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Commerce Commission New Zealand
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7 November 2024

Electric Kiwi – Submissions on the Contact/Manawa Clearance Application

Executive Summary

1. The effect of the proposed acquisition of Manawa Energy by Contact Energy is to remove the largest independent, non-vertically-integrated, generator. It will lessen competition.
2. There is a long history of the Commerce Commission, the Electricity Authority (EA) and others considering competition issues in the electricity industry, most recently with the establishment of the Energy Competition Task Force.
3. Competition in the electricity industry, particularly in wholesale and hedge markets, is not currently workable and effective. There is a lack of liquidity in hedge products, which restricts both independent retailers from competing and growing, and independent generators from investing in new generation.
4. Against that backdrop, Electric Kiwi submits that the Commission cannot be satisfied that the proposed acquisition of Manawa Energy by Contact Energy will not have, or would not be likely to have, the effect of substantially lessening competition in a market.
5. There are a number of key competition concerns with the proposed acquisition, as it will:
 - a. increase concentration in an already concentrated market (resulting in the 4 gentailers accounting for more than 90% of generation) and further entrench the market power of the gentailers, by removing the largest independent generator from the market;
 - b. likely enhance barriers to entry and make it more difficult for independent generators to enter the market, or non-vertically integrated players to compete;

- c. likely result in a decrease, rather than an increase, in generation capacity and reduce incentives to invest in new generation;
 - d. increase the risk of tacit collusion, as incentives among the 4 gentailers are similar; and
 - e. make it even more difficult for independent retailers to obtain appropriately shaped hedge products, thereby reducing the ability of independent retailers to compete in retail market(s). Electric Kiwi does not believe that the proposed acquisition will result in more hedge products being available, and this is not consistent with current market dynamics or Contact's previous behaviour.
6. Electric Kiwi also submits that the Commission should carefully scrutinise some of the key assertions made by the parties in the clearance application. In particular:
- a. The Commission should consider the appropriate market definition, and whether there are separate markets for hedge products, separate markets for firm generation and temporal markets to reflect peak and super peak time periods.
 - b. Independent Electricity Retailers (IERs) have consistently raised issues with the inability to access appropriately shaped hedge products, and the gentailers' refusal or constructive refusal to supply these products. This is inconsistent with Contact's assertion that it is incentivised to offer Fixed Price Contracts, and inconsistent with economic principles as set out in the letter to the EA dated 7 August 2024.
 - c. The assertion that the proposed acquisition will increase the amount of Fixed Price Contracts that the merged entity will be able to offer appears inconsistent with current market experience, and in any event, the anticipated additional capacity appears to be small. The Commission should also consider the merged entity's self-supply, whether that should be included in the market analysis, and the extent to which it impacts incentives or changes the competitive effects.
 - d. The view that this change would increase the volume of Fixed Price Contracts available to independent retailers. It is significantly more plausible that the proposed acquisition would result in the combined entity seeking to contract the additional generation volumes directly via market share growth as opposed to contracting this volume with independent retailers. This will only further exacerbate the market concentration issues with both the retail and hedge markets.
 - e. The Commission has noted in its decision on the Foodstuffs clearance application that regulatory oversight is not an answer to potential competition concerns, which is inconsistent with the applicants' submission

that the EA and its market rules will be a constraint on the merged entity, and the EA is best placed to respond to any competition issues. While the EA has undertaken a number of different projects and workstreams (or these are underway) none of these comprehensively consider the systemic issues identified in various reports.

- f. The impact on investment in new generation and the extent to which independent generators will impose a real constraint on the merged entity also needs to be considered carefully. Combined, Contact and Manawa account for 30% of the “committed” new generation projects listed in the Electricity Authority’s investment pipeline.
7. If the proposed acquisition proceeds, it will create the impression that there is no scope for independent supply or non-integrated generation in New Zealand.

Background – Competition in the Electricity Industry

8. Electric Kiwi, and a number of other parties, have consistently raised concerns about the lack of competition in the electricity industry, and the market power held by the 4 large gentailers (Contact Energy, Meridian Energy, Mercury and Genesis).
9. In a letter dated 7 August 2024, Electric Kiwi and 3 other independent retailers (through legal counsel and supported by HoustonKemp), wrote to the Electricity Authority (EA) and the Commerce Commission, setting out an analysis of the competition issues and a request for an urgent change to the Electricity Industry Participation Code (Code). The following paragraphs summarise the key points from that letter:

Without swift action, competition at the retail and wholesale levels in New Zealand’s electricity sector is likely to continue to wither due to the unavailability of hedging products capable of supporting successful new entry or expansion of existing competitors. Less than effective competition to deliver new sources of electricity will increase the cost and reduce the prospects of New Zealand achieving net zero by 2050.

Neither wholesale nor retail electricity markets are functioning in a workably competitive manner, which has been documented in both the EPR¹ and MDAG² reports. Many of the issues have been caused by the vertical integration of the four gentailers. Evidence of this (as detailed by our clients in their complaints to the Commerce Commission) includes:

¹ [Electricity Price Review Final Report](#), p.2.

² [MDAG Final recommendations Report](#), p.12 –13.

- *There is not sufficient investment in additional generation expected given anticipated demand³ and the incumbent gentailers do not have incentives to expand generation to keep pace with demand.*
- *There is not sufficient liquidity in the market for risk management tools (both on the ASX and in the OTC market). This has a number of effects, including:*
 - *Disincentivising independent generators from building new generation assets or entering the generation market.*
 - *IERs being forced to limit the growth of their customer base, and the market share of the IERs starting to stagnate or decline.*
- *Barriers to entry for generation are high.*
- *Wholesale prices have increased rapidly and are well above the long run marginal cost of generation.*
- *Retail prices are below wholesale prices.*
- *The gentailers have reported high or record profitability for their wholesale businesses and losses for their retail businesses.⁴*
- *IERs are unable to expand or compete in the way you would expect to see in a workably competitive market.*

...

In our view, it is both necessary and desirable for the EA to take urgent action to address the underlying issues of vertical integration and market design if the New Zealand electricity industry is to meet expected increased demand, support the transition to decarbonisation, encourage retail innovation and ensure long term reliability and affordable electricity for consumers.

Different competitive models (e.g. independent retailers and generators) can be expected to lead to increased output (supply of electricity and hedges) (productive competition); enhanced dynamic competition and greater innovation than a counterfactual of four vertically integrated players with similar market designs and incentives (resulting in coordinated effects).

10. We attach a copy of this letter as Appendix A to these submissions.

³ Total generation capacity only increased by 0.31% between 2021 and 2022 despite “record electricity generation from both wind and geothermal” and above average hydro inflows due to a wet winter, see p.14 of [MBIE Energy in New Zealand 23](#). In terms of actual generation in 2022, New Zealand generated 0.77% less electricity than in 2019 (p.15).

⁴ See for example, for the 6 months ended 31 December 2023: [Meridian Condensed Interim Financial Statements 2024](#) shows an EBITDAF of \$-43mil for retail and \$534mil for wholesale respectively; [Genesis Interim Report 2024](#) shows an EBITDAF of \$-34.8mil for retail and \$245.9mil for wholesale respectively; [Mercury Interim Report 2024](#) shows an EBITDAF of \$-20mil for retail and \$454mil for wholesale respectively; and [Contact 2024 Interim Financial Statements](#) shows an EBITDAF of \$-1mil for retail and \$383mil for wholesale respectively.

11. In this context, where the wholesale and retail electricity markets are already not functioning in a workably competitive manner, the Commission should closely scrutinise the proposed acquisition of Manawa by Contact Energy, and even a small change in the competitive dynamics could have a substantial impact on competition.⁵

Market Definition

12. We note that the applicant has adopted wide market definitions. However, we do not believe that is necessarily the right approach for analysing the competitive effects and we request that the Commission consider whether:
 - a. There are separate markets for hedge contracts;
 - b. There are separate markets for 'firm' generation and/or 'firm' hedge contracts; and
 - c. There are relevant temporal markets that should be considered, in particular regarding the supply of electricity in, or hedge contracts applying to, peak and super-peak periods.
13. There could be a number of potentially impacted markets (including those in which there may be little or no trading) and the focus should be on the impacts on where supply does/could occur (i.e. excluding self-supply) to better consider likely competitive effects.
14. As a starting point, we note that in 2009 the Commission published the Electricity Investigation Report, which defined the relevant markets as:⁶
 - a. National wholesale market for supply and purchase of electricity; and
 - b. National market for supply and purchase of hedge contracts, or forward contracts, for wholesale electricity.
15. Relevant comments on market definition include:

the Commission recognises that financial derivative contracts and physical electricity sales have quite different characteristics, and clearly are not substitutable on the demand side. Further, financial payments under hedge contracts can occur independently of whether the buyer and seller actually buy or sell electricity in the spot market.⁷

⁵ The Court of Appeal in *NZ Bus & Infratil v Commerce Commission* [20070 NZCA 502 at 270 held that competitive impact may be "minor" but can nonetheless constitute a substantial lessening of competition

⁶ [2009 Electricity Investigation Report](#), para 198.

⁷ 2009 Electricity Investigation Report, para 152

The Commission therefore considers in this case it is appropriate to place the risk management tool of derivatives contracts, and the sale and purchase of the physical product - wholesale electricity, in separate product markets.⁸

...

The Commission considers that market conditions can vary considerably over time, and that this could justify the use of a temporal dimension to market definition. This view is supported by the quantitative evidence provided to the Commission which finds that market power is most commonly exercised under certain market conditions.⁹

...

The Commission considers that for the purposes of this investigation it is not necessary to formally define a temporal dimension to the wholesale electricity market, but it will take into account any variations in the extent of competition over time in its market power analysis below.¹⁰

16. The Frontier Economics report accompanying the Contact Energy submission also contains statements that are consistent with the need for the competition analysis to be undertaken by reference to separate relevant markets for generation assets (and so the wholesale electricity market into which the output of those assets is sold) and financially firm hedging contracts.

17. Frontier Economics states (correctly in Electric Kiwi's view) that:¹¹

Financially firm hedging contracts [...] are essential to support fixed price energy supply contracts with customers. [emphasis added]

and, further, that the supply of financially firm hedging contracts is different from the supply of generation capacity or output, not all of which is capable of supporting financially firm hedging contracts, ie:¹²

The supply of financially firm contracts is determined by the supply of physically reliable generation earning spot prices, which are used to determine hedging contract payments. [emphasis added]

18. These statements show that financially firm hedging contracts can be presumed to fall into a product market that is distinct from generation generally or, at least, non-firm generation (and so non-physically reliable generation) capacity – such as variable renewable generation in the form of wind and solar.

⁸ 2009 Electricity Investigation Report, para 153

⁹ 2009 Electricity Investigation Report, para 186

¹⁰ 2009 Electricity Investigation Report, para 189

¹¹ 2024 Frontier Economics, Contact and Manawa, Appendix 1 to Contact clearance application, para 6.

¹² 2024 Frontier Economics, Contact and Manawa, Appendix 1 to Contact clearance application, para 7.

19. Reinforcing the distinction between physically reliable or firm generation capacity and that which is non-firm, Frontier also makes the point that financially firm hedging contracts are an essential input for the supply of electricity retailing services, which itself is distinct from the wholesale market for electricity generation.

20. Frontier states, correctly in Electric Kiwi's view, that:¹³

If the supply of financially firm contracts declines then one or more of the following may occur:

(a) retailers may find it increasingly difficult to set their contract position so they can supply retail customers the fixed prices they demand;

(b) some retailers may not be able to set their preferred position and may be exposed to spot price movements, potentially threatening their viability;

(c) other potential buyers of financially firm hedging contracts (such as commercial and industrial businesses who are large users of electricity) may not be able to obtain their preferred position of exposure to spot price movements for an acceptable price;

21. These observations amount to a strong endorsement of the need for a careful consideration of the implications of the proposed increase in concentration for both:

a. markets that encompass the supply of physical generation capacity, with a particular focus on firm capacity; and

b. markets that encompass the supply of financially firm hedging contracts, for use by retailers.

22. The Commission should also consider the merged entity's self-supply, whether that should be included in the market analysis. We note that there are some similarities with the wood markets analysed by the Commission in its decision on the acquisition by CRBF Limited of certain forestry estates owned by Carter Holt Harvey Limited.¹⁴ In that decision, the Commission considered:

the extent to which wood flows were committed to particular uses (such as self-supply for the case of vertically integrated forestry operators and long-term supply contracts), and therefore the extent by which the combined entity would be able to control or influence the flow of wood to parties, such as independent sawmills.

Key competition concerns arising from the proposed acquisition

¹³ 2024 Frontier Economics, Contact and Manawa, Appendix 1 to Contact clearance application, para 8.

¹⁴ Commerce Commission decision No, 589, 5 October 2006

23. In light of the current market dynamics referenced above, Electric Kiwi submits that the Commission cannot be satisfied that the proposed acquisition will not substantially lessen competition.
24. There are a number of key competition concerns with the proposed acquisition, as it will:
 - a. increase concentration in an already concentrated market (resulting in the 4 gentailers accounting for more than 90% of generation) and further entrench the market power of the gentailers, by removing the largest independent generator from the market;
 - b. likely enhance barriers to entry and make it more difficult for independent generators to enter the market, or non-vertically integrated players to compete;
 - c. likely result in a decrease, rather than an increase, in generation capacity and reduce incentives to invest in new generation;
 - d. increase the risk of tacit collusion, as incentives among the 4 gentailers are similar; and
 - e. make it even more difficult for independent retailers to obtain appropriately shaped hedge products, thereby reducing the ability of independent retailers to compete in retail market(s). Electric Kiwi does not believe that the proposed acquisition will result in more hedge products being available, and this is not consistent with current market dynamics or Contact's previous behaviour.

Entrenchment of market power and increase in barriers to entry

25. The four large generators, with significant hydro generation assets, dominate supply.
26. In its 22 May 2009 Investigation Report the Commerce Commission concluded: *"The Commission's investigation has led the Commission to the view that the four main generators - Contact Energy Limited (Contact), Genesis Power Limited (Genesis), Meridian Energy Limited (Meridian) and Mighty River Power Limited (Mighty River Power) - have a substantial degree of market power in the wholesale electricity market."* This was peer-reviewed by Von der Fehr.
27. Subsequent reports reach similar views.¹⁵
28. Generation is characterised by high entry barriers, exacerbated by vertical integration. Incumbents even argue new entrants should vertically integrate when

¹⁵ Similar views were reached by Oliver Browne, Stephen Poletti & David Young (2012): *Simulating market power in the New Zealand electricity market*, New Zealand Economic Papers, [DOI:10.1080/00779954.2011.649566](https://doi.org/10.1080/00779954.2011.649566)

that was not how their businesses evolved. Vertical integration can lead to competition concerns where vertically integrated entities have market power at one or more functional levels. Those problems are exacerbated in highly concentrated oligopolistic markets where all the main players are vertically integrated. (Here any efficiencies seem almost entirely risk management, rather than productive, which would not be necessary with liquid markets).

29. Manawa, although small in comparison with the gentailers, is the largest independent generator in the market. Its acquisition by Contact will mean that approximately 90% of generation will be provided by the four gentailers.
30. This will make it harder for non-integrated players (both generators and retailers) to compete in wholesale and retail markets.
31. Potential new generators face (among other barriers) the considerable obstacle of customers for such large projected supply. Without a liquid hedge market this is a considerable risk.
32. The applicants submit that there is only a small amount of aggregation of market share as a result of the proposed acquisition. However, the Court of Appeal in *NZ Bus & Infratil v Commerce Commission*¹⁶ that competitive impact may be “minor” but can nonetheless constitute a substantial lessening of competition.
33. Furthermore, we note that the Commission’s *Mergers and Acquisitions Guidelines* state:

*“A lessening of competition is generally the same as an increase in market power...”*¹⁷

*“we ask whether the merged firm’s market power would increase relative to the merged firm’s market power without the merger.”*¹⁸

Reduction in generation capacity and incentives to invest in new generation

34. The four gentailers seek to match their generation capacity with their retail supply. As a result of this internal hedge (balanced supply and demand) and their overall scale, they face much lower incentives to invest in new generation capacity than independent generators.
35. The issues in the wholesale market, with high and rising wholesale spot prices, were created in large part due to a failure by the gentailers to invest in new generation capacity, despite predicted increases in demand. This is rational profit-maximising behaviour but is a significant detriment to New Zealand consumers.

¹⁶ [2007] NZCA 502 at 270

¹⁷ Commerce Commission, *Mergers and Acquisitions Guidelines*, May 2022, Executive Summary at point 6

¹⁸ Commerce Commission, *Mergers and Acquisitions Guidelines*, May 2022, Chapter 2.20, p12

36. It is clear that to date there has not been sufficient investment in generation and infrastructure to keep up with demand, let alone forecast demand. For example, we note that:
- a. Total generation capacity increased by only 0.31% between 2021 and 2022 despite “*record electricity generation from both wind and geothermal*” and above average hydro inflows due to a wet winter.¹⁹
 - b. Since 2009, new generation has not fully replaced retired/decommissioned generation.
 - c. More recently, the EA has found a net negative of 42MW and 29MW for firming generation for winter 2024/25 respectively.²⁰
37. The clearance application refers to the Generation Investment Survey commissioned by the EA²¹ to highlight the number of projects that are being pursued. While this narrative is promising, we note:
- a. The pipeline projects are given a status of “committed”, “actively pursued” and “other”. “Committed” is the highest category status and most likely to proceed. However, this is still uncertain and it is possible that projects that have been treated in the report as “committed” may not in fact proceed.²²
 - b. Even if all of the “committed” projects are built, there will still not be sufficient new generation to meet demand in 2025 or 2027.²³
 - c. Of the 164 projects listed in the EA’s latest list of investment projects²⁴ only 30 are listed as “committed”.
 - d. Of those projects listed as “committed”, Manawa is the developer for 3 of those projects and Contact is the developer for 6 of the projects. Therefore 9 of the 30 “committed” new generation projects (30%) will potentially be affected by the proposed acquisition.
38. Concept Consulting acknowledge that concerns that the four gentailers do not have sufficient incentives to invest in generation may be valid. In 2022, Concept Consulting commented:

“The four largest generators have significantly lifted their development efforts in recent years – with major committed projects underway and more

¹⁹ See p.14 of [MBIE Energy in New Zealand 23](#).

²⁰ See *Table 5: An overview of the announced investment in firming generation (including BESS) for winter 2024 and winter 2025* in [Potential solutions for peak electricity capacity issues](#)

²¹ See paragraphs 30.2-30.3 of the clearance application

²² See the last bullet point on slide 15 of the [Generation Investment Survey](#).

²³ See point 3 on slide 2 of the Generation Investment Survey.

²⁴ EA list of investment projects, 11 September 2024, <https://www.emi.ea.govt.nz/Wholesale/Datasets/Generation/GenerationFleet/Proposed>

potential developments under consideration. While these factors should reduce wholesale price pressures, it is unclear whether major suppliers' investment pace is being tempered by cannibalization concerns.

"Such concerns can arise due to the depressing impact a new project may have on revenue from existing generation in an incumbent developer's portfolio. If a cannibalization effect applies, an incumbent supplier can be better off by delaying or foregoing investment, even though the project is economic it is own right.

"... based on underlying incentives, the concern appears valid and likely merits closer monitoring."²⁵

39. In 2023, Concept Consulting's comments about investment were more positive than the previous year, but it retained the view that there could be valid concerns that the four largest generators are under-investing:

"While the four largest generators have significantly lifted their development efforts in recent years – with major committed projects underway and more potential developments under consideration, some independents suggested that it was hard to attract interest from major generators, even with apparently attractive projects/power purchase offers – possibly due to cannibalization concerns."²⁶

40. There is an analogy between consented projects and restrictive covenants/land banking. The Commerce Commission has previously identified restrictive land covenants as impacting competition in the markets for residential building supplies, groceries and retail fuels, via its market studies into these sectors of the New Zealand economy.²⁷ Purchasing, consenting, but ultimately not building new generation assets on appropriate sites could have a similar impact on competition as restrictive land covenants.
41. According to Transpower "International experience is typically that only around 20% of proposed projects are ultimately developed."²⁸
42. Electric Kiwi therefore asks that the Commission carefully considers the impact the proposed acquisition would have on the incentives to invest in new generation:
- a. One potential counter-factual is that Contact would use the purchase price to invest in new generation capacity, to provide the internal hedge that it would otherwise seek to meet with Manawa's capacity. The acquisition of Manawa is therefore a potential loss in investment in new (and much needed) generation capacity.

²⁵ See slide 23 of Concept Consulting, Generation investment survey 2022, July 2022.

²⁶ See slide 47, [Concept Consulting, Generation investment survey 2023 update](#), undated.

²⁷ See [Commerce Commission - Foodstuffs North Island hit with \\$3.25m fine for blocking rivals \(comcom.govt.nz\)](#)

²⁸ Transpower, submission to MBIE, [Transpower submission on the Electricity Demand and Generation Scenarios \(EDGS\)](#), 6 June 2023.

- b. Both Contact and Manawa have projects in their respective investment pipelines (as stated above 9 of the 30 committed projects in the EA's investment pipeline are Contact or Manawa projects). While Contact states in its application that it will continue to pursue all of these projects and will be better placed to do so with a stronger balance sheet, it does acknowledge that not all of the projects will be pursued.²⁹ The Commission should consider the extent to which the acquisition will result in less new generation being commissioned than if the two entities remained separate.

Increase in risk of tacit collusion

43. Each of the four gentailers inherited their generation assets following the breakup of ECNZ. The four legacy generation businesses were permitted to enter retailing, and now hold most retail customers. They account for about 86% of generation and 84% of retail, so are largely hedged.
44. The proposed acquisition will result in further consolidation of generation, so that the four gentailers will account for more than 90% of generation post-acquisition.
45. Given the similar business structures of the four gentailers, they have similar incentives and the consolidation will therefore only increase the potential risk of tacit collusion.
46. In addition, Electric Kiwi has complained to the Commerce Commission (as have other IERs) about the conduct of the gentailers. It appears that the four gentailers have been/are engaging in textbook incumbent conduct found in the NZCC's (and similarly in most competition regulators') Misuse of Market Power Guidelines which undermines the effective operation of the wholesale electricity market:
 - a. Actual / constructive refusal to supply (eg shaped hedge products);
 - b. Price (margin) squeeze / Predation;
 - c. Lack of investment by gentailers in renewable or other generation; and
 - d. Gentailer spilling or restricting peak demand.

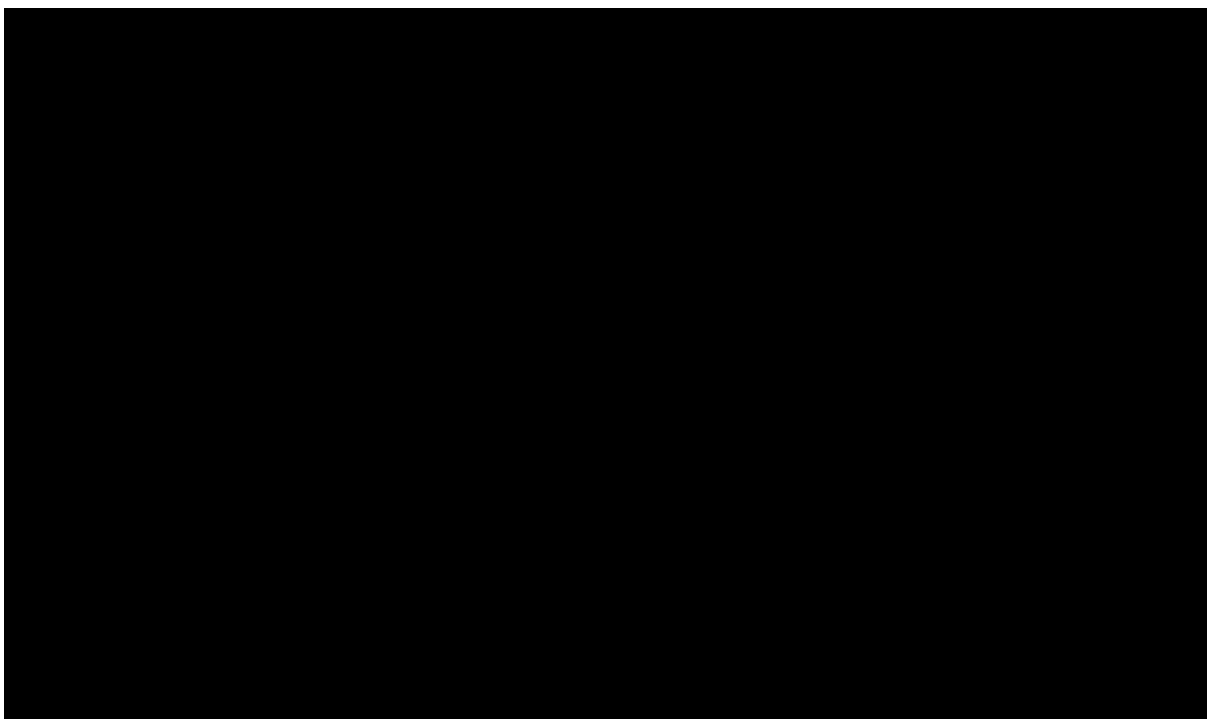
Impact on hedge and retail markets

47. Independent electricity retailers, including Electric Kiwi, have been raising concerns for some time about the inability to access appropriate hedge products and the lack of a liquid hedge market.
48. Electric Kiwi's experience is that the gentailers are refusing to supply in order to prioritise shaped hedge products for their own retail businesses. As retailers cannot grow their customer base without an effective hedge portfolio to manage exposure

²⁹ See paragraph 30.8 of the clearance application

to wholesale volatility both now and in the future, this refusal to supply in wholesale contract markets results in a lessening of competition in retail markets.

49. Electric Kiwi's experience is that when the gentailers are making the products available, they are doing so at excessively high prices. This raises the overall wholesale input costs of IERs, making them unsustainable, amplifying the impact of the margin squeeze on them and reducing their ability to compete.



51. Without access to hedge products or a liquid hedge market, independent retailers are not able to effectively compete in the retail market(s). Electric Kiwi has recently announced that it is not accepting new customers, because it is not able to obtain appropriate hedge products to support growth in its customer base.
52. Electric Kiwi does not believe that the proposed acquisition will result in more hedge products being available in the market, and this is not consistent with current market dynamics or Contact's previous behaviour.
53. In Electric Kiwi's experience, there is a substantial difference dealing with an independent generator in contrast to dealing with a gentailer.

³⁰ See page 8 and Appendix C of Electric Kiwi's 30 August 2023 complaint to the Commerce Commission.

³¹

[REDACTED]

54.

[REDACTED]

55.

[REDACTED]

Response to clearance application

56. There are a number of key assertions in the clearance application that Electric Kiwi submits should be scrutinised carefully, and which it does not accept. In this section, Electric Kiwi notes why some of those assertions should be tested by the Commission.

Competitive effects in generation

57. The clearance application asserts that the “*market share increment post-transaction is minor, resulting in an increase of approx. 4.3% on the basis of generation volumes*”.³² The contention as to benign competition effects is overly simplistic.

58. It is well understood that the potential aggregation of generation capacity in wholesale markets for electricity cannot be assessed by reference to simple market share changes alone. This is because, in contrast to many markets, producers in an electricity wholesale market each have different cost and performance characteristics. These give rise to a merit order or markedly upward sloping supply curve.

59. It follows that the relevant economic analysis for the purposes of assessing the proposed transaction is the change in incentives or ability that will arise for the merged entity (ie, change as compared with those applying without the merger), in relation to:

- a. the price at which the offers will be made into the wholesale market;
- b. the price and extent to which hedge contracts (in each of their relevant forms) will be offered to independent retailers and other gentailers; and

by consequence of this analysis, the likely competitive effects in relation to:

- c. the wholesale price of electricity;

³² See paragraph 25.3 of the clearance application.

- d. the liquidity, availability and price of hedging contracts, which are an essential input for independent retailers to compete in the retail market
60. To address the potential effects on the wholesale price of electricity, the analysis that needs to be undertaken is the likely effects on wholesale prices if the portfolios of Contact and Manawa are offered into the market as one. The principal consequences (relative to them being offered separately) that need to be considered are:
- a. the frequency with which the combined entity can be expected to have the ability to withhold and/or raise the price of any of unit capacity and thereby affect wholesale price – a circumstance that is most likely to arise when its capacity includes the price setting or pivotal plant, and how the frequency of such events may change with and without the merger; and
 - b. if it were to withhold capacity, the balance between:
 - i. the cost of withholding and thereby reducing the revenue received from pivotal plant;
 - ii. the benefit of other, inframarginal or non-pivotal plant of the increase in wholesale price arising from that withholding.
61. Such analysis requires modelling of wholesale market bidding and dispatch outcomes over several typical years, with the competition (wholesale price) effects being specific to the portfolios being combined, shape of the supply curve, etc
62. No such analysis has been undertaken in the clearance application, and it should either be required of Contact and/or undertaken by the Commission.

Access to hedge products

63. The clearance application asserts that the proposed acquisition will increase the amount of Fixed Price Contracts the merged entity will be able to offer. However, Electric Kiwi notes:
- a. this appears to be inconsistent with current market experience and does not address the fact that the merged entity will continue to prioritise its own committed supply;
 - b. even on Contact's numbers, the total volume of additional fixed price contracts is small;
 - c. while there may be an initial increase in the merged entity's willingness to offer Fixed Price Contracts to the extent that it does not have its own committed retail supply, Electric Kiwi expects that the merged entity will grow its retail book to match its generation capacity and therefore the availability of hedge products from the merged entity will decrease over time.

64. Notably, the analysis of Frontier Economics accompanying the Contact clearance application – the efficacy of which should be scrutinised very carefully – concludes only that:³³

the combined portfolio of Contact and Manawa could offer more financially firm hedging contracts, all other things being equal.[emphasis added]

65. This amounts to a very weak statement of little relevance to the critical competition issues arising, because:

- a. Frontier Economics has not undertaken any analysis capable of drawing a conclusion as to whether the merged entity would have an incentive to offer more financially firm hedge contracts and, if it could, whether a contractual arrangement short of merger between Contact and Manawa would be sufficient to support the provision of such hedge contracts; and
- b. in any event, Frontier Economics’ correlation analysis is undertaken by reference to the output performance of two separate generation portfolios and on an ‘all else equal’ basis when it is highly unlikely that the combined portfolio will be offered into the wholesale market in the same manner as those portfolios were offered when under separate ownership.

66. Rather, the implications of the combined entity of the change in incentives is a critical question that is not addressed in the Frontier Economics report. It should be a high priority for the Commission’s analysis.

Contact’s incentives to offer Fixed Price Contracts

67. In contrast to the conclusions drawn by Frontier Economics, the clearance application asserts that Contact is currently incentivised to offer Fixed Price Contracts and will continue to do so. However, this is not consistent with the experience of independent retailers, the documented issues with a lack of liquidity in the hedge market and the inability of independent retailers to access shaped hedge products.

68. [REDACTED]

a. [REDACTED]

b. [REDACTED]

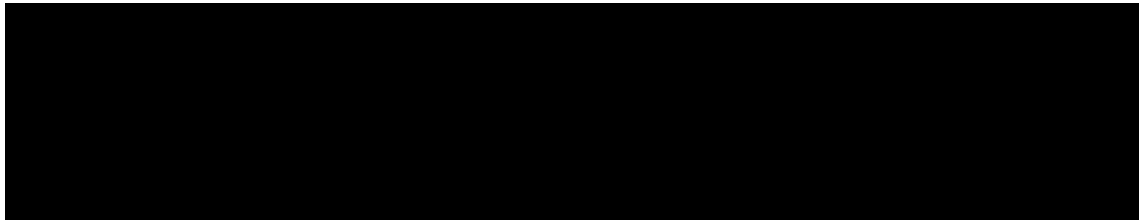
³³ 2024 Frontier Economics, Contact and Manawa, Appendix 1 to Contact clearance application, para 126.

³⁴ See page 8 and Appendix C of Electric Kiwi’s 30 August 2023 complaint to the Commerce Commission.

c.



69.



c.



EA as a constraint

70. The clearance application asserts that the EA and its market rules are a constraint on Contact and will be on the merged entity, and the EA are best placed to respond to any competition issues.
71. While the EA has undertaken a number of different projects and workstreams (or these are underway) none of these comprehensively consider the systemic issues identified by the Commerce Commission, or the impact on new generation, retail competition or the interests of consumers. For example:
- a. The wholesale market review commenced in March 2021 did not consider the interplay with the retail market, and a number of the facts and/or assumptions upon which the EA's conclusions are based have not been borne out.
 - b. Risk Management Review: The Project Initiation Document (PID) narrowly defines the scope and contains key assumptions that are incorrect (which assume away the issues). After 6 months, the IERs were told that the EA is still working on market definition, and that it will take almost a year for a report to be issued, which will "define the problem" for consultation but will not include any proposed solutions.
 - c. The Electricity Price Review (EPR) Final Report³⁵ dated 21 May 2019 identified a number of problems in the wholesale market, consistent with the ongoing concerns expressed by the IERs. These problems continue to persist in the market, as only some of the recommendations have been implemented by the EA.
 - d. The MDAG: Price discovery in a renewables-based electricity system – Final Recommendations Paper³⁶ dated 11 December 2023 identified a number of

³⁵ [Electricity Price Review: Final Report \(mbie.govt.nz\)](https://www.mbie.govt.nz/~/media/mbie/2019/05/21/20190521_epr_final_report.pdf): See Section D: Reinforcing wholesale market competition (pp41-46).

³⁶ [Appendix A2 - Final recommendations report.pdf \(ea.govt.nz\)](https://www.ea.govt.nz/~/media/ea/2023/12/11/mdag_price_discovery_in_a_renewables_based_electricity_system_-_final_recommendations_paper.pdf)

issues in the wholesale market and made a total of 31 recommendations. Almost one year on from that final report and the EA has stated that “work is currently underway on 19 of the 31 MDAG recommendations.”³⁷

- e. ITP and retail margin disclosure: There have been significant delays by the EA in making the ITP and retail margin disclosure available (the FY22/23 data was only published by the EA in June 2024 and there is no indication as to when the FY 23/24 data will be published). The ITPs are clearly stated by the gentailers to be accounting/disclosure tools only and not used to set their retail prices e.g. Meridian states “*Meridian views its ITP as an accounting mechanism primarily used in external report to provide a guide on the relative performance of the wholesale and retail segments of the business... Meridian’s ITP is not used to price mass market retail customers*”.³⁸
 - f. On 7 August 2024 the IERs submitted an urgent code change request to the EA. No substantive response has been received to this request nearly 3 months on.
72. In any event, the Commission has noted in its decision on the Foodstuffs clearance application, regulatory oversight is not an answer to potential competition concerns. The Commission noted:³⁹

The market study findings and work of the Commission under the GICA form part of the background for our consideration of the Proposed Merger. However, the GICA is not intended to, and would not, mitigate the structural loss of competition that would result from the Proposed Merger. In addition, we do not consider that the current and planned regulatory interventions under the GICA would have a material impact in a timeframe that would be relevant to assessing the effects of the Proposed Merger, with the Commission’s first annual grocery report noting that some of the changes and outcomes (from the GICA) will take time. The Parties agree that the GICA is not intended to, nor would, mitigate any loss of competition arising from the Proposed Merger. Rather, in their view, the Proposed Merger is not likely to result in a substantial lessening of competition, with the GICA forming part of the broader regulatory landscape that would place ongoing pressure on the merged entity.

ITP

73. The clearance application asserts that Contact’s ITP is the price that it sells to its own retail business and it is agnostic as to who it sells its electricity to. However, this does not appear to be consistent with Electric Kiwi’s experience in the market.

³⁷ EA Strengthening the wholesale market: quarter two update, 22 October 2024

<https://www.ea.govt.nz/news/general-news/strengthening-the-wholesale-market-quarter-two-update/>

³⁸ [ITP benchmarks | Tableau Public.](#)

³⁹ See paragraph 43 of the Commerce Commission’s [Determination: Foodstuffs North Island Limited and Foodstuffs South Island Limited \[2024\] NZCC 22.](#)

74.



Competition from independent generators

75. The clearance application asserts that independent generators compete strongly to develop new generation capacity, however:
- a. Currently independent generators account for only a very small percentage of the market, which will further reduce as a result of the proposed acquisition.
 - b. While there are lots of “committed” projects, only a small number will actually be built.
 - c. Renewable projects require a liquid hedge market or committed PPAs in order to be viable), and these are not freely available or traded.
 - d. Potential new generators face (among other barriers) the considerable obstacle of customers for such large projected supply. Without a liquid hedge market this is a considerable risk.

Confidentiality

76. A public (redacted) version of these submissions is provided for publication on the Commission’s website.
77. Confidentiality is sought over the highlighted information in these submissions (redacted in the public version) which is confidential and commercially sensitive. We request that it be treated as such.
78. We appreciate these submissions are subject to the Official Information Act 1982 (OIA), but that consistent with usual practice, you would notify Electric Kiwi of any request made to the Commission under the OIA for release of the confidential version of these submissions (or any part of them) and seek our client’s views.
79. Electric Kiwi consider that any request for disclosure should be declined based on sections 9(2)(b)(i), 9(2)(b)(ii), 9(2)(ba)(i), and 9(2)(b)(ii) of the OIA.

Yours sincerely

Huia Burt
Chief Executive Officer

