THE ELECTRICTY RULINGS PANEL

IN THE MATTER of the Electricity Act 1992 and the Electricity Amendment Act 2001 and the Electricity Amendment Act 1904 and the Electricity Governance Regulations 2003 and the Electricity Governance Rules 2003

AND

IN THE MATTER of a hearing on a formal complaint against Meridian Energy Ltd ("Meridian") in relation to alleged breaches of Rule 3.1 Part D, Rules 11 and 12 of Part E, Rules 3.1 of schedule E1 of Part E, Rule 3.2 of schedule E2 of Part E; and Rules 1.2, 2.2 and 4 of Part J of the Electricity Governance Rules 2003 (the "Rules").

Rulings Panel Members
Gael Webster– Chair
Craig Taylor
John Isles
John O'Sullivan
Peter Dengate Thrush

Appearances for the Electricity Commission
Ross Hill, Senior Legal Counsel
Peter Wakefield, Senior Investigator
Ron Beatty, Technical Witness

Appearances for Meridian
John Knight, Legal Counsel
Toral Joshi, Risk Performance Manager
Kevin Currie, Technical Witness
Glen Dunlop, Legal Adviser

Appearances for Genesis Energy
Andrew Maseky, Reconciliation and Switching Manager

Appearances for Vector
John Rampton, Manager Industry Governance and Policy

There were no appearances for **Mighty River Power** or **Todd Energy**, both relying on their written submissions.

Stenographer
Helen Hoffman

Date and Place of Hearing
Gas Industry Co Boardroom
The Todd Building
95 Customhouse Quay
Wellington
27 August 2010

DECISION OF THE RULINGS PANEL

Context of this Decision

1. Under Part 8 of the Electricity Governance Regulations 2003 (the "Regulations") the Rulings Panel (the "Panel"), an independent body corporate appointed by the Electricity Commission (the "Commission "), is given the function to decide complaints referred to it under the Regulations that a participant has committed a breach of these Regulations or the Electricity Governance Rules 2003 (the "Rules").

2. This was the fourth hearing of the Panel and concerned a formal complaint (the "Complaint") referred by the Commission under the Regulations.

3. The Panel heard oral submissions at the hearing and considered all the documents, including written submissions, listed in Appendix 1 of this decision.

Referral of the Complaint to the Panel

4. The Complaint concerns a total of eight breaches of the Rules by Meridian. The first relating to Rule 3.1 Part D was reported to the Commission by Vector Limited ("Vector") around 16th December 2008 during the course of an investigation into Meridian's claim of alleged breaches by Vector. The other breaches relating to Part E and J of the Rules were notified by the Market Administrator on 27 July 2009.

5. On 10 November 2009 the Commission appointed an investigator (the "Investigator") to investigate the notified breaches. The Commission, at its meeting held on 8 June 2010, considered a report and recommendation from the Investigator and decided to refer the Complaint to the Panel under regulation 90 of the Regulations in respect of breaches of the Rules by Meridian.

6. The reasons for the referral were that the Commission considered Meridian had breached the Rules as alleged, settlement of the alleged breaches could not be effected, Meridian knowingly did not submit the relevant consumption volumes to the Reconciliation Manager from 1 February 2008 being the date Meridian entered into an agreement with Lowe Corporation ("Lowe") in respect to the Sutherland site, and the alleged breaches have adversely affected participants.

7. The Commission at the same meeting directed the Investigator to report to the Panel under Regulation 93.

Amendment to Complaint

8. The Panel was advised 2 days prior the hearing that Vector would be withdrawing its complaint as a settlement had been reached in respect of the alleged breach of Rule 3.1 Part D. The Panel advised the parties that this part of the Complaint would

need to be withdrawn by the Electricity Commission, being the body that had referred the Complaint to the Panel.

9. In accordance with its power to regulate its own procedures under Regulation 96, the Panel agreed to adjourn the hearing in respect of the complaint under Rule 3.1 Part D in the likelihood that the Commission's Board would agree to this withdrawal at its next Board meeting.

10. The Panel was subsequently advised by the Board that it had withdrawn this part of the Complaint.

11. On the evening before the hearing Meridian advised the Panel that it now admitted all alleged breaches under Part E and J. Thus the hearing proceeded to consider appropriate orders for admitted breaches under Part E and J.

The Complaint: admitted breaches of Rules under parts E and J

12. The Complaint concerns the admitted breaches by Meridian of Rules under Part E and Part J in that:

- between 1 February 2008 and 28 May 2010 Meridian did not register as the retailer for ICP 0208316663LC9A8 (in breach of Rules 11 and 12 and 3.1 Schedule E1 and 3.2 Schedule E2 under Part E); and

- between 1 February 2008 and sometime in June 2010 Meridian did not provide the Reconciliation Manager with the required submission information (in breach of Rules 1.2, 2.2, and 4 under Part J).

13. An extract of the relevant Rules is attached to this decision as Appendix 2.

Factual Background

14. The facts illustrate a story of a difficult problem in several respects: complex Rules, problematic historical facts, multiple parties and a lengthy investigation. Most of the key facts giving rise to the admitted breaches were not in dispute between the parties; however some of the historical facts are not clear and Meridian had disputed what could be confidently inferred from these historical facts.

15. The Rule breaches relate to the supply of electricity to two different but adjacent properties leased by Lowe at 41 (the Southern Cross building referred to as the "Southern Cross site") and 43 Galway Street (the Sutherland building referred to as the "Sutherland site"), Onehunga, Auckland. Each building has been and continues to be supplied from separate 300kVA transformers maintained by Vector Limited ("Vector"). The Electricity Commission submitted that electricity supply to each building has been separately metered and a data logger located at the Sutherland site was for a period used to summate the electricity supply data until the communication cable connecting it to the Southern Cross site meter was

disconnected. This probably occurred during 1999 when supply was switched from Energy Auckland (at the time a retail division of Mighty River Power Limited ("MRP") to Meridian. Meridian has disputed that the data logger was used to summate the electricity supply data, and the Panel has not had to resolve this matter for the purposes of this penalty hearing.

16. The following chronology of events is based primarily on the Investigator's report and Meridian disputed some of these items as noted.

Date	Event	Panel Comment
1 Apr 1999	Maria Registry comes into effect.	
27 April 1999	Energy Auckland (incumbent retailer to Lowe) created the entry on the Registry for Southern Cross site ICP, backdated to 1 April 1999. Energy Auckland was a subsidiary of MRP. Lowe was prior to 1 April 1999 a customer of Energy Auckland at both the Sutherland and Southern Cross sites where it operated a tannery across the two sites.	
28 Apr 1999	Transfield undertakes Maria certification and a modem was installed and connected to the meter at the Southern Cross site.	The Investigators report noted that this was probably the time at which the communication cable, enabling summation of energy data from the two meters was disconnected.
1 May 1999	Meridian becomes retailer for the Southern Cross site ICP. Lowe switches all its sites throughout New Zealand to Meridian.	From here on Meridian accounts to Vector for a 600kVA capacity charge, the combined capacities of the transformers separately supplying the Sutherland and Southern Cross sites, but not the energy consumption related charges for the Sutherland site. It was not necessary for the Panel to determine whether Lowe switched the Sutherland site to Meridian at this time, Meridian had submitted this was not the case.
17 May 1999	Data logger and meter at Sutherland site last read. This	

	enabled Energy Auckland to create the final bill for Lowe at both the Sutherland and Southern Cross sites.	
1999 - 2003	Maria Registry progressively set up.	Industry practice at that time was for gaining retailer (Meridian) to be responsible for setting up an ICP at the Lowe sites. Industry practice also required that once an error came to light the new retailer would take ownership of the missing ICP from the time of the initial customer sign up as that would realise the customer intent.
17 Apr 2000	Energy Auckland creates an entry on the Registry for the Sutherland site ICP with an event date of 1 April 1999 and ICP "active status" but no physical address was attached.	It is understood that this was part of a bulk upload of ICPs onto the Registry. In April 2000 there was no address field in the Registry. This ICP was subsequently switched from Energy Auckland (MRP) to Meridian on 28 May 2010.
3 Feb 2002	Vector enters "decommissioned" as the status for the Sutherland ICP with an event date of 31 Jan 2002. No reason for the change of status was entered as this function was not required of the Registry until October 2002.	
8 Oct 2002	EMS audit report for Metrix records meter and data logger located at the Sutherland site.	Meridian claims it never saw this report.
8 Oct 2002	The capacity for the Southern Cross site as 600kVA was entered in the Registry. This is the first time the ICP had kVA capacity information recorded against it in the Registry. Previously the Registry did not include a capacity field. The physical configuration involved separate 300kVA transformers and live supply at each of the Sutherland and Southern Cross sites.	Only Vector as the distributor would have been able to enter this information.
1 Mar 2004	Electricity Governance Rules and Regulations come into force.	

29 Oct 2007	Meridian receives notice from Metrix that an additional meter was found at the Sutherland site on 12 Oct 2007.	
29 Nov 2007	Meridian inspects and re-discovers meter at Sutherland site.	
17 December 2007	Vector advises Meridian of the possibility that there was an ICP connected to the Sutherland site.	In a witness statement Kevin Currie states that Meridian did not know what to make of this at the time but it did indicate to them that Vector had made a mistake in decommissioning the ICP when the site was clearly live.
30 Jan 2008	Meridian alleged to the Commission that Vector had breached rule 2 of Part E in that Vector had failed to create an ICP from 1 March 2004.	
1 Feb 2008	Meridian enters into a supply agreement with Lowe for electricity supply to the Sutherland site. Between now and Aug 2008 Meridian sets up dummy ICP identifier for invoicing Lowe, and commences manual monthly meter interrogations at Sutherland site with the intention of being able to undertake a manual reconciliation when the dispute was resolved.	
13 Feb 2008	Meridian signals to Vector it will request a new ICP for the Sutherland site; Vector indicates it would prefer to use existing ICP.	There were numerous emails and letters between Vector and Meridian from this time through to 29 Feb 2008 where the possibility of a new ICP versus the return to use of the Sutherland site ICP was discussed. The facts indicate (presented as evidence in Meridian's submissions) that an email request was made for an ICP on 19 February 2008, the same day as Vector changed its status. Evidence of this request was not put before the Investigator, who found that the formal request was

		by letter dated 29 Feb 2008 (and received several weeks later). Meridian claimed Lowe requested a new ICP.
19 Feb 2008	Vector changes the status of the existing Sutherland site ICP from decommissioned to active effective from 1 April 1999 and records address as 41-43 Galway St.	
29 Feb 2008	Meridian formally requests Vector to enter into the Registry a new ICP at the Sutherland site (received on 29th March 2008).	
15 April 2008	There was a status change made by a user with the code of AUCK (which Meridian assumed to be Energy Auckland) which changed the status for the Sutherland site ICP from "Active" to "Inactive".	
16 Dec 2008	Vector alleges breach by Meridian of Rule 3.1 Part D in its reply to the investigation into its alleged breach.	Meridian was advised around this time of Vector's notification.
22 Jul 2009	Market Administrator advises Meridian that its failure to submit information to the Registry for an ICP and failure to submit consumption information to the Reconciliation Manager is in breach of the Rules.	It was not until around this time that the Commission and Market Administrator became aware during the investigations into the Vector allegation that Meridian had not been submitting consumption information in respect of the Sutherland site.
25 Sep 2009	Commission advises Meridian of Market Administrator's allegation of Rule breaches by Meridian.	
10 Nov 2009	Investigator appointed by Commission. MRP, Vector, Todd Energy and Genesis join the investigation as affected parties.	
12 Nov 2009	Commission advises Meridian that an Investigator had been appointed in respect of Vector's and the Market Administrator's allegations.	
11 Dec 2009	Meridian offers without prejudice proposal to use and be registered	Meridian's offer was similar to that proposed by the Commission

	as the retailer assigned to the Sutherland site ICP from 1 February 2008.	in July 2009, and it required all parties to agree in writing that the proposal was without prejudice to Meridian's position in relation to any Rule breaches. The proposal would leave unresolved the liability for supply to the Sutherland site from 1 April 1999 to end January 2008. Vector and MRP did not accept settlement offer.
28 Jan 2010	MRP advises Commission that it does not accept Meridian's offer and that it seeks to recover the energy cost it has paid as the incumbent retailer back to 2004 (when the Rules came into force).	
4 Mar 2010	Vector advises that it would not accept Meridian's revised proposal unless it was offered on a "without prejudice basis" and Meridian was responsible for all outstanding line charges from 1999 to February 2008.	
20 Apr 2010	Investigator reports on breaches of Rules alleged of Meridian by Vector and Market Administrator.	
12 May 2010	Commission issues decision that Vector did not breach Rules by changing decommissioned status of Sutherland site ICP on the Registry, which returned status to active. Vector was cleared of the alleged breaches of the Rules.	
28 May 2010	Meridian initiates the switch process for the Sutherland site ICP.	
14 June 2010	Commission refers Complaint to Panel.	
21 Jul 2010	Rulings Panel gives notice of hearing of allegations of breaches of Rules by Meridian.	

Submissions as to penalty, compensation and costs

17. Submissions were presented in writing and orally on the issue of penalty, compensation and costs. The position of each participant is summarised in the following table.

Party	Submission
Electricity Commission	• an order of civil pecuniary penalty of $20,000 in total under regulation 109 (regulation 107(1)(e)); and • an order that Meridian pay a sum by way of compensation (regulation 107(1)(f)), if any retailer is not compensated by Meridian in respect of any unaccounted for energy for the period 1 February 2008 to March 2009, as a result of Meridian's breaches.
Mighty River Power	• Costs in relation to the dispute resolution and costs of the Panel pursuant to Regulation 159; • Civil pecuniary penalties for breaches of Rules under Part E and Part J which should be deemed to have occurred from 29 October 2007 and not from February 2008 as stated in the Investigator's report; and The breaches were wilful therefore the cap on liability does not apply (Regulation 130).
Genesis Energy	Agreed with the Investigator's view on the alleged breaches.
Meridian Energy	No civil pecuniary penalty for each admitted breach.
Vector	A civil pecuniary penalty and the costs of the Panel process.
Todd Energy	A civil pecuniary penalty award at or near the maximum permitted.

18. The main arguments put forward by the Commission for imposition of a penalty were in respect of all breaches collectively as follows:

1. The breaches were deliberate as Meridian knowingly opted out of the Rules and did not submit the relevant consumption volumes to the Reconciliation Manager from 1 February 2008, the date it entered into an agreement with Lowe in respect of the Sutherland site.
2. The severity of the breaches have adversely affected participants with significant impact from unaccounted for energy.
3. The lengthy time the breaches remained unresolved. Meridian is entitled to little credit since it only commenced to resolve the breaches on 28 May 2010 when it was apparent the matter may be referred to the Panel and it only admitted the breaches in the days immediately before the hearing.

19. The main arguments submitted by Meridian against imposition of a penalty were:

1. It had assumed it was only responsible for the Southern Cross site ICP until 1 February 2008 when it entered into an agreement to supply Lowe at the Sutherland site.
2. The Commission's case in relation to the Sutherland site before 1 February 2008 relies on inference from limited facts mostly related to the physical configuration of the metering assets at the Southern Cross and Sutherland sites.
3. It did not deliberately breach the Rules but had a genuinely held belief that its interpretation of the Rules was correct being that the Rules did not allow for a decommissioned ICP on the Registry to be reactivated.
4. That it brought the issue to the Commission for resolution believing that it would be resolved much quicker than the length of time actually taken.
5. The Panel's power to order payment of a civil pecuniary penalty is limited to $20,000 in respect of any complaint or matter referred to it, rather than in respect of each breach of a Rule.

20. The main arguments put forward by Vector for imposition of a penalty, in respect of all breaches, were:

1. Meridian's actions since October 2007 were wilful. It knowingly failed to submit relevant consumption data to the Reconciliation Manager following the discovery of the meter at the Sutherland site during October 2007.
2. Attempts by the Commission to broker a settlement were delayed considerably by Meridian insisting that the breaches and its liability be limited to February 2008 and onwards.
3. Meridian chose not to accept a "without prejudice counter offer to settlement proposal" put forward by Vector.

21. The main arguments put forward by MRP for imposition of a penalty were:

1. Meridian ought to reasonably have discovered the lost meter in the period from 1 March 2004 and prior to October 2007 and should have made best endeavours to ensure all metering on the Lowe sites were accounted for.
2. The breaches following discovery of the meter during October 2007 were wilful.

22. The main arguments put forward by Todd Energy for imposition of a penalty were:

1. Meridian has unjustly enriched itself at the expense of the retailers in not properly accounting for volumes.
2. Meridian has sought to use the "unknown meter' situation to its commercial advantage, to extract an agreement from Vector and Mighty River Power not

to pursue Meridian for loss suffered by those parties in relation to consumption prior to 1 Feb 2008.

3. Meridian could have protected its position with respect to the historical quantities by submitting all consumer consumption under the ICP notified by Vector on a without prejudice basis without requiring the agreement of anyone.

Part E breaches

23. Meridian admits breaches of the following Rules under Part E:

- 11 and 12 of Part E requiring retailers to provide ICP information and to keep this information up to date;

- 3.1 of Schedule E1 of Part E, requiring the identity of the retailer to be given to the Registry; and

- 3.2 of Schedule E2 of Part E, requiring the retailer to inform the Registry of a switch request.

Panel approach to consolidation of Part E breaches

24. At the hearing Meridian admitted all breaches on the basis they were all consequential on the initial decision by Meridian to treat the Sutherland site ICP as being invalid.

25. The Panel considers that these breaches can be consolidated into a single breach for the purposes of considering any penalty, given there is a degree of 'doubling up' in the breaches as Rule 12 and the Rules 3.1 of Sch.1 and 3.2 of Sch. 2 are specifiers of the information required by Rule 11, which requires the retailer to provide ICP information, the ICP identification is the starting point of the issue and no significant purpose would be achieved by considering each of the consequential breaches separately.

Factors to be considered in assessing any penalty

26. In making this assessment, the Panel has had regard to the following matters as required under Reg 109(3):

Severity

27. Entering correct data to the Registry is a key obligation on retailers to allow for the efficient management of information held in the Registry and for switching customers. It is important for the physical connectivity of the system and customers that ICPs are correctly identified and for the consequential liability of the retailer for each ICP.

28. Severity is a relative concept. A breach of these Rules can be potentially severe because it may lead to significant impacts on the correct accounting of energy use/market clearance. In this situation the severity was relatively minimal as the breach involved one ICP, one site /customer.

Impact on others

29. The integrity of the Registry is compromised when participants can not rely upon it; however the consequence of the breach of Part E had very little impact in itself on participants.

Was the breach inadvertent or deliberate?

30. Meridian submitted its actions were intentional but that Meridian considered them consistent with the Rules as interpreted by them and therefore principled. That Meridian had a genuinely held belief that its interpretation of the Rules relating to decommissioned ICPs was correct; that Vector's actions in reactivating the decommissioned ICP was not permitted under the Rules, and using this ICP would put it, Meridian, in breach of the Rules. Meridian considered there was no ICP to switch. Its interpretation was there was no Rule it was breaching.

31. Meridian should have exercised its powers and obligations to populate the ICP once it had contracted to supply energy to Lowe as a customer. Meridian had choices available to it to comply with the Rules; by using the ICP at the Southern Cross site and resurrecting the previously used data logger system, or by agreeing to use on a 'without prejudice basis' the existing ICP at the Sutherland site offered by Vector. This would protect Meridian's position that this use was not permissible under the Rules and preserve its position in respect of pre- 1 February 2008 liabilities. Whilst we consider that the position is not as clear-cut as the previous statement implies, in essence Meridian chose to breach the Rules relying on its' interpretation and misreading of the Rules regarding the ICP.

Circumstances of the breach

32. The origins of the issue, in the late 1990s, were at the very beginning of a contestable New Zealand electricity market when the processes around customer switching and related data were still being developed. There appears to have been varying industry practices at the time of divestment by lines companies of their retail operations. Facts were difficult for the Investigator and participants to obtain and are incomplete. Some key facts related to the switching of Lowe from MRP to Meridian in 1999 cannot be determined with certainty. This uncertainty is compounded by the fact that Meridian was unable to supply the Panel a copy of the agreement between Meridian and its' customer, Lowe. In the absence of such documentation the Panel has some difficulty with the position advocated by Meridian that it took over only half of the Lowe factory at the Onehunga site when Lowe switched all other sites in NZ to Meridian.

33. Meridian had a different view than others on what had occurred. However, once Meridian discovered the Sutherland site ICP in October 2007, investigated the situation and clarified its contractual arrangements with Lowe, it had clear responsibilities under the Rules. The issue was which ICP to use and it disputed this with Vector.

34. Meridian raised the issue with the Electricity Commission by way of a breach allegation against Vector in January 2008. Meridian claimed it hoped the Commission would sort the matter out and did not contemplate the investigation into the Vector breach (and the deferral of a decision by the Electricity Commission until the Meridian investigation had been completed) taking as long as it did, 28 months in total. Meridian's view at that time was that making a breach allegation was the only option that Meridian had available to it, to test the legal point. Meridian rightly claims that there was no process whereby the parties could have sought an interpretation of the Rules –neither the Commission nor the Panel has this function under the Regulations.

35. The Panel accepts that Meridian may have been acting out of concern for its possible liabilities arising from the switch in 1999. However in 2008 it was required to meet its obligations under the Rules irrespective of what went before. In terms of the physical concept of the ICP, there was nothing wrong with it. The only thing that was wrong with the ICP was in the Registry, Vector had labelled it incorrectly as decommissioned and Mr Currie in his evidence said that he had inkling from the beginning that this was a mistake by Vector.

36. Genesis Energy submitted, and this was supported by Mr Beatty, that Rule 4 of Part J provides that a retailer only becomes responsible for an ICP from the time it puts its code against it, the identifier in the Registry, and the effective date of that change. Therefore the fact that Vector might correct the status of that ICP to a point some time previously when it was controlled by another retailer, would not have made Meridian liable for any ICP.

37. The Panel accepts that Vector contributed to Meridian's predicament, by not managing the Sutherland ICP properly by incorrectly recording a decommissioned status for the Sutherland ICP on the Registry when it clearly was not. Vector was concerned that if it did what Meridian asked it to do, all the history would be washed away and it might interfere with their ability to recover any compensation for lost line charges under their use of system agreement. The Panel considers that both parties were protecting pre-1 February liabilities with a degree of entrenchment and this impeded a suitable outcome.

Previous Rule breaches by Meridian

38. The Panel has heard no allegations of any previous breaches by Meridian of the Rules under Part E or Part J. The Investigator's report noted that there have been no other decisions against Meridian for breaches of Part E or J It is not appropriate for the Panel to interrogate records of admitted breaches by participants, the Panel

expects the complainant (in this case the Commission) to bring any such record to the attention of the Panel where such breaches are relevant to the matter under consideration, for example they indicate a level of repetitive breaching Difficulties are caused by the process involving confidential settlements where details of previous or sequential rule breaches cannot be made available to the Panel.

Disclosure

39. Meridian informed the Commission of the issue by alleging in January 2008, some three months after it became aware of the Sutherland site ICP, that Vector was in breach of the Rules for not creating a new ICP. This was within a reasonable period, given the uncertainties set out above.

Duration of breach

40. MRP suggested the breaches commenced when Meridian first became aware of the Sutherland site ICP on 29th October 2007 – (the obligation to update the Registry arose three days later on 1 November 2007). However MRP was not at the hearing to further this point, having settled with Meridian just prior to the hearing. At the hearing the date of 19 February 2008 was mooted, being the day when the ICP became active.

41. The parties have proceeded on the premise the breaches commenced on 1 February 2008 when the contract with Lowe became operable. This is the date the Market Administrator claimed the breaches arose and which Meridian later admitted. The Panel can see no reason to re-litigate this issue as it does not make any substantial difference to the outcome; it therefore proceeds on the basis the breaches commenced on 1 February 2008.

42. The duration of the breach resulting from these actions is significant and reflects the length of time for completion of the investigative process including the unanticipated change in Commission personnel creating delay in investigation and the final determination of the Commission on the dispute over re-activation versus new ICP identification.

43. The breach lasted for some 28 months from 1 February 2008 until around June 2010 when Meridian made the switch to the reactivated ICP after the Commission decision in May 2010, and commenced reconciling against this ICP.

44. The Panel accepts that Meridian did not appreciate that the matter would take as long to resolve as it did but it was always open to Meridian to propose a settlement offer on a without prejudice basis to matters pre 1 February 2008 at any time during the investigation. It did not do so until December 2009.

Actions on discovering a breach

45. There was dispute as to who created the breach- Meridian or Vector. Meridian chose to breach the Rules under Part E rather than using the Sutherland ICP as suggested by Vector. Meridian considered this course would also be a breach of the Rules. Meridian's action was to allege Vector was in breach of the Rules and trust that the breach investigative processes would resolve the issue in a timely manner. Our impression is that remedy became caught up in litigation issues and potential liability (over $1m) arising from the initial switch process in 1999.

46. Meridian made a without prejudice settlement offer in December 2009 to be registered as the retailer against the Sutherland site ICP from 1 February 2008. This was unacceptable to Vector and MRP as it did not address compensation and lines charges pre 1 February 2008. This offer was essentially the same as the proposal put by the Commission in July 2009 when it discovered that Meridian was not submitting information to the reconciliation process.

47. When the Commission made its determination in the Vector allegation that Vector was permitted under the Rules to reactivate the decommissioned ICP, Meridian took immediate steps to rectify the breaches by switching to the reactivated ICP.

48. Notwithstanding this action Meridian maintained its innocence of the breaches under Part E and J until the evening before this hearing as it still challenged the Commission's interpretation of the Rules, an interpretation which was supported by the other parties.

Benefits from the breach

49. There have been no benefits to Meridian from the breach.

Part J Breaches

50. Meridian admits breaches of Rules 1.2, 2.2 and 4 under Part J.

51. These breaches relate to Meridian's conscious decision not to submit to the Reconciliation Manager the consumption volumes supplied at the Sutherland site from 1 February 2008, being the date when it entered into a formal contract with Lowe.

Panel approach to consolidation of Part J breaches

52. The Rules in their totality require the retailer to submit accurate and complete submission information by a set time to the Reconciliation Manager for all NSPs at which it has purchased or sold electricity, and to correct any incorrect submission information.

53. The failure to provide submission information is the key breach and no significant purpose would be achieved by considering each of the consequential breaches separately.

54. The Panel considers that these breaches can be consolidated into a single breach for the purposes of considering any penalty.

Factors to be considered in assessing any penalty

55. In making this assessment the Panel has had regard to the following matters as required under Reg 109(3):

Severity

56. The obligation to provide submission information, in lay terms the quantity, value and 'ownership' of electricity conveyed to a customer, is a fundamental requirement for the reconciliation process. A breach of these Rules can affect the integrity of the market and the allocation of costs amongst market participants.

57. Whilst non-delivery of submission information on one point of connection for a small period of time could be taken care of in the wash-up period, the duration of this non-delivery past the wash-up period makes the breach more severe.

58. The Panel considers that breach of these Rules is potentially quite high on the severity scale, higher than that for breaches under Part E, but not as severe as a deliberate breach that affects the security of supply of the electricity system.

59. The severity in part is determined by the impact the breach has on others.

Impact on others

60. Participants suffered a financial detriment (before compensation is paid); the impact of the breaches was greater on MRP but spread over all retailers. The total energy costs from 1 February 2008 associated with this breach are around $303,000-$230,000 energy costs, and $73,000 lines charges. These are relatively small amounts in overall market terms and substantially less than those arising from the original Complaint; they are of minimal significance to the affected participants.

Was the breach inadvertent or deliberate?

61. Meridian considered it could not return the submission information data because there was no ICP to return it against. By setting up a dummy ICP, invoicing Lowe against this ICP, and holding monies otherwise payable to other retailers through the reconciliation process, Meridian set up an alternative structure to the Rules and intentionally decided not to provide submission information nor advise the Market Administrator of its position.

62. The Commission, MRP and Vector claim Meridian did deliberately opt out of these Rules whereas in mitigation Mr Knight claims Meridian thought it was not able to use the Rules to do what it knew ought to be done. See comments under Part E.

63. The Panel concludes that, by its own admission, Meridian's view was misplaced and failed to recognise the physical reality of the situation. The logical conclusion of this misplaced view is, as submitted by Mr Hill and supported by Mr Knight, that you would end up with an ICP that then would need to be physically decommissioned and a new piece of equipment or new point put in, in order to continue to supply electricity to the site which previously had had a point of connection in place.

64. The Panel accepts that the Rules were not as clear as they could have been but the view taken by Meridian, whilst possible, belied the physical realities of the system. Had there not been the issues surrounding liabilities pre 1 February 2008 the Panel doubts that Meridian would have taken this stance on the Rules nor had any difficulty using the existing ICP on the basis that the error of status could be adjusted. The Panel was advised by Mr Hill that there are procedures at a lower level, administrative procedures, available on the Commission website, which provide for this. These were not known to Meridian at the time.

65. On balance the Panel finds that Meridian did not take all possible steps available to it to avoid breaching the Rules in the first instance (see below), considers that Meridian should have accepted a "without prejudice" use of the ICP suggested, and that it knowingly breached the Rules in a deliberate manner but explicable to itself alone to manage possible liabilities pre 1 February 2008.

Circumstances of the breach

66. During the course of investigation there were discussions with the Commission. The Panel accepts the evidence of Mr Ron Beatty that there was never any agreement by the Commission to Meridian not delivering submission information.

67. The Panel considers that the investigation into the alleged breach by Vector did take an unreasonably long time. However, the fact remains that Meridian did not disclose to the Commission that it was not submitting information to the Reconciliation Manager until it became apparent in the course of the Vector investigation in July 2009.

68. Whilst challenging Vector's right to reactivate the decommissioned ICP, Meridian had a number of choices open to it whereby it could have complied with its obligations under the Rules- to reconcile against the Southern Cross ICP by reverting to the arrangement in place before the switch, or reconciling against the reactivated ICP on a without prejudice basis, or submitting volumes into the reconciliation manager so as not to prejudice the other retailers (the evidence of Mr Beatty confirmed this is what the Commission assumed Meridian was actually doing). None of these courses of action was considered by Meridian.

Previous Rule breaches by Meridian

69. See comments under Part E. This factor has no relevance to determination of the matter.

Disclosure

70. Meridian omitted to inform the Market Administrator or Commission that it was not providing submission information until this non-disclosure was discovered by the Market Administrator in the course of the Vector investigation in July 2009 (some 18 months subsequent to alleging Vector was in breach of the Rules). Meridian must have known that the subsequent withholding of information would result in market distortions. Meridian offered no real explanation as to why it had not informed the Market Administrator or Commission of its actions. A quicker investigative process may have occurred had it disclosed its actions.

Duration of breach

71. See comments under Part E. The duration of this breach contributes to impact.

Actions on discovering a breach

72. See comments under Part E.

73. Meridian knowingly committed the breaches under Part J and took no actions to notify the Commission or Reconciliation Manager that it was not providing submission information nor discuss alternatives, or to rectify the breach, but sought to minimise its possible future liability e.g. setting up a dummy ICP and process for future reconciliation once the dispute was resolved.

74. When the Commission made its determination in the Vector allegation that Vector was permitted under the Rules to reactivate the decommissioned ICP, Meridian immediately commenced providing submission information to the Reconciliation Manager on completion of the switch.

75. Meridian undertakes to restore the market and individual retailers to the position as if the switch had occurred 1 February 2008.

Benefits from the breach

76. There have been no benefits to Meridian from the breach; the monies received from Lowe since 1 February 2008 has been kept with interest accruing for redistribution to retailers by way of compensation. The Panel has no knowledge of what commercial arrangement Meridian may have with Lowe regarding this matter. The Panel was informed by Meridian that Lowe had requested Meridian to seek a new ICP.

Other factors in respect of breaches under Part E and J

77. The Panel has considered a number of mitigating factors:

1. Meridian's obligations as a retailer under the Rules were clear as at 1 February 2008, irrespective of what occurred before this date. Meridian was faced with a dilemma of how to comply with the Rules due to its interpretation of the ICP Rules and its potential liabilities pre February 2008 effectively choosing which Rule to breach. It later acknowledged its interpretation to be incorrect by admission of the breaches.

2. Its view about the incorrectness of Vector's approach was genuine and had some basis in the Rules albeit not in the physical reality of the situation; the evidence supports that Meridian knew that the Sutherland site ICP was not in fact decommissioned on 1 February 2008. All parties, including this Panel, have benefitted from a hindsight review of industry practice and the Rules themselves.

3. Meridian claims it sought direction from the Commission in an effort to resolve the compounding complexities; this was by way of allegation of a breach against Vector. The mitigating plea by Mr Knight was the length of time taken by the Commission to finally determine the Vector Rule breach allegation contributed to the duration of the breach and it was reasonable for Meridian to await the outcome of the investigation and therefore it cannot be solely responsible for the delay. The Panel accepts that the investigation process took too long, however Meridian did have other options to pursue rather than continuing this knowing breach of the Rules. It could have registered against the Sutherland site ICP on a without prejudice basis to the investigation process and pre 1 February liabilities and commenced submitting information. In other words it could have made its settlement offer or in put it in place any time once it had signed up Lowe.

4. Meridian did offer to settle the post 1 February 2008 matters without prejudice to its prior liabilities or any Rule breaches which can be construed it its favour; however this offer did not eventuate until December 2009. It was unacceptable to MRP and Vector who were seeking resolution of other matters pre 1 February 2008, but arguably they could have accepted the offer without prejudice to their pre February 2008 liabilities/entitlements.

5. We have taken account of there being no process under the Rules for interpretation of the Rules or an interim arrangement pending a decision by the Commission. The possibility of seeking an exemption from compliance under regulation 194 was not raised at the hearing.

6. There was a lack of any benefit to Meridian and issues arising out of the incident are unlikely to be repeated in the future.

Panel may make certain orders

78. Under section 172KE (1) of the Electricity Act the Panel may make certain orders including imposition of a civil pecuniary penalty, payment of compensation, and costs.

79. Meridian submits that the Panel's power to order payment of a civil pecuniary penalty is limited to $20,000 in respect of any complaint or matter referred to it. Meridian submits that in this hearing there are at most two complaints, and arguably only one matter. It submits the power to award penalties does not extend to each period of breach.

80. The Commission submits that there is no impediment to one formal complaint including a number of alleged breaches and as the reconciliation period is a calendar month, a penalty could be sought in respect of each breach for each monthly period since 1 February 2008. The logical application of this submission is that a penalty could be sought in respect of each of the seven breaches Meridian has admitted.

81. The relevant legislative provisions are attached to this decision as Appendix 3.

82. A number of separate breaches can be investigated and referred to the Panel in one formal complaint laid by the Commission. This has been the practice of the Commission to date. The Panel considers that s172 KE and Regulation 109 read together make it clear that the orders that can be made pertain to each individual breach. Regulation 109 requires assessment of the specified matters in respect of an individual breach, and a penalty that is commensurate with the seriousness of that breach.

83. To determine otherwise would result in there being no power for the Panel to impose more than the maximum of $20,000 whether there was only one serious breach or multiple serious breaches. That outcome would not act as in incentive for compliance with the Rules nor meet the purpose of the Regulations which is for "the monitoring and enforcement of the Rules".

84. This is consistent with the approach taken by the Panel in its Decision 3.

85. In this Complaint the Panel has decided to consolidate the breaches under each Part of the Rules as there is a specific logic in this case since the 'domino' effect requires only initiating breaches to result in consequential breaches.

86. However, it is possible that the wording of S.172 KE can be read narrowly, in the way that Meridian contends, with the effect being that only a single penalty of $20,000 can be imposed in relation to each complaint, no matter how many rule breaches are contained in the complaint, and despite breaches being repeated over many months.

87. On that view, the wording in Regulation 109 would be regarded as consistent, as

it contemplates the Panel imposing penalties only in relation to "the (singular) breach".

88. For the reason given above in relation to incentives, the Panel does not consider this to be the correct interpretation. Further, if it were the case, all that would result would be that complaints and referrals would need to set out, as multiple, individual complaints, the details of each breach, or each month in the cases of continuing breaches. The Panel does not think an interpretation which lead to that kind of prolixity was intended.

89. However, it might be an appropriate matter for future legislative clarification, as provisions involving the power to impose penalties deserve to be as clear as possible.

90. The Panel does not consider that a penalty should be imposed for a breach of each reconciliation period, in view of the historical background and Meridian's difficulty (albeit in part brought on by its own actions of not looking at alternative arrangements) in not having an efficient avenue to argue its interpretation of the Rules. Nor is this sought by the Commission.

Decision

91. The Panel has attempted to be consistent in its consideration of an appropriate remedy in both this and its previous decisions.

92. The Panel must take into account the level of civil pecuniary penalties it has ordered in any similar situations, which it has done, and must seek to order payment of a civil pecuniary penalty that is commensurate with the seriousness of the case.

93. The Panel regards these breaches of a serious nature, particularly in respect of Part J, and considers that the breaches of the Rules under Part E and Part J admitted by Meridian warrant imposition of a penalty.

94. The Panel considers that the purposes of the regulatory compliance regime are better served if participants can have some confidence that Rule breaches are discouraged. The Panel does not accept Meridian's submission that no useful purpose is served by a financial penalty. The Panel acknowledges that the maximum amount of penalty it may impose is low with a resultant limited range and of little significance in itself. However it is the only tool the Panel has, and a public financial penalty sends a signal to the industry that serious Rule breaches will not be tolerated. A useful purpose here is also to encourage participants to explore all options available to them before knowingly deciding to breach a Rule and opt out of the reconciliation process in reliance on a different interpretation of the Rules.

95. The Panel's principal concern is with the non-submission of market data to the Reconciliation Manager. Meridian's deliberate breach of withholding information from the Reconciliation Manager is a significant factor. Having considered the

submissions from participants on the level of penalty, mitigating factors, and having taken into consideration the matters required under Regulation 109 the Panel considers that the breaches of the Rules under Part E and Part J, warrant a penalty of $17,500.

Compensation

96. All retailer parties sought compensation for losses arising from the failure to submit consumption information to the Reconciliation Manager which resulted in such consumption being allocated to the retailers on a proportional basis through the allocation of unaccounted for electricity (UFE), in accordance with the Rules introduced for global reconciliation, as from 1 May 2008.

97. Prior to that date Mighty River Power as the incumbent retailer on the Registry incurred losses from (and before) 1 February 2008.

98. The Panel considers the events warrant an order that Meridian pay a sum by way of compensation (s172KE of the Act), to any retailer who has suffered losses in respect of any unaccounted for energy for the period 1 February 2008 to date, as a result of Meridian's breaches.

99. However Meridian has agreed that it will compensate all parties from 1 February 2008 and Meridian will pay the unaccounted for energy consumption which falls within the 14 month wash up period provided in the Rules to retailers, being from April 2009 until June 2010.

100. Meridian advised the Panel that the process of determining and making such payments which fall outside of the wash up period should take approximately two months.

101. The Commission submitted that if at the end of the process any retailer remains at a loss following or as a result of the breaches, then an order of compensation should be made by the Panel, if that's the final result of that wash up process.

102. All parties in attendance at the hearing, and the Panel, consider it preferable that Meridian be allowed to undertake this process to compensate retailers. Therefore the Panel reserves any decision it may make on compensation, pending notification of a satisfactory outcome of this process for all retailer parties (and the Commission) within two months of the hearing date.

Costs

103. The Commission, Genesis Energy, and Todd Energy did not seek costs.

104. Vector and Mighty River Power made submissions seeking the costs of the Rulings Panel be met by Meridian under the mistaken view that Regulation 159 applied and parties were responsible for their own costs.

105. The Panel pointed out at the hearing that Regulation 159 provides allocation of costs in respect of reconciliation or ancillary services disputes, not a complaint concerning Rule breaches.

106. In view of this misunderstanding as to regulation 159 the Panel considers that if one of these parties wish to apply for costs it may do so within ten working days of this decision.

107. At the hearing Vector sought a distribution of any penalty ordered to the parties. The Panel does not consider that this is appropriate given the contributing factor Vector played. Furthermore the Panel has the power to order a penalty but not to specify to whom it is to be paid. Penalties are paid to the Crown.

Recommendations, other orders or comments

108. The Panel decided no other orders were appropriate.

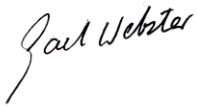
109. The Panel understands from Mr Beatty that the Rules in Part E are being amended to provide greater clarity for correcting obvious errors recorded on the Registry.

110. The lack of an avenue for a participant to formally seek a binding Rule interpretation of what are reasonably complex Rules, other than alleging a Rule breach, is also something which exacerbated the situation facing Meridian. A complaints process which took approximately 28 months (30 January 2008 to end May 2010) for resolution of the dilemma facing Meridian is far too long and does not promote efficiency in the market.

111. The Panel does not condone the action of setting up a dummy accounting process outside of the regulatory process and without the knowledge of the Market Administrator. If Participants find themselves in a position where they would consider such an action then there is a clear need to seek resolution to a problem using a more appropriate and transparent process.

112. Last, our part of this process followed an earlier decision on an alleged breach by Vector, a settlement relating to Part D whose terms were not disclosed to the Panel and then an admission of all breaches plus a compensation offer for post 2008 issues. Not only did the process stem from the same underlying factual circumstances but it generated issues of its' own in terms of complete resolution of underlying matters which weighed into penalty.

Issued on 22nd day November 2010.



Gael Caroline Webster
Chair of Electricity Rulings Panel

Appendix 1
List of documents

Formal complaint to Rulings Panel made by Electricity Commission dated 14 June 2010. –distributed by the Investigator.
Submissions from:
Meridian Energy Ltd
Appendix 1 -email of 19th February 2008
Mighty River Power Ltd
Appendix A -Mighty River response to Meridian submission
Appendix B- detailed cost calculations.
Todd Energy Ltd
Genesis Energy Ltd
Electricity Commission
Vector Ltd, including Appendix 1 lost line charges
Cross submissions from :
Meridian Energy Ltd
Mighty River Power Ltd, including witness statement of Nigel Williams with:
Exhibit A-Mercury Energy Supply agreement with Colyer Watson Hides Ltd
Exhibit B- Final bill information for site
Exhibit C- Mighty River Power detailed cost calculations.
Electricity Commission, including Mercury energy metering installation certificate 28.4.99
Vector Ltd
Exhibit s previously claimed as confidential in Investigator's report :
Exhibit E -the John Moore report;
Exhibit F -a chain of email correspondence between Meridian and Vector on 13th February 2008; and
Exhibit G-correspondence/email between Lowe Corporation and Meridian
Supply System Use agreement between Vector/Meridian dated 1999 (possibly subject to confidentiality so not distributed to all parties)
Definition and Descriptions for Rulings Panel provided by Investigator to Panel and parties.
Email description of the prescribed procedure that a participant retailer was to follow to request a new ICP around October 2007 to January 2008, from Ron Beatty dated 24.8.10.
Meridian /Lowe contracts (excluding confidential pricing information) dated 1 May 2003, 1 May 2006, and 1 February 2008.
Witness statement of Kevin Currie including 5 Exhibits.
Email advice from Commission concerning settlement by Meridian and affected parties of 3.1 Part D
Email advice from Meridian that Meridian admitted all alleged breaches of Part E and J.

Appendix 2
Extract of Rules in Part E and Part F

Rule 3.1 of schedule E1 of Part E (prior to 1 May 2008 the equivalent Rule was Rule 3.1 of schedule E2) provides:

3. Information to be provided and maintained in the Registry by retailers

For each ICP, the retailer must provide the following information to the Registry in accordance with Rules 11 and 12 of part E:

3.1 Identity of the retailer

The code for that retailer, as approved by the market administrator.

Rule 11 of Part E (the equivalent Rule prior to 1 May 2008 was Rule 9 of part E) provides:

11. Retailers must provide ICP information to the Registry

Each retailer must ensure that, in relation to each ICP at which the retailer supplies electricity, the information set out in Rule 3 of schedule E1 is provided to the Registry within three business days of commencement of supply of electricity at that ICP.

Rule 12 of Part E (the equivalent Rule prior to 1 May 2008 was Rule 10 of part E) provides:

12. Retailers must keep information up to date

Should any of the information referred to in Rule 3 of schedule E1 and provided in accordance with Rule 11 change, the retailer responsible for that ICP must provide notice to the Registry of that change (providing all relevant details) within three business days of the change occurring.

Rule 3.2 of schedule E2 of Part E (the equivalent Rule prior to 1 May 2008 was Rule 3.4 of schedules E3 of part E) provides:

3.2 New retailer informs Registry of switch request

Within two business days after entering into the agreement, for each ICP, the new retailer must advise the Registry of the expected event date and switch type.

Rule 1.2 of Part J (the equivalent Rule prior to 1 May 2008 was Rule 5.6.1 of section VI of part G) provides:

1.2 Reconciliation participants to supply accurate information

> Each reconciliation participant that has an obligation to deliver submission information to the reconciliation manager in accordance with the Rules must take actions so as to ensure, to the extent practicable, that all submission information so delivered is complete and accurate.

Rule 2.2 of Part J (the equivalent prior Rule to 1 May 2008 was Rule 2.2 of section I of part G) provides:

2.2 Correction of information

> If a participant discovers that any information previously disclosed by it to any person in accordance with this part J was misleading, deceptive or incorrect, that the participant must immediately correct that information and disclose the corrected information to the person who originally received the incorrect information.

Rule 4 of Part J (equivalent Rules were contained in section VI of part G prior to 1 May 2008) provides:

4 Provision of information to the reconciliation manager

4.1 Submission information to be delivered for reconciliation

4.1.1 Previous consumption period

Each reconciliation participant must, by 1600 hours on the 4th business day of each reconciliation period, ensure that submission information has been delivered to the reconciliation manager for all NSPs at which it has purchased or sold electricity during the consumption period immediately prior to that consumption period, in accordance with schedule J3.

Appendix 3
Extract from Electricity Act and Electricity Governance Regulations

s172KE Rulings Panel may make certain orders

- (1) The Rulings Panel may, after considering any complaint or matter referred to it in respect of an allegation that an industry participant has breached any electricity governance regulations or Rules,—
    - (a) decide that no action should be taken:
    - (b) issue a private warning or reprimand to an industry participant:
    - (c) issue a public warning or reprimand to an industry participant:
    - (d) impose additional or more stringent record-keeping or reporting requirements under or in connection with any electricity governance regulation or Rule:
    - (e) order an industry participant to pay a civil pecuniary penalty not exceeding $20,000:
    - (f) order an industry participant to pay a sum by way of compensation to any other person:
    - (g) order an industry participant that is found not to be complying with any electricity governance regulations or Rules to take any action that is necessary to restore it to a position of compliance:
    - (h) make an order terminating or suspending the rights of an industry participant under any electricity governance regulation or Rule:
    - (i) make orders regarding the reasonable costs of any investigations or proceedings:
    - (j) propose to the Commission that it recommend to the Minister that a change should be made to a regulation or Rule.

  (2) In making any such decision, the Rulings Panel must take into account its previous decisions in respect of any similar situations previously dealt with by the Commission or the Rulings Panel.

  Compare: SR 2003/374 r 107

  Section 172KE: inserted, on 18 October 2004, by section 12(1) of the Electricity Amendment Act 2004 (2004 No 80).

Civil pecuniary penalties

- (1) This regulation applies if the Rulings Panel is considering requiring a participant to pay a civil pecuniary penalty under section 172KE(1)(e) of the Act.

  (2) The Rulings Panel must seek to order payment of a civil pecuniary penalty that is commensurate with the seriousness of the breach.

  (3) The Rulings Panel must have regard to the following matters:

- (a) the severity of the breach:
- (b) the impact of the breach on other participants:
- (c) the extent to which the breach was inadvertent, negligent, deliberate, or otherwise:
- (d) the circumstances in which the breach occurred:
- (e) any previous breach of these regulations or the Rules by the participant:
- (f) whether the participant disclosed the matter to the Commission:
- (g) the length of time the breach remained unresolved:
- (h) the participant's actions on learning of the breach:
- (i) any benefit that the participant obtained, or expected to obtain, as a result of the breach:
- (j) any other matters that the Rulings Panel thinks fit.

(4) This regulation is subject to section 172KE(2) of the Act and to regulations 110 to 132 and the other provisions of this Part.

Regulation 109: substituted, on 20 March 2008, by regulation 14 of the Electricity Governance Amendment Regulations 2008 (SR 2008/14).