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Dear Sarah and Neil

## **Re Proposed merger of Gull and NPD and NPD's position in the market**

### **Introduction and summary**

1. Astra Energy has sought clearance for a transaction which would result in the merger of Gull and NPD. A Statement of Issues was published by the Commerce Commission on 16 March 2026.
2. One of the open issues is whether NPD has a distinct “aggressive pricing” strategy relative to Gull which would be lost as a result of the proposed merger.<sup>1</sup>
3. You have asked for my advice as to how this concern relates to the substantial lessening of competition test (**SLC test**).
4. I address this question in two parts. First, I identify that the SLC test is predominantly concerned with structural features of a market (such as the number of participants and conditions of entry), rather than changeable behavioural features such as strategies. Secondly, I assess the extent to which NPD has a distinct strategy that is sufficiently permanent to be relevant to the SLC test.
5. My overall conclusions are that:
  - a. The extent of competition in a market is primarily driven by structural features. Brands, positioning and strategies are more transitory in nature. They are the manifestation of independent rivalry and evolve dynamically over time. It is only in exceptional circumstances that a strategy or a brand takes on a quasi-structural character and becomes relevant to the SLC test.

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<sup>1</sup> Commerce Commission's Statement of Issues regarding NPD/Gull dated 17 March 2026 (**SOI**) at [89] and [95].

- b. The evidence suggests there is nothing particularly distinctive about NPD; its position in the market is not materially different from Gull's, or that of a number of others including Waitomo, Allied and the supermarkets. In other words, if NPD currently prices lower than Gull in overlap markets that is a *behavioural characteristic* rather than a *structural characteristic*.
- c. There is strong evidence that the merged entity would be in a better position than Gull and NPD individually to engage in competitive behaviour due to rivalry-enhancing efficiencies from the merger.

### **The SLC test focusses on structure rather than behaviour**

- 6. The Commission has recently reviewed the concept of competition in the context of the proposed merger between Foodstuffs North Island and Foodstuffs South Island.<sup>2</sup>
- 7. The Commission identified the following key principles from the case law:<sup>3</sup>
  - a. Competition is valued as a mechanism for the allocation of society's resources; firms are rewarded for innovation and discovering the goods and services that the community wants, and for supplying them as efficiently as possible.
  - b. The antithesis of competition is undue market power. That is the power to make choices without being undermined by rivals. This does not mean a particular choice will inevitably be made, rather the essence of market power is "discretionary power".
  - c. Effective competition requires independent rivalry in all dimensions of price, quality, range and service offerings across a market. "Independent rivalry" refers to the situation where different businesses or entities operate in a market, striving to best meet the needs of customers in order to achieve their own goals (which typically focus on profitability and market share), without colluding or coordinating their strategies with competitors. This process of rivalry creates incentives for efficient investment, for innovation, and for improved efficiency.
  - d. Whether and how strongly firms compete is in large part determined by market structure. This includes the degree of market concentration and the conditions for entry and expansion.
- 8. The Commission's description of competition closely follows the classic exposition given by the Australian Trade Practices Tribunal in *Re Queensland Co-operative Milling Association*.<sup>4</sup>
- 9. In relation to the final point, the importance of market structure, the Tribunal went on to highlight the following elements of market structure:<sup>5</sup>
  - a. the number and size distribution of independent sellers, especially the degree of market concentration;

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<sup>2</sup> Foodstuffs North Island Limited and Foodstuffs South Island Limited [2024] NZCC 22.

<sup>3</sup> At [69]-[74].

<sup>4</sup> *Re Queensland Co-operative Milling Association* (1976) 8 ALR 481 (Trade Practices Tribunal).

<sup>5</sup> At p515.

- b. the height of barriers to entry, that is the case with which new firms may enter and secure a viable market;
  - c. the extent to which the products of the industry are characterized by extreme product differentiation and sales promotion;
  - d. the character of “vertical relationships” with customers and with suppliers and the extent of vertical integration; and
  - e. the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.
10. A “lessening of competition” is treated as essentially equivalent to an increase in market power; that is, the ability of the merged firm (alone or together with others) to raise prices above the competitive level, or to reduce quality, range, service or innovation below competitive levels. The lessening must also be “substantial”, meaning real or of substance and material in its adverse effect on consumers in the market. There is no fixed quantitative threshold; substantiality is assessed qualitatively having regard to the size and durability of the competitive harm.
11. The SLC test focuses on structural issues.<sup>6</sup> The factors taken into account—market shares and concentration, countervailing power, conditions of entry and expansion, efficiencies, ownership incentives, failing firm defences and divestment undertakings—relate to structural, rather than transient, features of the market.
12. The distinction between structural and transient features is not, however, black and white. The following examples illustrate how a competition concern can be the result of a combination of structural and behavioural elements:
- a. **Merger removes a nascent competitor:** A “killer acquisition” (where an established firm buys a nascent competitor) might fail the SLC test because of a loss of a future competitive threat.<sup>7</sup>
  - b. **Mavericks may disrupt tacit co-ordination:** The risk of future tacit co-ordination might be higher if a merger removes a “maverick” competitor that plays a disproportionately disruptive competitive role relative to its size, for example by undercutting prices, refusing to follow industry norms, innovating aggressively, or otherwise destabilising the way incumbents would prefer to compete.<sup>8</sup>
  - c. **“Brands” may be quasi-structural where large sunk investments required:** A firm may have made substantial sunk costs investments in a particular market position such that a “strategy” becomes structural in nature. Examples might include: Pak’nSave in groceries, Chemist Warehouse in pharmacies and Kmart in homewares.
13. In summary, the extent of competition in a market is primarily driven by the structural features. Within those structural parameters, behaviours evolve as the

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<sup>6</sup> Mergers and Acquisitions Guidelines at [2.19], [3.5], [3.48] and [3.91].

<sup>7</sup> *Commerce Commission v Woolworths Ltd* [2008] NZCA 276, at [165] and [200].

<sup>8</sup> *Z Energy Limited and Chevron New Zealand* [2016] NZCC 10, Dissenting opinion of Dr Jill Walker at [4], [5], and [42].

participants strive to best meet the needs of customers in order to maximise their own profits. In other words, the observed behaviours and strategies are the manifestations of competition and change dynamically. It is only in exceptional circumstances that a strategy or a brand takes on a quasi-structural character and becomes relevant to the SLC test.

**Does NPD have a special position which is structural in nature?**

14. As discussed above, the SLC test is predominately focussed on market structure as opposed to behaviours which may be transient. So, the question becomes whether NPD has such a distinct brand and marketing positioning that the merger takes on a different complexion compared with a pure structural analysis.
15. The evidence before the Commission does not suggest there is anything overly distinctive about NPD or that the merged entity would have a materially different position in the market. In particular:
- a. **Gull and NPD have similar brand positions:** Both entities present as “disrupter” brands, offering a lower price offering than the majors.<sup>9</sup> While the Commission has suggested distinct approaches exist, as NERA notes,<sup>10</sup> it is not obvious “how Gull’s [REDACTED] differs from its [REDACTED] and how either is any different from NPD’s current strategy [REDACTED].”
  - b. **Gull and NPD are perceived similarly:** Third parties see both entities operating as [REDACTED].<sup>11</sup>
  - c. **No evidence Gull’s strategy has changed:** As noted by NERA,<sup>12</sup> there is no evidence that Gull’s change in ownership has resulted in any change in pricing strategy for Gull.
  - d. **Price differences are small:** As noted by NERA,<sup>13</sup> in local markets where Gull and NPD overlap, it appears that NPD generally prices lower than Gull but that the difference is small in both absolute terms and relative to the price differentials which exist within local markets.
  - e. **Competition is multi-dimensional:** The evidence is that both Gull and NPD have made significant investment in non-price features, such as pump-and-pay systems, ongoing development of the Gull app, and premium versions of the unstaffed offering that includes lighting for safety, canopies for comfort

<sup>9</sup> Astra Energy Response the Commerce Commission’s Statement of Issues in relation to the proposed merger of NPD and Gull to form Astra Energy, 2 April 2026 (**SOI Response**) at [4.3].

<sup>10</sup> SOI Response, Appendix 1 at [36].

<sup>11</sup> NPD-Gull – Astra Energy further submission on SOI 4 May 2026 at [3.8]; and SOI Response, Appendix 4 at [1.3], [1.4]: [REDACTED]

<sup>12</sup> SOI Response, Appendix 1 at [43] and Figure 3.

<sup>13</sup> NERA – Gull/NPD – further data analysis, 5 May 2026 (**Second NERA Report**) at [14].

and generous space allocation for accessibility by large vehicles.<sup>14</sup> Accordingly, price differences should not be considered in isolation as evidencing a different competitive strategy.

- f. **Price differences do not imply price leadership:** I am not aware of any data that suggests NPD has a “first mover” role in terms of initiating price cuts. Rather, the data shows differences in price, rather than whether either of these parties tends to be a price “leader” in this sense.
  - g. **Evidence of a large number of competitors:** Just one of a number is not a big deal. There are plenty of other competitors out there who have been, and are likely to continue, actively expanding their respective fuel retail networks. I understand that there are 15 national competitors providing retail fuel with different combinations of service offerings. U-GO, after opening its first site in April 2025, now has a network of 28 unstaffed stations. Further, Mobil has converted 14 of its existing sites into self-service retail fuel stations across the North and South Island, and Foodstuffs have over 50 sites across New Zealand.<sup>15</sup>
16. The evidence does not imply that NPD has a distinct strategy of price leadership. NPD’s brand positioning is similar to a number of others including not only Gull but also Waitomo, U-GO, Allied and the supermarkets. In other words, if NPD currently prices lower than Gull in overlap markets that is a *behavioural characteristic* rather than a *structural characteristic*, and there is nothing distinct, in a structural sense, which means a merger between Gull and NPD would fail the SLC test.
17. As NERA notes,<sup>16</sup> for it to be appropriate to predict a post-merger change from NPD’s current pricing strategy there would need to be an expected merger-induced change in the objective pricing incentives of the merged entity for the NPD sites. With the merger, NPD would become part of a larger network of sites, with a national as opposed to primarily South Island footprint. However, competition in fuel retailing is fundamentally localised: consumers are sensitive to prices at nearby rival stations. Given these dynamics, it is not clear how becoming a part of a larger network of sites with a national footprint would, in itself, be reason for the merged entity to consider it optimal to raise prices or soften its pricing approach.
18. Finally, it is necessary to consider any rivalry enhancing efficiencies that would result from the merger.<sup>17</sup> The evidence presented to the Commission shows that the merged entity would be in a better position to engage in rivalrous behaviour. There is evidence of substantial synergies.<sup>18</sup> As summarised by NERA,<sup>19</sup> the following would appear to reduce marginal costs:

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<sup>14</sup> SOI Response [4.13] and [4.14].

<sup>15</sup> SOI Response, at [1.6], and [5.25].

<sup>16</sup> SOI Response, Appendix 1 at [45]-[48].

<sup>17</sup> Mergers and Acquisitions Guidelines at [3.118] – [3.125].

<sup>18</sup> Clearance Application at [36]; SOI Response at [2.5]-[2.7].

<sup>19</sup> SOI Response, Appendix 1 at [49].

- a. [REDACTED]
- b. [REDACTED];  
and
- c. [REDACTED].

19. In addition, I understand that [REDACTED] which could be alleviated by the merger.<sup>20</sup>

20. Overall, there is strong evidence the merged entity would be in a better position to engage in rivalrous behaviour due to merger-specific rivalry-enhancing efficiencies.

Yours sincerely

[REDACTED]

James Every-Palmer KC

[REDACTED]

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<sup>20</sup> SOI Response at [1.13], [4.47] and [4.48]: [REDACTED].