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## **Cross-submission on the 2<sup>nd</sup> 9 August 2021 UTS investigation preliminary decision**

2degrees, Electric Kiwi and Flick Electric (the Independent Retailers) welcome the opportunity to cross-submit in relation to the Electricity Authority's preliminary decision on whether an undesirable trading situation (UTS) occurred on 9 August 2021, following the 16 February 2024 High Court judgment in *Haast Energy Trading Ltd v Electricity Authority* [2024] NZHC 195.

We agree with the submission of Haast Energy Trading in full including, in particular, that "The Judgment has not given rise to a UTS", "Nor can the Judgment provide the basis for a UTS investigation", "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" and "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."

Meridian made similar comments questioning whether it is open for the Authority to undertake a 2<sup>nd</sup> investigation: "The Authority has already considered the events of 9 August 2021 and decided that there was no UTS. All that has changed is the High Court's decision that scarcity prices were applied in error. If the Authority disagrees with the High Court, the appropriate response may have been to appeal the decision rather than use the UTS powers in the Code to negate the impact of the decision and re-open an investigation into a period that occurred far more than 10 business days ago, well beyond the period within which the Authority is able to commence a UTS investigation under clause 5.1A of the Code."

### **Limited submissions indicate confidence was not harmed**

We would reasonably expect substantially more support for the Authority's preliminary decision, than the two brief submissions from Contact and Nova, if the Authority's preliminary view was correct that confidence was undermined, there was a UTS, and/or the outcomes of 9 August 2021 "will also mute the incentives for investment in last resort generation, which will undermine security of supply".

We do not consider either the Contact or Nova submissions provides useful support that there was a UTS.

### **It seems clear Nova wants the Authority to negate the impact of the High Court judgment**

It is surprising that "In Nova's view the Authority's analysis of the circumstances of the events on 9 August is thorough and arrives at appropriate conclusions" given the preliminary decision does not support Nova's position that scarcity pricing should be applied. It is difficult to see how Nova can simultaneously support reinstatement of scarcity pricing through the UTS mechanism and the

Authority's conclusions in the preliminary decision which does not reinstate scarcity pricing, but that is what its submission says.

The Nova submission is deficient including because it does not address that the preliminary decision relates to trading periods 38 and 39, trading period 38 was never subject to scarcity pricing, or that the concern the Authority has raised is the impact on spot pricing from curbing of electricity demand following Transpower's request (as per paragraphs 10.2-10.19 of the preliminary UTS decision).

**Contact and Nova's submissions are otherwise focussed on the policy grounds for high pricing/scarcity pricing rather than on whether confidence in the market was undermined**

The Nova submission also relies on a view that "spot market prices on 9 August 2021 do not reflect the underlying market fundamentals or provide appropriate price signals" as being the reason the Authority should declare a UTS: "As such, an undesirable trading situation (UTS) has developed for trading periods 37 – 42 on 9 August 2021." Whether prices reflected underlying market fundamentals is not the test for a UTS. The Nova submission doesn't mention confidence in the market let alone suggest confidence has been undermined. It just focusses on its policy view that scarcity pricing should apply in the circumstances of 9 August 2021.

Relatedly, the central focus of Contact's submission appears to be on policy arguments about when scarcity pricing should apply and/or spot prices should be high. There is nothing in the Contact submission that draws a link between their view about when spot prices should be high and the impact on confidence in the market if prices are "artificially depressed".

Contact's reference to confidence is limited to the circular statement that "If the market is confident that any undesirable trading situation will be resolved, it will broadly improve confidence".

**The Authority's investigation – not the High Court judgment – is creating uncertainty**

The Independent Retailers share MEUG's concern that "This event occurred nearly three years ago, yet we have no greater certainty of final prices or market decisions. This creates significant uncertainty for stakeholders, particularly for those who are (or will be) financially impacted by resolution of this event. It also reduces confidence in the regulator – a point that is acknowledged in the Authority's own consultation paper."

Meridian made similar comments: "Considering UTS matters over periods of two years or more, may itself threaten confidence in the market to the extent it creates prolonged wholesale price uncertainty. The Authority has already considered the events of 9 August 2021 and decided that there was no UTS."

We also note Nova's previous warning that "The market is investing significant sums to move to real time pricing. That is intended to improve the market's responsiveness to market conditions such as intermittent generation and demand, as well as providing greater certainty on final prices. Resorting to declaring a UTS whenever there are errors in market processes (e.g. The errors in Transpower's demand reduction instructions to network companies) would be contrary to those objectives."<sup>1</sup>

Meridian and MEUG's submissions reinforce our concern that the Authority's own actions – including the decision to undertake a 2<sup>nd</sup> UTS investigation into 9 August 2021 – could threaten confidence in, or the integrity of, the wholesale market – and not the outcomes of the High Court judgment.

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<sup>1</sup> Nova, Re: Preliminary decision on August 2021 UTS, 3 February 2022.

## **Final pricing outcomes on 9 August are irrelevant to future investment decisions**

The Independent Retailers agree with Meridian that “The passage of time and implementation of real time pricing have likely already restored the normal operation of the market.”

We also agree with Meridian “it is not possible for the situation to be repeated now that real-time pricing has been implemented” and “there are not likely any benefits” from “ensuring that prices in the wholesale market create the appropriate incentives ... because the Code has since changed.”

Meridian’s submission accords with our submission that the 9 August 2021 prices will not mute incentives for investment in last resort generation because they have no bearing or relevance to future expected spot and hedge prices and therefore will not impact investment decisions including in last-resort generation and demand management. These submission points also address the submissions by Contact and Nova about the importance of high spot prices. If Contact and Nova genuinely hold an alternative view it is beholden on them to explain how and why the 9 August 2021 pricing outcomes impact their expectations about future spot prices.

## **“A UTS finding and corrective actions may ... result in abnormal market outcomes”**

The Independent Retailers agree with Meridian’s submission that “If a UTS was found, any pricing actions to correct it would not restore normal outcomes as most derivatives will have already settled and re-settlement will no longer be possible. Any price reset would therefore create pricing outcomes that could not have been expected or foreseen by any participants, with spot settlement and settlement of financial contracts for the same periods being inconsistent. This abnormal outcome that is likely from any corrective actions, plus the passage of time to settle 9 August 2021 pricing, may itself undermine confidence in the market.”

## **Concluding remarks**

The Independent Retailers share Meridian’s concern about “whether a UTS decision and actions to correct are necessary and would benefit consumers.”

There is nothing in the six submissions that the Authority can draw on as usefully supporting its preliminary decision. Quite the opposite. The submissions of the Independent Retailers, Haast Energy Trading, and Meridian question whether the Authority has legal discretion to reconsider whether there was a UTS on 9 August 2021.

The Independent Retailers, Haast Energy Trading, Meridian and MEUG submissions also bring into question whether confidence in the wholesale market is undermined by the High Court judgment that a pricing error should be corrected. The submissions of the Independent Retailers, Haast Energy Trading, Meridian and MEUG all provide strong basis for concluding that to the extent there is a risk confidence is being undermined it is by the Authority’s own actions in re-litigating the outcomes of the High Court judgment and the original 9 August 2021 UTS investigation.

Yours sincerely,

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