

29 November 2016

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Dear Barbara,

Code Review Programme 2016

Genesis Energy Limited welcomes the opportunity to provide a submission to the Electricity Authority (“the Authority”) on the consultation paper “Code Review Programme” (“the Consultation”), dated 18 October 2016.

While Genesis Energy accepts that the Code requires continual refinement to ensure it delivers an ongoing appropriate and workable framework we are very concerned that the current proposal entitled “2016 05 Removing references to the Authority acting reasonably” fails to meet the requirements under s 39(3) of the Electricity Industry Act 2010 (“the EIA”). Below, we address each of the amendments raised in this proposal.

Provisions that require the Authority to act reasonably

The Authority proposes to remove requirements in the Code for the Authority to act reasonably because, in the Authority’s view, these express requirements to act reasonably are a redundancy. The proposal states that the Authority is required to act in accordance with administrative law principles and those principles already include a requirement to act reasonably.

Genesis Energy does not agree. The explicit incorporation of the words ‘reasonable’ or ‘reasonably’ in an instrument such as the Code is not a redundancy. These words impose a higher standard of conduct on the Authority than the usual administrative law principles relating to *Wednesbury* unreasonableness. The usual *Wednesbury* standard is merely a negative duty not to be unreasonable with the focus being on ensuring that the public body acts within the scope of the relevant empowering clause. By contrast, the explicit use of the term ‘reasonable’ or ‘reasonably’ in the Code “increases the depth of

review by removing *Wednesbury* unreasonableness and replacing it with a positive duty to be reasonable".¹

The New Zealand Court of Appeal has recently explained this point in the context of s 10(2) of the Canterbury Earthquake Recovery Act 2011, which contained an explicit use of the term 'reasonably'.² The Court stated:³

We ... accept that the decision should not be reviewed on the basis of Wednesbury unreasonableness or irrationality because the requirement to consider 'reasonably' imports a higher standard. Indeed it was not argued that the decision was so unreasonable that no reasonable person could not have made it. The Court must be satisfied that the Minister's consideration of necessity was reasonable. This will involve the Court being satisfied that the Minister did in fact consider that the exercise of the particular power was necessary to achieve a particular purpose or purposes of the Act at the time the power was exercised, taking into account the nature of the particular decision, its consequences and any alternative powers that may have been available. In making this assessment, the Court will give such weight as it thinks appropriate to the Minister's expertise and opinion, while recognising that Parliament has enacted s 10(2) as a constraint on the exercise by the Minister of his powers under the Act.

Genesis Energy does not consider that the Authority should remove the 'reasonable' references in the Code. If the Authority seeks to do so, Genesis Energy submits that the Authority should direct itself properly about the legal effect of the changes, prepare a regulatory statement in accordance with its obligations under s 39(1)(b) and (2) of the EIA and consult again given that the changes would not in fact be technical and non-controversial.

Provisions that require the Authority to publish information within a reasonable period of time

The comments above apply equally to the Authority's proposal to remove references requiring the Authority to publish information within a reasonable period of time.

Provisions that require the Authority to make 'reasonable endeavours'

The only occurrence where Genesis Energy would support the removal of 'reasonable endeavours' is in the clause 4 of Schedule 13.7.

¹ G D S Taylor and R M Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [3.05].

² *Canterbury Regional Council v Independent Fisheries Limited* [2012] NZCA 601; [2013] 2 NZLR 57.

³ At [22].

Genesis Energy agrees with the deletion of the words “use reasonable endeavours” in this clause and the justification put forward by the Authority in the proposal. Deletion of the words will place a requirement on the Authority to make the relevant determination referenced in the clause. Genesis Energy agrees that the Authority should simply have the obligation to make the determination, rather than a weaker obligation only to make reasonable endeavours to make the determination.

Other matters

We are aware that the Code Review Programme contains changes proposed by the Authority as well as industry participants. In order to ensure the best feedback regarding proposed changes, we are of the view that it would be beneficial, when preparing the Code Review Programme, if the Authority noted the party who had proposed each change. This adds context to the change and, accordingly, the Authority is likely to receive more informed submissions to its Consultation.

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

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Rebekah Cain', with a long horizontal flourish extending to the right.

Rebekah Cain
Acting Regulatory Affairs Manager