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SUBMISSION ON THE ELECTRICITY MARKET COMPLIANCE FRAMEWORK REVIEW

- 1 Orion welcomes the opportunity to submit on the paper recently released by the Electricity Commission (the *EC*) on the *electricity market compliance review* (the *paper*).
- 2 Our submission is in two parts:
 - 2.1 general comments on the paper; and
 - 2.2 our response to the specific questions raised in the paper, which we set out in the schedule to this letter.

Background

- 3 Orion has had rule breaches alleged against us. We have also voluntarily self-reported a breach, and are currently joined as a third party in a minor breach allegation.
- 4 Orion has taken all of these situations extremely seriously, and has sought to resolve them appropriately. One of the breaches, which we were unaware of at the time, was minor in nature with no impact on the market. We acknowledged the breach and the matter was quickly resolved without further action. However, the other three alleged breaches were expensive in terms of both managerial time and actual costs spent in seeking a settlement.

- 5 In saying this, we do however believe that the rule-breach process achieves some outcomes that benefit the industry. For example, following an alleged breach by Orion of Part C of the Electricity Governance Rules (*EGRs*), we reached a settlement in which all parties acknowledged that Orion had not breached the *EGRs* – this settlement led to improved processes between the grid owner, system operator and line companies. We believe these improved processes benefit the entire industry.
- 6 In regard to the self-reported breach, we reported this not only because we were required to do so under the Electricity Governance Regulations, but because compliance with the rule in the given time-frame would have resulted in unnecessary loss of supply to customers. We consider that this issue was significant and affected other lines companies also. A positive outcome has resulted in that the industry now has a methodology where Transpower can consider and pre-approve certain paralleling arrangements between grid exit points. However, in Orion's case, after two years, we still await Transpower's decision and a final resolution to this breach.
- 7 The last of these breaches relates to a rule, which if complied with, would require considerable expenditure on high voltage metering that can never be recouped. This will make what is already an uneconomic supply even worse. We consider the Commission has been proactive in assisting in the development of a settlement to avoid this unnecessary expenditure.
- 8 We consider that improvements that minimise costs and managerial time spent on alleged breaches and that result in resolution within a reasonable time frame are required. Overall the process has been productive.

The key focus of the compliance framework

- 9 Orion supports the key focus of the compliance framework on self reporting and settlement. In Orion's view this has resulted in breaches or disputes being resolved in a framework of constructive engagement, with a minimal level of legalism. Viewed broadly, this is a good outcome.
- 10 However, for this kind of framework to work, there must be:
 - 10.1 consistency;
 - 10.2 transparency; and
 - 10.3 pragmatic acknowledgement that this approach is not appropriate in all cases.

Consistency

- 11 Orion agrees with the EC that participants are interpreting their reporting obligations differently.
- 12 Clearly achieving a realistic degree of consistency is basic to the integrity of the compliance framework. We agree that there is a role for the EC in addressing this issue. We recommend that the focus of the EC should be on education and communication about the current rules and regulations, rather than amending the rules for minor breaches or setting deadlines. Further regulation will only spawn further inconsistencies.

Transparency

- 13 Another key issue with the status quo is the lack of transparency around how the EC approves proposed settlements. At the moment the only guidance the EC gives is an assurance that it refers to section 172(N)(2) when assessing proposed settlements (see paragraph 7.10 of the paper). No detailed criteria or guidelines have been issued by the EC, and the Investigator's report and recommendation on a proposed settlement is not made available.
- 14 This is insufficient. The role of the EC in approving settlements, and therefore the criteria it uses, is fundamental to the compliance framework.
- 15 Greater transparency, by way of published criteria or guidelines and by publishing Investigator reports, would:
 - 15.1 inform participants negotiating a settlement of the goal posts;
 - 15.2 allow the EC to frame settlement negotiations, which would improve the efficiency of the settlement process and the consistency of outcomes;
 - 15.3 make the role of the EC staff clearer when facilitating negotiated settlements. Currently, EC staff facilitate the negotiation by the parties of a proposed settlement. The staff then make a recommendation to the EC on the settlement they have facilitated without informing the parties as to the specific criteria the staff are using to judge the settlement they have facilitated.

A pragmatic balance

- 16 Orion submits the compliance framework should recognise that a reliance on reporting and settlement will not be appropriate in all circumstances.
- 17 Orion submits the current requirement to report breaches by other participants should be made optional. There are a number of problems with the current approach of requiring participants to report knowing or suspected breaches of others:
 - 17.1 it softens the onus on the breaching party to self report;
 - 17.2 it can unnecessarily corrode the commercial relationship between participants. This does have a market impact – without a healthy commercial relationship between participants, transaction costs in the market will increase;
 - 17.3 it is difficult to implement from an internal compliance perspective, and to enforce from an external perspective. This leads to random enforcement, which undermines respect for the regime generally;
 - 17.4 often the reporting party is reporting the breach of another party out of respect for the obligation to do so, and not because it has suffered a material harm that would otherwise prompt it to initiate a commercial dispute. Yet under the current regime the act of reporting means the reporting party becomes enmeshed in what can be a lengthy settlement process.
- 18 Orion **recommends** the regulations should be amended to make reporting the breach of others optional, and to give the party reporting in these circumstances an option of minimising its role in any subsequent enforcement process (with the investigation and settlement driven by the EC).
- 19 Orion tentatively supports some of the suggestions in the paper that would create alternatives to the current focus on reporting and settlement. The paper raises the possibility of:
 - 19.1 EC staff taking an alleged breach straight to the Rulings Panel without attempting to facilitate a settlement;
 - 19.2 giving participants an ability to seek a ruling from the Rulings Panel.

- 20 The important caveat is that the criteria for these options must be specific and transparent. If used too broadly, these processes will undermine the central focus of the compliance framework on self reporting and settlement. If the EC is minded to pursue these options, then Orion submits the EC should consult further on appropriate criteria. As noted above, a general reference to section 172(N) does not give industry participants enough clarity and certainty as to how future decisions will be made.

Concluding remarks

- 21 Thank you for the opportunity to make this submission. If you have any questions, please contact Dennis Jones (Industry Developments Manager) DDI 03 363 9526, email dennis.jones@oriongroup.co.nz.

Yours sincerely

A handwritten signature in black ink that reads "D. L. Jones". The signature is written in a cursive, slightly slanted style.

Dennis Jones
Industry Developments Manager

Schedule 1 – Answers to the Commission’s specific questions

Question	Response
Q1: Do the existing obligations to notify alleged breaches need to be amended? If so, how should the obligations be amended?	Orion supports the focus in the compliance framework on self reporting of breaches. For the reasons discussed above, Orion submits that the requirement to report breaches by other participants should be made optional. The reporting party should also have the option of taking no further part, or only a limited part, in any investigation.
Q2: Is there sufficient guidance on determining the appropriate timeframe within which to notify an alleged breach (i.e. the balance between a quick notification and an informed notification)? If not, what sort of guidance would be useful?	Orion submits that the topic of guidance to industry participants on their reporting obligations, and the consistency of reporting, should be addressed more generally. There is a role here for the EC in promoting a common understanding of the reporting obligations, whether by issuing guidance notes, conducting workshops, or other measures.
Q3: Should there be a mandatory timeframe for notifying of alleged breaches? If so what should that timeframe be?	Orion would prefer a focus on education and consistency, and assessing the degree to which improvements can be made by taking these steps, before moving to more regulation and imposing a mandatory timeframe.
Q4: Should the notification obligations differ in circumstances where an alleged breach has already been notified? If so, how should the obligations differ?	No comment.
Q5: Would more guidance on how compliance with the notification obligations could be achieved be useful? If so, how could that guidance be given?	Yes. Orion’s support for the EC to have a role in promoting understanding of the rules and regulations and consistent reporting is discussed above.
Q6: Are participants aware of any situations where alleged breaches should be notified but are not notified? If so, how could appropriate notification be encouraged?	Anecdotal evidence suggests this to be the case. This again revolves around a focus on education and consistency, and the issues with being drawn into a breach process. There is also the issue that a number of the rules may be impractical to comply with in all instances. Even minor technical breaches, have the potential to involve considerable cost and management time if reported.
Q7: Are there any rules or regulations that could be excluded from the current	We consider that where the EC receives multiple breach allegations of a rule, which results in no action, this probably indicates the rule that should be excluded, or reviewed for its

notification requirements without significant impact on compliance or the efficient operation of both the system and market?	practicality.
Q8: Could the same or better compliance be achieved with a different system of notification? If so, what would that system be?	Orion supports the current system. As discussed in this submission, Orion believes there needs to be improvements in the area of consistent reporting by industry participants, and transparency by the EC. Changes do need to be made to the obligation to report on breaches by others, making this optional as discussed in this submission. We consider that a greater openness by participants in relationship to rule breaches will lead to improvements in the rules. However, the resulting costs of reporting breaches must be minimised.
Q9: Should the reference in regulation 63 to 'any rule relating to quality and security in Part C and Part G' be further defined or clarified? If so, how?	This should be the subject of guidance notes and input from industry participants, possibly at workshops. We note that the EC has recently consulted on expanding the area that this regulation may cover. This will add further complexity.
Q10: Should there be more detailed publication of notified alleged breaches? Would publication provide an incentive to comply or not to comply? If notifications should be further published, should all notifications be publicised or are there any categories of notifications that should not be publicised?	The key reason for publication of breaches should be for educational reasons, to assist participants' understanding of the interpretation of rules and to provide precedents that participants can rely on.
Q11: Should the Regulations specifically provide for withdrawal of a breach notification?	Orion agrees this should be possible.
Q12: In case Regulations specifically provide for withdrawal of a breach notification, what criteria should be used for justification of withdrawal?	There is no need to be prescriptive around the withdrawal of a breach notification. If a party withdraws a breach notification then this will be either because further facts have come to light and the party no longer believes a breach has occurred, or further investigation reveals the consequences to the party of the breach are so minor that the party does not wish to continue. In both cases, the party should be permitted to withdraw. If other parties are affected, they can always lodge a notification of their own.
Q13: What information, if any, should be publicised about	Orion submits that it would be useful for the EC to publish its criteria and reasons for declining to pursue a notification.

<p>notifications that the EGR Committee declines to pursue?</p>	<p>More transparency generally is needed around how the EC will assess notifications and proposed settlements.</p>
<p>Q14: Should a minor breach of the Rules or Regulations be treated differently to allegations that are not considered a prima facie breach of the Rules or Regulations? If so, how should a 'minor' breach be defined and how could such a breach be most efficiently dealt with?</p>	<p>Additional categories are unlikely to be helpful. At this point, it is better for the EC and participants to focus on achieving consistency of reporting from the industry, and transparency from the EC as to how it makes its assessments.</p>
<p>Q15: What changes, if any, should be made to the Commission's process for dealing with minor breaches of the Rules?</p>	<p>There should be a quick and simple process to deal with minor breaches. It should be low cost to the participants to encourage far more reporting of these minor breaches, many of which participants may currently consider too minor to report. Minor breaches should be noted and analysed to determine if the problem is symptomatic of an underlying problem with the rules and requires a rule change, or if it is related to poor compliance by a participant. A clear process and simple process for dispensation to rules is needed where the cost of compliance clearly outweighs the benefits of compliance.</p>
<p>Q16: Should information about minor breaches be published in aggregate, by category, without referring to the breaching party?</p>	<p>Yes, publication of breaches may lead to greater compliance by other parties or suggestions from the industry as to the appropriateness of the rule.</p>
<p>Q17: Is sufficient information provided to enable participants to decide whether or not to join an investigation as an affected party? If not, what additional information would be useful?</p>	<p>More information may be useful. The potential costs of being involved in an investigation and the possible downsides of negative publicity may well be the key factor that prevents parties joining.</p>
<p>Q18: Are there ways in which the quality of information provided during the investigation process could be improved? If so, how?</p>	<p>No comment.</p>
<p>Q19: Are there ways in which the investigation process could be made more efficient? If so, how?</p>	<p>It is important that the EC publish its criteria for assessing proposed settlements. Currently, parties negotiating a settlement do not know where the goal posts are. Inevitably, this makes for a less efficient process.</p>
<p>Q20: Are the powers to investigate and incentives to</p>	<p>See Q19.</p>

<p>respond to the exercise of investigative powers appropriate? If not, what should those powers and incentives be?</p>	
<p>Q21: Should the parties to an investigation be required to complete their deliberations within a set timeframe?</p>	<p>Yes. However, it may take parties significant time to collect information and the time-frame would need to have provisions to extend it on reasonable grounds. Clearly some rule breaches will be far more significant than others and require more time.</p>
<p>Q22: Are the appropriate parties involved in the investigation process? If not, what should the criteria for determining the appropriate parties be?</p>	<p>No comment.</p>
<p>Q23: If a party withdraws from an investigation and a proposed settlement, should the settlement negotiated by the remainder be still acceptable? Should the Commission exercise its discretion for assessment of appropriateness of a settlement agreement if one or more parties withdraw from the investigation and settlement process?</p>	<p>Yes. A settlement should still be acceptable. The party that withdraws does so knowing the consequences.</p>
<p>Q24: Should there be any circumstances in which the Commission should not be obliged to endeavour to effect a settlement? If so, what should those circumstances be?</p>	<p>Orion tentatively agrees. However the EC needs to propose detailed criteria that it will apply when determining not to endeavour to effect a settlement and go straight to the Rulings Panel.</p>
<p>Q25: Is the timeframe within which settlements agreements are reached quick enough? If not what amendments should be made to the process or Regulations</p>	<p>See Q 21</p>
<p>Q26: Do the current Regulations deal adequately with situations where participants (who are not parties to the settlement agreement) may be affected by the terms of a settlement agreement? If not, how should</p>	<p>No comment</p>

the Regulations be amended?	
Q27: Is the Commission's practice of approving settlements where a breach has not been admitted an acceptable way of achieving a settlement?	Yes.
Q28: Are the incentives on parties to honour a settlement sufficiently strong or should the Regulations be amended to provide the Commission with the ability to enforce settlement agreements?	The incentives to honour a settlement are sufficiently strong. A settlement is contractual and parties will enforce breaches where it is efficient to do so.
Q29: Are the appropriate cases being referred to the Rulings Panel both in terms of number and content? If not, how should that change and what criteria should be applied?	Orion supports the current focus on negotiated settlements. However, it would be helpful if the EC disclosed the criteria it is currently using to refer cases to the Rulings Panel.
Q30: Should the Rulings Panel be able to order compensation following a breach related to the determination of final prices?	Orion considers that the issue of compensation that the Rulings Panel can award needs to be considered. Our interpretation of the rules is that the Rulings Panel can order unlimited compensation; we consider that any compensation needs to be capped in a similar manner to the liability provisions.
Q31: Should participants be able to apply to the Rulings Panel for a ruling interpreting the meaning or application of the Rules or Regulations, and if yes, what threshold should apply for referring issues to the Rulings Panel?	Orion supports the suggestion that a participant should be able to apply to the Rulings Panel for a ruling interpreting the meaning or application of the EGRs or regulations. However, it will be important that the EC develop and disclose specific criteria as to when a participant is able to seek a ruling from the Rulings Panel.
Q32: Are the limits on liability set at appropriate levels? Are there any other factors that should be taken into account in assessing liability?	We consider that any consultation on limits to liabilities is such an important issue that it should be subject to consultation in its own right. We are more concerned about the unlimited compensation that could be awarded possibly for both direct and indirect losses
Q33: Are the appeal provisions appropriate? If not why not and what should they be replaced with?	No comment.