

29 August 2008

Helene Wallwork
Electricity & Gas Complaints Commission
Bolton Street
WELLINGTON

h.wallwork@egcomplaints.co.nz

Dear Helene,

Proposed changes to meet Electricity Commission and Gas Industry Company approval criteria

Genesis Power Limited, trading as Genesis Energy, welcomes the opportunity to provide a submission to the Electricity & Gas Complaints Commission (the EGCC) on the consultation paper "Proposal for changes to the scheme documents to comply with the proposed scheme requirements from the Electricity Commission and Gas Industry Co for approval of a scheme" dated July 2008. Genesis Energy has reviewed the consultation package and is pleased to respond to the issues raised.

Responses to specific consultation questions are set out in Appendix A.

Chasing Approval

The Electricity Commission and the Gas Industry Company received nearly 30 submissions in response to their May consultation on approval of a joint complaints resolution scheme.¹ Genesis Energy's submission raised

¹ <http://www.electricitycommission.govt.nz/submissions/retail/consumer-complaints>

substantive concerns regarding the regulators' proposals.² In particular, Genesis Energy was concerned the proposal would create a legal monopoly with constitutionally improper standards setting authorities and inadequate public sector accountability mechanisms.

Genesis Energy was also concerned that impetus from government policy statements had caused the regulators to set aside the type of policy development process explicitly required by legislation. Genesis Energy submitted that the regulators should at the very least develop and evaluate an 'approved scheme' option, a 'regulated scheme' option and the 'status quo' option.

Following their initial consultation round, the regulators have had to revisit their approach. The regulators have provided only limited information on their revised approach and no analysis of submissions. Clues as to their new direction are provided by a presentation from the Gas Industry Company's recent industry conference³ and by a two-pager update on the Electricity Commission's website.⁴ Both documents point to a further consultation stage to enable comparison of options. This consultation is to be carried out following an initial request for applications designed to flush out potential schemes. The target date for implementation (of an approved scheme if that option is pursued) is now late 2009 rather than January 2009 as originally planned.

The timeline set out at paragraph 28 of the EGCC's consultation paper indicates that the EGCC is cognisant of this revised timing. However, Genesis Energy questions whether it is appropriate for the EGCC to consider amending the scheme to meet anticipated approval criteria at this time. The revised process appears to provide opportunity to delay such consideration until at least until after the regulators have released their request for applications in September. Genesis Energy recommends however that the EGCC shouldn't try to meet the approval criteria until the regulators release their next consultation paper in late February next year. This would reduce the risk of chasing a moving target, or indeed of going through the scheme change process only to fail to emerge as the preferred applicant.

Given the number and depth of submissions that the regulators received in response to their May consultation round, it would be remarkable if the

² <http://www.electricitycommission.govt.nz/pdfs/submissions/pdfs/retail/consumer-complaints/GenesisEnergy.pdf>

³ Gas Industry Company presentation on 'meeting consumer expectations' slides 20 – 23, presented 8 August 2008. http://www.gasindustry.co.nz/Downloads/Documents/Publications_Presentations/8_BAS_WALKER.pdf.

⁴ 'Change to target dates: Approval of a joint electricity and gas consumer complaints resolution scheme', dated 26 June 2008. <http://www.electricitycommission.govt.nz/pdfs/opdev/retail/consumer-complaints/timeline.pdf>

approval criteria were to re-emerge unchanged. It seems similarly unlikely that the regulators could properly work through development of the 'status quo' and 'regulated scheme' options without evolving their thinking on criteria for scheme approval.

The consultation document says that the Board of the EGCC and the EGCC itself "will have the flexibility to bring different amendments into force at different times" and that "some of the amendments set out in this paper may come into effect immediately once they have been approved by the Board or Commission. For other matters the amendments may only come into effect when the regulators approve the scheme".⁵ This approach seems based on a presumption that any changes to approval criteria won't be substantial.

In addition, the marked up changes to the scheme documents don't identify which changes would be pursued immediately and which would be delayed pending possible approval.

Genesis Energy recommends that the EGCC should delay considering any scheme changes specifically aimed at meeting the Gas Industry Company and Electricity Commissions' approval criteria until after February 2009.

For the record, Genesis Energy considers that if the regulators do settle on the 'approved scheme' option then:

1. the approved scheme should be stripped of any standard setting functions (including 'codes of practice' and membership requirements) and pared back to a forum for resolving complaints based on extrinsic standards; and
2. funding should be via a levy or Crown appropriation, not via scheme membership fees.

Genesis Energy considers that this approach would be more consistent with the governing legislation and with public and administrative law principles generally. Alternatively, if the regulators consider that it is necessary for their to be codes of practice then the 'approved scheme' approach should be set aside in favour of the 'regulated scheme' approach or the status quo. If the regulated scheme approach were adopted, then the regulators could still contract the services of a privately-owned provider such as the EGCC.

Overall, Genesis Energy considers that the best option would be to retain contestability. This would obviate the need for regulatory intervention and

⁵ EGCC Consultation Paper, para 42.

allow for ongoing innovation and organic evolution within the sector. Genesis Energy appreciates that the government policy statement for electricity governance makes it difficult for the Electricity Commission to properly consider all options. The Gas Industry Company is not similarly constrained.

Efficiency and Effectiveness

Genesis Energy is more comfortable with the EGCC pursuing at this time a set of scheme changes aimed at improving efficiency and effectiveness. Genesis Energy considers that there is scope for improving the efficiency of the scheme and reducing costs. The proposed changes make some modest steps towards this.

Aside from improvements in efficiency, Genesis Energy considers that another area for improvement is the need for appropriate checks and balances on the EGCC’s decision making. Genesis Energy is aware of the need to balance accountability against cost and timeliness and so is open as to whether improved accountability could best be delivered via further bolstering the proposed independent review processes or via an independent merits review process.

Comments on Proposed Drafting

In light of Genesis Energy’s views above, we have not prepared a comprehensive set of detailed comments on the specifics of the proposed changes. Aside from our view that consideration of changes should be delayed, we also found that the consultation package does not provide a very clear overview of the changes or a good picture of how the changes would fit together.

Notwithstanding the above, some comments are offered in the table below. The reference numbers used in the table are as per Appendix Three of the consultation paper.

Table 1 - Comments on specific changes

Ref	Item	Comment
16 and 53	Scheme changes to be consistent with gas and electricity GPS.	Genesis Energy considers that it is inappropriate to require consistency with the government policy statements as these are a mechanism for the Minister of Energy to transmit high level objectives and

Ref	Item	Comment
		outcomes to the Electricity Commission, or to transparently express preferences to the Gas Industry Company. The regulators are responsible for developing any resultant operational policy changes and working through those with service providers.
30	Commission to set performance standards	Scheme members/owners are also interested in measuring the performance of the scheme. Standards should be for 'efficient and effective' performance, not just 'effective'.
37	Commission to 'take appropriate action' in relation to systemic industry problems	Genesis Energy appreciates that this arises from the regulators' approval criteria, but does not consider it an appropriate role for the EGCC (or any complaints resolution scheme). There seems limited scope for the EGCC to take any action in response to systemic problems and, in any event, any such problems are better dealt with by the regulators or the industry itself.
39	Code of practice setting out minimum standards of conduct for members.	If membership is mandatory across the industry, then it is not appropriate for the scheme to set enforceable standards of conduct.
50	Regulators can require independent review at any time.	This provision is not appropriate. If the regulators want ad hoc independent reviews, then the regulators should pay for these.

If you would like to discuss any of these matters further, please contact Ross Parry on 04 495 3348.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Carnegie'.

John A Carnegie
Regulatory Affairs Manager

Appendix A: Responses to Specific Consultation Questions

QUESTION	COMMENT
<p>Q1: Which changes to the scheme documents listed below DO NOT:</p> <ul style="list-style-type: none"> (a) meet the regulators' proposed scheme requirements; (b) [implement] the recommendations of the Wood Report; (c) otherwise improve the efficiency and effectiveness of the scheme? 	<p>Genesis Energy has not attempted to answer the first question and does not consider it important to consider that question at this time.</p>
<p>Q2: What other changes are required to be made to the scheme documents to comply with the regulators' proposed scheme requirements?</p>	<p>Refer Q1.</p>
<p>Q3: Given that membership of an approved scheme will be mandatory, is it appropriate to retain:</p> <ul style="list-style-type: none"> (a) the ability for members to withdraw from the scheme? (b) the concept of, and consequences for, defaulting members? 	<p>If the EGCC scheme were approved by the Electricity Commission, every electricity distributor and every electricity retailer would be compelled under s158G of the Electricity Act 1992 to <i>participate</i> in the scheme. If participation required membership (although Genesis Energy considers such a requirement would probably be <i>ultra vires</i>) then it would be redundant to include provision for withdrawal other than for parties that cease to trade as distributors or retailers. Similar analysis applies with respect to gas.</p> <p>Genesis Energy considers that it would be entirely inappropriate in the case of an approved scheme with</p>

QUESTION	COMMENT
	<p>mandatory membership to include the concept of expulsion from the scheme. In effect, expulsion from the scheme would deny the expelled party any ability to legally operate as a distributor or retailer. Such a weighty authority requires robust controls and accountabilities. Genesis Energy considers that the Board would be very exposed to legal challenge if it sought to exercise such an authority in an 'approved scheme' setting.</p> <p>This question also highlights the folly of using membership fees to fund the operation of a legal monopoly service provider. If costs were levy funded, then s172ZC of the Electricity Act 1992 and Subpart 2 of Part 4A of the Gas Act 1992 would cover prescription and recovery of the levy. Furthermore, the EGCC would recover funds from the regulators rather than from levy payers directly.</p> <p>While it wouldn't be appropriate to include these features were the EGCC to become an approved scheme, it wouldn't be prudent to remove these provisions in advance of any such approval.</p>

QUESTION	COMMENT
<p>Q4: Given that membership of an approved scheme will be mandatory, is it appropriate to retain the Board's power to refuse to accept an application to join the scheme on the basis that the Board believes the applicant:</p> <p>(a) does not have the ability to carry out its obligations under the Constitution?</p> <p>(b) does not have the ability to pay any entry fee or the annual level the Board requires?</p>	<p>Refer Q3.</p>