



20 July 2011

The Electricity Authority
Level 7, ASB Bank Tower
2 Hunter Street
Wellington 6143

FROM: Marcelo Rodriguez Ferrere
DIRECT: +64 4 498 4986
FAX: +64 4 472 7111
EMAIL: marcelo.rodriguezferrere@chapmantripp.com
PARTNER: Jack Hodder SC
REF: 042629415/1365476.1

by courier

IN RE BAY OF PLENTY ENERGY LIMITED AND ANOR CIV-2011-485-1371
IN RE CONTACT ENERGY LIMITED CIV-2011-485-1372
IN RE GENESIS POWER LIMITED CIV-2011-485-1373

Please find **attached**, by way of service, in each of the above named proceedings:

- A notice of intention by Meridian Energy Limited to support the decision of the Electricity Authority appealed against in each proceeding; and
- A memorandum of counsel for Meridian Energy Limited in anticipation of first case management conference in each proceeding.

Yours faithfully

A handwritten signature in blue ink, appearing to read "M. B. R. Ferrere".

Marcelo Rodriguez Ferrere

SOLICITOR

DIRECT: +64 4 498 4986

EMAIL: marcelo.rodriguezferrere@chapmantripp.com

under: Electricity Industry Act 2010

in the matter of: an appeal under section 64 of the Electricity Industry Act 2010 in respect of a Final Decision of the Electricity Authority that an Undesirable Trading Situation developed on 26 March 2011

in re: **Genesis Power Limited**
Appellant

Notice of intention by **Meridian Energy Limited** to support the decision of the Electricity Authority appealed against, including on other grounds

Dated: 20 July 2011

REFERENCE: J E Hodder SC (jack.hodder@chapmantripp.com)
T D Smith (tim.smith@chapmantripp.com)

Meridian Energy Limited ("**Meridian Energy**"), a duly incorporated company having its registered offices at 33 Customhouse Quay, Queens Wharf, Wellington, New Zealand, gives notice that it intends to support the final decision of the Electricity Authority ("**Authority**") under Part 5 of the Electricity Industry Participation Code 2010 ("**Code**") regarding the Undesirable Trading Situation ("**UTS**") of 26 March 2011 delivered in Wellington on 15 June 2011 ("**Decision**"), insofar as the Decision is challenged on appeal by Genesis Power Limited ("**Genesis**") in proceeding CIV-2011-485-1373, by Contact Energy Limited in proceeding CIV-2011-485-1372, and by Bay of Plenty Energy Limited and Todd Energy Limited in proceeding CIV-2011-485-1371, and to oppose each such appeal, including, in relation to the Decision's finding that a UTS existed on 26 March 2011, on the additional grounds set out below.

The specific additional grounds on which Meridian Energy intends to oppose each such appeal and support the Decision are:

- 1 the Authority has a crucial role under the Act and Code but interpreted the definition of UTS in clause 1.1 of the Code unduly narrowly, and thus took an unduly narrow view of its powers under Part 5 of the Code, and in particular erred in holding that -
 - 1.1 to be a UTS, a contingency or event must meet the criteria set out in paragraphs (a) and (b) of the definition, even though the contingency or event falls within paragraph (c) of the definition (Decision, at paragraphs 15, 19 and 21);
 - 1.2 manipulative trading activity constituting a UTS in terms of the Code does not necessarily occur when an industry participant is exploiting transient market power in a particular geographic area created by transmission constraints impairing the normal scope and operation of the wholesale market for electricity, by offering a significant volume of available supply at extremely high prices, and imposing unanticipated financial costs on other industry participants and reputational harm on the market arrangements as a whole (Decision, at paragraphs 107, 108 and 109);

- 2 as a result of the unduly narrow interpretation of a UTS, or in any event, the Authority erred insofar as it considered that a pre-condition to finding a UTS in the present situation was whether *"parties exposed to the prices on 26 March 2011 had time to seek supply from other sources or curtail their demand"* (Decision, at paragraphs 130 to 131), when the following factual findings of the Authority by themselves were sufficient for the trading situation on 26 March 2011 to meet the definition of a UTS pursuant to subclauses (i), (iii) and (v) of clause (c) of the definition of UTS, and to empower the Authority to act under clause 5.2 of the Code:
- 2.1 for trading periods 22 to 35 on 26 March 2011, Genesis was in a position, by virtue of being *"net pivotal"* in those trading periods, to determine prices for electricity generated north of the Whakamaru-Otahuhu transmission constraint (Decision, at paragraph 133), and Genesis knew this at the time it dispatched its high price offers (Decision, at paragraph 138);
- 2.2 generators are net pivotal in *"only rare circumstances"* (Decision, at paragraph 116 and "Box 1");
- 2.3 the *"exceptionally high interim prices"* on 26 March 2011 were *"not the result of an underlying supply-demand imbalance"* and appeared to *"bear no resemblance to any underlying or avoidable cost"* (Decision, at paragraph 150);
- 2.4 *"[i]f participants observe that prices are greatly divorced from supply-demand conditions and are excessively higher than underlying costs, they will lose confidence in the integrity of the market arrangements and the incentive structures surrounding the wholesale market for electricity may be greatly damaged"* (Decision, at paragraph 150);
- 2.5 *"a lack of confidence in the wholesale market for electricity could result in highly inefficient investment signals" and "[i]t would be highly inefficient, and contrary to the public interest, if this were to occur in the presence of existing generation*

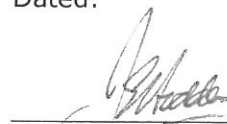
that could otherwise be operated profitably" (Decision, at paragraph 151);

2.6 if the present situation was not a UTS, *"it is entirely likely that generators may continue to cause exceptionally high prices in the wholesale market for electricity"* which *"will deter demand-side parties from becoming participants in the wholesale market for electricity or deter them from being exposed to wholesale electricity prices"*, *"substantially reducing the potential level of demand-side management available to the market"* (Decision, at paragraph 152);

2.7 *"the indications are that, if the high prices of 26 March 2011 are allowed to stand, the reputation of the wholesale market for electricity may be damaged to the point where trading on the market may be threatened and the adverse financial impact on some parties may preclude the maintenance of orderly trading or the proper settlement of trades"* (Decision, at paragraph 155).

This notice is given pursuant to Rules 1.2 and 1.6 and Part 20 of the High Court Rules.

Dated: 20 July 2011



J E Hodder SC
Counsel for Meridian Energy

To: The Registrar of the High Court at Wellington

And to: Genesis Power Limited

The Electricity Authority

Contact Energy Limited

Bay of Plenty Energy Limited

Fletcher Building Limited (including on behalf of Golden Bay
Cement)

King Country Energy Limited

Mighty River Power Limited

New Zealand Steel Limited

NZX Limited

Norkse Skog Tasman Limited

Powershop New Zealand Limited

Prime Energy Limited

Switch Utilities Limited

Todd Energy Limited

Transpower New Zealand Limited

Trustpower Limited

Vector Limited

This document is filed by Jack Edward Hodder SC, solicitor for Meridian Energy Limited, of the firm Chapman Tripp. The address for service of Meridian Energy Limited is at the offices of Chapman Tripp, Level 14, 10 Customhouse Quay, Wellington.

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under: Electricity Industry Act 2010

in the matter of: an appeal under section 64 of the Electricity Industry Act 2010 in respect of a Final Decision of the Electricity Authority that an Undesirable Trading Situation developed on 26 March 2011

in re: **Contact Energy Limited**
Appellant

Notice of intention by **Meridian Energy Limited** to support the decision of the Electricity Authority appealed against, including on other grounds

Dated: 20 July 2011

REFERENCE: J E Hodder SC (jack.hodder@chapmantripp.com)
T D Smith (tim.smith@chapmantripp.com)

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The specific additional grounds on which Meridian Energy intends to oppose each such appeal and support the Decision are:

- 1 the Authority has a crucial role under the Act and Code but interpreted the definition of UTS in clause 1.1 of the Code unduly narrowly, and thus took an unduly narrow view of its powers under Part 5 of the Code, and in particular erred in holding that -
 - 1.1 to be a UTS, a contingency or event must meet the criteria set out in paragraphs (a) and (b) of the definition, even though the contingency or event falls within paragraph (c) of the definition (Decision, at paragraphs 15, 19 and 21);
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that could otherwise be operated profitably" (Decision, at paragraph 151);

- 2.6 if the present situation was not a UTS, *"it is entirely likely that generators may continue to cause exceptionally high prices in the wholesale market for electricity"* which *"will deter demand-side parties from becoming participants in the wholesale market for electricity or deter them from being exposed to wholesale electricity prices"*, *"substantially reducing the potential level of demand-side management available to the market"* (Decision, at paragraph 152);
- 2.7 *"the indications are that, if the high prices of 26 March 2011 are allowed to stand, the reputation of the wholesale market for electricity may be damaged to the point where trading on the market may be threatened and the adverse financial impact on some parties may preclude the maintenance of orderly trading or the proper settlement of trades"* (Decision, at paragraph 155).

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Dated: 20 July 2011



J E Hodder SC
Counsel for Meridian Energy

To: The Registrar of the High Court at Wellington

And to: Genesis Power Limited

The Electricity Authority

Contact Energy Limited

Bay of Plenty Energy Limited

Fletcher Building Limited (including on behalf of Golden Bay
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New Zealand Steel Limited

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under: Electricity Industry Act 2010

in the matter of: an appeal under section 64 of the Electricity Industry Act 2010 in respect of a Final Decision of the Electricity Authority that an Undesirable Trading Situation developed on 26 March 2011

in re: **Bay of Plenty Energy Limited**
First Appellant

Todd Energy Limited
Second Appellant

Notice of intention by **Meridian Energy Limited** to support the decision of the Electricity Authority appealed against, including on other grounds

Dated:

20 July 2011

REFERENCE: J E Hodder SC (jack.hodder@chapmantripp.com)
T D Smith (tim.smith@chapmantripp.com)

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2.6 if the present situation was not a UTS, *"it is entirely likely that generators may continue to cause exceptionally high prices in the wholesale market for electricity"* which *"will deter demand-side parties from becoming participants in the wholesale market for electricity or deter them from being exposed to wholesale electricity prices"*, *"substantially reducing the potential level of demand-side management available to the market"* (Decision, at paragraph 152);

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Dated: 20 July 2011



J E Hodder SC
Counsel for Meridian Energy

To: The Registrar of the High Court at Wellington

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under: Electricity Industry Act 2010

in the matter of: an appeal under section 64 of the Electricity Industry Act 2010 in respect of a Final Decision of the Electricity Authority that an Undesirable Trading Situation developed on 26 March 2011

in re: **Genesis Power Limited**
Appellant

Memorandum of counsel for Meridian Energy Limited (**Meridian Energy**) in anticipation of first case management conference

Dated: 20 July 2011
Next Event Date: 25 July 2011
Before: tba

REFERENCE: J E Hodder SC (jack.hodder@chapmantripp.com)
T D Smith (tim.smith@chapmantripp.com)

**MEMORANDUM OF COUNSEL FOR MERIDIAN ENERGY LIMITED IN
RELATION TO IN ADVANCE OF FIRST CASE MANAGEMENT
CONFERENCE**

May it please the Court:

Introduction

- 1 This memorandum is being filed in respect of each of the appeals brought under s64 of the Electricity Industry Act 2010 against the Final Decision of the Electricity Authority ("**Authority**") regarding the Undesirable Trading Situation ("**UTS**") of 26 March 2011 (the "**Decision**"), by Genesis Power Limited (CIV-2011-485-1373), Contact Energy Limited (CIV-2011-485-1372) and Bay of Plenty Energy Limited and Todd Energy Limited (CIV-2011-485-1371) (together, the "**appeals**").
- 2 Meridian Energy Limited (**Meridian Energy**) was one of the complainants to the Authority in respect of the 26 March 2011 UTS, and is directly affected by the Decision of the Authority, and as a consequence, the appeals.
- 3 Meridian Energy seeks to be joined as a respondent to the appeals. If joined as a respondent, Meridian Energy intends to oppose the appeals and:
 - 3.1 support the Decision;
 - 3.2 submit that the Decision that the circumstances of 26 March 2011 constituted a UTS can be supported on other grounds – namely, that, although it adopted an unduly narrow interpretation of the definition of UTS, and thus took an overly constrained approach to the exercise of its jurisdiction, the Authority was entitled to conclude that there was a UTS on a wider range of grounds than are relied on in the Decision.
- 4 A notice of intention to support the Decision on other grounds has been filed in relation to each of the appeals contemporaneously with this memorandum of counsel.
- 5 In summary, Meridian Energy's position is that:
 - 5.1 it is entitled to respondent party status in each appeal;
 - 5.2 it intends to oppose the appeals and support the Decision, including on other grounds;
 - 5.3 it is appropriate that the appeals be case managed and heard together;

- 5.4 the intitulements should be in orthodox form with respondents named;
 - 5.5 it is neutral on whether the Authority is made a respondent, but recognises its entitlement to be heard;
 - 5.6 a further period should be allowed for other claimants before the Authority to seek involvement in the appeals;
 - 5.7 it is likely that there will be joint representation of Meridian Energy and some other interested persons; and
 - 5.8 while the appeals should progress expeditiously, there is no sound basis to invoke urgency for the determination of the appeals.
- 6 The balance of this memorandum of counsel addresses in more detail:
- 6.1 Meridian Energy's application to be joined as a party to the appeals;
 - 6.2 the status of other parties to the appeal;
 - 6.3 the appellants' indication that they intend to seek the appeals be dealt with urgently;
 - 6.4 other matters to be addressed in the conference memorandum.
- 7 Counsel are available to attend the first case management conference of the appeals, to be held on 25 July 2011.

Party status – Meridian Energy

- 8 Rule 4.56(b) of the High Court rules permits the Court to, at any stage of a proceeding, order the name of a person to be added as a party to the proceeding because either "*the person ought to have been joined*" or "*the persons presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding*".
- 9 No application is required, and the order may be made on terms the court considers just: High Court Rules, r 4.56(2).
- ***Joinder of Meridian Energy as a respondent***
- 10 Meridian Energy respectfully submits that it should be joined as a respondent to the appeals, on the grounds that it satisfies both limbs of r 4.56(b) to achieve party status.

- 11 Meridian Energy was, quite correctly, served with these proceedings as a "*party directly affected by the appeal*" under r 20.6(1)(c). As a consequence, the notice of appeal ought to have named Meridian Energy as a party by virtue of r 20.9 (requiring the notice of appeal to include the "*full name and description of each party*").
- 12 Meridian Energy's presence before the Court is also both desirable and necessary to adjudicate on and settle all questions involved in the proceeding. It is also appropriate, given the interests and monetary amounts at stake, that Meridian have full party rights as a respondent, including rights of appeal.
- 13 In briefest summary, Meridian Energy :
- 13.1 is an industry participant in the wholesale electricity market;
 - 13.2 was one of the parties who claimed to the Authority that the situation on 26 March 2011 constituted an UTS for the purposes of the Code;
 - 13.3 provided detailed submissions in the course of the Authority's process to make the Decision;
 - 13.4 was directly and significantly affected by the UTS of 26 March 2011, the Authority's Decision to correct the UTS; and
 - 13.5 consequentially will be directly affected by the outcome of the appeals.
- 14 While a decision to find a UTS under Part 5 of the Electricity Industry Participation Code 2010 (the **Code**) is a "regulatory decision", nothing turns on that description. The Decision under appeal was made following claims lodged with the Authority by, amongst others, Meridian and a process in which the appellants and the claimants lodged competing submissions (and expert reports), and cross-submissions. There was thus a conventional adversarial aspect to the Authority's process, albeit in the setting of a regulatory consultation exercise.
- 15 In that process, Meridian Energy made legal submissions and provided expert reports to the Authority. Those submissions emphasised the definition of a UTS and the consequential breadth of the Authority's discretion to intervene to ensure that the taking advantage of transient market power through excessive prices is not incentivised. Meridian Energy's submissions were partially, but not completely, accepted by the Authority in the Decision, which led the Authority to determined that a UTS existed on 26 March 2011 on a narrower basis than contended for by Meridian Energy.

- 16 Accordingly, unless Meridian Energy is joined as a party on the appeal:
- 16.1 the Court will not hear the full range of legal argument that occurred before the Authority; and, in particular,
- 16.2 the Court will not have before it submissions on the other grounds that Meridian Energy contends exist to support the decision that a UTS existed on 26 March 2011.
- 17 Finally, the Authority's Decision also had material and direct consequences on Meridian Energy and other claimants. To briefly explain this point, the UTS that arose on 26 March 2011 concerned "*exceptionally high interim prices*" for wholesale electricity for Hamilton and regions north of Hamilton required by Genesis, during a period of transient market power. The prices required by Genesis exceeded \$19,000 per megawatt hour (MWh) over several hours. For that period, Meridian Energy was required to purchase significant tranches of electricity at the high interim prices imposed on the market by Genesis.
- 18 The spot price for wholesale electricity in these markets is, in ordinary circumstances, less than \$500 per MWh. The Decision corrects the UTS by requiring a modification to the interim pricing to constrain prices to no more than \$3,000 per MWh. Accordingly, the effective difference between the interim prices imposed by Genesis, and the prices determined by the Authority, is understood to be in excess of \$15 m for Meridian Energy. In the event that the Decision is quashed on appeal by this Court, and the interim prices restored, there would be a corresponding direct and significant detriment to Meridian Energy.
- **Form of intitlement**
- 19 Unlike the decisions of the Charities Commission considered by Ronald Young J in *Canterbury Development Corp Trust v Charities Commission* [2010] 2 NZLR 707 (HC), the Decision of the Authority:
- 19.1 was the result of a contested process, in which Meridian Energy as claimant was a major participant; and
- 19.2 directly and materially affects parties other than the appellant.
- 20 In the present circumstances, the "*In re*" formulation of intitlement proposed by Ronald Young J is not clearly appropriate, and its unilateral adoption by the appellants should not obscure the position that the appeals are brought from the decision of the Authority as between competing positions advanced by claimants, including Meridian, in opposition to the position of the appellants.

21 Instead, it is submitted that the usual formulation of appellants and respondents be adopted, with the claimants before the Authority who appropriately seek to be parties to the appeal named as respondents.

22 Meridian Energy notes the appellants' invitation to the Electricity Authority to apply to be joined as a respondent. Meridian Energy anticipates that the Authority will wish to participate in the hearing, as is contemplated under r 20.17. Meridian Energy takes no position as to whether the Authority should be formally joined as a respondent.

Service

23 Meridian Energy has followed the same approach to service of its notice of intention to support the Decision, including on additional grounds and this memorandum as followed by the appellants in relation to their respective notices of appeal.

24 Meridian Energy will abide any directions of the Court in relation to service of other parties.

Other parties

25 Given the relatively short period between the filing of the notices of appeal and the first case management conference, together with the approach adopted by the appellants to service, Meridian Energy considers that it is appropriate for the Court to give a further period to the other claimants before the Authority, and any other interested parties, to indicate whether they wish:

25.1 to be joined as respondents;

25.2 to intervene on a more limited basis.

26 Meridian Energy is aware that at least two other registered industry participants who either made a complaint in respect of the UTS or responded to information requests from the Electricity Authority are likely to wish to be heard in relation to the appeals. It is anticipated that a joint representation with other respondents may be arranged, to ensure the efficient argument of the issues before the Court.

27 Meridian Energy suggests that a further period of 15 working days be given to enable any other participants to notify the Court, by way of memorandum, whether they wish to be joined as respondents to the appeals or to intervene.

28 The appellants should have the responsibility of bringing the order of the Court regarding to the attention all persons who made submissions to the Authority. However, Meridian Energy submits that it may also be sensible for the Court's order to be published on the Authority's website, where the notices of appeal have already

been published (<http://www.ea.govt.nz/act-code-regs/uts/decisions-and-claims/#appeals>).

Urgency

- 29 Meridian Energy notes that the memorandum of counsel for Genesis anticipates that at the first case management conference Genesis will seek orders for urgency and an expedited hearing in light of "*market uncertainty*".
- 30 Meridian Energy will respond more fully to a request for such orders if and when it is made. However, Meridian Energy anticipates that it will oppose such orders. Meridian Energy does not consider that the Decision creates any uncertainty in the market. To the contrary, it considers that the Decision creates *certainty*, by confirming rules of responsible trading in the market.
- 31 The appeals involve significant matters for the wholesale electricity market, and questions that are important both in terms of the immediate consequences for the parties arising out of the 26 March 2011 UTS, and the consequences for the future operation of the market. This is the first time that a Court will have considered the UTS definition, the Electricity Industry Participation Code, and the role of the Authority in maintaining a functioning wholesale electricity market for the long term benefit of consumers.
- 32 These matters also have a reasonable degree of complexity, involving the overlay of an economic context to the text of the Code and empowering statute. The Authority's Decision was the result of its consideration of a large volume of submissions, and expert economic reports, against the background of its pre-existing expert knowledge of the workings of the wholesale electricity market. Some education of the Court (and counsel) will inevitably be required on these matters.
- 33 In those circumstances, Meridian Energy's view is that the importance of the issues to the participants in the industry is unlikely to be best served by a truncated preparation of the record, of submissions or for the hearing.

Other matters to be addressed

- 34 Meridian Energy agrees that it is sensible for the appeals to be case managed together. Given the degree of apparent overlap between the arguments to be made by the appellants, it would seem inevitable that the appeals also be heard together. In this regard, Meridian Energy would favour formal consolidation of the proceedings, to better ensure the efficiency of the ultimate hearing.
- 35 In the event, Meridian Energy submits that consideration of this matter, together with the other issues required to be addressed in

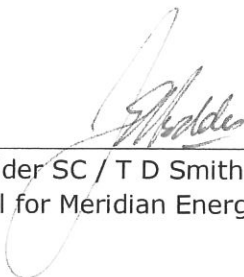
Schedule 6, be deferred until all interested parties are before the Court, following the period suggested in paragraph 26, above.

- 36 However, for the avoidance of any future doubt, Meridian Energy anticipates that it is likely that a departure from the standard form directions in Schedule 6 to the High Court Rules, particularly in relation to the timing of written submissions, will be necessary in order to allow for the just resolution of the appeals.

Dated:

20 July

2011



J E Hodder SC / T D Smith
Counsel for Meridian Energy

under: Electricity Industry Act 2010

in the matter of: an appeal under section 64 of the Electricity Industry Act 2010 in respect of a Final Decision of the Electricity Authority that an Undesirable Trading Situation developed on 26 March 2011

in re: **Contact Energy Limited**
Appellant

Memorandum of counsel for Meridian Energy Limited (**Meridian Energy**) in anticipation of first case management conference

Dated: 20 July 2011
Next Event Date: 25 July 2011
Before: tba

REFERENCE: J E Hodder SC (jack.hodder@chapmantripp.com)
T D Smith (tim.smith@chapmantripp.com)

**MEMORANDUM OF COUNSEL FOR MERIDIAN ENERGY LIMITED IN
RELATION TO IN ADVANCE OF FIRST CASE MANAGEMENT
CONFERENCE**

May it please the Court:

Introduction

- 1 This memorandum is being filed in respect of each of the appeals brought under s64 of the Electricity Industry Act 2010 against the Final Decision of the Electricity Authority ("**Authority**") regarding the Undesirable Trading Situation ("**UTS**") of 26 March 2011 (the "**Decision**"), by Genesis Power Limited (CIV-2011-485-1373), Contact Energy Limited (CIV-2011-485-1372) and Bay of Plenty Energy Limited and Todd Energy Limited (CIV-2011-485-1371) (together, the "**appeals**").
- 2 Meridian Energy Limited (**Meridian Energy**) was one of the complainants to the Authority in respect of the 26 March 2011 UTS, and is directly affected by the Decision of the Authority, and as a consequence, the appeals.
- 3 Meridian Energy seeks to be joined as a respondent to the appeals. If joined as a respondent, Meridian Energy intends to oppose the appeals and:
 - 3.1 support the Decision;
 - 3.2 submit that the Decision that the circumstances of 26 March 2011 constituted a UTS can be supported on other grounds – namely, that, although it adopted an unduly narrow interpretation of the definition of UTS, and thus took an overly constrained approach to the exercise of its jurisdiction, the Authority was entitled to conclude that there was a UTS on a wider range of grounds than are relied on in the Decision.
- 4 A notice of intention to support the Decision on other grounds has been filed in relation to each of the appeals contemporaneously with this memorandum of counsel.
- 5 In summary, Meridian Energy's position is that:
 - 5.1 it is entitled to respondent party status in each appeal;
 - 5.2 it intends to oppose the appeals and support the Decision, including on other grounds;
 - 5.3 it is appropriate that the appeals be case managed and heard together;

- 5.4 the intitulements should be in orthodox form with respondents named;
 - 5.5 it is neutral on whether the Authority is made a respondent, but recognises its entitlement to be heard;
 - 5.6 a further period should be allowed for other claimants before the Authority to seek involvement in the appeals;
 - 5.7 it is likely that there will be joint representation of Meridian Energy and some other interested persons; and
 - 5.8 while the appeals should progress expeditiously, there is no sound basis to invoke urgency for the determination of the appeals.
- 6 The balance of this memorandum of counsel addresses in more detail:
- 6.1 Meridian Energy's application to be joined as a party to the appeals;
 - 6.2 the status of other parties to the appeal;
 - 6.3 the appellants' indication that they intend to seek the appeals be dealt with urgently;
 - 6.4 other matters to be addressed in the conference memorandum.
- 7 Counsel are available to attend the first case management conference of the appeals, to be held on 25 July 2011.
- Party status – Meridian Energy**
- 8 Rule 4.56(b) of the High Court rules permits the Court to, at any stage of a proceeding, order the name of a person to be added as a party to the proceeding because either "*the person ought to have been joined*" or "*the persons presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding*".
- 9 No application is required, and the order may be made on terms the court considers just: High Court Rules, r 4.56(2).
- ***Joinder of Meridian Energy as a respondent***
- 10 Meridian Energy respectfully submits that it should be joined as a respondent to the appeals, on the grounds that it satisfies both limbs of r 4.56(b) to achieve party status.

- 11 Meridian Energy was, quite correctly, served with these proceedings as a *"party directly affected by the appeal"* under r 20.6(1)(c). As a consequence, the notice of appeal ought to have named Meridian Energy as a party by virtue of r 20.9 (requiring the notice of appeal to include the *"full name and description of each party"*).
- 12 Meridian Energy's presence before the Court is also both desirable and necessary to adjudicate on and settle all questions involved in the proceeding. It is also appropriate, given the interests and monetary amounts at stake, that Meridian have full party rights as a respondent, including rights of appeal.
- 13 In briefest summary, Meridian Energy :
 - 13.1 is an industry participant in the wholesale electricity market;
 - 13.2 was one of the parties who claimed to the Authority that the situation on 26 March 2011 constituted an UTS for the purposes of the Code;
 - 13.3 provided detailed submissions in the course of the Authority's process to make the Decision;
 - 13.4 was directly and significantly affected by the UTS of 26 March 2011, the Authority's Decision to correct the UTS; and
 - 13.5 consequentially will be directly affected by the outcome of the appeals.
- 14 While a decision to find a UTS under Part 5 of the Electricity Industry Participation Code 2010 (the **Code**) is a "regulatory decision", nothing turns on that description. The Decision under appeal was made following claims lodged with the Authority by, amongst others, Meridian and a process in which the appellants and the claimants lodged competing submissions (and expert reports), and cross-submissions. There was thus a conventional adversarial aspect to the Authority's process, albeit in the setting of a regulatory consultation exercise.
- 15 In that process, Meridian Energy made legal submissions and provided expert reports to the Authority. Those submissions emphasised the definition of a UTS and the consequential breadth of the Authority's discretion to intervene to ensure that the taking advantage of transient market power through excessive prices is not incentivised. Meridian Energy's submissions were partially, but not completely, accepted by the Authority in the Decision, which led the Authority to determine that a UTS existed on 26 March 2011 on a narrower basis than contended for by Meridian Energy.

- 16 Accordingly, unless Meridian Energy is joined as a party on the appeal:
- 16.1 the Court will not hear the full range of legal argument that occurred before the Authority; and, in particular,
- 16.2 the Court will not have before it submissions on the other grounds that Meridian Energy contends exist to support the decision that a UTS existed on 26 March 2011.
- 17 Finally, the Authority's Decision also had material and direct consequences on Meridian Energy and other claimants. To briefly explain this point, the UTS that arose on 26 March 2011 concerned "*exceptionally high interim prices*" for wholesale electricity for Hamilton and regions north of Hamilton required by Genesis, during a period of transient market power. The prices required by Genesis exceeded \$19,000 per megawatt hour (MWh) over several hours. For that period, Meridian Energy was required to purchase significant tranches of electricity at the high interim prices imposed on the market by Genesis.
- 18 The spot price for wholesale electricity in these markets is, in ordinary circumstances, less than \$500 per MWh. The Decision corrects the UTS by requiring a modification to the interim pricing to constrain prices to no more than \$3,000 per MWh. Accordingly, the effective difference between the interim prices imposed by Genesis, and the prices determined by the Authority, is understood to be in excess of \$15 m for Meridian Energy. In the event that the Decision is quashed on appeal by this Court, and the interim prices restored, there would be a corresponding direct and significant detriment to Meridian Energy.
- **Form of intitlement**
- 19 Unlike the decisions of the Charities Commission considered by Ronald Young J in *Canterbury Development Corp Trust v Charities Commission* [2010] 2 NZLR 707 (HC), the Decision of the Authority:
- 19.1 was the result of a contested process, in which Meridian Energy as claimant was a major participant; and
- 19.2 directly and materially affects parties other than the appellant.
- 20 In the present circumstances, the "*In re*" formulation of intitlement proposed by Ronald Young J is not clearly appropriate, and its unilateral adoption by the appellants should not obscure the position that the appeals are brought from the decision of the Authority as between competing positions advanced by claimants, including Meridian, in opposition to the position of the appellants.

- 21 Instead, it is submitted that the usual formulation of appellants and respondents be adopted, with the claimants before the Authority who appropriately seek to be parties to the appeal named as respondents.
- 22 Meridian Energy notes the appellants' invitation to the Electricity Authority to apply to be joined as a respondent. Meridian Energy anticipates that the Authority will wish to participate in the hearing, as is contemplated under r 20.17. Meridian Energy takes no position as to whether the Authority should be formally joined as a respondent.

Service

- 23 Meridian Energy has followed the same approach to service of its notice of intention to support the Decision, including on additional grounds and this memorandum as followed by the appellants in relation to their respective notices of appeal.
- 24 Meridian Energy will abide any directions of the Court in relation to service of other parties.

Other parties

- 25 Given the relatively short period between the filing of the notices of appeal and the first case management conference, together with the approach adopted by the appellants to service, Meridian Energy considers that it is appropriate for the Court to give a further period to the other claimants before the Authority, and any other interested parties, to indicate whether they wish:
- 25.1 to be joined as respondents;
- 25.2 to intervene on a more limited basis.
- 26 Meridian Energy is aware that at least two other registered industry participants who either made a complaint in respect of the UTS or responded to information requests from the Electricity Authority are likely to wish to be heard in relation to the appeals. It is anticipated that a joint representation with other respondents may be arranged, to ensure the efficient argument of the issues before the Court.
- 27 Meridian Energy suggests that a further period of 15 working days be given to enable any other participants to notify the Court, by way of memorandum, whether they wish to be joined as respondents to the appeals or to intervene.
- 28 The appellants should have the responsibility of bringing the order of the Court regarding to the attention all persons who made submissions to the Authority. However, Meridian Energy submits that it may also be sensible for the Court's order to be published on the Authority's website, where the notices of appeal have already

been published (<http://www.ea.govt.nz/act-code-regs/uts/decisions-and-claims/#appeals>).

Urgency

- 29 Meridian Energy notes that the memorandum of counsel for Genesis anticipates that at the first case management conference Genesis will seek orders for urgency and an expedited hearing in light of "*market uncertainty*".
- 30 Meridian Energy will respond more fully to a request for such orders if and when it is made. However, Meridian Energy anticipates that it will oppose such orders. Meridian Energy does not consider that the Decision creates any uncertainty in the market. To the contrary, it considers that the Decision creates *certainty*, by confirming rules of responsible trading in the market.
- 31 The appeals involve significant matters for the wholesale electricity market, and questions that are important both in terms of the immediate consequences for the parties arising out of the 26 March 2011 UTS, and the consequences for the future operation of the market. This is the first time that a Court will have considered the UTS definition, the Electricity Industry Participation Code, and the role of the Authority in maintaining a functioning wholesale electricity market for the long term benefit of consumers.
- 32 These matters also have a reasonable degree of complexity, involving the overlay of an economic context to the text of the Code and empowering statute. The Authority's Decision was the result of its consideration of a large volume of submissions, and expert economic reports, against the background of its pre-existing expert knowledge of the workings of the wholesale electricity market. Some education of the Court (and counsel) will inevitably be required on these matters.
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Other matters to be addressed

- 34 Meridian Energy agrees that it is sensible for the appeals to be case managed together. Given the degree of apparent overlap between the arguments to be made by the appellants, it would seem inevitable that the appeals also be heard together. In this regard, Meridian Energy would favour formal consolidation of the proceedings, to better ensure the efficiency of the ultimate hearing.
- 35 In the event, Meridian Energy submits that consideration of this matter, together with the other issues required to be addressed in

Schedule 6, be deferred until all interested parties are before the Court, following the period suggested in paragraph 26, above.

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Dated:

30 July

2011



J E Hodder SC / T D Smith
Counsel for Meridian Energy

under: Electricity Industry Act 2010

in the matter of: an appeal under section 64 of the Electricity Industry Act 2010 in respect of a Final Decision of the Electricity Authority that an Undesirable Trading Situation developed on 26 March 2011

in re: **Bay of Plenty Energy Limited**
First Appellant

Todd Energy Limited
Second Appellant

Memorandum of counsel for Meridian Energy Limited (**Meridian Energy**) in anticipation of first case management conference

Dated: 20 July 2011

Next Event Date: 25 July 2011

Before: tba

REFERENCE: J E Hodder SC (jack.hodder@chapmantripp.com)
T D Smith (tim.smith@chapmantripp.com)

**MEMORANDUM OF COUNSEL FOR MERIDIAN ENERGY LIMITED IN
RELATION TO IN ADVANCE OF FIRST CASE MANAGEMENT
CONFERENCE**

May it please the Court:

Introduction

- 1 This memorandum is being filed in respect of each of the appeals brought under s64 of the Electricity Industry Act 2010 against the Final Decision of the Electricity Authority ("**Authority**") regarding the Undesirable Trading Situation ("**UTS**") of 26 March 2011 (the "**Decision**"), by Genesis Power Limited (CIV-2011-485-1373), Contact Energy Limited (CIV-2011-485-1372) and Bay of Plenty Energy Limited and Todd Energy Limited (CIV-2011-485-1371) (together, the "**appeals**").
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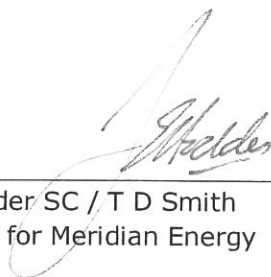
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Dated:



2011



J E Hodder SC / T D Smith
Counsel for Meridian Energy