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nova energy

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Submissions
Electricity Authority
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By email: UTS.2024@ea.govt.nz

Cross-submission on the Electricity Authority's preliminary decision paper on the UTS following 16 February 2024

The debate on the correct pricing for the events of the evening of 9 August 2021 has become increasingly wrapped up in the interpretation of the Code and arguments about applying a strict interpretation of the Code over the substance at issue. This is reflected in the submissions contesting the Authority's preliminary decision, and possibly in the time that it took the High Court to make its decision. Despite this, Nova contends that the decision rests on one key issue:

- If the cost of having consumers disconnected from supply during periods of high electricity demand is to be taken seriously, wholesale spot prices at such times must reflect scarcity pricing.

The other issues raised as reasons for not declaring a UTS are a distraction to that key point:

- The time elapsed in determining the final prices for 9 August 2021 has no relevance to the decision to be made. The impact on future decisions on ensuring that generation plant is available at critical times remains the same. Further, the decision should not be influenced in favour of parties that have been disputing the determination of scarcity pricing and thereby creating the delay in resolving final prices.

- The transition of the spot market to real time pricing should not be a factor in the decision. The events of 10 May 2024 illustrate that the question of incentives to provide demand response and generation during grid emergencies remains valid even under real time prices, albeit the circumstances will be different in every instance.

- Haast suggests that it would be contrary to law to find a UTS because it "would undermine or circumvent the judgment". However, the finding of a UTS in the absence of scarcity pricing would be taking an entirely different conceptual approach to the issues raised by 9 August 2021. There is nothing in the High Court judgment that precludes a finding of a UTS as outlined by the Authority – or, indeed, a broader UTS.

Nova addresses points raised in various submissions in detail in the **attached** Appendix.

Yours sincerely

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Nova submission: Cross-submission on the Electricity Authority's preliminary decision on whether a UTS occurred following 16 February 2024 (Preliminary Decision)

Submission	Reference	Response
Contact Energy	Paragraphs 2-3	"*Accurate price signals are essential for ensuring trust in the market to support commitment decisions and investment decisions.*" "*On 9 August 2021 there was 80MW of unpriced demand response. This curtailed market prices, and did not lead to the pricing the market would expect in tight market conditions.*" This is the essence of the need for declaring a UTS and recalculating prices.
	Paragraphs 5-6	Nova agrees with Contact's points regarding the need for high prices when the market is tight and that this is crucial for investment decisions. Nova similarly agrees with both Contact and the Authority that it is important to respond to this particular case because if the market is confident that any undesirable trading situation will be resolved, that will broadly improve confidence.
MEUG		"*MEUG believes that further attention needs to be given to the potential scale and role for demand-side participation within in the wholesale electricity market, and how it is dispatched alongside other resources in the market.*" Agreed.
Meridian Energy	1st bullet point	"*Meridian agrees in principle that scarcity prices are an appropriate response to the demand shedding that occurred on 9 August 2021."* Nova is supportive of the above statement.
	2nd & 3rd bullet points	"*the passage of time and implementation of real time pricing have likely already restored the normal operation of the market*" "*in practice it may be too late*" The comments above conflict with Meridian's own conclusion that: "*if that is not the case, signals to invest in and commit peaking and last resort generation and demand response will be muted, undermining security of supply in the long term and harming consumers*." These points are addressed in further detail below when responding to Haast's submission.

Submission	Reference	Response
Meridian Energy	Page 2	"*The passage of time and implementation of real time pricing have likely already restored the normal operation of the market*" Real time pricing was in fact shown to be an inadequate solution for the market when the System Operator used a range of communications to effect a reduction in demand on 10 May 2024, which also had the effect of reducing prices to below the marginal cost of demand reductions and generation. Again, these points are addressed in more detail below when responding to Haast's submission.
	Pages 4-6	These pages deal with the fact that the GEN notices would naturally be understood as requiring electrical disconnection of demand. Nova agrees with Meridian's analysis in this regard and refers to the affidavit of Charles Teichert of Nova dated 12 December 2022.
Electric Kiwi, 2degrees & Flick Electric	Front page	"*Potential precedent risks…"* The events of 9 August must be considered as a whole. Reflecting on whether one or more Trading Periods were addressed by the High Court is not relevant to the question of a UTS applying. The UTS was created by the High Court decision to ignore the substance of the events on 9 August 2021. It is the role of the Authority, and not the High Court, to address failure of the market systems to provide prices that reflect the costs of generation and the needs of consumers. If prices under conditions experienced on 9 August 2021 do not reflect scarcity, then there will be an increased risk of demand response or generation being unavailable under similar conditions in the future, with or without real time pricing.
	2nd page Point (i)	"*There was a request from the System Operator to reduce demand on 9 August, not a requirement,*" The High Court took the view that the form of the GEN notice did not satisfy the precondition for an ISS notice. The application of the Code in this way damages any confidence that generators of last resort might have in expecting due recompense for providing a service in the rare circumstances where high cost generation and demand response is desperately required. That satisfies the definition of being a UTS. Nova agrees with Meridian's submission (as set out in detail above) on what would naturally have been understood by the GEN notices – that is that demand was required to be reduced. To be focussed unduly on the form of the notices is to undermine all of the policy underlying scarcity pricing. On this, again see the affidavit of Charles Teichert of 12 December 2022. These points also address the points regarding policy made by these parties at pp 3-4.

Submission	Reference	Response
Electric Kiwi, 2degrees & Flick Electric	2nd page Point (ii)	"*Nova was the only party that joined the Electricity Authority in the High Court hearing.*" Irrelevant; it is not a vote. Nova expects there are other parties supportive of the Authority's and Nova's position; but will be financially worse off under scarcity prices. It would be difficult for them in that circumstance to justify offering resources to support the Authority's position.
	3rd page Point (iii)	"*The prices in the two half-hours on 9 August 2021 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.*" This statement is simply not supportable. Parties making financial decisions on plant maintenance, investment in demand response systems, or simply making dispatch decisions will always rely on past experience in addition to current circumstances when making those decisions. As outlined further below, in response to the submissions of Haast, Nova agrees with the statement of the Authority, at p 2 of the Preliminary Decision, that "*[i]t is important that the industry has confidence that the Authority will take any necessary action where prices have been artificially depressed, or inflated, to send the appropriate price signals to the market.*"
	Page 3	"*We therefore disagree with the Authority's conclusion that demand management on 9 August was sufficient to trigger a UTS. This would amount to a very low bar for future UTSs.*" The case for declaring a UTS in this instance is in fact far stronger than the case for declaring a UTS in December 2019, in which the Authority decided that energy offers during a period of hydro spill were higher than desirable. Here, as the Authority recognises, the reason for declaring a UTS in this instance is that the High Court judgment, in allowing for artificially low prices for the evening of 9 August 2021, has created "*a situation that threatens, or may threaten, confidence in, or the integrity of, the wholesale market, … which cannot be resolved via other mechanisms under the [Code].*"
	Page 4	The comments regarding market participant expectations are addressed above in comments on Meridian's submission. The comments regarding final pricing outcomes being irrelevant to future investment decisions are addressed below in the responses to Haast's submissions. Again, Nova also repeats its points in respect of Point (iii) above.
	Page 5	The fact that some hedge market contracts may have already been resettled following the High Court judgment is no reason for a UTS not be found. If there was a UTS, there was a UTS and it should be determined to be so accordingly.

Submission	Reference	Response
Haast Energy	Summary Point: 1	"*The Judgment has not given rise to a UTS*." The provision allowing for calling a UTS specifically provides the Authority with a broad discretion to correct for any situation where there has been a market failure that needs to be rectified to return confidence in the market. The issue of whether a UTS has occurred is not about whether or not there was a legal error. Rather, as effectively rightly recognised in the Preliminary Decision, the UTS question, is a question of substance over form.
	2	"*The Judgment did not relate to TP 38.*" Again, as rightly recognised in the Preliminary Decision, the UTS should be applied to the events of 9 August 2021, and dealt with as a whole. As rightly stated in the Preliminary Decision, at p 3: "*Given the High Court's decision, the underlying fundamentals and appropriate price signals may no longer be reflected in prices on 9 August 2021. Without the high prices from scarcity pricing, it is necessary to consider the impact of the system operator's demand management for all relevant trading periods. This includes periods 37-42.*" Here, the Judgment created the conditions which undermined the premised of the Authority's 2021 finding that there had been no UTS.
	3	"*The Authority is not actually concerned with scarcity pricing (or its absence).*" The Judgment gave rise to the UTS. The resolution of the UTS should relate to all Trading Periods impacted by the events of 9 August, and in particular demand reductions that gave rise to spot prices settling at prices well below the true marginal cost of lost consumption (scarcity prices). Further, this statement by Haast ignores clear indications about the Authority's concerns as set out in the Preliminary Decision. For example, the Authority stated, at p 3, that "*[t]he Authority considers that 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 in periods 39 to 42****, threatens or may threaten, confidence in, or the integrity of, the wholesale market.*" [Emphasis added]. The absence of scarcity pricing is, accordingly, at the heart of the Authority's concerns.
	4	"*The Authority is time-barred from commencing a(nother) UTS investigation*" Clearly the Authority (and a number of other parties) commenced investigations of the events of 9 August 2021, well within 10 business days of the event. Furthermore, the High Court Decision of 16 February 2024 initiated the current investigation, and there is nothing in the Code that suggests that an investigation of a UTS shall be restricted to the original Trading Periods that gave rise to the investigation. The discretion to investigate a UTS is a deliberately broad one – and certainly broad enough to capture the High Court judgment. As a precedent, a key part of the UTS investigation of high prices in December 2019 was to determine the specific time period for which the adjustment of prices under UTS should be applied.

Submission	Reference	Response
Haast Energy	5	"Concerns that prices may be subject to retrospective ad hoc review outweigh any overly-simplistic concerns about the need to incentivise fast start generators." It would seem that this statement directly conflicts with Haast's call for a "retrospective ad hoc review" of hydro generation price offers during the period of hydro spillage in December 2019 in which it called for a UTS. As per Nova's submission, the provision of scarcity pricing provides incentives for all generation to ensure that it is available during peak demand periods, not just fast-start generators. Haast's submission fails to acknowledge the significance of scarcity pricing on market dynamics. Further, it was the appeals by Haast in this context which undermined the previous pricing felt to be appropriate by the Authority. The Authority is correct to be conceptually consistent with its previous decisions as to the appropriateness of scarcity pricing on the evening of 9 August 2021 – in a manner which is not inconsistent with the High Court judgment in so far as it is adopting an entirely different conceptual approach by making a determination of a UTS in appropriate circumstances.
	Haast's comments 3	Haast's quote is incomplete. It says that "*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'…*" without adding that that quote continued to say "*in periods 39 to 42, threatens or may threaten, confidence in, or the integrity of, the wholesale market.*" This misquote highlights a theme of Haast's submissions, which is to seek to diminish the weight which the Authority is clearly placing on periods 39 to 42 – which in turn highlights why the High Court judgment can, contrary to what is suggested by Haast, form the foundation of a UTS.
	6	Haast states that "*[t]he Authority's investigation solely concerns TPs 38 and 39 of 9 August 2021*" – citing paragraphs [2.1] and [2.3] of the Preliminary Decision in support. However, in so doing Haast omits the crucial paragraph [2.2] of the Preliminary Decision which states that: "*The Authority has previously consulted on the events of 9 August 2021 in the UTS preliminary decision paper – 9 August 2021 and the Supplementary Consultation Paper – UTS decision. The Authority published its final decision on the UTS investigation in June 2022 (the 2021 UTS). That investigation was predicated on scarcity pricing applying to trading periods 39-42. The present investigation proceeds on the basis that scarcity pricing has not been applied, following the High Court's finding upholding the pricing error claim appeal.*" The omitted paragraph highlights the fact that the Authority is appropriately considering all TPs on 9 August 2021 – and also why the High Court judgment is an appropriate foundational point for a new investigation into whether there is a UTS.
	7	Haast refers to numerous paragraphs in the Preliminary Decision to support its statements that the Authority is only investigating TPs 38 and 39. Those paragraphs are [8.1], [10.20], [12.11] and [12.3] and, in respect of the analysis in Part 10, paragraphs [10.7]-[10.19]. However, this ignores the statements in paragraphs [10.1 (a) and (b)], which make it clear that the Authority is appropriately looking at the evening of 9 August 2021 as a whole. See also paragraphs [10.2], [10.3] and [10.6] – which again make clear that the whole of 9 August 2021 is being examined.

Submission	Reference	Response
Haast Energy	8 and 11-13.	See comments above.
	15-24.	Haast suggests that that Authority is unable to consider whether an undesirable trading situation has occurred in respect of TP 38 because clause 5.1A of the Code provides that "*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 has occurred.*" However, given that it is clear that the situation was created by the High Court judgment, there can be no merit in this argument. Nova refers to the comments in the Preliminary Decision as referred to in response to Haast's Summary Point 3 above. Further, while Haast refers, at paragraph [19], to paragraphs [3.32]-[3.33] of the Preliminary Decision in support of its arguments, those paragraphs, when considered in full, undermine its position. They provide that: "*3.32 The resetting of prices without the application of scarcity pricing reduces prices for trading periods 39-42 from approximately $10,000 MW/h to well under $1,000 MW/h. This is set out in further detail in section 10. Scarcity pricing had not been applied to trading periods 37 and 38.* *3.33 The High Court decision referred to trading periods 39-42 as these were the periods that scarcity pricing applied to. As set out above,* ***the Authority's UTS investigation is not confined to these trading periods, as without scarcity pricing ensuring the correct incentives in last resort generation, it was necessary to look at all trading periods where prices may have been artificially depressed as a result of demand management.***" [Emphasis added].
	25-31	Haast suggests that "*[j]ust as TP 38 is time-barred, so too is TP 39*". In response to this, Nova repeats its points above.
	32-39	Haast suggests, at paragraph [32]], that "*[t]he Authority has already considered whether a UTS arose in relation to TP 38" continuing to say, at [33], that "[t]he 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.*" However, as stated at p 3 of the Preliminary Decision, "*[t]he Authority's previous UTS investigations into 2021 found that the application of scarcity pricing on 9 August was not a UTS because the circumstances were precisely those which the scarcity pricing regime was designed to manage.*" Accordingly, while Haast suggests, at paragraph [34], that "*[n]othing has changed in relation to TP 38 since the Authority's initial PDP was released in late 2021*", that ignores the fact that the High Court judgment essentially removed the entire underlying premise of its previous decision – as is clearly and appropriately recognised by the Preliminary Decision.

Submission	Reference	Response
Haast Energy	40-46	Haast suggests, at paragraph [40], that the Authority's investigation is "*not an appropriate or lawful use of the TPS provisions in the Code*" because, it says at paragraph [41], that the "*UTS regime is supposed to respond to a dynamic situation which affects trading in a way not intended by the Code*". However, even if that were correct, the High Court judgment did create a dynamic situation which affected trading in a way not intended by the Code – for all of the reasons previously given by the Authority, including in the Preliminary Decision. The 10 day limitation period, referred to at paragraph [43], is not an issue for the reasons already outlined above. At paragraphs [44]-[45], Haast suggests that it would be contrary to law to find a UTS because it "*would undermine or circumvent the judgment*". However, as noted above, the finding of a UTS in this context would be taking an entirely different conceptual approach to the issues raised by 9 August 2021. There is nothing in the High Court judgment that precludes a finding of a UTS as outlined by the Authority – or, indeed, a more broad UTS.
	47-52	These paragraphs again suggest that it is inappropriate to use the UTS provisions in response to the High Court judgment. Again, however, there is no reason why that judgment could not, in combination with other factors, create a "*situation that threatens, or may threaten, confidence in the integrity of the wholesale market*" – with the Preliminary Decision setting out well why it does so. As noted above, the Authority is appropriately looking at the substance of what occurred on 9 August 2021, rather than just pure form.
	53-72	These paragraphs address amendments to the UTS provisions in 2013. Nova considers that it has largely responded to the substance of the points made above. However, to the extent that Haast relies on the RTP reforms to say that there is nothing to "restore" (using the wording of cl 5.5 of the Code), that ignores the point made by the Authority, at p 2 of the Preliminary Decision, that, even with the introduction of RTP, "*there is, however, still the risk that either error or other action or event could result in prices that are in some way inappropriate given market conditions. It is important that the industry has confidence that the Authority will take any necessary action where prices have been artificially depressed, or inflated, to send the appropriate price signals to the market.*" As noted, cl 5.5 obliges the Authority to "*attempt to correct every undesirable trading situation*" and the Preliminary Decision rightly recognises that it needs to do this whenever there are prices which are in some way inappropriate given market conditions – which it became apparent that there was in respect of the prices set for the evening of 9 August 2021 following the High Court judgment – which created an extreme outcome (contra Haast's paragraph [65]) that, as a matter of substance, undermined the policy underlying the scarcity pricing regime. Haast's paragraph [69] notes that Part 1 of the Code defines a UTS as a situation which "*cannot satisfactorily be resolved by any other mechanism under the Code.*"[1] While Haast then suggests, at paragraphs [70]-[71], that the relevant issues can be resolved by amendments, including those such as the RTP reforms, those amendments could not fix the problems arising in respect of 9 August 2021. Nova again also repeats the points made by the Authority at p 2 of the Preliminary Decision as set out in the paragraph immediately above.

[1] The Code actually refers: "cannot satisfactorily be resolved by any other mechanism available under this Code"

Submission	Reference	Response
Haast Energy	73-83	Again, in Nova's view, it has substantively answered the points made in the paragraphs above – with paragraph [74] of Haast's submission yet again incorrectly suggesting that the "*Preliminary Decision is not about scarcity pricing*". While paragraph [76] suggests that "*once adjusted the price does not come anywhere near close to the floor imposed through scarcity pricing*", it bears emphasis that the Preliminary Decision rightly acknowledges, at p 4, that "*[i]f the Authority reaches a decision that a UTS is developing or has developed, it will then separately consider what action is necessary.*" Accordingly, it is premature to suggest what appropriate pricing might be in the event that a UTS is ultimately found – although Nova would suggest that the imposition of scarcity pricing would be entirely appropriate as it would be consistent with industry expectations, as acknowledged in the Preliminary Decision. To the extent that Haast notes that Nova turned on its peakers before the System Operator issued its first notice, it was clear to Nova that additional production was going to be required. As noted at paragraph [25] of the affidavit of Charles Teichert for Nova dated 12 December 2022: " *Nova continued to run its four peaker units at capacity on the evening of 9 August 2021 in response to notices from the System Operator calling for maximum output from all generators. (Nova had commenced running its peakers earlier that day, with the last peaker turned on at 4:30 pm, in the expectation of high spot prices on the evening of 9 August 2021 due to forecasts of low temperatures and warnings by the System Operator of shortfalls in generation reserve.*"
	73-83 (continued)	To the extent that Haast suggests, at [76], "*that the Authority's concern that the non-imposition of scarcity pricing would disincentivise investment in fast start generators*" is misplaced. Nothing could be further from the truth. Nova has previously set out its position in this regard in its submission to the Authority dated 3 February 2022. The New Zealand electricity market experienced price spikes and periods of high spot prices long before scarcity pricing was introduced in June 2013, and will continue to do so under Real-Time Pricing. For instance, 26 March 2011 prices reached above $20,000 per MWh. These prices were reduced by the Authority under a UTS from to between $1,500 and $3,000 per MWh. The Market Development Advisory Group under its "Price Discovery Under 100% Renewable Electricity Supply" Issues Discussion Paper describes how prices can be expected to become more volatile over time. Further, in Nova's submission to the Authority on the Preliminary Decision it points out that the potential for scarcity pricing, or any other high pricing periods, impacts on every generator's decision making, including decisions on outage planning, maintenance programmes and spare parts inventories.
	84-94	While Haast suggests, at paragraphs [86]-[87], that the issues of pricing on the night of 9 August 2021 are now moot in light of the RTP reforms, those reforms do not, of course, address the problems with pricing that occurred on that night. Again, as noted in the Preliminary Decision at p 2, "*[i]t is important that the industry has confidence that the Authority will take any necessary action where prices have been artificially depressed, or inflated, to send the appropriate price signals to the market.*" Further, while Haast complains about delay, at paragraphs [88]-[94], the Authority has acted as quickly as it could following the issuing of the High Court judgment. The Authority is rightly seeking to get the correct result – in suggesting that there should be appropriate pricing in circumstances in which pricing would otherwise be artificially depressed – as soon as it can.