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cc Karen Bradley
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Dear Bas

Options for the Governance of Retail Contract Terms

Introduction

1. Mighty River Power welcomes the opportunity to respond to the GIC's consultation paper "Options for the Governance of Retail Contract Terms", dated 5 October 2009. No part of the submission is confidential and Mighty River Power is happy for it to be publicly released. We have copied our response to the Electricity Commission given the GIC and Electricity Commission are essentially working on the same issue and we believe the two regulators should adopt the same approach to the matter, as outlined in this submission.

Opening comments

2. In our last submission on this matter we stated that we did not believe the GIC had demonstrated current retail practices fall short of reasonable consumer expectations and/or are unfair. We went on to suggest the GIC should detail retailers and their practices that fall into these categories.
3. We are pleased the GIC has commissioned an independent review of current retail practices against a set of benchmarks. The GIC has now demonstrated a minority of retailers have residential terms and conditions which fall below acceptable practice. We are also pleased the independent review determined Mercury Energy's residential terms and conditions scored most favourably. This is perhaps not surprising as Mercury Energy has no gas 'incumbency' and only started gas retailing operations in 2003/04. As we noted in our previous submission, we have had to build up our customer base from scratch through competitive activity. All our customers have made a conscious decision to switch to us. If we did not offer fair and reasonable terms and conditions it would be more difficult to attract customers.
4. We also consider the GIC's substantial shift from its previously proposed Model Contract Guidelines to a set of "selective" benchmark terms, and moving away from proposals for

Model Contract terms and conditions,¹ to both be positive changes. We did not feel the previous proposals adequately recognised that gas retailing is a competitive activity. Not only do gas retailers face competition from other gas retailers, but they also face considerable competition from other fuel sources. This is reflected in the fact that only about 44% of consumers who have gas available to them actually take up the service.

5. Mighty River Power considers the proposed benchmark terms, while not perfect and in need of some refinement, provide a useful approach for the GIC and also the Electricity Commission to adopt. We would like to see the Electricity Commission and GIC adopt the same benchmark terms approach.
6. This would address our concern that while Mercury Energy offers a generic set of residential terms and conditions for both gas and electricity consumers, there is a risk that we would have to navigate two sets of residential contract regulation. Where one regulator's residential contract was more prescriptive than the other, full compliance would require adoption of the more prescriptive regulation for both gas and electricity. Where there were conflicts between the two sets of regulation, retailers would be forced to either not comply with one set, or to adopt different terms and conditions for their electricity and gas services. None of these scenarios would be satisfactory for retailers or, more importantly, for their customers.

GPS requirements

7. Clause 13 (bullet 2) of the Government Policy Statement on Gas Governance (Gas GPS) 2008 states that "Contractual arrangements between gas retailers and small consumers adequately protect the long-term interests of small consumers." Clause 38 of the Government Policy Statement on Electricity Governance (Electricity GPS) 2009 is broadly similar.² It states that "The [Electricity] Commission should ensure that the terms and conditions of contracts between domestic consumers and electricity retailers (and where applicable, contracts between domestic consumer and electricity distributors) reflect the reasonable expectations of consumers."
8. Clause 39 of the Electricity GPS goes on to state that "The Commission should ensure the following matters are addressed in contracts:
 - transparency of charge components
 - frequency of billing
 - company-specific arrangements for dispute resolution
 - arrangements for informing consumers about planned outages
 - arrangements for the benefit of low income domestic consumers as described below."

¹ Consistent with changes made to the Government Policy Statement on Gas Governance.

² We aren't really sure why there is any difference in the wording. There are only two real differences and neither of these are material:

- a. The Electricity GPS refers to domestic consumers whereas the Gas GPS refers to small consumers, which could be interpreted as wider than just domestic consumers.
- b. The Electricity GPS refers to the "reasonable expectations of consumers" whereas the Gas GPS refers to providing adequate protection in the long-term interests of consumers. Mighty River Power believes reasonable expectations of consumers corresponds to providing adequate protection to consumers which is in their long-term interests i.e. the two phrases should be treated as identical.

9. Mighty River Power is reasonably comfortable with these statements. All consumers should be able to choose a gas and/or electricity retailer, in their area, that offers supply on fair and reasonable terms.
10. It is notable both the Electricity and Gas GPS' have moved away from prescribing that the Electricity Commission and GIC should develop model contracts. Clause 11 of the 2004 Gas GPS stated the Government expected "The development of model contract terms and conditions between consumers and retailers." Similarly, clause 12 of the 2006 Electricity GPS stated "The Commission should develop, in consultation with the Ministry of Consumer Affairs and other relevant interests, model terms and conditions or guidelines for these contracts. It should recommend regulations if model arrangements or guidelines are not comprehensively implemented." Both of these clauses were subsequently removed.
11. The first best way to ensure the current Electricity and Gas GPS requirements are met is by ensuring there is workable competition in the electricity and gas retail markets and ensuring network access terms and conditions are fair and reasonable so they don't negatively impact on what retailers can offer consumers. For example, the ability of a retailer to offer gas services at a quality (benchmark term 4.2) consistent with all legal obligations relating to the supply of gas and no less than good industry practice in New Zealand is entirely dependent on the service offered by the pipeline business.
12. These two points are interrelated in so much that network access terms and conditions impact both on the level of competition in a market and the terms and conditions retailers can offer consumers. This is why Mighty River Power has emphasised in previous submissions the importance of regulation of network access terms and conditions and that regulating the natural monopoly parts of the market should be given higher priority than regulating the competitive parts of the market.
13. The stronger competition is in a market the greater surety there will be consumers are being offered fair and reasonable terms and conditions. Competition can also mean that if some retailers are not offering fair and reasonable terms and conditions, consumers can readily obtain service from an alternative retailer, such as Mercury Energy, that does offer fair and reasonable terms and conditions.
14. There is often a lot of attention given to comparisons of different retailer's tariffs and the savings that could be gained from switching retailer. Powerswitch was introduced precisely to assist with this. What has tended to be neglected are the other terms and conditions different retailers offer.
15. Achievement of the Electricity Commission and GIC's GPS requirements could be assisted by monitoring and reporting on different retailer's terms and conditions to provide transparency of good and bad practice. The GIC's benchmark terms, once finalised, would provide an appropriate basis for such monitoring.³ This would help ensure consumers are able to consciously choose a retailer that offers fair and reasonable terms and conditions, even if not all retailers offer reasonable terms and conditions.

³ We appreciate that the independent review of gas retailer terms and conditions the GIC undertook as part of this review was anonymous reflecting that the benchmark terms have not been finalised, but would have preferred the results for each retailer to have been made public.

16. In short, Mighty River Power is comfortable with the development of benchmark terms the Electricity Commission and GIC could use to assist in monitoring and publicly reporting on different electricity retailer's terms and conditions.

Framework for determining whether to regulate

17. An issue both the Electricity Commission and GIC need to make a decision on is whether they should regulate contract terms and conditions. We see this as being akin to a decision on whether to regulate prices under Part 4 of the Commerce Act and should have similar tests for determining whether to regulate. To that end, Mighty River Power has proposed framework for determining whether to recommend regulation (and for compliance monitoring) in our previous submissions to the Electricity Commission and the GIC on this matter.⁴ Specifically, the tests Mighty River Power has recommended are:

a. Compliance test:

- (i) The guidelines/benchmark terms are not being fully complied with; and
- (ii) Adequate reasons for non-compliance have not been provided; and
- (iii) A warning would not be sufficient or has failed to bring about compliance.

b. Competition test:

- (i) Competition in the relevant market is limited; and/or
- (ii) Regulation would promote competition; and/or
- (iii) Regulation is warranted on social policy grounds.

c. Net benefit test: Regulation would be to the long-term benefit of acquirers or end-users.

18. It is worth noting, in the context of the competition test, that it should not be acceptable, for a retailer to impose terms and conditions which effectively prevent switching and lock customers into a contract roll-over. The example of this practice the GIC has provided⁵ is in our view entirely unacceptable and may well give rise to Commerce Act 1986 issues. If the two gas retailers concerned aren't willing to remove such terms and conditions we would support the GIC introducing any regulation needed to preclude such practices.

19. We agree with the GIC's qualitative assessment that regulated minimum terms would have higher costs than voluntary benchmarks. However, we do not agree they would also have higher benefits. Regulation of competitive activities would have a negative impact on competition [just as price control on competitive services would undermine competition⁶]. Accordingly, we believe regulated minimum terms would have higher costs and lower benefits than voluntary benchmarks.

⁴ Refer to section 7 of Mighty River Power's submission to the GIC "Current issues for domestic and small business gas consumers", 28 October 2008, and section 4 of our submission to the Electricity Commission "Model Contracts", 6 May 2008.

⁵ As referred to in section 4.2 of the consultation paper.

⁶ This is why the tests under section 52G of the Commerce Act for when goods or services may be regulated include that there is "little or no competition" and "little or no likelihood of a substantial increase in competition".

Specific comments on the benchmark terms

20. Mighty River Power considers that the benchmark terms could be equally adopted for residential electricity services, by the Electricity Commission, and gas retail services. We consider them to be a substantial improvement on the previous proposals by both the GIC and Electricity Commission. We also consider the benchmark terms to be fair and reasonable, though they could be improved:
- a. Mighty River Power believes the benchmark terms should be written in a way which is agnostic to how they are implemented e.g. through contract terms and conditions or other means. There are some things the benchmark terms state the “contract must” say or include which electricity retailers could comply with in different ways.⁷ For example, does an explanation of how estimated bills are calculated need to be in the terms and conditions or would a retailer’s welcome pack suffice? Likewise, a retailer could be giving 30 days notice of price increases without stating this in their terms and conditions. Mighty River Power believes consumers are much more likely to be aware of what they should expect if it is dealt with in something like welcome packs rather than in residential terms and conditions which very few customers would actually read.
 - b. Benchmark 1.2: Mighty River Power believes it is reasonable for the customer to be able to switch retailers without charge (though we question whether the GIC has jurisdiction over gas retailer pricing). It should be borne in mind that if the customer wishes to stop taking gas permanently then the gas retailer under the current network and GMS agreements will incur costs from both the network and GMS operator in disconnecting and decommissioning the supply, which will need to be recovered either directly from the customer or socialised through (higher) tariffs.
 - c. Benchmark 2.1: See comments on benchmark 1.2.
 - d. Benchmark 3.2: Mighty River Power believes retailers should not be able to change their terms and conditions during the period of a fixed term contract. We believe benchmark term 3.2 should be amended to reflect this. The proposed benchmark term 3.2 is also problematic in that it begs the question of how “materially less” should be interpreted. Our proposed alternative approach avoids this problem altogether.
 - e. Benchmark 4.2: The ability of retailers to meet this service quality requirement is dependent on the network operator also doing so. Benchmark 4.2(b) also begs the question of how “good industry practice” should be interpreted.
 - f. Benchmark 10.1(b): Planned outages are undertaken by the gas pipeline business, not the retailer. The extent to which a retailer can give notice of a planned shutdown is dependent on the amount of notice the network operator gives the retailer.
 - g. Benchmark 11.1/12.1: Mighty River Power questions whether residential terms and conditions need to state that retailers will comply with aspects of the law i.e. the Privacy Act and Consumer Guarantees Act. This should be taken as a given.

⁷ The consequence of this is that the independent review of retail terms and conditions underestimates the level of compliance, in that it only recognises compliance through contractual terms and conditions.

- h. Benchmark 12.1: Network operators should be required to provide retailers with back to back compensation against Consumer Guarantees Act 1993 liabilities that originate from occurrences on the network.

Miller J issued a judgement in April 2009 in the High Court case of Contact Energy and others v Jones in which he held that retailers are liable under the guarantee of acceptable quality for electricity fluctuations or outages attributable to the distribution system.⁸ This reflects an interpretation that Parliament wanted to ensure consumers did not have to prove whether the retailer or the network owner is responsible for the defect in the quality of electricity supplied and that, instead, the retailer and network owner should resolve liability between them.⁹ However, present use-of-system agreements do not provide for network owners to take responsibility for liabilities that attributable to the distribution system.

21. Mighty River Power also considers that the GIC's proposed benchmark terms cover all aspects of clause 39 of the Electricity GPS. Benchmark clause 5 deals with transparency of charge components and frequency of billing, benchmark term 9 addresses with arrangements for the benefit of low income consumers (by prescribing certain protections against disconnection), benchmark term 10 deals with arrangement for informing consumers about planned outages and benchmark 13 deals with company-specific arrangements for dispute resolution.

Concluding remarks

22. In summary, Mighty River Power is of the view that:
 - a. the Electricity Commission and GIC should give priority to initiatives that would promote retail competition, particularly regulation of network access terms and conditions;
 - b. benchmark terms (with minor amendments from that proposed by the GIC) should be introduced to support monitoring the terms and conditions offered by both electricity and gas retailers – we agree with the GIC that the benchmark terms should be selective and outcome based rather than comprehensive and prescriptive;
 - c. the Electricity Commission and GIC should publicly report on the outcomes of its monitoring including explicit identification of which retailers have good and bad practices and how the different retailers rank;
 - d. the Electricity Commission and GIC should adopt the same benchmark terms and explicitly acknowledge that it would be undesirable for retailers offering gas and electricity services to have to adopt different terms and conditions for the two services;
 - e. the Electricity Commission and GIC should avoid a situation occurring where retailers that provide both gas and electricity services have to undertake two separate reviews of their retail contracts;
 - f. the Electricity Commission and GIC should be explicitly clear about the framework they would adopt to determine what are acceptable variations from the benchmark terms and

⁸ At paragraphs 74, 75 and 76.

⁹ Paragraph 73.

under what circumstances it would recommend introduction of (mandatory) regulation;
and

- g. neither the Electricity Commission nor the GIC should introduce Model Contract terms and conditions for gas or electricity retail services.

23. The consultation paper's Executive Summary notes there "would be a substantial transitional period, as it would take some time for retailers to realign their terms with the benchmarks." We agree with this. How long depends on a number of factors including, for example:

- a. The more prescriptive the Retail Contract Terms the longer the time it would take to review them;
- b. If the Retail Contract Terms are required to be complied with through retail contracts (rather than specified in an agnostic way so they could be complied with by other means¹⁰) this will also mean compliance would take longer; and
- c. The extent of co-ordination between the Electricity Commission and GIC, and the commonality of their respective requirements. Mighty River Power would be very reluctant to alter its retail contracts, to reflect the GIC's Retail Contract Terms, if we expected we would have to take another review later on to address the Electricity Commission's requirements.

24. In the case of Mercury Energy the process for changing our retail contracts involves rewriting, internal approval, legal approval, proof reading and printing. This is then accompanied by consumer notification that requires 30 days prior notice of change. We would suggest that at a minimum retailers be given a year from the GIC and Electricity Commission both publishing their Retail Contract requirements to incorporate changes.

25. If you have any queries regarding this submission please do not hesitate to contact me on 09 308 8259 or robert.allen@mightyriver.co.nz.

Yours sincerely,

Robert Allen
Regulatory Manager

¹⁰ See paragraph 20a of this submission.