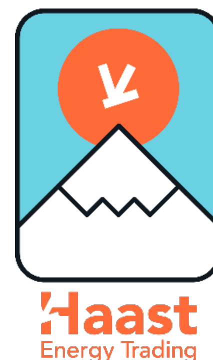

19 June 2024

Electricity Authority
WELLINGTON

By email only (uts.2024@ea.govt.nz)

PRELIMINARY DECISION ON FEBRUARY 2024 INVESTIGATION OF AN UTS

Haast Energy Trading Ltd (**Haast**) welcomes the opportunity to comment on the Electricity Authority's preliminary decision on whether an undesirable trading situation occurred following 16 February 2024 (the **Preliminary Decision**).

In summary, the Authority considers the High Court's judgment in *Haast Energy Trading Ltd v Electricity Authority* [2024] NZHC 195 of 16 February 2024 (**Judgment**) has given rise to an undesirable trading situation (**UTS**). The Authority is considering whether to re-price trading periods 38 and 39 on 9 August 2021 (**TPs 38–39**) by stripping-out the impact of the demand management steps taken by the System Operator.

Haast has prepared comments on the Preliminary Decision, which begin overleaf. In summary, Haast's position is as follows:

1. The Judgment has not given rise to a UTS. Nor can the Judgment provide the basis for a UTS investigation, particularly as the Judgment simply corrects a legal error made by the Authority in respect of the imposition of scarcity pricing to trading periods 39–42 on 9 August 2021.

2. The Judgment did not relate to TP 38, because TP 38 was never subject to scarcity pricing. Accordingly, the Judgment cannot give rise to a UTS in connection with that trading period.

3. In substance, the focus of the Preliminary Decision is on the impact of demand management on the price for wholesale electricity in TPs 38–39, which suggests the Authority is actually concerned about the disconnections that occurred during those trading periods. The Authority is not actually concerned with scarcity pricing (or its absence). In particular, the analysis in part 10 of the Preliminary Decision does not arise out of, or relate to, the Judgment.

4. The Authority is time-barred from commencing a(nother) UTS investigation into the events of 9 August 2021: see cl 5.1A of the Code. The Authority has known about the disconnections on 9 August 2021 since they occurred. Those disconnections — and their impact on prices — do not arise from the Judgment.

5. In any event, to now consider re-pricing two historic trading periods would undermine price certainty and, therefore, the integrity of and confidence in the market. Concerns that prices may be subject to retrospective ad hoc review outweigh any overly-simplistic concerns about the need to incentivise fast start generators.

Stepping back, it is clear the Preliminary Decision relates to the demand management steps taken by the System Operator on 9 August 2021. It has little to do with the Judgment, which is simply a convenient basis for the Authority to attempt to re-open the events of 9 August.

Haast trusts the Authority will take its position into account before it issues its final decision on whether a UTS occurred following 16 February 2024.

For the reasons given by Haast, it is clear that a UTS has not occurred.

Yours faithfully,

Phillip Anderson
Managing Director, Haast Energy Trading

HAAST'S COMMENTS ON THE PRELIMINARY DECISION

The Preliminary Decision

1. The Authority has decided to investigate whether the setting of final prices for trading periods 38 and 39 (**TPs 38 and 39**) could threaten confidence in, or the integrity of, the wholesale market following the judgment of the High Court in *Haast Energy Trading Ltd v Electricity Authority* [2024] NZHC 195 (the **Judgment**).

2. The Authority's preliminary view *"is that confidence in the wholesale market is threatened, or may be threatened, by prices being determined by offers in conjunction with demand management in circumstances where participants would expect higher prices to apply"*.[1]

3. The Authority's preliminary view is premised upon *"prices for trading periods 38 and 39 being artificially depressed as a result of the system operator's notices to reduce demand, combined with the absence of scarcity pricing"*.[2]

4. The Authority has invited feedback on all aspects of its Preliminary Decision.[3]

The UTS is about TPs 38 and 39

5. Before commenting on the Preliminary Decision itself, it is important to make a preliminary observation about the scope of the Authority's investigation.

6. The Authority's investigation solely concerns TPs 38 and 39 of 9 August 2021. That is made clear by the Authority in its introduction to the Preliminary Decision in Part 2, which provides as follows:

   What this consultation paper is about

   2.1 The purpose of this paper is to seek feedback from interested parties on the Authority's preliminary decision on the UTS, which is that prices for trading periods <u>38 and 39</u> being artificially depressed by demand management, in circumstances where participants would expect higher prices to apply…may threaten confidence in the wholesale market. […]

   2.3 The Authority welcomes feedback on all aspects of this preliminary decision and is particularly interested in the sector's views on the following issues:

   (a) whether prices in trading periods <u>38 and 39</u> were artificially depressed as a result of demand management by the system operator […]

   (Emphasis added).

7. That the Authority is only investigating TPs 38 and 39 is reinforced elsewhere in the Preliminary Decision, including:

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[1] Preliminary Decision at pg 2.
[2] Preliminary Decision at pg 2.
[3] Preliminary Decision at [2.3].

(a) The summary of the Authority's preliminary views in [8.1], [10.20], [12.1] and [12.3], which are confined to TPs 38 and 39; and

(b) The Authority's analysis in Part 10 of the Preliminary Decision, including at [10.7]–[10.19], which relates solely to TPs 38 and 39.

8. The substance of the Preliminary Decision is consistent with the focus of the Authority's investigation being TPs 38 and 39. The Preliminary Decision investigates the impact of the System Operator's steps to manage demand on prices in TPs 38 and 39.

9. By *"demand management"*, the Authority means the System Operator's decision to issue a series of Grid Emergency Notices (**GEN**) between 5.10pm and 9.01pm on 21 August 2021.[4] The most significant of the GENs were issued at 6.47pm and 7.09pm. The practical effect of these notices was that five line-companies disconnected customers to achieve reductions in demand.

10. The System Operator gave notice that the grid emergency had ended at 9.01pm. It was not until 11.54pm that the System Operator issued the Island Shortage Situation Notice (**ISS Notice**). The Judgment confirms that the ISS Notice wrongfully led to the imposition of scarcity pricing for trading periods 39–42 on 21 August 2021 (**TPS 39–42**).

11. It follows that the Preliminary Decision is inarguably about the System Operator's demand management and the impact of those steps on the price of wholesale electricity in TPs 38 and 39.

12. Relatedly, this helps to emphasise what the Preliminary Decision is not about; it is not about the Judgment, the ISS Notice or the wrongful imposition of scarcity pricing to TPs 39–42.

13. The Judgment was concerned solely with the (mis)application of Scarcity Pricing to TPs 39–42. The Court did not consider trading periods 37 and 38.

14. The consequences of the Preliminary Decision's focus on demand management, rather than the wrongful imposition of scarcity pricing, is discussed below.

The Authority is time-barred from considering TP 38

15. The Authority is unable to consider whether an undesirable trading situation has occurred in respect of TP 38.

16. The Authority is prevented from investigating an undesirable trading situation if 10 business days or more have passed since the situation occurred.[5] Clause 5.1A of the Code provides: *"the Authority must not commence an investigation if more than 10 business days have passed since the situation, which the Authority suspects or anticipates may be an undesirable trading situation, occurred."*

[4] See Preliminary Decision at [7.3]–[7.10].
[5] See Clause 5.1A of the Code.

17. It has been more than 10 business days since the situation relating to the setting of prices for TP 38 occurred. Contrary to the Authority's apparent position, the Judgment — and the wrongful imposition of scarcity pricing more broadly — does not relate to TP 38.

18. Scarcity pricing only ever affected TPs 39–42. The ISS Notice stipulated the island shortage situation started at 7pm and ended at 8.30pm and the Grid Emergency Report identified the grid emergency started at 7pm and ended at 9.00pm. That is, these notices implicated TPs 39–42 but not TP 38.

19. Scarcity pricing was never applied to TP 38, which relates to the time period from 6.30pm–7.00pm. The Authority acknowledges this at [3.32]–[3.33] of the Preliminary Decision, where it notes scarcity pricing applied to, and the Judgment implicated, TPs 39–42.

20. As noted above, the Authority has suggested that what has given rise to the Preliminary Decision in respect of TPs 38–39 is the Judgment, which was delivered on 16 February 2024. In correspondence, the Authority stated: *"The situation that the Authority is investigating is the setting of prices following the High Court judgment. The Authority commenced the investigation within 10 days of the judgment being issued."*[6]

21. But the Judgment did not relate to TP 38. The Judgment was solely concerned with the wrongful application of scarcity pricing to TPs 39–42. The Authority acknowledges this at [3.33] of the Preliminary Decision, where it states *"[t]he High Court decision referred to trading period 39–42 as these were the periods that scarcity pricing applied to."*

22. The Judgment concluded that *"[t]he imposition of scarcity pricing triggered in error should now be corrected."*[7] And that is what happened when the Pricing Managing finalised prices for TPs 39–42 without the imposition of scarcity pricing. Again, the Preliminary Decision recognises that the Pricing Manager was *"required to recalculate prices without the application of scarcity pricing for the <u>four trading periods</u>"* (emphasis added).[8]

23. The Authority cannot now investigate TP 38. In fact, the Authority has already investigated the circumstances surrounding TP 38 and earlier concluded they did not give rise to the UTS.[9] The events of 9 August 2021 occurred more than 10 working days before the Authority commenced the investigation leading to the Preliminary Decision. The demand management on that date was nearly 3 years ago.[10]

24. Accordingly, the Authority cannot (re)investigate an undesirable trading situation in relation to TP 38.

The Authority is time-barred from considering TP 39

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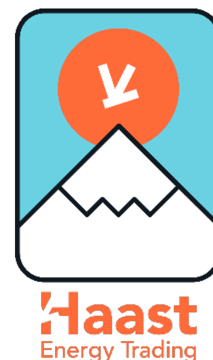
6 Letter from the Authority to Haast dated 27 March 2024.
7 Judgment at [120].
8 Preliminary Decision at [3.29].
9 See Preliminary Decision Paper dated 16 December 2021. This is addressed below.
10 The Authority was aware of the disconnection affecting TP 38 shortly after it occurred. As outlined below, there is no requirement to show when the Authority became aware of *"the situation"*. Nor is there a *"reasonable discoverability"* threshold (*cf* s 52 of the Act). The Authority expressly eschewed such a threshold when it considered potential reforms to the UTS provisions in 2013.



25. Just as TP 38 is time-barred, so too is TP 39.

26. The Authority's re-calculation of prices for TP 39 in Part 10 do not involve the application of scarcity pricing. Instead, the re-calculations attempt to account for the impact of demand management on TP 39.

27. The impact of demand management on TP 39 is something that occurred well outside the 10 business-day timeframe in cl 5.1A and is an event the Authority has known about since 2021.

28. The re-calculations that occur in Part 10 are not prompted by or related to the Judgment. These are calculations the Authority could have undertaken itself, in the original UTS, independently of Haast's appeals in July 2022. However, the Authority chose not to.[11] It cannot attempt to do so now.

29. Accordingly, the Authority is time-barred from considering whether a UTS has arisen in respect of TPs 38 and 39. This must spell an end to the Authority's investigation.

30. If the Authority were to accept that a UTS investigation is time-barred in respect of TP 38, no useful purpose would be served by focussing solely on TP 39. As the Authority acknowledges at 10.7 of the PDP, the vSPD analysis it has undertaken shows that the largest effect of adding back the disconnected demand occurs within TP 38. The remaining impact on TP 39 is so immaterial (and historical) it is doubtful whether the integrity of the market, as a whole, could be said to be affected.

31. Without prejudice to this position, Haast comments further on whether a UTS has arisen in respect of TPs 38 and 39.

The Authority has already determined no UTS arose in relation to TP 38

32. The Authority has already considered whether a UTS arose in relation to TP 38.

33. The Authority reached the view that no UTS had arisen in respect of TP 38 from as early as 16 December 2021, when the Authority issued its initial PDP in relation to the events of 9 August 2021.

34. Nothing has changed in relation to TP 38 since the Authority's initial PDP was released in late-2021. As above, the Judgment does not address or consider TP 38. The Authority cannot now revisit its earlier conclusions in respect of TP 38 because it is time-barred from doing so under cl 5.1A.

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[11] For the avoidance of doubt, it is not necessary to show that the Authority became aware of the occurrence giving rise to the potential UTS within the 10-working day timeframe. However, the Authority was aware of other potential measures of loss or quantification in relation to TP 39 well before it commenced the current UTS. At paras [119] and [129] of the Authority's synopsis filed in the High Court, on 20 February 2023, the Authority expressly refers to the possibility of re-pricing TP 39 (- 42) in the absence of scarcity pricing. The Authority was also invited to undertake alternative analysis of harm, or loss, by the Major Energy Users Group on 3 February 2022 (such as estimating the Value of Loss Load – VoLL) resulting from the disconnection of approximately 34,000 consumers (see COA [570]).

35. In any event, the Executive Summary of the December 2021 PDP makes it clear the Authority has already considered whether a UTS had arisen in relation to TP 38. The Summary states (inter alia): *"Having investigated the alleged UTS relating to this event, the Authority has reached the preliminary decision that a UTS did not occur in relation to trading periods 37 to 42 on 9 August 2021… The market operated as expected, and the events lasted for a relatively short time period. As a result, there was no situation that threatened, or may have threatened confidence in or integrity of the wholesale market."*[12] (Emphasis added).

36. The December 2021 PDP also makes clear that the Authority was considering the same events and occurrences in respect of TP 38 as it is proposing to (re)consider now. The December 2021 PDP refers to the actions of the System Operator, namely the issuance of the GEN at 6:47pm which requested distributors to shed load, which, in turn, led to disconnections.[13]

37. In fact, the Authority refers to content from the December 2021 PDP and adopts it for present purposes. For example, Figure 2 from the December 2021 PDP is reproduced as Figure 1 in the current Preliminary Decision. The graph shown in both PDPs is said to illustrate the timing of the System Operator's GENs and the timing and approximate magnitude of customer connections.[14] This data has not changed since it was set out in the 2021 PDP.

38. The Authority concluded in 2021 that: *"Having investigated the alleged UTS relating to this event, the Authority's preliminary decision was that a UTS did not occur in relation to trading periods 37 to 42, on 9 August 2021. In this particular context, the Authority found the decisions made by the system operator… were reasonably open to [it] in the circumstances. The market operated as expected and the events lasted for a relatively short time period."*[15]

39. There is no basis to re-open that decision in respect of TPs 38 and 39.

The appropriate scope and use of the UTS provisions

40. If the Authority is not prevented from considering TPs 38 and 39, the Authority's investigation in relation to TPs 38 and 39 is not an appropriate or lawful use of the UTS provisions in the Code.

41. First, the UTS provisions are supposed to respond to a situation which has developed or is developing. The UTS regime is supposed to respond to a dynamic situation in the wholesale market which affects trading in a way not intended by the Code.

42. There is nothing dynamic or developing in respect of TPs 38 and 39 on 9 August 2021. As above, the Authority is only concerned with the demand management issues which have been in existence since 2021.

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[12] See also [1.9] of the December 2021 PDP: "… at UTS did not occur in relation to trading periods 37 to 42."

[13] See [7.5] and [7.12] of the December 2021 PDP. TP 38 lasts between 6:30pm and 7pm and so necessarily includes the GEN issued at 6:47pm. The Authority also recorded in this PDP that only TPs 39–42 were affected by scarcity pricing at [6.6].

[14] See [7.2] of the Preliminary Decision.

[15] See [10.1] of the December 2021 PDP. See also the Authority's conclusion in the FDP, dated 28 June 2022, at [7.1]: "Having investigated the alleged UTS relating to this event and reviewed all the submissions received, the Authority's conclusion is that a UTS did not occur during Trading Periods 37 – 42 on 9 August 2021".

43. Second, the UTS provisions were amended in 2013 to curtail, not enlarge, the scope and reach of the UTS regime. A 10-day limitation period was added, which reinforces the point above; that the UTS regime is intended to respond to a dynamic and recent occurrence.

44. Further, cl 5.2(2A)(b) of the Code was added to provide expressly that while the Authority *might* be able to direct a participant to undertake a certain course of action that would otherwise be inconsistent with the Code, the Authority could not direct a participant to take such a step if that would be contrary to the Electricity Industry Act 2010 (the **Act**) or the law.

45. Here, the High Court required the removal of scarcity pricing from TPs 39–42. Such a direction by the Court has the force of law. For the Authority to direct the Pricing Manager to re-price TP 39 would be contrary to law, as it would undermine or circumvent the Judgment. That cannot have been the intended effect of the UTS regime. If the Authority disagreed with the Judgment, it could have appealed. It did not do so.

46. Stepping back, the events of 9 August 2021 have been thoroughly reviewed by multiple agencies. It appears to be accepted by all participants that the System Operator breached the Code and issued defective notices during the emergency, including the ISS Notice that wrongly led to the imposition of scarcity pricing to TPs 39–42. The Judgment confirms this.

The UTS provisions respond to developed or developing dynamic events

47. Part 1 of the Code defines a UTS as any situation that threatens, or may threaten, confidence in or the integrity of the wholesale market.

48. To interpolate, it is difficult to see how a High Court judgment that had the effect of confirming that scarcity pricing was not triggered under the Code could ever *"threaten"* confidence in, or the integrity of, the wholesale market.

49. Part 5 of the Code addresses UTS investigations in more detail. Clause 5.1 relevantly provides:

> If the Authority suspects or anticipates the development, or possible development, of an undesirable trading situation, the Authority may investigate the matter.

50. This clause anticipates the Authority investigating a situation that has recently arisen and is dynamic in nature. In contrast, the Judgment merely corrected the misapplication of scarcity pricing in relation to trading periods that, on any definition, are now historic.

51. Clause 5.1(2) also provides examples of situations that might constitute a UTS. While these are not exhaustive, they are self-evidently illustrative. The Preliminary Decision does not suggest any of the examples given under cl 5.2(a) to (f) arise here.[16] Again, as the Judgment is corrective of a legal error (misapplication of scarcity pricing), it does not fit within the definition of a UTS.

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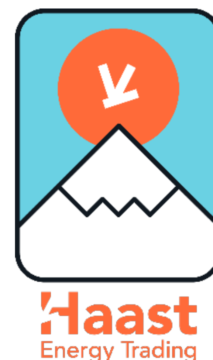
[16] The Judgment corrected a *"material breach of the law"* because the Court found the imposition of scarcity pricing to be contrary to the Code.



52. Clause 5.2 reinforces the dynamic nature of the UTS provisions because it outlines the steps the Authority may take to *"correct"* a UTS. What is said to have given rise to a UTS here is the Judgment, which the Authority chose not to appeal. The idea that the Authority has the ability to *"correct"* a UTS arising out of the Judgment, which correctly applies the Code, is unsustainable.

Amendments to the UTS provisions in 2013

53. Following the judgment in *Bay of Plenty Energy v Electricity Authority*,[17] the EA undertook extensive consultation with market participants about proposed amendments to the UTS provisions. The consultation resulted in a decision paper issued on 17 June 2013.[18]

54. Importantly for present purposes, the UTS provisions were amended to include:

    (a) A 10-business day time limit for investigating potential UTS breaches; and

    (b) A clause which clarified that the Authority cannot direct participants to take remedial action if to do so would be contrary to law.

55. These two amendments, and the rationale behind them, are addressed below.

The 10-day time bar

56. Clause 5.1A has been outlined above.

57. The UTS provisions are bookended by cl 5.5, which provides: *"The Authority must attempt to correct every undesirable trading situation and, consistently with section 15 of the Act, <u>restore the normal operation of the wholesale market as soon as possible</u>"* (emphasis added).

58. This reinforces Haast's position: there is nothing to *"correct"* here (the High Court has already corrected the misapplication of scarcity pricing) and there is nothing to *"restore"* (the real time pricing reforms (**RTP Reforms**) have replaced the scarcity pricing regime).

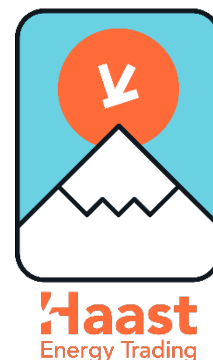
59. Prior to cl 5.1A being added to the Code in 2013, the Authority received submissions to the effect that the time limit ought to include a *"reasonably discoverability"* test. The Authority expressly rejected including such a test for the following reasons:

    (a) The Authority considered it extremely unlikely that a situation of sufficient materiality to constitute a UTS would go unnoticed for any extended period;[19]

[17] *Bay of Plenty Energy v Electricity Authority* [2012] NZHC 238.

[18] Review of the Undesirable Trading Situation provisions in the Code. Published by the Authority on 17 June 2013. Amendments to the UTS provisions were published in the Gazette on 14 June 2014.

[19] The Final Decision paper reinforces this aspect at [4.7.5]: "the Authority considers that any situation that is likely to be a UTS in the wholesale market <u>will become quickly apparent."</u> See also [4.7.6] where the Authority stated: "<u>The Authority further notes that all of the UTS claims made under the Code</u>, the preceding Electricity Governance Regulations, and (as far as the Authority is aware) before that under the NZEM rules, <u>were lodged within hours or days of the event or circumstance arising."</u> [Emphasis added].



(b) A time limit should provide more confidence that the UTS provisions can only be invoked in extreme circumstances;

(c) The UTS provisions should not be relied upon as a fix-all in place of Code amendments. The Authority expects that any situation that has gone unnoticed for a sustained period is likely to be more appropriately handled by amending the Code on a prospective basis; and

(d) The existence of a time limit on a UTS investigation promotes market certainty with respect to the republication of final prices, as discussed later in section 4.8.

60. While these reasons speak for themselves, it is useful to consider how the reasoning above aligns with the Authority's proposed course of action here.

61. First, reason (a) emphasises the UTS provisions applying in a dynamic trading occurrence. The fact that the Authority considered the relevant trading occurrence was likely to be noticed promptly emphasises the emergence of events that occur during wholesale trading periods, as opposed to many years later.

62. In the present case, a High Court decision is not a trading event that occurred within the context of a trading period. Nor is the Judgment forward-looking. The Judgment responds to, and remedies, an event that had previously occurred – the imposition of scarcity pricing.

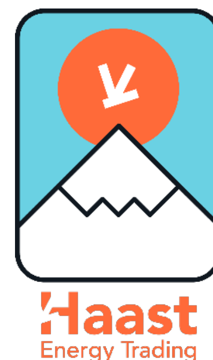
63. In 2013, the Authority expanded on its reasoning in relation to this point at [4.7.4] of the Final Decision Paper. The Paper stated: *"the Authority considers that a short, fixed time limit is important. It limits the Authority to being able to intervene only in those situations that provoke an immediate concern with respect to the confidence in, or integrity of, the wholesale market"* (emphasis added). The Authority reasoned it would not be appropriate to have time limits which were subject to a reasonable discoverability test because: *"it would leave open the potential for UTS claims to be lodged for situations in the distant past."*[20]

64. Accordingly, the Authority sought to limit its ability to intervene in historic events. It only intended to respond where a situation provoked an immediate concern. Plainly enough, there is nothing immediate about the events of 9 August 2021. The Authority was aware of the potential ramifications of an adverse result in the Judgment well before it was issued.[21]

65. Second, reason (b) emphasises the UTS provisions were only intended to apply extreme circumstances. It is difficult to see how a Judgment correcting the misapplication of scarcity pricing could constitute an extreme outcome or event.

66. Third, reason (c) is important, as the Authority recognised the UTS provisions are not a panacea. The UTS provisions should not be employed as a substitute for Code amendments. The RTP Reforms are a response to some of the perceived short-comings with the scarcity pricing regime.

[20] Final Decision Paper at [4.7.8].
[21] See for example [119] of the Authority's synopsis in the High Court dated 20 February 2023.



The Authority acknowledged in 2016 that the RTP Reforms (not then in place) would likely replace the scarcity pricing regime.[22]

67. The RTP Reforms are now in force. What occurred on 9 August 2021, including as a consequence of demand management, cannot happen again. That renders the issue in relation to TP 39 moot.

68. The definition of a UTS supports Haast's position that the scarcity pricing regime operated as intended but, if it was not fit for purpose, the Code could have been amended. By dint of the RTP Reforms, this has happened.

69. Part 1 of the Code defines a UTS as a situation which *"cannot satisfactorily be resolved by any other mechanism available under the Code"* (emphasis added). The Authority has the ability to amend the Code, which it did with implementation of the RTP Reforms. This is the *"normal application of the Code"* in action.

70. Further support for the submission that Code amendments are preferable to ad hoc use of the UTS provisions can be found in the Authority's *"Guidelines for Participants on Undesirable Trading Situations"* released in 2016. In this paper the Authority stated: *"a situation cannot be a UTS if it can be satisfactorily resolved by any other means under the Code. In other words, a UTS cannot exist if the normal application of the Code will resolve the situation."*[23] The Authority went on to say: *"The normal application of the Code includes Code amendments"* (emphasis added).

71. So, to repeat: the normal operation of the Code includes amendments to it; this has occurred through the RTP Reforms; a UTS cannot have arisen with TPs 38 and 39 because whatever issues existed at the time have been resolved by amending the Code.

72. Reason (d) is also important as it gives due emphasis to market certainty. This factor is addressed further below.

The role and relevance of the scarcity pricing regime

73. What is envisaged by the Preliminary Decision is to revisit and reprice the prices for TPs 38 and 39 as if demand management had not occurred. The Authority could have undertaken that exercise in 2021 or 2022.[24]

74. Although the Authority uses the Judgment to justify its UTS, including by reference to the incentives behind scarcity pricing, the current Preliminary Decision is not about scarcity pricing.

75. In the Judgment, extensive reference was made to the Authority's Consultation Paper on scarcity pricing.[25] The result of the Authority's consultation was that one event – and only one event – was adopted as the *"trigger"* for SP under the Code.[26] Consistently with the Consultation Paper

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[22] See Scarcity Pricing Code Amendments Final Decision Paper (2016) at 4.2.
[23] At [25].
[24] See Final Decision Paper dated 28 June 2022, at [8.4] – [8.5]. [COA 34].
[25] Dated 11 July 2011, COA 332.
[26] See pages 28, 30 and 31 of the Paper at [COA 359]; [361].

and the wording of the Code, the Judgment confirmed scarcity pricing only applied where there had been an instruction to disconnect.

76. The Authority's concern appears to be that the non-imposition of scarcity pricing would disincentivise investment in fast start generators. That concern is misplaced because the Authority has not suggested that scarcity pricing should be (re-)applied to TPs 38 and 39. The Preliminary Decision's analysis of the impact of demand management suggests the price for wholesale electricity in TPs 38 and 39 could increase if adjusted. But once adjusted the price does not come anywhere near close to the floor imposed through scarcity pricing.

77. Accordingly, the Authority's analysis about the need to incentivise fast start generators by tinkering with TPs 38 and 39 is unsustainable. Fast start generators ought to have known — as the Judgment confirms — that there was a single trigger for the application of scarcity pricing and that such a trigger would rarely occur.[27] Adjusting for the impact of demand management on TPs 38 and 39 would not see prices for those trading periods approach the floor price applied when scarcity pricing occurs. And any prospective investment decisions will take into account the RTP Reforms, rather than the now-historic approach to scarcity pricing.

78. To take a case study in support of this, Nova Energy commissioned its first two peaker generators before the scarcity pricing regime came into force. Scarcity was implemented in June 2013. Nova commissioned its first two turbines well before that, as they have been operating since 2012.[28] Nova cannot have commissioned its first two turbines in reliance on scarcity pricing being an incentive.

79. Nova's most recent two peakers were completed by 2020.[29] These were commissioned when the RTP Reforms had been well-telegraphed and documented by the Authority. Nova could not have commissioned these with any expectation that the scarcity pricing regime would make these peakers economic or otherwise, at least not across their life.

80. Accordingly, the Authority's suggestion that the remote possibility of scarcity pricing incentivised the investment in fast start generators is unsupportable. It is also inconsistent with the facts that occurred on 9 August 2021.

81. On 9 August 2021, Nova first turned on three of its peakers in the morning,[30] long before there were any price signals that could suggest scarcity pricing might apply. The first GEN was issued at 5:10pm and the (faulty) DAN which requested a reduction in load was not issued until 6:27pm. That Nova decided to run its peakers made sense because forecasting data suggested high demand and short supply. These forecasts had nothing to do with the potential application of scarcity pricing.

82. Nova decided to turn on its last peaker at 4:40pm, nearly two hours before the System Operator issued its first notice requesting the reduction of demand.

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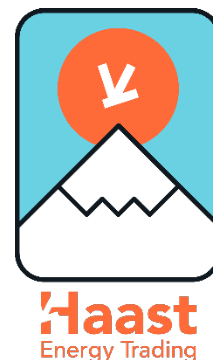
27 Scarcity Pricing Overview, 27 October 2011 [COA 467].
28 Teichart at [11].
29 Teichart [11].
30 Teichart [25].



83. The notion that participants such as Nova would be disincentivised from further investment in fast start generators is overly simplistic. Various market and regulatory forces will influence such investment decisions. An inquiry into prices in TPs 38 and 39 on 9 August 2021 will not be one of them.

The inconsistent approach of the Authority

84. In the High Court, the Authority submitted that:

(a) Re-fixing prices would be costly and would delay receipt of payments in such a way as to undermine confidence and integrity in the market;

(b) Haast's appeal was moot because of the advent of the RTP Reforms, which meant the events of 9 August 2021 (and its impact on wholesale prices) could not repeat;[31] and

(c) Haast's pricing error appeals ought to have been dismissed because the outcome of the original UTS decision could have been influenced by, or different, if the Authority had known that a pricing error had occurred.

85. These points are examined in turn. The effect of these points is clear enough: the Authority cannot say on the one hand that Haast's appeals were moot and potentially disruptive, and then ignore those same factors now.

Mootness

86. The Authority wrote in its original UTS decision at [5.58]: "when the real-time pricing reforms come into force … there will be no distinction (for pricing purposes) between electrical disconnection and other demand-reduction measures taken in real time. Indeed, scarcity pricing will not be triggered by ISS Notices at all. Instead, scarcity pricing will automatically apply whenever this is merited by the underlying (im)balance of supply and demand. *This highlights that the Code's current focus on electrical disconnection as a pre-requisite for scarcity pricing is not necessary in order to ensure integrity and confidence.*" (emphasis added).

87. In the High Court, the Authority submitted that Haast's appeals were moot in light of the introduction of the RTP reforms.[32] That must be the case for this investigation into TPs 38 and 39; it is rendered moot by the RTP Reforms, which prevent the issues identified by the Authority from repeating.

Delay and prejudice

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[31] See EA's synopsis at [122] & [124], where the EA submitted that the High Court decision would have "no precedent value" and that the interrelationship between ISS Notices and the pricing error regime has been overtaken by the RTP reforms". See also the Executive Summary of the most recent PDP: "the introduction of RTP in November 2022 will prevent the same event that took place on 9 August 2021 happening again." The PDP also records: "The particular circumstances of this situation cannot occur again…" at page 4.

[32] See [122]; [124] and the Authority's Notice of Opposition, para 3.32 at [COA 121]

88. The Authority warned about the impact of delay when opposing Haast's appeals and interim relief. The process the Authority now seeks to undertake only adds to that delay, much of which was caused by the Authority in the first place.

89. In the High Court, the Authority:

    a. Opposed interim relief when it had no evidential basis for doing so. So much is clear from the costs decision: [2022] NZHC 408; and[33]

    b. Opposed the granting of special leave in the High Court, again without any evidence of prejudice: see [44] of the Judgment.

90. The positions adopted by the Authority in the High Court only delayed the litigation.

91. While the Preliminary Decision appears to acknowledge factors such as delay, mootness and disruption, they are given relative lip-service. By contrast, in the High Court the Authority attempted to persuade the Judge that delay and prejudice were fatal to Haast's appeals.

92. Prior to the High Court appeals, the Authority seemed to regard finalising prices as critical. In its Market Brief of 7 September 2021, the Authority dismissed Haast's request to reconsider its pricing error claim. In doing so, the Authority wrote: *"as the total cost of the scarcity pricing situation for these trading periods is material, participants can be sure the invoiced amounts when they are invoiced are correct and final."*

93. In reality, nothing has changed to undermine the Authority's acknowledgement of correct and final pricing. Yet, the current UTS investigation potentially undermines both those attributes.

94. Factors such as delay and prejudice are not more acute in the context of Haast's appeals than they would be in the context of a fresh UTS investigation. Market integrity and confidence are undermined by delay and a lack of certainty. The Authority ignores this.

Conclusion

95. The Authority has already considered the events of 9 August 2021. In respect of TPs 38 and 39, the Authority determined no UTS arose. No new event or data has emerged since this decision was made in December 2021. The Authority is time-barred from re-opening or re-considering its earlier decisions in this regard.

96. The Authority's re-calculation of prices for TPs 38 and 39, in Part 10 of the Preliminary Decision, attempts to account for the impact of demand management on that Period. But the fact and impact of demand management on those trading periods occurred well outside the 10 business-day timeframe in cl 5.1A. The Authority has known about these events since 2021 when they occurred.

[33] See [36] where Gwyn J held: "I accept that … the Authority did act unilaterally – it opposed interim relief in the absence of any evidence of specific prejudice to third parties, despite the Authority having had more than a year to assess the position, and when there was no suggestion the appellants were not prosecuting the appeals promptly."

97. More broadly, the events of 9 August 2021 have been considered on multiple occasions by a number of agencies. The High Court has removed the erroneous application of scarcity pricing from TP 39.

98. The suggestion that a judgment which corrected the Authority's error of law could justify investigating a UTS is flawed and, frankly, disingenuous. The Judgment does not give rise to any new information or occurrence for the purposes of Part 5 of the Code.

99. Paradoxically, if the Authority were to re-open its investigation into TPs 38 and 39 this would undermine confidence in and the integrity of the wholesale market because it would mean that prices for historical (and limited) trading periods remain susceptible to ad hoc re-pricing decisions. That undermines the very purpose of Part 5.

100. For all these reasons, the Authority must find that there has not been a UTS in respect of TPs 38 and 39.