

19 September 2023

Dr John Small  
Chair  
Commerce Commission  
Wellington

Dear Dr Small

## **Request for the Commerce Commission to undertake a section 36 investigation into Contact, Genesis, Mercury and Meridian's conduct**

**s9(2)(b)(ii)** requests the Commerce Commission initiate an investigation into whether Contact, Genesis, Mercury and Meridian (the vertically-integrated incumbent generator-retailers or 'gentailers') have engaged in conduct in the wholesale electricity/hedge market that has the purpose of or is likely to have the effect of, substantially lessening competition in a market including the downstream electricity retail market(s), under section 36 of the Commerce Act (**Act**).

There would seem to be broad consensus that conduct including margin/price squeezes, (constructive) refusals to supply and raising rivals' costs, that may have been more readily permissible under the old s.36 test, may now be more readily captured under the new s.36 test based on the "effect" on a market. This is consistent with the Commission's view that "*Parliament intended the Amendment Act to strengthen the prohibition on the misuse of market power... [which] failed to deter or penalise some forms of anti-competitive conduct.*"<sup>1</sup>

Based on the information available to us, we consider there is a clear prima facie case that gentailers are likely to have breached the new s.36 test by implementing a margin squeeze and/or refusing to provide access to necessary market hedge products or at prices designed to substantially lessen competition. Regardless of each gentailer's "purpose", the "effect" or "likely effect" of such conduct is likely to substantially lessen competition in electricity markets.

Specifically, in our view the gentailers have:

- a substantial degree of power (**SMP**) in the wholesale electricity market (including the spot and hedge market);
- refused (or constructively refused) access to hedge products that are necessary for a new and non-vertically integrated retailer to manage wholesale market exposure and risk in order to effectively compete at scale in a market characterised by volatile wholesale spot prices and generally fixed retail prices;
- provided financial hedge products to their own internal retail businesses which are not offered to third party non-vertically integrated downstream competitors and at prices that are substantially more favourable than they make available to third party and independent retailers. This has effectively resulted in a margin squeeze where markets would be materially more competitive absent such conduct in likely counterfactuals (forms of undue discrimination and undue price discrimination); and

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<sup>1</sup> [https://comcom.govt.nz/data/assets/pdf\\_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf](https://comcom.govt.nz/data/assets/pdf_file/0014/311360/Misuse-of-Market-Power-Guidelines-March-2023.pdf), paragraph 4.

- used (record) profits from wholesale activities – achieved through sustained high spot prices – to subsidise their internal retail businesses/supply with artificially lower internal transfer prices (ITPs) thwarting effective competition in the retail market.

Individually and in combination this conduct has resulted in price squeezes for new and non-vertically integrated retailers meaning we have not been able to compete effectively in the electricity retail market in a meaningful and substantive manner. s9(2)(b)(ii)

– is substantially limited by the artificial wholesale barrier created by the gentailers' conduct. s9(2)(b)(ii)

Based on our observations this experience is not isolated to s9(2)(b)(ii) it seems to be an established pattern of conduct by the gentailers across the market. The aggregate of that conduct is likely to have the effect of substantially lessening competition in electricity markets; it is the type of anticompetitive conduct carried out by a party with SMP that the amendments to s.36 were intended to capture.

We are aware Electric Kiwi has recently requested the Commerce Commission undertake an investigation on a similar or substantially overlapping basis as s9(2)(b)(ii). Given this similarity we would expect the Commerce Commission to consider the complaints jointly; and we suspect that other non-vertically integrated parties would have applicable information for an investigation.

In our view, the conduct we describe in our complaint directly harms New Zealand electricity consumers by hindering s9(2)(b)(ii) and other non vertically integrated firms including those that may be incentivised to enter the electricity retail market. There must be workable and sustainable competition in the wholesale market including access to hedge products provided by the vertically-integrated gentailers to promote competition. It is harmful to all New Zealanders including the need for downward pressure on retail electricity prices to support cost of living pressures as well as decarbonisation through electrification.

### **Contact, Genesis, Mercury and Meridian each have substantial market power in the wholesale electricity market**

The Commerce Commission opened an investigation in late 2005 into whether the gentailers had market power and, if so, whether they had taken advantage of SMP in breach of s.36 of the Act; and whether they had behaved in a collusive manner in breach of sections 27 or 30.

This followed a number of complaints about high electricity prices, large company profits, a perceived low level of competitive activity and allegations of anti-competitive conduct (a similar situation to the present time).

The Commerce Commission determined each of the gentailers has SMP, and each of the gentailers had used that SMP:<sup>2</sup>

<sup>2</sup> <https://comcom.govt.nz/news-and-media/media-releases/archive/commerce-commission-finds-that-electricity-companies-have-not-breached-the-commerce-act>

*"The Commission considers that each of the four largest gentailers - **Contact, Genesis, Meridian and Mighty River Power** - is likely to have held substantial market power on a recurring basis, particularly during dry years," said Dr Mark Berry, Chair of the Commerce Commission.*

*"Each of these companies has the ability and incentive unilaterally to exercise market power and increase wholesale prices during certain periods. The price increases in dry periods are well above any increases in input costs, including the higher opportunity cost of water when hydro storage is low. **However, the Commission concludes in the case of this investigation that the gentailers are using that market power to maximise their profits ...**" (emphasis added)*

s9(2)(b)(ii) considers that each of the gentailers continues to have SMP as there have been no material market changes that would undermine the Commission's conclusion in 2005. Of particular relevance was that the Commission's determination was made under the then existing and somewhat controversial s.36 test that required that a firm used its SMP for an anticompetitive "purpose". As the Commission is fully aware that single "purpose" test which when applied in 2005 resulted in the Commission determining that the gentailers were simply exploiting their SMP to maximise profits has been amended to include an "effects" test.

The Electricity Authority has also confirmed "Electricity generation is relatively concentrated. Four large vertically integrated generator-retailers supply over 80% of generation to the market .... There has been little change to concentration in the past 8 years" and "In addition, these four generator-retailers are frequently gross pivotal – that is, demand in a trading period would not be able to be met without their supply. Meridian is gross pivotal most of the time (historically around 77%, though it increased to 90-95% in the review period). While short-term incentives depend on generators' position net of retail and contracts, long-term incentives are to use market power to increase future prices for contracts and retail customers."<sup>3</sup>

### **Electricity Authority has found evidence of substantial market power**

The Electricity Authority Undesirable Trading Situation (UTS) investigations and its wholesale market review (WMR) provide evidence the gentailers have SMP, and evidence that the gentailers are using that SMP.

For example, on 12 December 2019 the Electricity Authority received a claim from seven participants that an undesirable trading situation had begun on 10 November 2019 and was continuing at the time of the claim.<sup>4</sup>

The claim alleged the UTS was caused by Meridian Energy and Contact Energy spilling water from their hydro generation stations in the South Island, while simultaneously offering this generation into the spot market at prices significantly above its short-run marginal cost.

The Electricity Authority determined there was a UTS and generation had been "*effectively withheld from the market*" resulting in substantially elevated spot prices for a sustained period of time e.g.:<sup>5</sup>

*"... Meridian's use of what it terms "non-clearing tranches" means that generation is effectively withheld from the market.*

*"... Meridian was able to increase its offer prices and withhold generation when spilling despite what Sapere terms "the massive increase in fuel available to [South Island] hydro generation".*

<sup>4</sup> <https://www.ea.govt.nz/industry/wholesale/uts/uts-10-november-2019/>

<sup>5</sup>

*"... As Sapere points out, an increase in available fuel should have shifted the supply curve outwards, implying lower offers, lower prices, and more generation from South Island generators. But, in the event, the opposite happened. ...*

*"We found that the UTS extended from 3 December 2019 to 27 December 2019. During this time ... we estimate the average extra generation Meridian could have achieved is 82MW, and **around one third of the spill at Benmore could have been used to generate. We estimate the spot market impact of this was \$70m.***

*"... this is a lower bound estimate for the excess spill. ..."* (emphasis added)

The conduct described above, i.e., a firm with SMP deliberately reducing output for the purposes of raising downstream rivals costs, is not generally viewed as conduct that promotes competition and results in pro-competitive outcomes for electricity consumers.

Unsurprisingly the Electricity Authority's WMR found *"evidence to suggest that [wholesale electricity market] prices may not have been determined in a competitive environment"* (2021 WMR) and there has been a *"persistence of high spot and forward prices, well above the cost of new renewable supply"* (2022 WMR) e.g.:

- *"The market is dominated by a few large firms, with Meridian needed to meet demand over 90 percent of the time."*
- *There is "evidence to suggest that generators have an increased incentive and ability to exercise market power, and may have been doing so over the review period."*
- *"There is some evidence of an increased incentive and ability for electricity generators to structure their offers into the market in a way that keeps prices high (economic withholding)."*
- *"Meridian (Waitaki) has always had a high percentage of offers priced at over \$300/MWh, and this proportion has been increasing steadily over the years. This proportion does not change with underlying supply conditions as much as for other hydro generators."*
- *"there is often a large proportion of offers above cost (regardless of the cost estimate used) for some generators ... Some offers do not reflect underlying conditions."*
- *"the steadily increasing percentage of higher priced offers since 2014 at Meridian's (Waitaki) stations, the only slight decrease in 2020 at Contact's (Clutha) stations, and the quantity of higher priced offers at Mercury's (Waikato) stations since 2018 is not immediately explainable by underlying conditions."*
- *There is "evidence to suggest that prices may not have been determined in a competitive environment."*
- *"Our economists used a linear regression model, a common statistical framework, to investigate the factors that have contributed to elevated prices. This analysis included an unexplained dummy variable that indicated that prices were about \$38/MWh higher during the review period in addition to the usual factors that influence prices."*

*"Our analysis confirms that prices have been higher than expected ..."*<sup>6</sup>

<sup>6</sup> [https://www.linkedin.com/posts/electricity-authority-of-new-zealand\\_the-authority-is-currently-consulting-on-activity-6874514213331718144-qcCl](https://www.linkedin.com/posts/electricity-authority-of-new-zealand_the-authority-is-currently-consulting-on-activity-6874514213331718144-qcCl)

- *“Concept found that forward prices have been above the cost of new electricity supply by about 50 percent, and this has been the case for longer than we would expect to see in a workably competitive market.”*
- *“Both Meridian and Contact were able to profit from selling to NZAS because they benefit from increased revenue from the rest of New Zealand ... However, only a generator about the size of Meridian could sell to a customer on those terms ... these issues arise from the scale of generation (particularly in the South Island) ...”*

The Electricity Authority sought expert independent advice from Munro Duignan on its WMR and its “overall conclusion” which it considered could be reasonably drawn *“is that the evidence provided by analysis of the structure, conduct and performance analysis of the electricity generation market indicates that one (and sometimes more than one) generator has had the ability to exercise substantial market power, as that term is defined in the economic literature, for significant periods since the Pohokura outage (“the outage”) in 2018”*.<sup>7</sup>

Munro Duignan also concluded *“What can be said with high confidence is that Meridian’s agreement to provide NZAS Limited with the CFD described as the Tiwai Agreement in January 2021 implies it expects to have substantial market power during the term of the agreement. Secondly, the Authority’s 2019 UTS decision can be viewed as indicating that Meridian exercised market power”*<sup>8</sup> and *“Meridian can afford to provide NZAS with a large discount from the forward price, and potentially even from the avoidable cost, because NZAS continuing to consume around 13% of total generated power results in the marginal cost of generation, and therefore the spot price, being much higher than Meridian’s average cost”*.<sup>9</sup>

### **The electricity market is vertically-integrated**

The electricity market is highly vertically-integrated with the gentailers making up approximately 90% market share in both generation and retail.<sup>10,11</sup> This means that the gentailers principally rely on self-supply/internal transfer payments to manage their retail wholesale electricity price risk.

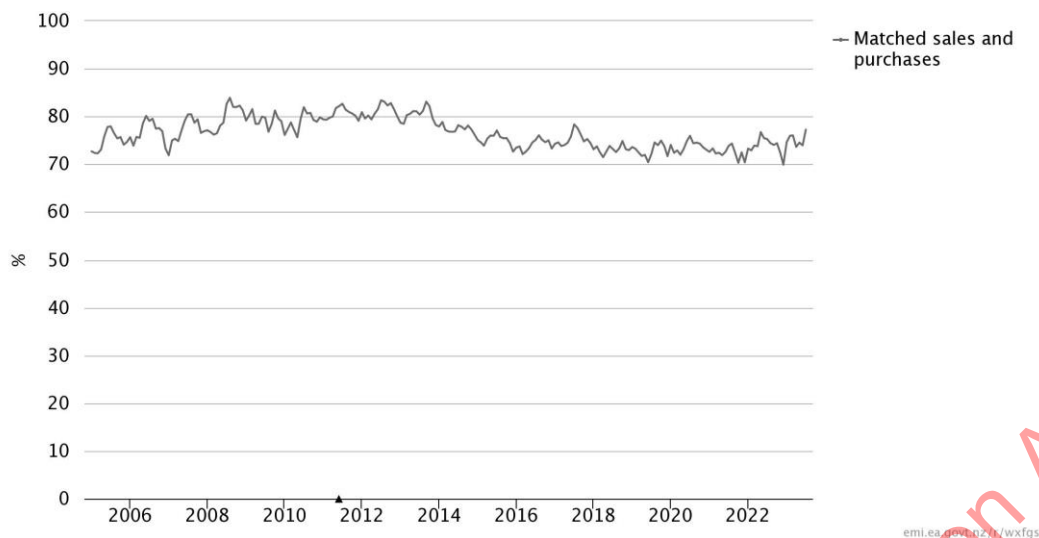
<sup>7</sup> Munro Duignan Limited, Review of Electricity Authority paper “Market Monitoring Review of structure, conduct and performance in the wholesale market (since the Pohokura outage in 2018)”, 19 October 2021.

<sup>8</sup> Munro Duignan Limited, Review of Electricity Authority paper “Market Monitoring Review of structure, conduct and performance in the wholesale market (since the Pohokura outage in 2018)”, 19 October 2021.

<sup>9</sup> Munro Duignan Limited, Review of the Electricity Authority discussion paper “Inefficient Price Discrimination in the wholesale market – issues and options”, 22 October 2021.

<sup>10</sup> [https://www.emi.ea.govt.nz/Wholesale/Reports/BLKL4U?\\_si=v|3](https://www.emi.ea.govt.nz/Wholesale/Reports/BLKL4U?_si=v|3)

<sup>11</sup> Electricity Authority, Promoting competition in the wholesale electricity market in the transition toward 100% renewable electricity, Issues Paper.



**Table 2 Generation in New Zealand: key characteristics 2022**

	Contact	Genesis	Meridian	Mercury	Manawa	Other	Total
Total capacity MW	2,023	2,023	2,784	1,565	658	1,050	10,100 MW
Thermal MW	801	1203	-	-	-	398	2,402 MW
Stored hydro MW	760	185	2350	1105	-	0	4,400 MW
Market share generation	19.5	18.1	30.2	18	6.1	8.1	100%
Market share retail	19.7	21.6	16.3	25.9	0.6	15.9	100%
Vertical integration	76.5	86.4	78.6	92.1	-	-	

Source: Electricity Authority

Notes: 'Stored hydro' refers to Lakes Taupo, Waikaremoana, Tekapo, Pukaki, Hawea, Te Anau and Manapouri. Generation units downstream of these lakes are classified as stored hydro. Market share of generation is based on injection. Market share of retail is based on number of ICPs as of May 2022. Vertical integration is mean value for year ended May 2022. Vertical integration is based on sales and purchases of MWh, ignoring derivative markets. [https://www.emi.ea.govt.nz/Wholesale/Reports/BLKL4U?\\_si=v|3](https://www.emi.ea.govt.nz/Wholesale/Reports/BLKL4U?_si=v|3)

## Wholesale electricity (spot) prices have been elevated for an extended period of time

The Electricity Authority has observed that “Wholesale electricity spot prices rose in mid-2018”, “Prices have generally remained well above the average level that prevailed prior to [mid-2018]” and “The Authority’s Market monitoring review of structure conduct and performance in the wholesale market published in October 2021 found that ... generators may have been exercising market power during the review period”.<sup>12</sup>

**Figure 2 Wholesale market prices 2012-2022**



Relatedly, “... the Authority observed forward prices out to 2026 remain well above the cost of new supply. This is despite evidence of a promising pipeline of committed and actively pursued investment in new renewable generation”.

## Access needed to “over-the-counter” hedge products from the gentailers

Electricity retailers buy and generators sell electricity on the New Zealand Electricity Market (NZEM) pool.

In order to manage wholesale electricity price risk, non-vertically integrated retailers purchase hedge/risk management products.

These are obtained from the New Zealand electricity futures market (provided on Australian Securities Exchange (ASX)) or “over-the-counter” (OTC) contracts with gentailers.

The ASX exchange for New Zealand energy futures has not been available to non-vertically integrated retailers since 31 October 2022. This was due to exit of Jarden and Bell Potter,<sup>13</sup> as broker and clearing providers for the ASX used by New Zealand independent retailers. s9(2)(b)(ii)

This has meant that access to OTC contracts provided by gentailers is the only trading option for risk management available to electricity retailers in the New Zealand market.

<sup>12</sup> Electricity Authority, Promoting competition in the wholesale electricity market in the transition [sic] toward a renewables-based electricity system, Decision Paper, May 23.

<sup>13</sup> <https://www.jarden.co.nz/>



The Electricity Authority has noted:<sup>14</sup>

**Without access to exchange-traded futures**, market participants have a greater reliance on off-market transactions for risk management. If the appropriate risk management cannot be obtained from off-market transactions, **market participants may have increased exposure to electricity spot prices**. (emphasis added)

### Withholding supply to retail shaped hedging

s9(2)(b)(ii) recently undertook a retail shaped RFP. s9(2)(b)(ii)

s9(2)(b)(ii) engaged with gentailers via EOI/ RFP seeking long-term partnering and wholesale relationships. As part of that process with the incumbent gentailers and Manawa, s9(2)(b)(ii)

We chose retail shaped hedging for simplicity and to reflect the risk management offered by the gentailers to their internal retail business.

The RFP requested wholesale supply with terms s9(2)(b)(ii)

s9(2)(b)(ii)

These issues are not unique to s9(2)(b)(ii). In December last year, the Electricity Authority noted:<sup>15</sup>

*"Participants appear to have a mixed experience in receiving timely responses for baseload RFPs, including responses for locations outside of Otahuhu and Benmore. In addition, participants experienced relatively greater difficulty in receiving responses for non-baseload contracts, either receiving no response or a response for a different location."*

### Incumbent gentailer gross margin and ITP disclosures highlight price squeeze problems

The Commerce Commission has previously noted (based on the "old" s.36 "purpose" test) that "a dominant firm that reduced prices below cost, only because it could cross-subsidise from areas where it was making monopoly profits, would likely breach the Act".<sup>16</sup> The Commerce Commission's

<sup>14</sup> Electricity Authority, Open letter to market participants, 18 October 2022: [https://www.ea.govt.nz/documents/1278/Open\\_letter\\_-\\_Notice\\_of\\_information\\_request\\_and\\_request\\_for\\_feedback\\_on\\_proposed\\_scope.pdf](https://www.ea.govt.nz/documents/1278/Open_letter_-_Notice_of_information_request_and_request_for_feedback_on_proposed_scope.pdf)

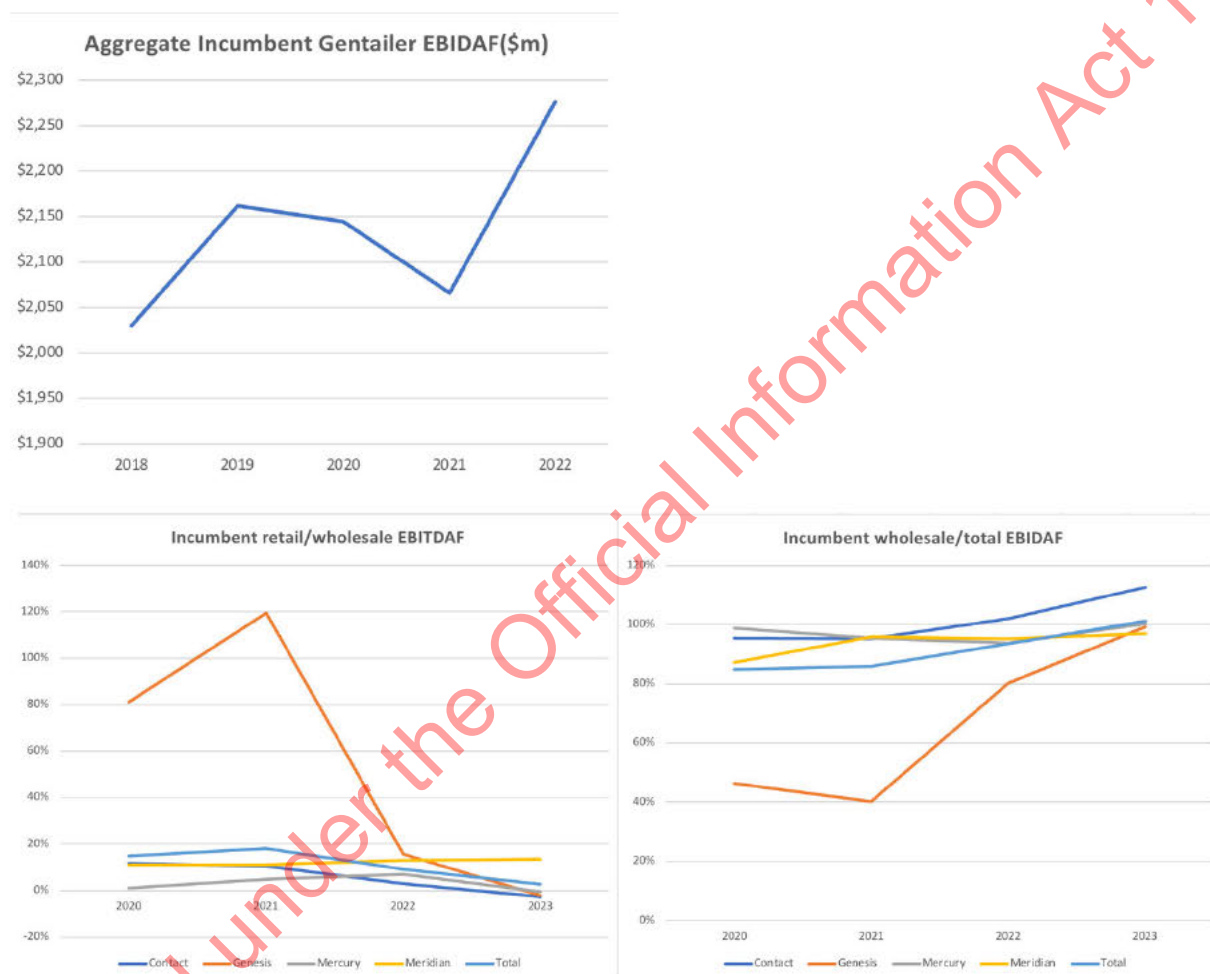
<sup>15</sup> Electricity Authority, Open letter to market participants, 13 December 2022: <https://www.ea.govt.nz/documents/1260/Open-Letter-Stage-2-December-20221381881.2.pdf>

<sup>16</sup> <https://comcom.govt.nz/news-and-media/media-releases/archive/commission-will-not-intervene-in-telecom-move-to-match-saturns-prices>



investigation into whether Telecom was pricing its Hutt Valley residential (fixed line) telephony services in 1998 at below cost considered various cost measures which provides potential useful and relevant precedent for determining whether there is and has been subsidies from Contact, Genesis, Mercury and Meridian's respective wholesale businesses to their respective retail businesses.<sup>17</sup>

The gentailers' 2023 Annual Reports show that: (i) collectively they have reported record company-wide profits; (ii) collectively they have reported record wholesale-only profits (which in aggregate exceeds their company-wide profits); (iii) at the same time they have shifted profits from retail to wholesale (Genesis being the most extreme example of this); and (iv) Contact, Genesis and Mercury have reported retail losses.



#### Gentailer reported retail profits, 12 months ended June-2023

	Retail revenue	Retail margin	Retail EBITDA
Contact	\$1,102m	\$55m	(\$14m)
Mercury	\$1,450m	\$177m	(\$5m)
Genesis	\$1,658m	\$156m	(\$11m)
Meridian	\$2,140m	\$173m	\$103m

<sup>17</sup> <https://comcom.govt.nz/news-and-media/media-releases/archive/telecomsaturn-report-part-1>

Contact Energy has provided more granular break-down of its retail profits than the other gentailers, including separation of electricity from other retail activities, and break-down by customer type.<sup>18</sup>

Historic performance

## Retail segment

Residential electricity	unit	FY20	FY21	FY22	FY23
Average connections	#	355,073	357,117	373,347	380,482
Sales volumes	GWh	2,532	2,520	2,644	2,688
Average usage	MWh per ICP	7.1	7.1	7.1	7.1
Tariff	\$/MWh	250.4	253.4	256.4	272.1
Network, meters and levies	\$/MWh	-122.1	-118.0	-119.5	-122.7
Energy costs	\$/MWh	-94.8	-100.2	-115.0	-139
Gross margin	\$/MWh	33.5	35.2	21.9	10.8
Gross margin	\$ per ICP	239	249	155	77
Gross margin	\$m	85	89	58	29

SME electricity	unit	FY20	FY21	FY22	FY23
Average connections	#	55,033	49,679	48,459	46,962
Sales volumes	GWh	991	860	796	794
Average usage	MWh per ICP	18.0	17.3	16.5	16.9
Tariff	\$/MWh	229.3	231.7	239.7	239.3
Network, meters and levies	\$/MWh	-115.8	-106.4	-112.9	-117.0
Energy costs	\$/MWh	-93	-99.3	-113.7	-138.6
Gross margin	\$/MWh	20.5	26.1	13.0	3.6
Gross margin	\$ per ICP	369	451	215	62
Gross margin	\$m	20	22	10	3

Broadband	unit	FY20	FY21	FY22	FY23
Average connections	#	19,579	39,245	62,338	75,057
Tariff	\$/cust/mth	70.1	68.2	70.1	69.6
Network, provisioning, modems	\$/cust/mth	-69.6	-69.9	-60.5	-63.5
Gross margin	\$/cust/mth	0.5	-1.6	9.6	6.17
Gross margin	\$m	0.1	-1	7	6

Residential gas	unit	FY20	FY21	FY22	FY23
Average connections	#	61,591	60,701	64,649	66,605
Sales volumes	TJ	1,577	1,495	1,583	1,504
Average usage	GJ per ICP	25.6	24.6	24.5	22.6
Tariff	\$/GJ	33.1	35.3	36.6	42.1
Network, meters and levies <sup>1</sup>	\$/GJ	-18.5	-18.6	-18.9	-22.9
Energy costs	\$/GJ	-7.9	-8.6	-11.8	-10.1
Carbon costs	\$/GJ	-1.4	-1.5	-2.1	-4.2
Gross margin	\$/GJ	5.3	6.5	3.8	4.9
Gross margin	\$ per ICP	136	107	92	112
Gross margin	\$m	8	10	6	7

SME gas	unit	FY20	FY21	FY22	FY23
Average connections	#	3,949	3,876	3,880	3,519
Sales volumes	TJ	1,441	1,313	1,224	1,063
Average usage	GJ per ICP	365	339	315	302
Tariff	\$/GJ	15.4	16.3	19.3	25.2
Network, meters and levies	\$/GJ	-6.0	-7.9	-8.3	-9.5
Energy costs	\$/GJ	-7.9	-8.6	-11.8	-10.1
Carbon costs	\$/GJ	-1.4	-1.5	-2.1	-4.2
Gross margin	\$/GJ	0.2	-1.6	-2.4	-1.4
Gross margin	\$ per ICP	63	-552	-769	-412
Gross margin	\$m	0	-2	-3	1

Retail segment EBITDAF	unit	FY20	FY21	FY22	FY23
Electricity Gross margin	\$m	105	111	68	32
Gas Gross Margin	\$m	9	8	3	9
Broadband Gross Margin	\$m	0	-1	7	6
Total Gross Margin	\$m	114	118	78	47
Other income	\$m	5	6	7	9
Other operating costs	\$m	-69	-68	-68	-69
Retail segment EBITDAF	\$m	50	55	17	-14
Corporate allocation (50%)	\$m	-15	-15	-14	-22
Retail EBITDAF	\$m	35	40	3	-36
EBITDAF margins (% of revenue)	%	3.6%	4.3%	0.3%	-3.3%

<sup>1</sup> FY22 Retail residential and SME gas network costs split was re-stated to align to the latest data

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s9(2)(b)(ii)

Gentailer reported retail profits, 12 months ended June-2023 (ITP normalised to \$125GWh)

	Retail revenue	Retail margin	Retail EBITDA
Contact	\$1,102m	\$40m	(\$29m)
Mercury*	\$1,450m	\$177m	(\$5m)
Genesis	\$1,658m	\$156m	(\$11m)
Meridian	\$2,140m	(\$42m)	(\$112m)

\* Mercury not adjusted due to lack of ITP in its Annual Report.

<sup>18</sup> Contact Energy, 2023 full year results presentation, 14 August 2023.

<sup>19</sup> s9(2)(b)(ii)

The wholesale electricity prices continue to be at elevated levels for a sustained period of time, combined with the price and limited availability of hedge products, which means the available retail margin is insufficient to enable efficient competitors to profitably operate in the electricity retail market(s) and/or to facilitate new entrants from achieving an equal footing with existing competitors.

[REDACTED] s9(2)(b)(ii) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

### The Consumer Advocacy Council has summarised the problem well

Reflecting the public interest in the matters we are raising, and specifically the harm to consumers, the Consumer Advocacy Council has raised the same issues in submission to the Electricity Authority in response to its 2022 WMR consultation e.g.:<sup>21</sup>

*"The vertical integration of generators and retailers (gen-tailers) is weakening competitiveness in the electricity market. The vertically integrated gen-tailers can generate at close to their own contracted position, which creates effective self-hedges against the impact of spot price volatility and spikes. "However, small retailers do not have the same protection and are exposed to the risk associated with volatile spot prices and have difficulty in obtaining adequate bilateral hedges. This hinders competition in the retail market."*

Their companion NZIER report also highlighted issues faced by small players and new entrants:

*"... the wholesale market volatility and the resulting lift in the futures price ... may have negatively affected new entrant retailers [that] could not obtain suitable bilateral arrangements to enable them to be competitive against the five gen-tailers [that] are vertically integrated. Analysis of EA's data on trends in retail market share and entry and exit shows that 14 retailers have left the electricity market since late 2018 and a number of other new entrant retailers have either not increased customer numbers or have reduced customer numbers."*

*"... our analysis showed some signs of market power across the vertically integrated gentailers, as it has given them significant competitive advantage over other competitors ... and created barriers for new entrants through self-hedging contracts ... This has consistently enabled them to obtain large short-term profits from the wholesale market. However, the increased number of grid emergency notices in the recent winter (NZ Herald 2022; RNZ 2022a) and Transpower's concerns about constrained generation capacity for the next two winters suggest that the gen-tailers are incentivised to make short-term profits and pay excessive dividends to shareholders rather than making longterm investment in new renewable generation. Ultimately, this comes at the cost of higher electricity bills for consumers, especially households and small businesses."*

**Example of how s9(2)(b)(ii) ability to enter the market and compete has harmed competition:  
Launch of s9(2)(b)(ii) electricity retail product**

[REDACTED] s9(2)(b)(ii) [REDACTED]  
[REDACTED]  
[REDACTED]

s9(2)(b)(ii) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

<sup>20</sup> s9(2)(b)(ii) [REDACTED] financial reporting purposes. Meridian, for example, ITP disclosure states that the ITP is for financial reporting purposes only.

<sup>21</sup> Consumer Advocacy Council, Re: Promoting competition in the wholesale electricity market in the transition towards 100% renewable electricity, 16 December 2022.

<sup>22</sup> s9(2)(b)(ii) [REDACTED]  
[REDACTED]

s9(2)(b)(ii)

s9(2)(b)(ii)

s9(2)(b)(ii)

New Zealanders will benefit from s9(2)(b)(ii) entry into the electricity market and we look forward to engaging with the Commission on how the market evolves to better meet the needs of New Zealand homes and businesses.

s9(2)(b)(ii)

s9(2)(b)(ii)

s9(2)(b)(ii)

This is disappointing for us but, moreover, highlights that electricity markets are failing to meet the Commerce Act's purpose, that is "*...to promote competition in markets for the long-term benefit of consumers within New Zealand.*"<sup>28</sup> s9(2)(b)(ii) is not the only non-vertically integrated retailer whose entry has been hindered. Octopus Energy is another example of a financially well-resourced non-vertically integrated retailer that has only made a soft-launch into the market and appears to be limiting the customer base it develops. Firms that are forced to limit their customer bases are highly unlikely to proactively innovate in markets in ways that promote competition for the long-term benefit of consumers.

<sup>24</sup> s9(2)(b)(ii)

<sup>26</sup> s9(2)(b)(ii)

<sup>28</sup> Commerce Act, Purpose, section 1A.

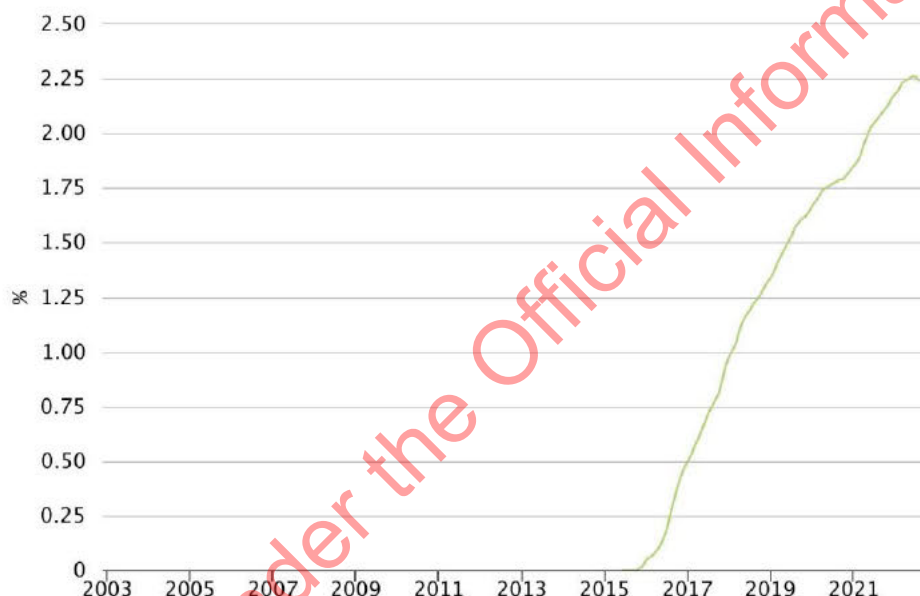


We are acutely aware that while there has been a large amount of market entry (with 37 electricity retailers at present), most of these remain nascent, many are capping their own growth and there has been notable failure and disengagement in recent years. We are more fortunate than some other entrants s9(2)(b)(ii) but we need to manage our wholesale market risk exposure – the larger the customer base, the higher our risk exposure. Given the wholesale costs, we will lose money on every customer we add above our current forecasted hedge toolbox.

We are ambitious for New Zealand and ambitious for s9(2)(b)(ii) and ultimately want to be in a position where we can offer innovative electricity services s9(2)(b)(ii)

There is evidence competitive market outcomes are stalling or getting worse

s9(2)(b)(ii)



s9(2)(b)(ii)

emi.ea.govt.nz/r/4ofx1

The market share of independent retailers has stalled/declined. The market share of the independent retailers has decreased over the last two years, and is now at the level it was at in 2018.<sup>30,31</sup>

#### Market share by electricity supplied – excluding Direct Connect Industrial & Tiwai

	2017	2018	2019	2020	2021	2022	2023
Total Volume MWh	33,784,573	33,464,691	33,848,746	33,653,563	33,629,650	33,866,089	13,383,517
Independents Volume MWh	1,768,916	1,968,451	1,886,712	1,997,601	2,122,873	2,094,191	784,443
Gentailer Volume MWh	32,015,657	31,496,240	31,962,035	31,655,962	31,506,778	31,771,898	12,599,074
Independents %	5.2%	5.9%	5.6%	5.9%	6.3%	6.2%	5.9%
Gentailer %	94.8%	94.1%	94.4%	94.1%	93.7%	93.8%	94.1%

There have been deteriorations in retail market concentration measures.

#### Concluding remarks

s9(2)(b)(ii) considers that it is in the public interest for the Commerce Commission to initiate a section 36 investigation into the conduct of Contact, Genesis, Mercury and Meridian. In our view, it is clear that competition is being thwarted in electricity markets by the gentailers' conduct; that conduct is likely to breach the new s.36 "effects" test to the detriment of New Zealand consumers. Only an investigation by the Commission using its information gathering powers can establish the extent of the competition gap between the conduct and likely counterfactual(s) absent the conduct.

Issues of energy affordability (consumers facing increasing difficulty paying their electricity bills<sup>32</sup>), the prospect that the transition to a greater reliance on renewable electricity supply could weaken wholesale electricity competition/increase the market power of hydro generators,<sup>33</sup> and the importance of affordable electricity and a highly competitive market for a successful energy transition and greater electrification<sup>34</sup> are becoming increasingly prominent.

The dominance and control of the market by the incumbent operators needs to be addressed to introduce effective competition and New Zealand's competitive, clean green advantage in electricity.

<sup>30</sup> Note that if market share is measured on a MWh basis the result will be substantially lower than if it is measured on a per ICP basis.

<sup>31</sup> Source: EMI reconciliation data 11/07/23 2023 data is the period Jan-May 23. All years are based on current company ownership e.g. Electricity is assumed to be gentailer owned for consistency throughout the periods.

<sup>32</sup> For example, a recent Consumer Advocacy Council (CAC) survey found that:

- 58% of domestic consumers are concerned about the impact of electricity prices on their budgets, which only groceries, petrol (current record prices) and mortgage/retail payments being of greater concern (notably all matters that have been our subject to Commerce Commission market studies);
- 65% of domestic consumers are concerned about their power bills; and
- 42% are finding it increasingly difficult to pay their electricity bills.

<https://www.cac.org.nz/assets/Documents/New-Zealand-small-electricity-consumer-sentiment-survey-2022-Overview.pdf>

<sup>33</sup> See, for example, the Electricity Authority (MDAG) project on pricing in a renewables-based electricity system:

<https://www.ea.govt.nz/projects/all/pricing-in-a-renewables-based-electricity-system/>

<sup>34</sup> See, for example, the MBIE consultation on advancing New Zealand's energy transition: <https://www.mbie.govt.nz/have-your-say/consultation-on-advancing-new-zealands-energy-transition/>

As a country we need a large, diverse number of participants making individual choices and competing fiercely to meet consumer needs.

We remain committed to the s9(2)(b)(ii) and are ready and willing to add robust competition to this market. We are happy to assist the Commerce Commission in any way we can with its consideration of whether to initiate an investigation and/or with the investigation if the Commission decides to go ahead.

Yours sincerely

s9(2)(a)

s9(2)(a)

The information provided in this letter contains confidential and commercially sensitive information. It is provided to the Commission on a confidential basis for the sole purpose of considering the conduct raised in this letter and conducting an investigation. If the Commission receives a request (including under the Official Information Act 1982 (OIA)) for release of this letter (or any of the information in it) we request that the Commission advises us of that request and allows us sufficient time to provide you with our views on whether the information remains confidential and commercially sensitive at the time such a request is being considered.