



COMMERCE COMMISSION

Decision No. 555

Provisional authorisation pursuant to the Commerce Act 1986 in the matter of controlled services supplied by:

POWERCO LIMITED

and

VECTOR LIMITED

The Commission: **PR Rebstock**
 D Bates
 PJM Taylor

Summary of the Provisional Authorisation: Pursuant to s 71 of the Act, the Commission authorises the supply of the controlled services defined by the Commerce (Control of Natural Gas Services) Order 2005 (as amended by the Commerce (Control of Natural Gas Services) Amendment Order 2005) by Powerco Limited and Vector Limited, on the terms specified in the provisional authorisation attached. This provisional authorisation has effect on and from 25 August 2005.

Date of Decision: 24 August 2005

**COMMERCE ACT (NATURAL GAS SERVICES)
PROVISIONAL AUTHORISATION 2005**

Pursuant to section 71 of the Commerce Act 1986, the Commerce Commission (“the Commission”) makes the following provisional authorisation:

1 Title

This provisional authorisation may be cited as the Commerce Act (Natural Gas Services) Provisional Authorisation 2005.

2 Commencement and expiry

- (1) This provisional authorisation comes into force on 25 August 2005.
- (2) This provisional authorisation remains in force until it is revoked by the Commission or is superseded by the making of a final authorisation.

3 Interpretation

- (1) In this provisional authorisation, unless the context otherwise requires, —

Act means the Commerce Act 1986

assessment means assessment by the Commission against the terms in *clauses 5 to 7*

assessment date means a date as at which controlled businesses are to be assessed against the terms in *clauses 5 to 7*, being each 1 October on which this provisional authorisation is in force

assessment period means the period of 12 months commencing on an assessment date and ending on the day before the subsequent assessment date

auditor, in relation to a controlled business, means a person who—

- (a) is qualified for appointment as auditor of a company under the Companies Act 1993; and
- (b) has no relationship with, or interest in, the controlled business, being a relationship or interest that is likely to involve that person in a conflict of interest; and
- (c) has the necessary expertise to properly undertake an audit required by *clause 7*; but

- (d) need not be the same person as the person who audits the financial statements of the controlled business for any other purpose

base quantity means, for the purpose of calculating the notional revenue of a controlled business, the annual quantity (for example, customer numbers, kWh, etc) corresponding to a price

commencement date means 25 August 2005

compliance statement means a statement of a kind described in *clauses 7(1)(a), 7(2)(a) and 7(3)(a)*

controlled business means Powerco or Vector

controlled services means the controlled services described in the Schedule of the Order

final authorisation means an authorisation made in respect of the controlled services under section 70 of the Act

first assessment date means 1 October 2005

initial period means the period on and from 25 August 2005 to 30 September 2005

new non-standard service means a non-standard service supplied in accordance with a non-standard contract that was not in force before the commencement date

non-standard contract means a contract for the supply of a controlled service that is not a standard contract

non-standard service means a controlled service that is not a standard service

notional revenue, in relation to a controlled business, means the summation, across all prices, of the product of price and base quantity

Order means the Commerce (Control of Natural Gas Services) Order 2005 as amended by the Commerce (Control of Natural Gas Services) Amendment Order 2005

Powerco means Powerco Limited

price means a price in nominal terms (such as a tariff, fee or charge) or a component thereof, that a controlled business charges in relation to a controlled service

publicly disclose, in relation to any information required by this provisional authorisation to be made available by a controlled business, means to make that information available in the following ways:

- (a) by making copies of that information available for inspection, during ordinary office hours, at the principal office of the controlled business; and

- (b) at the request of any person, by providing the person with a copy of that information (either free of charge or for a charge that is reasonably required to recover the cost of providing that copy) either—
- (i) by post; or
 - (ii) for collection, during ordinary office hours, from the principal office of the controlled business—,
- whichever the person requesting the information prefers;

and **public disclosure** has a corresponding meaning

quarterly reporting period means the period of 3 months ending on the day before a quarterly reporting date or ending on the day before an assessment date

quarterly reporting date means a date as at which controlled businesses are to provide a report to the Commission in accordance with *clause 7(2)*, being each 1 January, 1 April and 1 July on which this provisional authorisation is in force

reference date means 30 June of a calendar year in which an assessment date occurs

reference period means the 12 month period ending on a reference date

standard contract means a contract for the supply of a controlled service, where the price at which the controlled service is to be supplied under the contract is determined solely by reference to publicly disclosed terms and conditions

standard service means a controlled service supplied in accordance with a standard contract

Vector means Vector Limited

- (2) Terms used in this provisional authorisation that are defined in the Act or in the Order but not in *subclause (1)* have, unless the context otherwise requires, the same meanings as in the Act or in the Order.

4 Provisional authorisation

- (1) The Commission authorises each controlled business to supply to any person the controlled services applicable to that business on the terms specified in *clauses 5, 6 and 7*.
- (2) The authorisation granted by *subclause (1)* is a provisional authorisation pending the making of a final authorisation.

5 Terms relating to prices

The prices that each controlled business charges for its controlled services must satisfy the following terms:

- (a) *prices throughout the initial period*: throughout the initial period:
- (i) the price of each standard service must be the price determined in accordance with the standard contract that was in force on the day before the commencement date; and
 - (ii) the price of each non-standard service that was supplied on the commencement date must be the price determined in accordance with the non-standard contract for that service that was in force on the day before the commencement date; and
- (b) *prices at each assessment date*: the notional revenue of a controlled business at each assessment date (calculated in accordance with the left-hand side of the following expression) *is not to exceed* the allowable notional revenue of the controlled business (calculated in accordance with the right-hand side of the following expression):

$$NR_t \leq AR_t$$

where:

t denotes the calendar year during which the assessment date occurs;

NR_t is the notional revenue of the controlled business at the assessment date occurring in calendar year t , being equal to $\sum_i P'_{i,t} Q_{i,t}$;

AR_t is the allowable notional revenue of the controlled business at the assessment date occurring in calendar year t , being equal to $(1 - X) \sum_i P_{i,t} Q_{i,t}$;

i denotes each price pertaining to every controlled service;

$P_{i,t}$ is the i^{th} price at the reference date occurring in calendar year t , for a controlled service supplied at the assessment date occurring in calendar year t ;

$P'_{i,t}$ is the i^{th} price at the assessment date occurring in calendar year t , for a controlled service supplied at that assessment date;

$Q_{i,t}$ is the base quantity corresponding to the i^{th} price at the reference date occurring in calendar year t , for the reference period ending in calendar year t ,

or, if the i^{th} price at the reference date was not in effect for the entire reference period ending in calendar year t , is the base quantity corresponding to the i^{th} price at the reference date for the number of days that price was in effect during that reference period, multiplied by 365 and dividing the result by the number of days during which that price was in effect;

X is, at the first assessment date, the “X factor” value specified in Schedule 1 for the controlled business,

and, at subsequent assessment dates, is zero;

- (c) *prices throughout each assessment period after the first assessment date:* throughout an assessment period the price of each standard service must be the price determined in accordance with the standard contract that was in force at the assessment date on which that period commenced.

6 Terms relating to quality standards

At each assessment date after the first assessment date, each controlled business must demonstrate, by reference to the quality standards, measures and statistics described in *clause 7*, that there has been no material deterioration in the quality of its controlled services since the day before the commencement date.

7 Terms for ensuring compliance with the provisional authorisation

- (1) Each controlled business must provide to the Commission, within 30 working days of the first assessment date, the following statement and documents:
- (a) A written statement that—
- (i) confirms the controlled business’ compliance, or otherwise, with *clauses 5(a) and 5(b)*, and includes evidence to this effect in the form of notional revenues, prices, base quantities, units of measurement associated with all numeric data, and other data, information, and calculations, that fully supports and explains the confirmation; and

- (ii) describes the terms and conditions (including, but not limited to, price) for the supply of each new non-standard service the controlled business introduced during the initial period, and provides evidence that fully explains whether it is more advantageous to the acquirer or prospective acquirer of that new non-standard service to be supplied in accordance with a non-standard contract rather than to be supplied in accordance with a standard contract, and that fully explains whether the terms and conditions of that non-standard contract are consistent with, or are more advantageous to the acquirer or prospective acquirer of that service than the terms and conditions for comparable non-standard services supplied during that period; and
 - (iii) describes the methodology used and rationale for determining the prices charged on the first assessment date; and
 - (iv) describes the quality standards that were applicable to the supply of its controlled services on the day before the commencement date; and
 - (v) describes the policies and procedures which the controlled business uses for monitoring its compliance with the quality standards described for the purposes of *subparagraph (iv)*; and
 - (vi) describes the quality measures and statistics relating to its controlled services that the controlled business proposes to use to demonstrate compliance with *clause 6* at assessment dates after the first assessment date; and
 - (vii) includes all such other information as is sufficient to enable the Commission to properly determine whether or not the terms of this provisional authorisation have been complied with by the controlled business; and
 - (viii) states the date on which it has been prepared:
- (b) A report on the statement required by *paragraph (a)* that is signed by an auditor and is in the appropriate form required by auditing standards promulgated by the New Zealand Institute of Chartered Accountants:
 - (c) A certificate in the form set out in Schedule 2, duly signed by two directors of the controlled business.
- (2) Each controlled business must provide to the Commission, within 30 working days of each quarterly reporting date, the following statement and document:
- (a) A written statement that—
 - (i) describes the terms and conditions (including, but not limited to, price) for the supply of each new non-standard service the

controlled business introduced during the quarterly reporting period ending on the day before that quarterly reporting date, and provides evidence that fully explains whether it is more advantageous to the acquirer or prospective acquirer of that new non-standard service to be supplied in accordance with a non-standard contract rather than to be supplied in accordance with a standard contract, and that fully explains whether the terms and conditions of that non-standard contract are consistent with, or are more advantageous to the acquirer or prospective acquirer of that service than the terms and conditions for comparable non-standard services supplied during that period; and

- (ii) states the date on which it has been prepared.
- (b) A certificate in the form set out in Schedule 2, duly signed by two directors of the controlled business.
- (3) Each controlled business must provide to the Commission, within 30 working days of each assessment date after the first assessment date, the following statement and documents:
- (a) A written statement that—
 - (i) confirms the controlled business' compliance, or otherwise, with *clauses 5(b) and 5(c)*, and includes evidence to this effect in the form of notional revenues, prices, base quantities, units of measurement associated with all numeric data, and other data, information, and calculations, that fully supports and explains the confirmation; and
 - (ii) describes the terms and conditions (including, but not limited to, price) for the supply of each new non-standard service the controlled business introduced during the quarterly reporting period ending on the day before that assessment date, and provides evidence that fully explains whether it is more advantageous to the acquirer or prospective acquirer of that new non-standard service to be supplied in accordance with a non-standard contract rather than to be supplied in accordance with a standard contract, and that fully explains whether the terms and conditions of that non-standard contract are consistent with, or are more advantageous to the acquirer or prospective acquirer of that service than the terms and conditions for comparable non-standard services supplied during that period; and
 - (iii) describes the methodology used and rationale for determining the prices charged on that assessment date; and

- (iv) confirms the controlled business' compliance, or otherwise, with *clause 6*, and includes evidence to this effect in the form of quality measures and statistics of its controlled services; and
 - (v) describes the policies and procedures which the controlled business has used for recording the quality measures and statistics of its controlled services referred to in *subparagraph (iv)*; and
 - (vi) identifies whether the controlled business has, throughout the assessment period, met the quality standards described to the Commission for the purposes of *subclause (1)(a)(iv)*; and
 - (vii) includes all such other information as is sufficient to enable the Commission to properly determine whether or not the terms of this provisional authorisation have been complied with by the controlled business; and
 - (viii) states the date on which it has been prepared:
- (b) A report on—
- (i) the statement required by *paragraph (a)*; and
 - (ii) each of the statements required by *subclause (2)(a)* for the assessment period ending on the day before that assessment date—
- that is signed by an auditor and is in the appropriate form required by auditing standards promulgated by the New Zealand Institute of Chartered Accountants:
- (c) A certificate in the form set out in Schedule 2, duly signed by two directors of the controlled business.
- (4) A controlled business must identify any information included in a statement under *subclause (1), (2) or (3)* that it considers is commercially sensitive.
- (5) Each controlled business must publicly disclose and publish on the Internet, within 30 working days of each assessment date the information described in *subclauses (1)(a)(iii) to (v) or subclauses (3)(a)(iii) and (v)* as applicable.
- (6) Each controlled business must, within 30 working days of each assessment date, publish in each area where its controlled services are supplied, by means of the newspaper having the greatest number of copies distributed in that area at that time, a notice including a brief summary of the information referred to in *subclause (5)* and the Uniform Resource Locator (URL) of the Internet site where that information can be found.

- (7) An auditor's report given for the purposes of this clause must state whether, in the auditor's opinion,—
- (a) the statement to which the report relates complies with the relevant provisions of this clause; and
 - (b) proper records have been kept by the controlled business to enable the completion and audit of the statement; and
 - (c) the statement gives a true and fair view of the matters to which it relates.
- (8) If an auditor's report given for the purposes of this clause is qualified in any respect, the report must state the full reasons for the qualification.

8 Reasons for provisional authorisation

The Commission's reasons for making this provisional authorisation are—

- (a) the Order declares that the controlled services are controlled on and from 25 August 2005; and
- (b) section 55 of the Act prohibits the supply of the controlled services unless an authorisation is made or the Commission obtains or accepts an undertaking under section 72 of the Act; and
- (c) the Commission considers it essential that the controlled services continue to be lawfully supplied on and from 25 August 2005; and
- (d) the Commission has not obtained or accepted an undertaking under section 72 of the Act, and accordingly this provisional authorisation is necessary to enable the controlled services to continue to be lawfully supplied on and from 25 August 2005;
- (e) the Commission considers that the terms in *clauses 5 to 7* strike an appropriate balance in respect of the interests of all those affected by this provisional authorisation given:
 - (i) the conclusions and considerations identified in the Commission's Gas Control Inquiry Final Report dated 29 November 2004; and
 - (ii) the submissions made by interested persons to the Ministry of Economic Development on that report; and

- (iii) the submissions made by Powerco and Vector to the Commission following the making of the Order; and
- (iv) that this authorisation is a provisional authorisation rather than a final authorisation; and
- (v) the fact that section 70C of the Act enables the Commission, as part of a final authorisation, to impose provisions providing for remedies and penalties that apply if the prices determined by the Commission in that final authorisation are lower than any price charged to any person under this provisional authorisation.

Dated at Wellington this 24th day of August 2005.

COMMERCE COMMISSION.

SCHEDULE 1

Clause 5(b)

X FACTOR VALUES FOR POWERCO AND VECTOR

Powerco	9.0%
Vector	9.5%

SCHEDULE 2

Clauses 7(1)(c), 7(2)(b) and 7(3)(c)

FORM OF DIRECTORS' CERTIFICATE ON COMPLIANCE STATEMENT

We, *[insert full names]*, being directors of *[insert name of controlled business]* certify that, having made all reasonable enquiry, to the best of our knowledge and belief, the attached compliance statement of *[insert name of controlled business]*, and related information, prepared for the purposes of the Commerce Act (Natural Gas Services) Provisional Authorisation 2005 complies with the requirements of that authorisation **[except in the following respects]:*

[insert description of non-compliance].

[Signatures of Directors]

[Date]

**Delete if inapplicable.*

Note: Section 103(2) of the Commerce Act 1986 provides that no person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it. It is an offence to contravene section 103(2) and any person who does so is liable on summary conviction to a fine not exceeding \$10,000 in the case of an individual or \$30,000 in the case of a body corporate.

EXPLANATORY NOTE

The purpose of this provisional authorisation is to—

- (a) permit the controlled businesses (Powerco Limited and Vector Limited) to continue to lawfully supply controlled services on and from 25 August 2005 on the terms specified in clauses 5, 6 and 7 of the provisional authorisation; and
- (b) require those controlled businesses to communicate to acquirers of the controlled services the methodology used and rationale for determining the prices charged during the term of the provisional authorisation; and
- (c) require those controlled businesses to regularly send to the Commission compliance statements, accompanied by supporting evidence, auditor's reports and directors' certificates.

This provisional authorisation remains in force until it is either revoked by the Commission or is superseded by the making of an authorisation under section 70 of the Act (a "final authorisation").

Section 70C of the Act enables the Commission, as part of a final authorisation, to impose provisions providing for remedies and penalties that apply if the prices determined by the Commission in that final authorisation are lower than any price charged to any person under a provisional authorisation. Those remedies and penalties may include the payment of refunds, specified amounts, and compensation to persons acquiring the controlled services, or the making of deductions from the prices charged in the future to persons acquiring the services.

It is the Commission's current intention to provide in that final authorisation that Powerco Limited and Vector Limited must ensure that, to the extent practicable, the persons who have been affected by any such higher prices receive the benefit of any remedies and penalties provided for in that final authorisation, whether or not those persons are in a direct contractual relationship with Powerco Limited or Vector Limited, or are end consumers.