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Dear Jenny

## Approval Method for Consumer Complaints Resolution Schemes

Genesis Power Limited, trading as Genesis Energy, welcomes the opportunity to provide comments to the Electricity Commission on the consultation paper entitled 'Approval Method for Consumer Complaints Resolution Schemes' dated December 2006. Genesis Energy is grateful to the Electricity Commission for accepting this as a late submission.

Genesis Energy has reviewed the consultation paper and is pleased to have the opportunity to respond to the issues raised in it. In general, Genesis Energy supports the proposed approach outlined in the Electricity Commission's consultation paper. However, Genesis Energy considers that some aspects of benchmark criteria and suggested achievement standards need to be amended to ensure any approved resolution scheme is effective and fair, and remains accountable. Criteria and standards need to ensure actual or perceived conflicts of interest are avoided, and that procedural fairness and effective decision making remains of paramount importance.

Genesis Energy also considers that an ongoing and robust monitoring regime must be implemented to ensure that all stakeholders have confidence in the scheme and its decisions. While Genesis Energy supports the Electricity Commission's view that its role does not end with approving a scheme, Genesis Energy considers it vital that the scheme and its decisions are subject to regular (perhaps biennial or triennial) review by a suitably qualified independent and experienced person.

Our responses to the specific questions posed by the Electricity Commission are attached to this letter as Appendices One and Two.

If you would like to discuss any of these matters further please contact either myself on 021 375 061, or Nick Dwan, Corporate Legal Counsel, on 09 580 4754.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Carnegie', written in a cursive style.

John A Carnegie  
Regulatory Affairs Manager

## Appendix One: Responses to Specific Discussion Questions: Feedback Form One

QUESTION	RESPONSE
<p>Q1. Do you see any problems with the Commission using the Australian Benchmarks for consumer complaints resolution schemes? If so what valuation method should the Commission use?</p>	<p>Genesis Energy believes that the Australian benchmarks represent a good start point for evaluating schemes. However, as is discussed in response to Question 3, Genesis Energy believes some of the benchmarks may require further evaluation as to their suitability in the New Zealand context, particularly to ensure compliance with the Government Policy Statement October 2006. Genesis Energy also believes that the Electricity Commission should take a flexible approach when evaluating Resolution Schemes against the benchmarks. This point is discussed more fully in response to Question 6.</p>
<p>Q2. The suggested level of achievement is to indicate the level at which the Commission believes the benchmark criteria would be met. Is it useful to have a suggested level of achievement for each of the benchmark criteria?</p>	<p>Genesis Energy believes that there is real merit in setting out suggested levels of achievement for each benchmark criteria. The very general nature of the benchmark criterion is such that each criteria is capable of being interpreted in a number of ways. Qualifying the criterion with suggested levels of achievement provides a degree of clarity (and certainty) of an approved Resolution Scheme's features, role and principles, something that would otherwise be lacking. However, as with the benchmark criteria, Genesis Energy believes that the levels of achievement should remain as a guide only, and strict compliance should not be a prerequisite or determinant for ongoing approval of a Resolution Scheme</p>
<p>Q3. The Commission is seeking comments on the individual benchmark criteria and achievement standards detailed in the table attached as Appendix one:</p> <ul style="list-style-type: none"> <li>a) Identify benchmark criteria that are not suitable for the evaluation of an electricity consumer complaints resolution scheme. If possible, suggest an alternative;</li> <li>b) Identify achievement standards that are not suitable for the evaluation of an electricity complaints resolution scheme. If possible, identify an alternative; and</li> <li>c) Should any additional benchmark criteria be inserted? If so, what should the additional benchmark criteria specify, and what would the achievement standard be?</li> </ul>	<p>See Appendix Two, Feedback Form Two, attached.</p>

QUESTION	RESPONSE
<p>Q4. Should the Commission approve more than one scheme?</p>	<p>Genesis Energy notes that section 158G(1) of the Electricity Act 1992 states that “Every electricity distributor and every electricity retailer must participate <b>in a</b> complaints resolution scheme that is approved by the Commission [...] (emphasis added)”.</p> <p>Genesis Energy interprets section 158G(1) of the Act to mean that if more than one Resolution Scheme is approved, electricity retailers and distributors would be required to participate in one scheme but not both.</p> <p>Genesis Energy notes that there are inherent difficulties with more than one Resolution Scheme operating in a small market like New Zealand, and expresses a preference for one scheme that operates efficiently and effectively, particularly in terms of the quality of its decision making.</p> <p>Having said that, Genesis Energy can see some advantages to there being more than one Resolution Scheme – not least of which involve consumer choice and the concomitant incentives that choice provides in terms of service quality. However, a decision to approve more than one Resolution Scheme comes down to a balance between any additional transaction costs versus the additional benefits of having more than one scheme. Ultimately this is an empirical question.</p> <p>On the basis that participants would be obliged to join only one Resolution Scheme (and therefore there would not be an additional cost burden), Genesis Energy would have no objection were the Electricity Commission to approve more than one Resolution Scheme, provided sound mechanisms were in place to appropriately manage cross jurisdictional issues.</p>

QUESTION	RESPONSE
<p>Q5. If the Commission were to approve more than one scheme, what should be required of each scheme to ensure that consumer confusion is avoided? Are the achievement standards under criteria 6.2(a) sufficient?</p>	<p>Ultimately, this is a matter of scheme design and whether the additional transaction costs can be minimised.</p> <p>For example, it would be important to be able to deal with such circumstances as a lines related complaint where the lines company serving the complainant was a member of a different Resolution Scheme to the electricity retailer, but the complainant raised the complaint against the retailer. Alternatively, if that same complaint was being determined by the Resolution Scheme of the retailer, but the distribution company was not subject to that decision maker's jurisdiction.</p> <p>Clearly there would need to be a mechanism in place to determine which Resolution Scheme would need to be used, and potentially for hand-over of complaints.</p> <p>In terms of the achievement standards, Genesis Energy agrees with the first two standards, but does not support the third which states that "each scheme must establish procedures covering the circumstances under which it will recognise and enforce a decision of another approved scheme which is adverse to a member of the scheme." In Genesis Energy's view it is inappropriate for one Resolution Scheme, whose member was not a party to the proceedings to be required to enforce the decision of another Resolution Scheme.</p>

QUESTION	RESPONSE
<p>Q6. Is it appropriate that the Commission is able to consider applications that do not meet the level of achievement for each benchmark criterion? That is, should the Commission be able to accept alternative evidence that a benchmark principle is met to an acceptable standard even though individual benchmark criteria are not satisfied as specified by the achievement standards?</p>	<p>Genesis Energy believes that it is appropriate for the Electricity Commission to exercise its discretion and consider applications that do not meet all of the levels of achievement for each benchmark criterion. It recognises that compliance with some benchmark criteria and achievement standards are more important than others. Indeed, it would be expected that the Electricity Commission would view compliance with certain achievement standards as a minimum requirement, while viewing others as complementary but not critical standards. For example, non compliance with the achievement standards for principles 1.1 or 1.6 should not preclude a scheme from being considered for approval. However, it would be expected that non compliance with the levels of achievement for principles 3.1 and 3.3 would preclude a scheme.</p> <p>Genesis Energy also believes that the benchmark criteria and achievement standards represent a good start point. Once a Resolution Scheme has been approved, it will be subject to ongoing review and assessment. And, Genesis Energy would expect that the Electricity Commission would modify its benchmark criteria, achievement standards, and the weight in placed on compliance with each criteria and standard based on those reviews and assessments, to ensure that the Resolution Scheme continued over time to satisfactorily meet the requirements of all stakeholders.</p> <p>Accordingly, Genesis Energy believes that it is appropriate for the Electricity Commission to exercise its discretion and consider applications that do not meet all of the levels of achievement for each benchmark criterion.</p>

QUESTION	RESPONSE
<p>Q7. Do you have any comments on the performance monitoring process?</p>	<p>As discussed in response to Question 6, Genesis Energy considers that any approved Resolution Scheme must be subject to ongoing review and assessment. However, that review and assessment process should not be limited to a review of a Resolution Scheme's annual report; documents which Genesis Energy respectfully suggests are of very limited value in this context, being that they lack reliable information as to the scheme's achievement of any guiding principles, and indeed whether customers' complaints are being appropriately addressed by the industry as a whole.</p> <p>To illustrate, a Resolution Scheme's annual report may reveal that over time the number of complaints being referred to it have fallen, or have not increased. That information is capable of being interpreted to mean that consumers are not sufficiently aware of the scheme and its services, and that a marketing campaign, to increase the scheme's profile, is warranted. However, information from consumers who have had complaints dealt with by an electricity retailer, or electricity retailers themselves, may reveal that the number of complaints referred to the Resolution Scheme had fallen because the electricity retailers had improved their resolution services or were more willing to 'settle' complaints to avoid the expense or the increasing risk of adverse outcomes that present when the Resolution Scheme considers complaints.</p> <p>Accordingly, Genesis Energy considers that any review should focus on the results from each review of the Resolution Scheme carried out by an independent and competent third party (see recommendations above regarding "determinations – benchmark principles 4.1, 5.11 and 6.11"), and feedback provided directly to the Electricity Commission from all stakeholders (being scheme members, consumers and other interested or affected parties). The Resolution Scheme's annual report would supplement the information considered during the review process.</p>

QUESTION	RESPONSE
Q7. Response cont.	<p>Following any review and assessment, Genesis Energy would expect that the Electricity Commission would not only review the Resolution Scheme's compliance with the existing benchmark criteria and achievement standards, but would also modify its benchmark criteria, achievement standards, and the weight it placed on compliance with each criteria and standard based on those reviews and assessments. The Resolution Scheme should be expected to modify its processes and procedures to comply with any new criteria and achievement standards.</p>

## Appendix Two: Responses to Specific Discussion Questions: Feedback Form Two

BENCHMARK CRITERIA REFERENCE	FEEDBACK ON BENCHMARK CRITERIA	FEEDBACK ON ACHIEVEMENT STANDARD
<p><i>Awareness and Promotion – Principles 1.1 and 1.2 – Commission’s Achievement standards</i></p>		<p>Genesis Energy believes that the Electricity Commission’s achievement standards for awareness and promotion of Resolution Schemes will focus attention too heavily on Resolutions Schemes at the expense of member organisations’ in house disputes resolution schemes. Genesis Energy believes that the focus should be on educating customers (and non customers) about their options for dispute resolution. A Resolution Scheme is a part of that process, but it should not be a focal point. If it is a focal point, complainants may be persuaded into believing that the best forum for resolving their dispute is the Resolution Scheme, rather than genuinely committing to the alternative dispute resolution process offered.</p> <p>Accordingly, Genesis Energy accepts that it is appropriate to promote the existence of a Resolution Scheme, but it considers that any promotion should be part of a wider promotion of an organisation’s dispute resolution procedures. Genesis Energy suggests that the current achievement standards are deleted and replaced with the following: energy retailers and lines companies to promote the Resolution Scheme within the disputes resolution section of the company’s website; periodic notices on invoices noting that the company is a member of the Resolution Scheme.</p>
<p><i>Access – Principle 1.10 – Benchmark criteria</i></p>	<p>Genesis Energy believes that it is important that the Resolution Scheme’s terms of reference are not only expressed clearly, but that they are also freely available to the public.</p>	

BENCHMARK CRITERIA REFERENCE	FEEDBACK ON BENCHMARK CRITERIA	FEEDBACK ON ACHIEVEMENT STANDARD
<p><i>Cost – Principle 1.11 – Commission’s Achievement standards</i></p>		<p>Genesis Energy acknowledges that the Government Policy Statement notes that the Government expects any Resolution Scheme to be free. Notwithstanding the discretion of a Resolution Scheme to set aside a vexatious or trivial complaint, Genesis Energy is concerned that this feature can make a scheme subject to abuse by such complainants. It notes that the Disputes Tribunal charges a filing fee, and believes it is appropriate to allow Resolution Schemes to similarly charge a nominal filing fee. That fee could be refunded if the Resolution Scheme upholds the complaint; meaning the Resolution Scheme’s service ultimately remains free to the complainant.</p>

BENCHMARK CRITERIA REFERENCE	FEEDBACK ON BENCHMARK CRITERIA	FEEDBACK ON ACHIEVEMENT STANDARD
<p>Non adversarial approach and legal representation – Principles 1.16 to 1.22 – Benchmark criteria</p>	<p>Genesis Energy notes that the benchmark criteria contemplate in person hearings, where legal representation may be present. While the majority of consumer related complaints will not require attendance at hearings or legal representation, Genesis Energy supports Resolution Schemes offering the option of having informal in person hearings. In its experience, some deadlock complaints (being complaints that cannot be resolved satisfactorily in house, and which are referred to the current Electricity and Gas Complaints Commission [the EGCC] for adjudication) raise issues of evidential credibility. Without 'face to face' hearings, there is no opportunity for the adjudicator to assess the credibility or truthfulness of a complainant's, or a company's, account of facts. In other words, Genesis Energy questions how a Resolution Scheme can complete a proper investigation and make a balanced and fair assessment of a fact situation, which in itself is a benchmark criterion, when it relies on written submissions only.</p> <p>Notwithstanding the above comments, Genesis Energy supports avoiding an adversarial and legalistic approach and supports discouraging the use of legal representation at hearings.</p> <p>Genesis Energy enthusiastically supports the Electricity Commission's achievement standard suggesting that the Resolution Scheme's staff have legal qualifications and experience, and supports those staff members undertaking continuing legal education. Genesis Energy considers the nature and role of Resolution Schemes requires that its staff have legal qualifications and appropriate experience.</p>	

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<p><i>The decision maker – Principle 2.2</i></p>	<p>Genesis Energy strongly supports the fixed term appointment of any decision maker. Member organisations have no rights of appeal against poor decisions from the decision maker. Accordingly, apart from an independent review of the decision maker's decision's (see discussion in relation to benchmark principles 4.1, 5.11 and 6.11 below), there are no checks or balances on the decision maker's own performance. This means stakeholders could be stuck with an unsatisfactory decision maker indefinitely. The unfortunate result of that situation could be an undermining of confidence in the Resolution Scheme, which it is noted relies, in the execution of its role, to a great degree on the voluntary cooperation of all stakeholders. It is also noted the Resolution Scheme has no legal power to enforce its decisions, meaning acceptance of decisions also relies on the voluntary cooperation of member organisations.</p> <p>Genesis Energy is not aware of any compelling reasons for the indefinite appointment of a person to such a role. In its view, the term of appointment should be no greater than 5 years.</p>	
<p><i>The decision maker – Principle 2.4 – Benchmark Criteria</i></p>	<p>Genesis Energy agrees that the decision maker must not have any relationship with a scheme member that would give rise to a perceived or actual conflict of interest. Of equal importance is that the structure (including the remuneration) of a Resolution Scheme must not give rise to any such conflict, or risk of bias.</p> <p>The EGCC Scheme is currently funded in part by filing fees. That scheme requires that a member company pays the filing fee to the EGCC when a complaint, having reached 'deadlock', is referred to the EGCC and it begins its investigation into the complaint. The fee is only refunded to the member company if the complaint is not upheld or is found (by the EGCC) to be outside its jurisdiction. In Genesis Energy's view there are inherent problems when financial incentives or implications for a Resolution Scheme are linked to the decisions of that scheme. The Resolution Scheme must be funded in a way that avoids any risk of a conflict of interest.</p>	

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<p><i>Determinations – Principle 3.1 – Benchmark criteria</i></p>	<p>Genesis Energy agrees that the decision maker must make determinations which are fair and reasonable, but considers that in doing so it must observe and apply the law and industry codes and practices. It considers that the phrase “having regard to good industry practice, relevant industry codes of practice and the law” is so imprecise, that it could be interpreted as enabling the decision maker to ignore basic legal principles if those laws would, in the decision makers view, provide an unfair result to one party.</p> <p>In Genesis Energy’s view, if the law is not observed and applied when considering a complaint and delivering a determination, then it is difficult to understand how that determination could be consistent with the concepts of fairness or rationality. That is not to say that the law always results in fair outcomes. However, as one jurisprudential theory suggests, laws are based on, and are designed to, guide rational behaviour in a community. It could therefore be argued that any departure from legal principle and process could lead to irrational outcomes, which may also be unfair.</p> <p>At a more practical level, irrational outcomes present risk and uncertainty for an organisation, and that risk is generally absorbed by adjusting the price the consumer pays for the good or service. Alternatively, the organisation may simply offer financial settlements to complainants (irrespective of the merits of complainant’s arguments) to avoid the risk of an irrational outcome from the decision maker (and the further risk of a precedent setting irrational outcome).</p> <p>Genesis Energy does not believe that requiring the Resolution Scheme to observe and apply the law will translate into a legalistic or adversarial resolution process. The EGCC, which is very consumer focused, has in its terms of reference the following:</p> <p>“In considering any Complaint and in granting any remedy under Clause B3 the Electricity and Gas Complaints Commissioner must determine what he or she considers is fair and reasonable in the circumstances after: (a) observing and applying any applicable law, rule of law or judicial authority [...]”<sup>1</sup></p>	

<sup>1</sup> Terms of reference, Schedule B, Clause B1.2

BENCHMARK CRITERIA REFERENCE	FEEDBACK ON BENCHMARK CRITERIA	FEEDBACK ON ACHIEVEMENT STANDARD
	<p>Accordingly, Genesis Energy believes that the benchmark should be “The decision maker makes determinations which are fair and reasonable, <i>after observing and applying</i> the law, the contract between the parties, relevant industry codes of practice and good industry practices”.</p>	
<p><i>Procedural fairness – Principles 3.4 and 3.5 – Commission’s achievement standards</i></p>		<p>While Genesis Energy supports the Electricity Commission’s achievement standards, it believes that the timely exchange of information is an important factor missing from the Electricity Commission’s standards. To be afforded a fair opportunity to understand, and rebut, the arguments and information presented by a party requires that the receiving party has sufficient time to consider the information and arguments presented, and collect further information as necessary. Genesis Energy notes that this is particularly relevant to claims which involve historic events, or disputes where a retailer is being held to account for the acts of a third party (such as a lines owning or meter owning company).</p> <p>Accordingly, Genesis Energy believes that the Electricity Commission’s achievement standard (3.4) should be amended to: “both parties are informed of the arguments, are given sufficient information to know the case of the other party, and are given sufficient time to consider those arguments and the case of the other party before responding”.</p>

BENCHMARK CRITERIA REFERENCE	FEEDBACK ON BENCHMARK CRITERIA	FEEDBACK ON ACHIEVEMENT STANDARD
<p><i>Provision of information to the decision maker – Principle 3.9 – Benchmark criteria</i></p>	<p>Genesis Energy notes that the Electricity Commission’s benchmark provides that a party may withhold information if that information identifies a third party to whom a duty of confidentiality is owed, or it is required to withhold that information by law.</p> <p>Genesis Energy considers that there are additional circumstances regarding commercial sensitivity of information which justifies its non disclosure. For example, the business policies which determine when and how a retailer applies its charges are commercially sensitive<sup>2</sup>. Genesis Energy believes this exception for commercially sensitive information is particularly important as the Electricity Commission’s achievement standard for Principle 4.2 provides that member companies (but not complainants) may be named in written determinations.</p>	
<p><i>Determinations – Principle 4.1 – Benchmark criteria, Monitoring – Principle 5.11 – Benchmark criteria, and Independent Review – Principle 6.11 – Benchmark criteria</i></p>	<p>Genesis Energy agrees with the Electricity Commission’s benchmark criteria in relation to “Accountability” of a Resolution Scheme, and the Electricity Commission’s benchmark criteria under Principle 6.11. However, it believes, in the interests of true accountability, the Resolution Scheme must be subject to biennial or triennial review of its performance (including a review of its processes and decisions) by an independent and competent third party, such as a suitably experienced independent barrister or law firm.</p> <p>While Genesis Energy supports any proactive steps by the scheme’s staff to gather informal feedback from parties on the performance of the Resolution Scheme (Principle 5.12), it believes that it is inappropriate for the decision maker itself, or any person or entity associated with the Resolution Scheme or the decision maker, to conduct a formal review of the scheme (including that outlined in Principle 5.11). Genesis Energy believes that the independence of any reviewer is fundamentally important, as the review process is the only real and credible check on the Resolution Scheme’s adherence to the benchmark principles; noting that member companies have no</p>	

<sup>2</sup> It is noted that while the while the matter of a company’s charges and fees maybe outside the jurisdiction of a Resolution Scheme, in Genesis Energy’s experience, this does not preclude a scheme’s decision maker from investigating and commenting on its business rules regarding the application of those charges.

BENCHMARK CRITERIA REFERENCE	FEEDBACK ON BENCHMARK CRITERIA	FEEDBACK ON ACHIEVEMENT STANDARD
	<p>rights to appeal a decision maker's determinations.</p> <p>Genesis Energy notes that the New Zealand Banking Ombudsman Scheme is subject to an independent review on a triennial basis (a factor which was supported in the Independent Review of the New Zealand Banking Ombudsmen Scheme, March 2006, undertaken by the now New Zealand Governor General, The Honourable Anand Satyanand). In particular, Mr Satyanand recommended that the review be conducted more regularly to ensure that any difficulties with that Scheme are dealt with quickly, noting that a full review of the Scheme would probably not be necessary on each occasion.</p> <p>Accordingly, Genesis Energy does not support Principle 5.11, Monitoring. It further considers that the Electricity Commission's achievement standards for Principle 6.11 should be amended to require regular (biennial or triennial) reviews of the performance and processes of a Resolution Scheme by an independent and competent third party, recognising that a full, 'across the board' review may not be necessary on each such occasion.</p>	