulse detailed that price smoothing requires: (i) market power, and that (ii) the market is not fully workably competitive:

[17] The Authority clarified that residential and SME would be bundled, at the 5 March 2026 workshop: https://youtu.be/c8LvLJ9uPVY?si=SzAq3qLwLXvDWhop.

[18] WELLINGTON INTERNATIONAL AIRPORT LTD & ORS v COMMERCE COMMISSION [2013] NZHC, [11 December 2013], at para [15].

	> To the extent retail customers are insulated from prolonged periods of high spot prices the quid pro quo (smoothing) is that retail prices will be higher than they otherwise would need to be, or would be efficient, when spot prices are low. If the electricity market was fully competitive high retail prices when spot prices are low would not be sustainable, as it would create an opportunity for other retailers to compete on the basis of low retail prices off the back of low spot prices, undercutting the incumbents. … The IERs **recommend** that if price smoothing is treated as a (potentially) permitted reason for a negative/low positive RPCA then: (i) the gentailer should be required to provide evidence in support of its claims of when the offsetting over-recovery occurred (past) or is expected to occur (future), including ex post verification of the latter. Absent this information, the Authority will not be able to establish that "the reasoning and the data … stack up objectively …"; and (ii) the Authority should test whether the extent of price smoothing would fail cross-subsidy or predatory pricing tests.
Q6. Do you have any comments on the proposed date for the first RPCA disclosures? If you are a gentailer, and have concerns about your ability to meet that timeframe, please explain these in detail	Refer to Link Economics' reports.
Uncommitted capacity	
Q7. Do you prefer Option 1, Option 2 or our previous proposal on uncommitted capacity? Do you have any feedback on how Options 1, 2 and our previous proposal on uncommitted capacity could be improved?	The Independents prefer a requirement that the incumbent gentailer must not discriminate against buyers in favour of its own internal business units for the supply of risk management contracts without an objectively justifiable reason (option 2), with "objectively justifiable" defined and discrimination that could harm competition excluded from the exemption. **Uncommitted capacity** Neither the original proposed "uncommitted capacity" NDO limitation nor the revised version in Option 1 should be adopted or permissible. The Independents welcome that the Authority acknowledges the near universal opposition to the "uncommitted capacity" NDO limit and is proposing to remove it from the draft Code amendment. Both the original and revised version of the "uncommitted capacity" NDO limitation in Option 1 would fundamentally undermine the NDO regime and enable incumbent gentailer activity that would limit the promotion of competition. Octopus

Energy's submission point that the "uncommitted capacity" limitation to the NDOs creates "a regulatory loophole that legalises withholding" and "This loophole would effectively guarantee that independent retailers and generators remain structurally dependent on the gentailers' discretion, preserving their market power" applies to both the previous and current versions of the proposal.[19]

Our December joint and individual submissions detailed why we consider the concept of "uncommitted capacity" is unacceptable and tantamount to providing regulatory permission for the incumbent gentailers to discriminate and provide preferential treatment to their internal retail business units. Our December submissions also detailed the potential for the incumbent gentailers could apply the "uncommitted capacity" NDO limitation in such a way that there would be limited or no "uncommitted capacity". For example, the IEGA and IER joint submission commented that:

> "This approach is unorthodox and inconsistent with regulatory best practice in other sectors both here and overseas.
>
> - In both the New Zealand grocery and telecommunications sectors, non-discrimination obligations apply to the full supply of products and services. There is no carve-out for "committed" or self-supplied capacity.
> - Internationally, similar regimes, such as the UK's electricity generator licence conditions, also require non-discrimination across all relevant capacity to ensure effective competition.
> - By limiting the NDOs to only "uncommitted capacity," the Authority would allow gentailers to classify the vast majority of their output as "committed." This effectively circumvents the non-discrimination requirements and renders the reform ineffective."
>
> "This model would undermine the objectives of the reforms:
>
> - The rules would apply to only a tiny and likely insignificant proportion of capacity.
> - It would not improve market liquidity or guarantee fair access to risk management products.
> - Instead, it would create a loophole that enables refusal to supply, making enforcement extremely difficult and stifling competition and investment by independent generators and retailers."[20]

These concerns are still highly relevant despite the Authority's proposed new definition, Code and Guidance about uncommitted capacity.

The Authority appears to have clarified that it intends that "uncommitted capacity" would be limited to the incumbent gentailer's 'current' customer base and does not provide for forecast or organic customer growth. We note that this clarification addresses the conflict between the October

[19] Octopus Energy, Level playing field measures - consultation paper, 2 December 2025.
[20] IEGA, 2degrees, Electric Kiwi, Pulse Energy and Octopus Energy, Level Playing Field Code Consultation Proposal - Non-Discrimination Must Apply to All Gentailer Capacity, 2 December 2025.

	consultation paper and the October draft Code, rather than changing the proposal. A concern we have is that the updated definition of "uncommitted capacity" as part of Option 1 widens the provision to include "(d) any other reasonable operational or risk management considerations specifically documented in the gentailer's non-discrimination policy" which would further serve to water-down the NDOs. This would allow the incumbent gentailers to deduct additional generation for 'reasonable operational or risk management considerations' documented in their NDO policy e.g. maintenance buffers, portfolio balancing. If the Authority does adopt "uncommitted capacity", clause (d) should be removed. In addition, the Independents support the adoption of Electric Kiwi's recommendations in its December submission (page 6) in relation to tightening the definition of "uncommitted capacity", for example: • Contracts an incumbent gentailer transacts as a result of their market-making obligations on exchange-traded instruments should not be included in the calculation of uncommitted capacity. • Any risk management products that an incumbent gentailer acquires from a third party or another gentailer (for example, additional Huntly firming options) should increase, not reduce, the gentailer's uncommitted capacity. • If a carve-out for an incumbent gentailer's own end customer supply is allowed, then it should not include any organic growth from existing customers (e.g. from heightened demand due to electric vehicles owned by existing customers), growth from acquiring new customers, replacement of lost customers due to churn, or any other form of inorganic expansion. Refer also to the main body of the submission.
Q8. Do you have any feedback on the interplay between OTC monitoring requirements and the appropriate reporting where gentailers rely on 'intolerable risk position' in response to a request for a risk management contract?	
Internal non-discrimination policies and audit requirements	

Q9. Is it useful and/or helpful to provide greater specification in the Code of the requirements for a non-discrimination policy?	Yes. The current reference to "audit" within the RPCA framework is insufficiently defined and risks being interpreted as a technical compliance exercise only (ref (13.236SA)). There is a lack of clarity on whether the audit will: • test calculations only; or • assess whether outcomes provide a true and fair representation of non-discriminatory behaviour. The Authority should align the RPCA assurance framework with established auditing standards, including: • ISA (NZ) 200 – Overall Objectives of the Independent Auditor → Requires auditors to obtain reasonable assurance that information is free from material misstatement. • ISA (NZ) 540 – Auditing Estimates → Highly relevant given reliance on judgment, forecasts, and assumptions. • ISA (NZ) 320 – Materiality Supports a risk-based focus on significant deviations. A key principle under ISA 200 is professional scepticism, defined as: A questioning mind and critical assessment of evidence. This is not consistent with the current framing of "transparency", which implies: • acceptance of information provided; and • limited challenge of assumptions. The Independents **recommend** that the Authority: • require assurance that RPCA outputs provide a "true and fair view" of non-discrimination; • explicitly mandate professional scepticism; and • require assessment of judgments, assumptions and methodologies, not just arithmetic accuracy.
Q10. Do you support the requirement for external audit of compliance with the NDOs? Why or why not?	Yes. For the avoidance of doubt, we support the adoption of the existing Code requirement that the auditor be approved or

	appointed by the Authority to carry out the audit and the application of Part 16A of the Code more generally.[21]
Q11. Is an annual audit of these requirements appropriate, or would a different timeframe be better? Why? Do you have any comments on the alignment of the timing with other gentailer audit obligations?	Annual audit is appropriate.
Q12. Would the codification of the audit requirement impose significant additional costs? What would you estimate these costs to be?	The codification of the audit requirement is unlikely to impose significant additional costs, especially when weighed against its potential benefits. The estimated audit costs are small in the context of the overall revenues and profit margins of the large, incumbent gentailers. More importantly, the Authority's focus should be on ensuring that benefits flow through to consumers. Even if there are some compliance costs, these are outweighed by the gains from promoting fairer competition, improving transparency, and fostering lower prices and better service options for consumers. This approach is firmly aligned with the long-term interests of consumers and the statutory objectives of the regulatory regime.
Q13. Do you have any comments on the impact of the proposals in this paper on the regulatory statement set out in the October consultation paper?	The Independents would expect that a robust regulatory assessment, including assessment of the costs and benefits, would include quantified measures on impact on competition (e.g. the extent to which the proposals are expected to reduce market concentration) and on electricity prices and affordability. It is entirely unclear from the Authority consultations how much, or how quickly, the Authority expects its proposals to result in improvements in wholesale and retail competition. This is something the Authority needs to have a view on to have confidence its proposals are fit-for-purpose. We would expect that if the Authority had confidence its proposals would result in substantial improvement in competition then it would be able to map out expectations for unwinding retail regulation (time-of-use pricing, retail billing regulation etc) that it has felt the need to introduce because it did not have confidence it could rely on competition.
Appendix A – Draft RPCA guidance for consultation purposes	
Q14. Do you agree with the proposed general approach to the RPCA, including the approach to implementation and	It is important to recognise inclusion of shared and common costs means the RPCA could be negative (or marginally positive), but the incumbent gentailer's internal retail business could be contributing to the company's overall profits because it is recovering more than its incremental/avoidable cost. The

[21] We also consider that Part 4 Commerce Act/Part 6 Telecommunications Act provides useful precedent with the requirement that Transpower/Chorus procure an independent assurance report by an assurance auditor in respect of the annual compliance statement in relation to price-quality regulation.

potential evolution of guidance? If not, why not and what would be an alternative approach?	Authority would need subsidy-free/predatory pricing test cost information to verify whether this defence is valid. The simplest thing to do would be to require the incumbent gentailers to split out incremental/avoidable costs from shared and common cost allocation in their RPCA disclosures. The Independents **recommend** the Authority: (i) specify in Code that cost allocation is required to be between incremental (or avoidable) and stand-alone costs[22] and incremental is to be defined on a long-run basis, and (ii) require that incremental (or avoidable) costs and the allocation of shared and common costs is separated out in disclosures.[23] As per Link Economics' December expert reports "The relevant retailing costs would include all costs that are incremental to retailing over the long-run (including costs that are fixed in the short-run). They would also include the portion of shared (overhead) costs that a firm would typically expect to be recovered via retailing activities."[24] We also have the following general comments: • While we recognise the need for some evolutionary refinement as experience with disclosures accumulates, we have strong concerns that excessive reliance on guidance (as opposed to codified rules) creates regulatory uncertainty and undermines predictability for market participants. In our view, iterative improvements to the regime should be made primarily through codified changes – supported by guidance, not substituted by it. • Too support regulatory certainty and consistent application, we consider it essential the Authority sets a clear upfront expectation that participants are required to adhere to Authority-issued guidance. The default position should be that guidance carries a "comply or explain" status, with any departures clearly disclosed and robustly justified. We recommend this expectation be codified - ideally as a clause early in the Code- so all parties are fully aware of their obligations as guidance is developed or updated.
Q15. Do you agree with the proposed overall calculation approach to the	Refer to Link Economics' reports.

[22] Consistent with clarification the Authority provided to us in response to a query.

[23] We note that there is an inconsistency in the consultation. The Authority has specified in Code and Guidance that the RPCA cost allocation includes a contribution to shared and common costs but has, to the contrary, also stated the Authority prefers an "as-efficient competitor standard" and that this "is usually interpreted as applying a long-run avoidable costs approach. As the Commission put it: "long-run average avoidable costs do not include an allocation of common costs shared between the relevant downstream service and other services (whether upstream services or services in other markets)"." In short, the consultation both states that there should and there should not be an allocation of shared and common costs under its proposals, but the Authority has subsequently clarified that the former is its intention.

[24] Link Economics, Implementing NonDiscrimination Obligations, 2 December 2025.

RPCA? If not, why not? In what way could it be improved and why?	
Q16. Do you agree on the draft guidance with respect to customer coverage, and the approach and criteria for identifying and reviewing RPCA segments? Do you agree that RPCAs should be reported by NRR? Please provide reasons and any proposals to improve. Note, you do not need to duplicate responses to the earlier question on the proposed segmentation.	See response to Q4.
Q17. Do you agree with the proposed approach to calculating average retail prices per MWh, including that each RPCA assessment should be based on retail prices as at the assessment date? If not, why not?	The incumbent gentailers should be required to undertake RPCA testing each time they introduce a new retail tariff as well as at the assessment date. Refer also to Link Economics' reports.
Q18. Do you agree with the proposed approach to calculating non-energy costs, including the proposed approach to shared and common costs and attribution of costs to bundled services? If not, why not? Note, you do not need to duplicate responses to the earlier question on the efficiency standard for retail costs.	Allocation of shared and common costs is inevitably arbitrary. While the Authority may be correct that "The RPCA conceptually covers similar ground to margin squeeze theories of harm" they measure costs differently e.g. margin squeeze testing uses avoidable/marginal cost benchmarking and exclude shared and common costs that would remain even if the incumbent gentailer didn't provide retail services.[25] The draft Code and Guidance specify that "Gentailers should allocate a contribution to shared and common costs to its retail cost, using a principled cost allocation rule" [clause A.75] and attribution of shared and common costs should be on a "principled basis". The Authority's expectation is that allocation "should be based on "using rational cost drivers that reflect a causal relationship, or if this cannot be established, some other reasonable proxy measure". It also asks incumbent gentailers to provide reasons for the approach taken.

[25] See, for example, the Commerce Commission's discussion on predatory pricing tests in its Telecom residential pricing investigation, TELECOM'S PRICING OF FIXED TELEPHONY SERVICES IN LOWER HUTT, 30 July 1998.

	There are a wide range of different methods with a wide range of different cost allocation outcomes that would satisfy these requirements and could be considered to be principled. This will create challenges with trying to do like-with-like comparisons of the incumbent gentailers' disclosures. The results could be a function of differing approaches to cost allocation. It is evident from the incumbent gentailers' existing segmented financial reporting that there is currently significant inconsistency in how they allocate costs, including: • retail vs wholesale vs generation; and • direct vs shared costs. The incentive for each of the incumbent gentailers would be to 'hide' discriminatory practices and evidence that their retail business, or certain retail customer groups, are being supplied at a loss. One way to achieve this would be to adopt cost allocation methodologies that allocate as much of their shared and common costs to their wholesale business (artificially suppressing wholesale profitability) and to other business activities and to minimise allocation to electricity retail. Likewise, the incentive would be to allocate costs to retail customers not covered by the RPCA regime. For example, customer numbers would be an obvious cost driver for various costs including billing, but its use may be limited as it would result in higher cost allocation to residential and SME customers. An example of this, based on 2degrees' experience in telecommunications, is that there have been issues with Chorus' trying to allocate excessive amounts of its costs to its regulated wholesale (fibre) business under the fibre price-quality regulation provisions in Part 6 of the Commerce Act.[26] The Independents **recommend** the Authority: (i) require disclosure of the methodology and cost allocators the incumbent gentailers have applied and/or provide a default set of allocators;

[26] For example, in response to Chorus' expenditure proposal hike the 2025 fibre price-quality determination, 2degrees noted that Chorus proposed a very large number of changes in allocators for shared and common costs that uniformly increased the amount of costs that would be allocated to fibre services. 2degrees had also submitted that Chorus had proposed to allocate 100% of some costs to the regulated fibre business.

The guardrail that applied to regulation of fibre services is that the cost allocators for different shared and common costs were transparent and explicitly specified AND determined by the Commerce Commission. The Commerce Commission decided not to adopt many of Chorus' proposed changes.

This is not an isolated example, based on 2degrees' experience, with 2degrees also raising concerns about Chorus' attempts to inflate its regulated asset base (RAB) through cost allocation, and production of TSLRIC and net cost of the Kiwi Share Obligations that were widely in excess of the Commerce Commission cost determinations.

	and (ii) include provision that cost allocators/methods are required to be approved by the Authority. At a minimum, this should include that the Authority: • prescribes standard cost categories, informed by ACCC approaches e.g.: ○ Billing & collections ○ Customer service ○ Sales & marketing ○ Metering & data ○ IT systems ○ Corporate overheads/shared services; and • requires disclosure of allocation methodologies; and assumptions (including allocators that have been used).
Q19. Do you agree with the proposed approach to expected cost of electricity? If not, why not? We would particularly welcome any views on proposed guardrails (eg, minimising risk adjusted cost of supply) and possible alternatives, and on our approach to changes in method between assessments.	The appropriate approach depends on whether the Authority is attempting to use the RPCA to detect discriminatory pricing or test for economic replicability. **Price discrimination testing** The Independents agree with Octopus Energy that "Conceptually, non-discrimination testing should focus on whether the price a gentailer charges for risk management contracts is higher than the price it implicitly charges itself." [emphasis added][27] There can be a significant difference between the electricity cost (ITP) it implicitly charges itself and uses to set its actual retail tariffs and whether an incumbent gentailer can artificially construct a "hypothetical" risk management strategy that passes the RPCA test. Put another way, where a "gentailer is discriminating on the price of risk management contracts it makes available to independent retailers by, effectively, providing energy at more favourable rates to its own retail internal business unit" [emphasis used] depends on the rates available to its own retail internal business unit. This is the ITP(s) incumbent gentailers use for their retail pricing.[28] **Economic replicability** The requirement that the "expected cost of electricity" is "based on a hypothetical portfolio of risk management contracts consistent with rational and prudent risk management practices"

[27] Octopus Energy, Level playing field measures - consultation paper, 2 December 2025.
[28] As opposed to the ITPs used for accounting/financial segmentation purposes.

	is divorced from actual incumbent gentailers' practices[29] but aligns with economic replicability testing. In response to Q3, we noted that by definition "hypothetical" is divorced from the incumbent gentailers actual practices – in an analogous way to how the "hypothetical efficient operator" concept in TSLRIC pricing is divorced from Chorus' actual costs – so there is no particular reason why the Authority would need to rely on the incumbent gentailers' own subjective judgment about how "hypothetical" risk management strategies should be constructed. This could be determined by the Authority through a consultation process. If the Authority relies on the incumbent gentailers' individual assessment of the "hypothetical" cost, it needs to be cognisant of the incentives this would create. The lower the electricity/hedge costs the incumbent gentailers can construct the better looking their RPCA test results will be (in the same way as minimising allocation of shared and common costs will result in more favourable looking RPCA test results). The Independents **recommend** that, if the Authority allows the incumbent gentailer discretion to construct a hypothetical hedge book/risk management strategy, (i) this be limited by a requirement to align with the (implicit or explicit) electricity costs they use to construct actual retail tariffs, and (ii) the Authority commission development (including with consultation) of an independently constructed hypothetical risk management strategy that would be achievable by a prudent and efficient independent or new entrant retailer. Refer also to our response at Q21.
Q20. Do you agree with the proposed guidance on the assessment of results, including the factors the Authority may consider in determining the appropriate follow up for negative or small positive RPCA results? If not, why not and what would be an alternative approach? Note, you do not need to duplicate responses to the earlier question on price smoothing.	The Authority has been clear the way it has specified the RPCA test is such that it is not a "bright-line test". A negative or slightly positive RPCA test does not necessarily mean the NDO rules have been breached. Similarly, the RPCA test only looks at one element of non-discrimination (price). A positive RPCA does not say anything about other aspects of discrimination such as the quantity of hedge products that are made available and the terms and conditions. Refer also to Link Economics' reports.

[29] By way of analogy, application of the hypothetical efficient operator (HEO) concept to determination of TSLRIC is divorced from the regulated business's actual network and is not necessarily (or usually) determined by the regulated business.

Q21. Do you agree with the proposed approach to RPCA disclosure and reporting? If not, why not?	We support a requirement that the RCPA tests and factors are made public [A1.38] however the methodology and the calculation methodology for these component needs to be published with sufficient detail and: • Define the relevant customer base and volume: The calculation should begin with the electricity volume required to supply segments that are within scope of the assessment. • Assume the required volume is fully contracted: The expected cost of supply should be assessed on the basis that 100% of the required volume is secured through contracts. The benchmark should not assume spot market exposure, consistent with prudent risk management by independent retailers. • Anchor the calculation in observable ASX prices: Wholesale electricity prices used in the calculation should be drawn from observable ASX market data, rather than internal transfer prices or valuations of self-supply. This ensures the calculation is externally verifiable and comparable across gentailers. • Apply a multi-year averaging methodology: To avoid distortion from short-term price volatility or abnormal market conditions, the daily rate should be derived using an average of ASX prices over a defined multi-year period (for example, three years), reflecting a hedge build-up approach rather than point-in-time pricing. • Convert wholesale prices into a daily average rate: The averaged ASX prices should be converted into a daily average $/MWh rate, representing the expected daily cost of supplying the required volume. This produces a stable and comparable measure of expected cost, rather than one driven by short-term trading outcomes. • Apply consistent and transparent load shape assumptions: Standardised daily and seasonal load shapes appropriate to residential and SME customers should be applied consistently. Load shape assumptions materially affect costs and must therefore be clearly defined, disclosed, and applied uniformly.
Appendix B – Proposed Code amendments	
Q22. Do you have any comments on the drafting of this Code amendment? Are we missing anything? Is there anything that we should not include?	Refer to Appendix B for the response to this question. We recognise there are any number of drafting approaches that could resolve the issues that we have raised but trust our suggested drafting will be helpful for the Authority. We would be happy to discuss the suggested drafting and potential alternative drafting approaches if that would be helpful. We have already

	suggested that the Authority should undertake a final drafting consultation once it has made its decisions on this matter.

Appendix B - Proposed Code Amendments
Q22. Do you have any comments on the drafting of this Code amendment? Are we missing anything? Is there anything that we should not include?

The comments provided by the Independent Electricity Retailers (IERs) in our respective October submissions remain applicable to the Code drafting currently under consultation. In particular, Electric Kiwi's submission provided detailed, clause-by-clause feedback on nearly every draft provision - much of which remains relevant and has not been addressed by the targeted changes in Appendix B. As the Authority has confirmed, Appendix B only includes amendments that have been updated since October and does not show all possible Code changes still under consideration for the final decision paper. Further amendments, including to clauses not shown in Appendix B, may still be made in the final Code without further consultation. It is therefore essential that the Authority comprehensively review and take into account all earlier feedback from IERs and Electric Kiwi when finalising the Code.

For example, our earlier comments regarding the drafting and application of the "objectively justified reason" standard remain relevant and should be considered in the final version.

In relation to the amendments that have been further updated since October and therefore shown in Appendix B, we have the following specific comments/changes.

A new clause should be added up front along the lines of the below to provide clear notice that Authority-issued guidance on the non-discrimination obligation framework carries a "comply or explain" status throughout the Code, establishing the expectation that participants will adhere to such guidance

Application of Authority guidance
(1) Where, under this Code, the Authority publishes guidance, methodologies, explanatory material or similar statements, participants are expected to adhere to such guidance in relation to their relevant obligations.
(2) Any material departure from the Authority's published guidance must be clearly identified, explained, and justified in the participant's reporting and compliance documentation under this Code.

Definitions

The Code should include a definition of "hypothetical portfolio of risk management contracts" consistent with the Independent's submission.

13.236P Non-discrimination principles

1. **13.236P(2)** As per previous submissions of the IERs reference to "risk management contracts" should be broadened to cover actual or implied risk management contracts to explicitly capture all gentailer self-supply whether contracted formally or not. We suggest the following redrafting of clause 13.236P(1)-(3):

   Combine 13.236P(1 and 2) with the following:

   > *"A gentailer must not, in relation to the supply of risk management contracts, treat any buyer differently or, where the gentailer supplies itself with a service (that has the same or similar effect as a risk management contract) it must not treat itself (including its internal business units or any interconnected bodies corporates) differently from any other buyer, except and only to the extent that a particular difference in treatment is objectively justifiable and does not lessen or harm, or is unlikely to lessen or harm, competition in the electricity retail market."*

   Create new 13.236P(2) to replace 13.236P(3) as follows:

   > *"Without limiting 13.236P(1) in any way, a gentailer must not discriminate against buyers in favour of its own internal business units in price or non-price terms, when supplying risk management contracts (including the self-supply of services that have the same or similar effect as a risk management contract), except and only to the extent that a particular difference in treatment is objectively justifiable and does not lessen or harm, or is unlikely to lessen or harm, competition in the electricity retail market."*

   Numbering references to be updated.

2. 13.236P(4) - While we consider the shift from "prevented" to "unduly deterred" is an improvement, the phrase "unduly deterred from operating profitably" still introduces unnecessary uncertainty for both market participants and the Authority. We recommend replacing this with a clearer test, "from achieving reasonable margins," which provides a more objective and measurable standard linked to margins rather than undefined measure *operating profitably*. The Authority should also consider whether benchmarks or reference points, such as typical retail margins in a competitive market, can be developed to guide interpretation and enforcement of this clause. This would help ensure consistent application and greater certainty for all parties.

3. 13.236P(4) – change "as efficient with regards to operating costs as the gentailer's own retail internal business unit" to "is operating consistent with a Reasonably Efficient Operator."

This change aligns with the analysis provided by Link Economics, which supports using a Reasonably Efficient Operator (REO) standard, rather than benchmarking solely against each gentailer's own retail unit. The current drafting risks embedding incumbent gentailers' own cost structures.

13.236Q Non-discrimination policy

4. As per the Independent's submission the Authority must make it clear that a Gentailer's 13.236Q Non-Discrimination policy relates not only to the trading of risk management contracts but also to the self-supply of services that have the same or similar effect as a risk management contract. Add the following to draft Code reference 13.236Q(1)(a):

   "*or the supply of services to its own internal business units that have the same or similar effect as risk management contracts."*

5. 13.236Q(1)(b) - change "of a reasonable standard, taking into account the nature, scale and complexity of the gentailer's operations" to "is robust, effective, and fit for purpose, having regard to the nature, scale, and complexity of the gentailer's operations." The current drafting permits too much interpretation and risks allowing minimal standards; our proposed wording is more objective and outcome-focused.

6. The RPCA should be explicitly referenced within the 13.236Q non-discrimination policy. This ensures that the processes, methodologies and governance of the RPCA are properly embedded in the gentailer's internal compliance framework. Therefore the following addition to 13.236Q(4) should be made:

   "(f) a description of the gentailer's policies and procedures, methodologies, assumptions and considerations for preparing, reviewing, and governing Retail Price Consistency Assessments under clause 13.236V, and for managing any issues or insights identified through such assessments.

13.236S Record-Keeping

7. The Gentailers must be required to record the volume of risk management contracts they have traded with buyers and importantly that they have self-supplied, and this must include volumes or generation services that have the same or similar effect as a risk management contract that they have provided to their internal business units.

8. 13.236S(2) (e) should be updated so that any reason for discriminating between buyers or against buyers in favour of a gentailer's own internal business unit must also be accompanied with a detailed rationale as to why such reason did not, or is not likely to, harm competition.

9. A new 13.236S(2)(g) should be added as followings:

> *13.236S(2)(g) all records, models, working papers, calculations, supporting data and documentation relating to the preparation of each retail price consistency assessment, including all inputs, cost allocations, methodologies, and underlying assumptions used for the purposes of clause 13.236V.*

12.326V Retail Price Consistency Assessment

10. 13.236V(1)(a) - reference to retail brands should be expanded so clause reads as follows:

> 13.236V(1)*(a) for each of its retail brands (including, for the avoidance of doubt, all sub-brands, subsidiaries, trading names, or other distinct customer-facing offerings as defined);*

11. 13.236V(1)(b) - More granular segmentation is necessary to ensure that differences in pricing and competitive dynamics between residential, SME, and larger commercial and industrial customers (except the very largest end of town) are visible and not masked by aggregate reporting, allowing for more effective monitoring of potential discrimination or anti-competitive behaviour.

> ***(****b) in relation to each of the following retail segments within each brand:*
> *(i) residential customers (new and existing separately);*
> *(ii) small to medium business (SME) customers (new and existing separately),*
> *(iii) commercial and industrial customers (new and existing separately) with annual electricity consumption of up to [10GWh]*

12. 13.236V(1)(b) - A new subclause (iii) should be added making it clear that an RCPA should be undertaken each time a retail tariff is amended or new retail tariffs are introduced

13. 13.236V(2) The purpose of the RCPA must be to demonstrate compliance with the Non-discrimination obligations as well as to assist with the monitoring of compliance.

14. 13.236V(4)(a) - see the Independent's main submission. The Authority must be prescriptive as to how a Gentailer calculates the expected cost of electricity associated with supply to the relevant retail segment.

15. 13.236V(4)(c)(iv) see the Independent's main submission and Link Economics Report. The Authority should impose a standardised retail operating costs for use by the Gentailers consistent with the Reasonably Efficient Operator model, if the Authority is unwilling to do this, it must at a minimum be prescriptive as to how a Gentailer calculates the retail operating costs generally (and then how the Gentailer apportions these costs across customers type and network reporting regions). The Authority must

set out distinct categories of costs that may be included (including those shared and common costs) using readily understood financial accounting terms. Separately, the Authority should assess the RCPA results against a REO benchmark to evaluate whether there is any evidence of discriminatory behaviour or activities that could constitute an abuse of market power.

16. 13.236V(4)(d) see the Independent's main submission. The Authority must be prescriptive in how the Gentailers calculate the retail prices to the relevant retail segment in terms of fixed and variable charges, and other costs.

17. 12.326V (7) should be expanded to include a requirement that the RCPA report must be:

    (i) Signed by at least two directors of the gentailer
    (ii) Accompanied by a statement confirming the trust and accuracy of the report to the best of those directors' knowledge and belief having made all reasonable enquiries (including an explanation of the enquiries made).

13.236W Public reporting

18. To avoid ambiguity about selective reporting and ensure all relevant outputs are published, the "or" in clause 13.236W(1) should be changed to "and", so that the gentailer must publish public versions of the annual report, the interim report, and any retail price consistency assessment report. This change makes clear that all three categories of report are subject to the public-reporting requirement

19. The below proposed audit related clauses are intended to convert the current, lightly-defined "audit" in the RPCA framework into a robust, standards-based assurance exercise rather than a narrow technical check.

    13.236SA Gentailers to arrange for regular audits
    Add a new subclause (2) as follows:

    (2) For the purposes of subclause (1), the gentailer must ensure that the scope and standard of each audit comply with clauses 16A.26A to 16A.26C.

    Add a new clause 16A.26B and 16A.26C as follows:

    16A.26B Scope and standard of gentailer non-discrimination obligations audits
    (1) An audit required under clause 13.236SA must be conducted in accordance with applicable auditing and assurance standards issued by the External Reporting Board (XRB), including (without limitation) ISA (NZ) 200, ISA (NZ) 320, and ISA (NZ) 540, or any standards that replace them.
    (2) In carrying out an audit under clause 13.236SA, the auditor must apply professional scepticism throughout the engagement, including by critically assessing—
    (a) the methodology and calculations used by the gentailer; and

(b) the judgments, forecasts, estimates, and assumptions underpinning the gentailer's RPCA and non-discrimination disclosures.
(3) The audit must assess whether the gentailer's statements, reports, and other outputs made under this subpart present a true and fair view of the gentailer's compliance with its non-discrimination obligations, and must not be limited to testing for technical or arithmetic accuracy only.
(4) The audit must include testing of the rationale for material decisions that could affect offers, prices, or other terms to which those obligations apply
(b) the rationale for material decisions that could affect offers, prices, or other terms to which those obligations apply.

16A.26C Auditor's opinion - gentailer non-discrimination obligations audits
(1) The auditor's report for an audit required under clause 13.236SA must state whether, in the auditor's opinion -
(a) the gentailer's reported outputs under this subpart present a true and fair view of its compliance with the non-discrimination obligations in this subpart; and
(b) any material non-compliance or misrepresentation has been identified.
(2) If the auditor does not give an unqualified opinion under subclause (1), the report must describe the nature of any limitation, qualification, or adverse finding.

Outlook

Consultation – RPCA guidance - Economist Report to supplement the IERs and IEGA submission

From Louise Henderson <[redacted]>
Date Wed 2026-03-25 7:44 PM
To Level playing field <levelplayingfield@ea.govt.nz>
Cc Robert Allen <[redacted]>

2 attachments (704 KB)
Link Economics report on NDO Consultation March 2026.pdf; LPF -IEGA and IER - Joint submission to EA of Link Economist Report_Final.pdf;

Dear Level Playing Field team,

Please find attached a report by Link Economics, prepared at the request of the Independent Electricity Generators Association (IEGA) and Independent Electricity Retailers (IERs) (collectively, the Independents), in response to the Electricity Authority's consultation paper on the Non-discrimination obligations: Retail Price Consistency Assessment (RPCA), uncommitted capacity and other matters.

This report supplements the substantive response prepared by the Independents that will be submitted under separate cover by Robert Allen on behalf of the Independents.

We appreciate the Authority's willingness to accept our submissions at this time.

Please let us know if any further information or clarification would be helpful.

Kind regards,
Louise Henderson

Louise Henderson she/her
General Counsel and Head of Risk
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25 March 2026

Electricity Authority
WELLINGTON

By email only: levelplayingfield@ea.govt.nz

Non-discrimination obligations: Retail Price Consistency Assessment, uncommitted capacity and other matters – Economist report

Please find enclosed the Link Economics Report, prepared at the request of the Independent Electricity Generators Association (IEGA) and Independent Electricity Retailers (IERs) (collectively, the Independents), in response to the Electricity Authority's consultation paper on the Non-discrimination obligations: Retail Price Consistency Assessment (RPCA), uncommitted capacity and other matters.

Link Economics specialises in competition and regulatory economics. They have experience designing non-discrimination arrangements and advising clients on internal compliance with them.

The enclosed report offers insights relevant to the Authority's consultation, focused on implementing an effective and sustainable non-discrimination regulatory regime and practical recommendations on aspects of the RPCA. This report supplements the Independent's substantive submission that has been provided to the Authority under separate cover.

We submit this report to assist the Authority's review and to ensure that the RPCA and related matters are implemented in a robust, transparent, and fit-for-purpose manner whilst ensuring consistency with international and national regulatory precedence.

Yours sincerely,

Independent Electricity Generators Association	Independent Electricity Retailers			
IEGA INDEPENDENT ELECTRICITY GENERATORS ASSOCIATION	2	Electric Kiwi	pulse energy	octopus energy

Comments on Draft RPCA Guidance

Prepared for 2degrees, Electric Kiwi, IEGA, Octopus Energy and Pulse Energy

By Emma Ihaia and Dr Eric Ralph

March 2026

Contents

Executive Summary

This report, prepared for the independent electricity retailers and the Independent Electricity Generators Association (IEGA), comments on the Electricity Authority's February 2026 consultation paper on non-discrimination obligations (NDOs), with a focus on the proposed Retail Price Consistency Assessment (RPCA).

RPCA guidance that promotes competition

Our central concern is that the Authority's proposed approach – requiring gentailers to conduct RPCAs using their own costs rather than those of a reasonably efficient operator (REO) – is unlikely to promote competition or the efficient operation of the electricity industry. Rather, it may continue to allow harm to outcomes faced by domestic consumers and small businesses.

Competition and dynamic efficiency impacts are enhanced by using REO costs

Use of a gentailer cost standard creates a risk that pricing behaviour that drives independent retailers from the market could nonetheless pass the RPCA. Thus, the competition benefits and dynamic efficiencies associated with independent retailing (including flow-on effects for independent generation investment) would continue to be threatened. Using REO costs in the RPCA would address this risk. International regulatory practice supports this view: the use of either REO or adjusted as-efficient operator costs in margin squeeze and replicability tests have been commonly used by European national regulatory authorities for telecommunications, consistent with European Commission guidance that REO costs are appropriate where market entry or expansion has been frustrated.

The use of gentailers' costs in the RPCA shifts the regulatory burden

The Authority's proposed approach of using gentailer costs shifts and may even increase, rather than reduce, regulatory burden relative to the use of REO costs. Allowing four gentailers to use their own methodologies and cost allocations creates a substantial and ongoing analytical burden and capability requirements for the Authority and smaller, less-resourced stakeholders. A standardised, REO-based framework would involve higher upfront design costs but generate large savings in RPCA scrutiny and is more consistent with good regulatory practice.

If gentailer cost standards are used in RPCA, REO analysis by the Authority is necessary

If the Authority retains the gentailer-cost standard, it must supplement the RPCA with its own REO analysis to identify cases where gentailer prices, while passing the RPCA, threaten the viability of independent retailers. Adversarial stakeholder input — including analysis by independent consultants under appropriate confidentiality arrangements — could assist the Authority in this task.

Other recommendations

We also recommend that the Authority: require methodological consistency across RPCAs and over time to prevent regulatory gaming; establish standard cost-to-serve (retail cost) categories to facilitate cross-gentailer comparisons; commit to scrutinising patterns of forecast failure as potential evidence of bad faith; and extend granular testing to cover new products or brands as they emerge and to also disaggregated by customer segments (residential, SME, and large commercial).

1 Introduction

1. This report, prepared for the independent electricity retailers (2degrees, Electric Kiwi, Octopus Energy, and Pulse Energy) and the Independent Electricity Generators Association (IEGA), comments on the Electricity Authority's consultation paper "Non-discrimination obligations: Retail Price Consistency Assessment, uncommitted capacity and other matters" that was released on 26 February 2026.

2. We focus our comments primarily on the Retail Price Consistency Assessment (RPCA).

2 NDOs are a tool to promote competition

3. The design and implementation of the RPCA and other NDOs involves a series of decisions on methodology, inputs, process and interpretation. Those decisions all need to be made within a framework with a clear sense of the objective and guiding principles. Doing so is good regulatory practice.

4. The proposed Code changes to introduce NDOs, and this consultation about how those NDOs will apply in practice, arose as part of the Energy Competition Taskforce's package of measures that were identified to achieve the outcome: "to enable new generators and independent retailers to enter, and better compete in, the market."

5. The Authority's statutory objectives also provide over-arching guidance:

> *The main objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers. The additional objective of the Authority is to protect the interests of domestic consumers and small business consumers in relation to the supply of electricity to those consumers" (s.15(1) and (2) Electricity Industry Act 2010).*

6. Our primary concern with the Authority's February consultation paper is that it will neither achieve the outcomes desired by the Taskforce, nor will it effectively promote competition or the efficient operation of the electricity industry for the long-term benefit of consumers. Domestic consumers and small businesses will likely bear the greatest harm of this failing.

2.1 Use of REO costs in the RPCA

7. The most important place our concern arises is where the Authority proposes that gentailers develop retail price consistency assessments (RPCAs) based on their own costs, rather than those of a reasonably efficient operator (REO). This approach has two problems. First, such a test could be met even if competition and the efficient operation of the electricity industry is harmed, to the detriment of domestic consumers and small businesses. In short, conduct that meets this test may prevent new generators and independent retailers from entering and competing. Second, the approach will result in the application of four different methodologies and cost allocations, one for each gentailer, which will be cumbersome, opaque and place a substantial burden on the Authority and other stakeholders to scrutinise and interpret those methodologies and allocations. Both these problems would be resolved through the use of the REO concept.

REO costs are more consistent with promotion of competition

8. The first problem is fundamental: the Authority's proposed test will not effectively promote its main objective or achieve the desired outcome of enabling independent retailers to enter and better compete.

9. Consider the following realistic situation. At least one gentailer, call it Gentailer X, has lower costs than retailer-only competitors.[1] For some time, gentailers had set retail prices that are sufficiently high to enable profitable retail-only supply. Over time, retail-only operations took advantage of these prices, claiming market share by setting prices below those of the gentailers. Gentailer X decides action is required to address its market share losses, losses that are increasing and may be exacerbated by further independent retailer price cuts. Thus, it decides to lower its retail prices to a level where independent retailers cannot compete, but which are still profitable to the gentailer.

10. Such prices would pass the RPCA.

11. Gentailer X's actions would lead some or all of the other gentailers, and possibly some or all the independent retailers, to also lower their prices. Any other gentailer that has lower costs than independent retailers could cut their prices to levels similar to Gentailer X's, still passing their own RPCAs.

12. If that were the end of the story, consumers would benefit, but such simple ending is improbable. Instead, it is likely there would be some independent retailer exit, while other independent retailers, somewhat chastened, would lose material market share, weakening their competitive capacity. In all likelihood, with time, this reduction in retail-only competition would result in price increases. After all, high prices were maintained for some time leading to independent retailer entry, which brought them down somewhat, and Gentailer X acted only after a period of sustained market share losses. With the effects of that action reducing competition, Gentailer X, and indeed all retailers, would have a renewed capacity to raise prices. If the net result brought prices to levels above the level that retail competition would have otherwise effected but for Gentailer X's action, then the action would have substantially lessened competition.

13. Any of the four gentailers is likely to have a substantial degree of market power given the size of each of the gentailers relative to the New Zealand market. In any case, it is implausible that one of the three gentailers with substantial government ownership does not. Notably, when assessing competition impacts the gentailer's intentions are not relevant – it is enough that its action would weaken independent retailers with some potentially exiting, reducing price competition. Indeed, this would be true even if Gentailer X's price cuts had been a competitive response with no thought to the future. The effect would still have been a substantial lessening in competition.

14. The use of an REO would assist in addressing these issues. This was recognised by the Commerce Commission in its guidance on equivalence and non-discrimination where it found that "markets in which regulation or workable competition does not constrain downstream

[1] Retail costs are used as an example, but the point applies more generally, e.g., if gentailers have lower energy costs, for example, due to scale of purchases, whether in spot or hedge markets.

prices" are examples of where a cost standard such as REO or an adjustment to the as-efficient costs might be appropriate.[2]

Dynamic efficiencies arise from competition

15. The Commerce Commission also identified that other situations where an alternative cost standard such as REO might be relevant include where the presence of dynamic efficiencies from additional entry in the downstream market are likely to outweigh productive efficiency losses.[3]

16. As discussed in our May 2025 report on level playing field measures, independent retailers have stronger incentives than gentailers to pass through cost-reflective price signals, which can drive very large efficiencies through avoided or deferred investment in networks and/or generation. Similarly, independent retailers are likely to have higher incentives than gentailers to invest in innovative demand-side flexibility services (for example, vehicle-to-grid).

17. The extent of competition in the retail market also has flow-on impacts to generation investment. Generation projects involve long lead times and large, mostly sunk costs, so investors need confidence that they will be able to earn reasonable margins. If gentailers can limit the ability of independent retailers to compete, and therefore maintain dominance in retailing, independent generators cannot be confident they will receive the same margins that gentailers achieve. Instead, they may face restricted opportunities to sell their output.[4] For example, if a gentailer behaved in the way described for Gentailer X above, independent retailers would not earn sufficient margins to buy energy at prices that allow independent generators to achieve returns comparable to those of the gentailers.

18. To help address these problems, we recommend the use of an REO in the RPCA to avoid the risk that behaviour that harms competition could routinely pass the RPCA.

There is a high cost in using gentailers' own costs and methodologies

19. The preceding demonstrates the use of gentailers' costs, rather than those of an REO would carry a substantial cost. While we recognise it is valid to trade off burden against prevention, allowing the gentailers to rely on their own costs, rather than those of an REO, is likely to increase rather than reduce burden. The proposed approach reduces gentailer burden, transferring it to the Authority and smaller more disparate stakeholders, such as the independent retailers, independent generators and consumer groups. Given the potential harm of such an approach outlined immediately above, the putative, and as explained next, likely negative, burden reduction of allowing the gentailers to use their own costs is unjustified.

20. Ensuring effective transparent regulation is costly. To be effective, a regulatory test must be sufficiently transparent that the regulator can judge whether it has been meaningfully passed. Indeed, if justice is to be seen to be done, then the process must also be substantially transparent to the broader community. A party's submission of a passed test that is solely

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[2] Commerce Commission (30 September 2020), "Equivalence and non-discrimination – guidance on the Commission's approach for telecommunications regulation" para 3.58.1.
[3] Commerce Commission (2020), para 3.58.1.
[4] As discussed in the Link Economics May 2025 report on level-playing field measures, the gentailers tend to have high levels of matching between each gentailer's energy sales and purchases, rather than relying significantly on independent generators.

based on the party's own methods and data is obviously not sufficient. Rather, the regulator must examine the submission's methods and sources, and weigh these against the facts of the world as the regulator knows them. And the process must be sufficiently open to garner belief in its soundness.

21. While it is important to minimise regulatory costs, shifting costs between parties or across stages of the regulatory process should not be confused with cost minimisation. Under the Authority's proposed approach, a considered evaluation of the submitted tests would be no small undertaking. There would be four sets of tests, one for each gentailer, each with different methodologies for cost measurement, cost allocation and hedging strategy development. All of these matters are highly technical. Allowing gentailers to use their own costs and methods reduces their burdens, but increases that of the Authority and other stakeholders, since the views of stakeholders with different interests to those of the gentailers are vital to the Authority's ability judge the gentailers' tests. Use of gentailers' costs and methods also trades off frontend investment in developing a standardised process for a substantial increase in backend processing.

22. The first trade-off shifts the burden of effective regulation from the four largest businesses in New Zealand's energy sector to the Authority, independent retailers, independent generators, and consumer groups, who are considerably smaller and less able to efficiently undertake this burden. Imposing a more standardised approach on gentailers, to the extent that would increase their burden, in all likelihood is more efficient than imposing high interpretation costs on the Authority and adversarial stakeholders. The gentailers' scale provides them with greater access to expertise at lower costs than would apply to the Authority and other interested stakeholders.

23. Of equal or even greater concern, the Authority is also implicitly trading off the upfront cost of developing a standardised test, for example, based on an REO, against the costs of ongoing backend analysis, the present value of which is likely to be exceptionally high. Under the Authority's proposal, substantive analysis of whether four sets of RPCAs were likely to violate s.36 (described in more detail in Section 2.2 below) would be required every six months. Yes, the Authority's proposed RPCAs could be effected quickly, and would impose relatively light costs on the gentailers. But, the proposed RPCAs will require substantive forensic effort on the part of the Authority and other interested stakeholders every six months. The present value of the cost of such efforts would be large, and could be substantially reduced by material upfront investment in standardised REO-based tests.

24. We discuss below the benefits of allowing stakeholders or their proxies access to the data used in the RPCAs subject to appropriate protection of commercial-in-confidence data. This raises a further point in favour of REO-based tests: being standardised, they would be less reliant on individual gentailer's data and thus would require less sharing of commercial-in-confidence data.

International regulatory practice

25. The Authority refers to a number of international examples of use of either an As-Efficient Operator (AEO) or a REO, some of which are in the context of competition law, and concludes that the literature and cases are not definitive on what cost standard to apply. The Authority has cited the European Commission in relation to competition law analysis of margin squeezes. However, it is more appropriate for a regulator applying non-discrimination tests to have

regard to regulatory practice rather than case law on margin squeeze assessment. Case law is shaped by the specific legal framework and judicial tests of a particular jurisdiction, whereas regulators generally share a broader policy goal of promoting effective competition.

26. As a result, the European Commission's Recommendation that guides National Regulatory Authorities (NRAs) on non-discrimination obligations, equivalence of inputs, and costing methodologies for broadband and next-generation access regulation across the EU is a more relevant reference. That 2013 Recommendation identifies the use of the as-efficient cost standard, but then describes the situations in which REO costs may be more appropriate:

> *Where specific market circumstances apply, such as where market entry or expansion has been frustrated in the past, NRAs may make adjustments for scale to the SMP operator's costs, in order to ensure that economic replicability is a realistic prospect. In such cases, the reasonably efficient scale identified by the NRA should not go beyond that of a market structure with a sufficient number of qualifying operators to ensure effective competition.*[5]

27. Following the publication of that Recommendation, the Body of European Regulators for Electronic Communications (BEREC) published guidance on economic replicability tests in 2014, which discussed the choice of cost base in light of the Recommendation. BEREC highlighted that justification of the Equally Efficient Operator (EEO) cost standard relies on static efficiencies whereas the REO could be used where dynamic efficiencies are expected to overcome static inefficiencies.[6]

28. The BEREC publication also discussed the results of its survey on National Regulatory Authorities' (NRAs') use of the costs of the REO, the EEO, or adjusted EEO,[7] in which it found that:

> *A majority of the NRAs who answered the questionnaire and implemented a margin squeeze test, have replied that they use the REO/adjusted EEO test (12 NRAs), while 9 NRAs answered that they use the EEO test.*[8]

29. Over time there has been some change in the use and specification of non-discrimination tests when structural changes have occurred in the telecommunications sector (for example, in Italy the replicability test is no longer required following structural separation of the incumbent telecommunications network) or as retailing markets have evolved (for example, as entrants market shares have grown). However, a 2025 survey found that 10 NRAs (including France and Germany) continue to use a test based either on REO or adjusted EEO, with 10 using the EEO cost standard.[9]

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[5] Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment, (2013/466/EU)

[6] Body of European Regulators for Electronic Communications (5 December 2014), "BEREC Guidance on the regulatory accounting approach to the economic replicability test (i.e. ex-ante/sector specific margin squeeze tests)", p. 9.

[7] The adjusted EEO approach uses the EEO costs as a starting point but allows for adjustment to reflect differences in the scale and scope of an efficient alternative operator compared to the incumbent.

[8] *Ibid*, p. 18.

[9] Cullen International (10 March 2025), "Two thirds of the European countries impose replicability tests" https://wwworigin.cullen-international.com/news/2025/03/Two-thirds-of-the-European-countries-impose-replicability-tests.html

30. In sum, regulatory examples, which are more relevant than case law, suggest that REO costs have been commonly used.

2.2 Option for the Authority to use REO analysis to assist with interpretation of the RPCA results

31. Despite the above discussion, if the Authority were to stick with the use of gentailer costs in the RPCA, then the Authority must be reasonably able to identify when a gentailer-cost RPCA would be passed even though prices threaten the viability of independent retailers who may be a primary source of competitive price pressure.

32. To reduce this risk, and indeed to achieve the Taskforce's desired outcomes, the Authority must undertake its own REO analysis in the light of the submitted RPCAs. It is necessary that each gentailer's actual and implied prices ensure viability of an REO.

33. This on its own would place a burden on the Authority. A natural way to ease this burden would be to rely on adversarial interests, allowing stakeholders such as independent retailers and consumer groups to provide their own REO analysis of the RPCAs, subject to appropriate confidentiality protections. For example, it may be inappropriate for anyone with a direct commercial interest in an independent retailer to have access to confidential gentailer data. Instead, stakeholders could hire outside consultants to analyse the RPCAs. These outside parties, subject to reasonable (as determined by the Authority) gentailer veto, would sign non-disclosure agreements developed by the Authority. They could then analyse the RPCAs, including by replacing where relevant, gentailer with independent retailer costs.

34. In fact, such an approach applied broadly would greatly enhance the Authority's regulatory capabilities.

2.3 Inclusion of shared and common costs

35. We agree with the Authority that the RPCA must include a contribution to shared and common costs. Only in unusual circumstances would firms maintain a line of business that cannot make a material contribution to costs it shares with other business lines.[10] In a world of substantial uncertainty, a line of business is not viable if it perpetually straddles the knife edge between covering avoidable costs and not.[11]

36. Thus, we do not consider what the Authority terms the "usual" interpretation of the as-efficient competitor standard, even if it were in fact the usual interpretation, as being commercially appropriate. The Authority writes, in ¶3.3,

> *One of the differences between a generic application of the… [REO vs as-efficient competitor] tests can be the approach to common costs. The as-efficient competitor standard is usually interpreted as applying a long-run avoidable costs approach. As*

[10] One example would be a new product line that is expected to eventually more than recover any initial losses it might make, including ultimately making material contributions to shared and common costs. Another would be a loss-leader that generates sales in other areas. The US example of Costco's $1 hot dogs comes to mind, the costs of which are small, while its symbolism looms large.

[11] For the same reason, firms, when greenlighting a new line of business, routinely require projected rates of return that are well above breakeven levels, even after accounting for returns to capital.

> *the Commission put it: "long-run average avoidable costs do not include an allocation of common costs shared between the relevant downstream*

37. Recognising that in the long run, by definition, all costs are avoidable, we understand the Authority here as saying that the as-efficient competitor standard would require revenues to at least recover all costs directly attributable to, in our specific case, retailing. The Authority suggests further that under the "usual" interpretation, no contribution to costs shared between retailing and wholesaling would be required.[12]

38. It is algebraically true that a line of business that contributes a fraction of a cent toward shared costs would be profitable, so would be undertaken by an algebraically modelled firm. However, as already noted, in practice firms require substantial leeway for the uncertainties inherent in estimates of a line of business's profits. Consequently, maintaining a line of business that has near zero expectations of economic profit only occurs in exceptional circumstances. A pro-competition exceptional circumstance cannot be that maintaining a retail arm allows gentailers to prevent independent retailer competition from sustaining lower prices than otherwise would obtain.

39. Reflecting this, regulators commonly incorporate shared and common costs in replicability tests, and the treatment of these costs is a distinct decision from the question of whether to use the as-efficient or REO cost standard. For example, the European Commission, in its Recommendation that describes how non-discrimination tests should be applied by regulators specifies that:

> *NRAs should ensure that the margin between the retail price of the SMP operator and the price of the NGA wholesale input covers the incremental downstream costs and a reasonable percentage of common costs.*[13]

40. That part of the European Commission's Recommendation applies regardless of whether an NRA uses the costs of an as-efficient operator or a REO.

3 Other comments on the RPCA

3.1 Requirements for methodological consistency over time

41. In a range of respects, the Authority defers to the gentailers on the methods applied in developing their RPCAs. Two important examples are on cost allocation (as described in A.59-A.60 of the Consultation Paper) and estimation of the cost of electricity supply (A.81-83). We recommend that the Authority requires that a gentailer's chosen methods be consistent across all RPCAs and should remain consistent over time with stringent restrictions on updating. The gentailers have a far better understanding of their businesses than anyone else and hence can choose approaches that most advantage them. To allow them material flexibility in changing those approaches would create irresistible incentives to game the RPCA.

42. We recommend language along the following lines: "To reduce the burden on gentailers, and in recognition of the Authority's limited understanding of the gentailers' businesses, in many

[12] As an aside, overhead costs that are scalable are avoidable. For example, if a smaller headquarters building would be called for in the absence of a retailing unit, then the cost difference between the actual and the smaller building is avoidable. The only shared cost is that of the smaller building.
[13] European Commission (2013), Clause 64.

cases, the Authority allows the gentailers to use their own methods in developing the RPCA. Examples include cost allocation and estimation of the cost of electricity supply. However, the Authority requires that the gentailers use the same approaches across all RPCAs. Further, and in deference to the gentailers' deep knowledge of their own businesses, the Authority will only allow the gentailers to change their chosen methods if the Authority finds that no change would materially and manifestly harm the Authority's objectives."

43. While the Authority does have a requirement for consistency over time in the case of the estimated cost of electricity supply, at paragraphs A.83-A.84, we believe that language is too vague and would result in gentailer gaming of the RPCAs.

3.2 Further guidance on cost categories

44. We also recommend that the Authority identify standard cost categories as a means of making comparisons across gentailers easier. It is common practice for regulators to identify cost categories. For example, BEREC's guidance on economic replicability tests identifies the following retailing cost categories:

    a. marketing,

    b. customer acquisition,

    c. billing

    d. customer care,

    e. bad debt,

    f. Customer Premises Equipment (CPE)/distribution of CPE, and

    g. product development/management as relevant costs of retail operations.[14]

45. While CPE is not relevant to electricity retailing (unless bundled with other services), metering and data would be an obvious addition. Other relevant categories could include IT systems, and corporate overheads.

3.3 Scrutiny of the RPCA tests

46. We support the Authority's forward-looking approach, which would have the RPCA based on expectations, as that is consistent with the commercial decisions all parties make (see, e.g., A.30(3)). However, it is inappropriate for the Authority to say, as it does at A.12, "The Authority does not, at this point, intend to test or make any judgment on the accuracy of recorded expectations by looking at outturns, unless there are material doubts about the credibility or good faith of the recorded expectations. We are open to reconsidering this stance in the future."

47. We suspect the Authority's intention is that it does not intend to call out mistaken forecasts if there is no indication that they weren't made in good faith. That is quite different to saying the Authority will not test or make any judgement on the accuracy of recorded expectations. A key indicator of a lack of good faith in forecasting, whether intentional or due to negligence, would be a string of probabilistically implausible forecast failures that harm independent retailers.

[14] BEREC (2014), section 2.2.3.

Thus, we recommend replacing A12 with, "The Authority recognises that an RPCA based on expectations will sometimes be wrong ex-post, in some instances with the outturn being unable to pass the RPCA. We will not consider random outturns of this form a *per se* evidence of a problem. However, the Authority will consider a string of outcomes that improbably fail the RPCA as suggesting gentailer discrimination." We believe explicit recognition of these circumstances as being indicative of bad faith or negligence will serve to promote both competition in and the efficient operation of the electricity industry.

48. More generally, there is no escaping the necessity for the Authority to apply its own expertise in analysing the RPCAs. While important, auditing for accounting accuracy and consistency is not enough to ensure that the tests are serving their intended function. It is necessary to scrutinise whether the tests are good indicators of competitive viability.

3.4 Interpretation of the RPCA tests

49. We agree with the Authority that the RPCA regardless of how it is defined and implemented, has the following characteristics:

- It can only be an indicator and not a bright line test of whether a gentailer is discriminating on the price of risk management contracts it makes available to independent retailers.
- It cannot provide evidence as to whether a gentailer's behaviour is discriminatory in other respects, such as "access to risk management contracts, or inappropriate use of market power in the pricing of individual risk management contracts."
- It need not necessarily imply a violation of s.36 of the Commerce Act, nor would a violation of s.36 require a failure of an RPCA.

3.5 Specification of the tests and frequency

50. We agree with the Authority's proposal to set the RPCA margin to the retail price for the period ahead less expected non-electricity costs and less expected cost of electricity. We agree also that the expected cost of electricity be valued at observed market prices *as if* the cost for all that electricity was fixed with risk management contracts at observed market prices (see A17-A18). This second proposal assesses whether a gentailer's retail prices are consistent with observed hedge prices, which is to say market rather than firm valuations, making use of, where available, objective publicly available data. However, we emphasise that here again it would be inappropriate to rely on gentailers' energy costs if gentailers are able to obtain energy at lower prices than retailers due to scale – for example, through hedge contracts that are not available at lower volumes.

51. As an aside, the Authority's preference for objectivity here, goes exactly to the value of consistent RPCA application, and ideally a standardised RPCA. Judgement is necessary in identifying the optimal portfolio across hedges, including the market in which the hedges are bought. If those judgements are being made by gentailers, then, at a minimum, they must be consistently applied. One way of achieving this, as well making comparisons across gentailers more transparent, would be to standardise the portfolios or at least the methods used for portfolio construction in the RPCAs.

52. We also support conducting the RPCAs every six months. Six months is sufficiently short to prevent any harms a pricing strategy might bring from becoming either substantial or, worse,

irreversible (A.27). We similarly support the guidance provided for undertaking an RPCA found in paragraphs A.28-A.30.

3.6 Granularity of tests

53. We broadly agree with the comprehensive range of tests proposed in A.31-53, with separate tests for new and existing customers, across network regions and for each brand. However, we make three suggestions.

54. First, we recommend a firm-wide test across all retailing also be applied as a means of illustrating the profitability of the retail operation where all retail costs are fully attributable. This should involve minimal burden, since it will largely amount to aggregating the gentailer's disaggregated RPCAs.[15]

55. Second, we recommend the Authority explicitly say that should the gentailers begin marketing new products or brands or addressing with new prices particular customer segments, then they should produce RPCAs for these. This is important, since measuring specific things creates an incentive to develop production and prices in ways that avoid measurement.

56. Third, we recommend that the tests are separated by customer group – for example, Residential, SME and Large Commercial. Doing so is common practice internationally in the application of non-discrimination and replicability tests and reflects that pricing can vary significantly across customer groups.

[15] If the Authority continues with its proposed approach of including a contribution to fixed and common costs, and that approach were to require a full accounting of these, that is, the sum of costs across all the tests would capture all retail costs, then this test is merely an aggregation of the information from other granular tests. If, instead, an avoidable methodology was adopted (which we don't recommend) then depending on how it was implemented, a test across the sum of all retailing activities would capture a wider group of costs. However, for the reasons we have given above, it would not be appropriate for avoidable retail costs to only be considered in the aggregate test. Consistent with commercial practice, retailing should in fact contribute toward costs shared between retailing and other lines of the gentailers' businesses.

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Emma Ihaia specialises in competition analysis and regulatory economics, with 25 years of experience in this field. Emma has been retained as an expert in the context of regulatory investigations and consultations, and has prepared competition assessments for merger clearances, authorisations, and market studies.

Non-discrimination and price squeezes in the presence of vertical integration have been a specialty area for Emma, both in a regulatory and competition law context. She advised both Telstra and Telecom Italia on methodologies for testing for non-discrimination and assisted them with the associated internal compliance programmes. She also advised Telstra through the process of developing operational separation measures, focussing particularly on the imputation tests that Telstra was required to publish to demonstrate price equivalence between internal and external wholesale pricing.

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