

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2020-

UNDER The Electricity Industry Act 2010 (**Act**)

IN THE MATTER of an appeal under section 64 of the Act against a decision of the Electricity Authority to issue new guidelines for the development of a new transmission pricing methodology

BETWEEN **TRUSTPOWER LIMITED**, a duly incorporated company having its registered office at 108 Durham Street, Tauranga and carrying on business as an electricity generator and retailer

Appellant

AND The principal **electricity industry participants** directly affected by the decision identified in the Schedule to the Notice of Appeal and others who may seek to become respondents following directions to be sought from the Court

Potential Respondents

**MEMORANDUM OF COUNSEL FOR TRUSTPOWER LIMITED IN RELATION
TO NAMING OF RESPONDENT(S), ANTICIPATED PARALLEL
PROCEEDINGS, AND SERVICE**

Dated: 8 July 2020
Judicial Officer: TBA

MinterEllisonRuddWatts

PO BOX 2793 DX SP20009
WELLINGTON 6140
TELEPHONE +64 4 498 5000
FACSIMILE +64 4 498 5001
SOLICITOR ACTING / PARTNER
RESPONSIBLE: BRIONY DAVIES
briony.davies@minterellison.co.nz

SENIOR COUNSEL INSTRUCTED:
JACK HODDER QC
THORNDON CHAMBERS
PO BOX 1530
WELLINGTON 6140
TELEPHONE: +64 4 460 0636
jack.hodder@chambers.co.nz

MAY IT PLEASE THE COURT:

1. This memorandum of counsel for Trustpower Limited (**Trustpower**) accompanies a Notice of Appeal for a new proceeding appealing against the decision, made by the Electricity Authority (the **Authority**) on 10 June 2020, to make and publish new guidelines and processes for the development of a new transmission pricing methodology (the **TPM Guidelines**) pursuant to clause 12.83 of the Electricity Industry Participation Code 2010 (the **Code**). The Authority's decision and reasons are provided in its decision paper titled *Transmission pricing methodology 2020 Guidelines and process for development of a proposed TPM*, also published on 10 June 2020 (the **EA Guidelines Decision**) (the **TPM Guidelines Appeal**).
2. The purpose of this memorandum is to:
 - (a) seek a direction that the Authority be named as respondent to the TPM Guidelines Appeal;
 - (b) provide timely notification to the Court, the Authority and other interested parties of the pending filing of an application for judicial review by Trustpower in relation to the EA Guidelines Decision and TPM Guidelines, and that Trustpower will seek that the TPM Guidelines Appeal and its judicial review are managed in parallel and heard at the same time;
 - (c) identify how Trustpower proposes to effect service of the TPM Guidelines Appeal (and later its judicial review) as required for the appeal by rule 20.6 of the High Court Rules 2016 (the **HCR**) in order to properly bring the TPM Guidelines Appeal, given that:
 - (i) the pool of parties potentially directly affected by the TPM Guidelines Appeal is large;
 - (ii) only a small number of affected parties are likely to wish to participate in the appeal and apply to be joined as respondents; and

- (iii) the statutory deadline for bringing the TPM Guidelines Appeal is today (8 July 2020).

Direction that Authority be named as respondent

3. Trustpower will seek an order (in due course) that the Authority be named as respondent to the TPM Guidelines Appeal. Due to the restriction in HCR 20.9(2) (which states that, absent a direction from the Court, the decision-maker is *not* to be named as a respondent to the appeal), the Authority is not currently named as respondent.
4. Under the HCR the number of persons named or joined as parties must be limited as far as practicable to:
 - (a) persons whose presence before the Court is necessary to justly determine the issues arising; and
 - (b) persons who ought to be bound by any judgment given;(HCR 4.1).
5. There are many parties (and in particular electricity industry participants) who may be interested in the appeal, which we outline further below from paragraph 10. HCR 20.6 requires that all persons “directly affected” by the appeal must be served, although none are required to be listed as respondent (and we anticipate most will not wish to play an active role in the appeal).
6. Nevertheless, Trustpower submits that the Authority would be most appropriately named as respondent because it is best placed and most likely, as the decision-maker, to “respond” fully to the questions of law being raised in the appeal. As the decision-maker the Authority is already entitled to be heard on the appeal (HCR 20.17). In addition, commentary on HCR 20.9 in *McGechan on Procedure* notes that where there is no other party to an appeal it is standard practice to name the decision-maker as respondent.

Parallel judicial review proceedings

7. Trustpower intends shortly to apply for judicial review of the EA Guidelines Decision and TPM Guidelines pursuant to the Judicial Review Procedure Act 2016 (the **JR Proceeding**) and HCR. It is highly likely to be appropriate (and most efficient for the Court) for the anticipated JR Proceeding and TPM Guidelines Appeal to be managed together and heard together (per HCR 10.12).
8. Trustpower will formally apply as needed in due course, but for present purposes counsel note:
 - (a) The TPM Guidelines Appeal and anticipated JR Proceeding will both relate to the same EA Guidelines Decision and TPM Guidelines.
 - (b) Both proceedings will seek orders quashing the EA Guidelines Decision and TPM Guidelines.
 - (c) The grounds of appeal and judicial review will likely overlap to a material extent including because both will likely raise issues relating to the interpretation and application of the Electricity Industry Act 2010 (the **Act**) and the Authority's role under the Code.
 - (d) The parallel management and trial of proceedings is an important mechanism for:
 - (i) avoiding the possibility of conflicting findings and/or inconsistent decisions arising out of common questions of law: *CallPlus v Telecom NZ Ltd* (2000) 15 PRNZ 14 (HC); and
 - (ii) preventing considerable duplicative work which would otherwise be required by both the Court and parties, with substantial time and cost savings: *Medlab Hamilton Ltd v Waikato District Health Board* (1997) PRNZ 517 (HC).

Trustpower's process for serving the TPM Guidelines Appeal

Proposed identification of affected parties

9. The HCRs require service of a Notice of Appeal on every party "directly affected" by the appeal (HCR 20.6). This gives rise to a number of issues in relation to the TPM Guidelines Appeal:
 - (a) The EA Guidelines Decision was preceded by public consultation (through written and oral submissions) at a number of points during the Authority's transmission pricing review (which ran from October 2009 through to the date of the EA Guidelines Decision, 10 June 2020);
 - (b) the submitters during the last 12 months of this process (through the consultation most relevant to this appeal) are likely to represent most (if not all) of those potentially directly affected by the appeal, but also a number of other less affected parties;
 - (c) the submitters through the process range from individuals, industry groups, Government entities, Members of Parliament and companies, many of whom do not have formal addresses for service and have not provided publicly available contact details as part of the consultation process; and
 - (d) there may be additional parties directly affected by the TPM Guidelines Appeal which for whatever reason have chosen not to engage with the most recent consultation rounds.
10. Trustpower therefore proposes that it identify and organise (in the manner set out below) service on all submitters in the most recent call for submissions prior to the EA Guidelines Decision, which was in relation to the issues paper dated 23 July 2019, as a proxy for those who are potentially directly affected by the appeal. It also proposes to include in this group parties who are directly connected to the national grid but may not have participated in the most recent EA consultation process.

Manner of service

11. Trustpower will today (or as soon as possible thereafter) personally serve the Authority, Transpower, the large generators, the main electricity lines companies, major electricity users who made submissions (or are directly connected to the national grid) and have registered offices for service, plus those other potentially directly affected submitters in the Authority's July 2019 consultation process who have registered addresses for service (as listed in **Schedule 1** to this memorandum – over 80 entities). Trustpower then proposes that the Authority:
 - (a) posts on its website; and
 - (b) includes in its next "Market Brief"; and
 - (c) (where it has relevant contact details), emails all those who made submissions (or cross submissions) on the 23 July 2019 issues paper;

a copy of the Notice of Appeal and this memorandum of counsel, along with contact details of counsel for Trustpower so that any other submitter / interested party may notify counsel within 10 working days of the Notice of Appeal being filed (on 8 July 2020) of their interest in being served with details of the first case management conference and proceed to apply to be joined as appropriate from there.
12. Listed in **Schedule 2** to this memorandum are a further 50 plus persons that made submissions on the 23 July 2019 issues paper that Trustpower has not personally served and as such will only be notified of the TPM Guidelines Appeal and next steps through the Authority following the steps we propose in paragraph 11 above.
13. Trustpower considers that in all the circumstances this is the most efficient and practical means of serving the TPM Guidelines Appeal, including to notify potentially interested parties, in part because we anticipate that the Authority may not consider itself able to release the contact details of all submitters without the consent of each individual submitter.

14. By its solicitors, Trustpower has today written to the Authority requesting it to take the steps listed above.
15. Trustpower will in due course seek orders under HCR 20.7 deeming service of the TPM Guidelines Appeal as set out above to be effective service under Part 20 of the HCR.

Process for indicating participation in the appeal

16. Trustpower is advising all parties who intend to apply to be joined as respondents and/or be heard in relation to the matters set out in this memorandum of counsel to notify its counsel by email within 10 working days of the date of filing the Notice of Appeal (filed on 8 July 2020). A copy of the draft letter to all personally served parties (in **Schedule 1**) is **attached** to this memorandum.
17. Trustpower is asking the Authority to provide the same notification to all recipients of its email and in its Market Brief as set out in paragraph 11 above.
18. Following the referenced 10 working day period Trustpower will serve all those whom have indicated a further interest in being joined and or heard (the **Interested Parties**) with the notice of first case management conference at which point Trustpower will formally seek the orders outlined in this memorandum.
19. Trustpower anticipates that for the proposed judicial review proceeding it will only serve those parties who have indicated an interest in being a party to (or otherwise involved in) the appeal.

Orders sought

20. Following identification of the Interested Parties as set out above, Trustpower will seek the following orders at the first case management conference:
 - (a) that the Authority be named as respondent in the TPM Guidelines Appeal;

- (b) that service of the parties referred to above at paragraphs 10 to 12, in the manner proposed in paragraph 11, be deemed effective service as per HCR 20.7; and
- (c) such other orders as the Court considers appropriate to enable service of appropriate parties and/or the other issues raised in this memorandum.

DATED this *8th* day of July 2020



J E Hodder QC / B A Davies
Counsel for the appellant

Schedule 1 – list of entities being personally served

	Entity
1.	Electricity Authority
2.	Transpower New Zealand
Generation companies that are directly connected to the grid	
3.	Contact Energy Limited
4.	Genesis Energy Limited
5.	Mercury NZ Limited / Mercury Energy Limited
6.	Meridian Energy Limited
7.	Ngatamariki Geothermal Limited
8.	Nova Energy Limited
9.	Rotokawa Geothermal Limited (as part of Nga Awa Purua Joint Venture)
10.	Tahumatua Limited (as part of Nga Awa Purua Joint Venture)
11.	Tararua Wind Power Limited
12.	Tilt Renewables Limited
13.	Todd Generation Taranaki Limited
14.	Todd Energy Limited (as part of Fonterra Todd Cogeneration Joint Venture)
15.	Whareroa Co-Generation Limited (as part of Fonterra Todd Cogeneration Joint Venture)
Major users that are directly connected to the grid	
16.	Beach Energy Resources NZ (Kupe) Limited
17.	Daiken Southland Limited
18.	Kiwirail Limited / Kiwirail Holdings Limited
19.	Methanex New Zealand Limited

	Entity
20.	New Zealand Aluminium Smelters Limited
21.	New Zealand Steel Limited
22.	Norske Skog Tasman Limited
23.	OMV NZ Production Limited
24.	Pan Pac Forest Products Limited
25.	Resolution Developments Limited
26.	Southpark Utilities Limited
27.	Winstone Pulp International Limited
Distribution companies	
28.	Alpine Energy Limited
29.	Aurora Energy Limited
30.	Buller Electricity Limited
31.	Centralines Limited
32.	Counties Power Limited
33.	EA Networks Limited
34.	Eastland Generation Limited / Eastland Network Limited
35.	Electra Limited
36.	Electricity Invercargill Limited
37.	Horizon Energy Group Limited / Horizon Energy Distribution Limited
38.	Mainpower New Zealand Limited
39.	Marlborough Lines Limited
40.	Nelson Electricity Limited
41.	Network Tasman Limited
42.	Network Waitaki Limited

	Entity
43.	Northpower Limited / Northpower Electric Power Trust
44.	Orion New Zealand Limited
45.	OtagoNet Limited / OtagoNet Properties Limited / PowerNet Limited
46.	Powerco Limited
47.	Scanpower Limited
48.	The Lines Company Limited
49.	The Power Company Limited
50.	Top Energy Limited
51.	Unison Networks Limited
52.	Vector Limited
53.	Waipa Networks Limited
54.	WEL Networks Limited
55.	Wellington Electricity Lines Limited
56.	Westpower Limited
Other entities	
57.	Ecotricity Superceded Limited / Ecotricity GP Limited
58.	EIS Holdings (2010) Limited / EIS Group Limited
59.	Electric Kiwi
60.	Electricity Networks Association Incorporated
61.	Employers and Manufacturers Association Northern Incorporated
62.	Energy Trusts of New Zealand Incorporated
63.	Federated Farmers of New Zealand Incorporated
64.	Federated Farmers of New Zealand (Auckland Province) Incorporated
65.	Fletcher Concrete and Infrastructure Limited (Golden Bay Cement)

	Entity
66.	Flick Electric Limited
67.	Fonterra Co-Operative Group Limited
68.	Independent Electricity Generators Association
69.	King Country Energy Limited / King Country Energy Holdings Limited
70.	Lower Waitaki Irrigation Company Limited
71.	New Zealand Steel Limited
72.	New Zealand Wind Energy Association Incorporated
73.	Ngati Tuwharetoa Electricity Limited
74.	North Otago Irrigation Company Limited
75.	Oji Fibre Solutions (NZ) Limited
76.	Pacific Aluminium (New Zealand) Limited (as New Zealand entity of Rio Tinto Aluminium Limited)
77.	Pioneer Energy Limited
78.	The Major Electricity Users' Group Incorporated
79.	The New Zealand Refining Company Limited
80.	The Sustainable Energy Forum Incorporated
81.	Vocus Group NZ Limited / Vocus (New Zealand) Holdings Limited / Vocus (New Zealand) Limited
82.	Waitaki Irrigators Collective Limited

Schedule 2 – list of submitters who will not be personally served

	Entity / individual(s)
1.	A D Wilson
2.	Andree Wallace
3.	Bronagh Hegan
4.	Bryan Leyland
5.	Chamber of Commerce Southland Incorporated
6.	Counties Power Consumer Trust
7.	Donald Faulkner
8.	Donna Holz
9.	Electric Power Optimization Centre
10.	Energyclubnz
11.	Entrust
12.	Environment Southland
13.	Far North District Council
14.	Gore District Council
15.	Graeme Weston
16.	Grey Power New Zealand Federation Incorporated
17.	Hamish Walker, Member of Parliament for Clutha Sutherland
18.	Ian Miller
19.	Invercargill City Council
20.	Jason Allison
21.	Jock Webster
22.	John Moynihan
23.	Julia van Eeden

	Entity / individual(s)
24.	Kaipara District Council
25.	Mahitahi Hauora
26.	Matt Furness
27.	Mike Dikstaal
28.	Molly Melhuish
29.	Neil Walbran Consulting Limited
30.	Northland Incorporated
31.	Northland Regional Council
32.	Ngāti Tūwharetoa
33.	One Double Five Whare Awhina Community House Trust
34.	Otago-Southland Employers' Association
35.	Peter and Janet McKnight
36.	Pulse
37.	Robert Boekhout
38.	Sarah Dowie, Member of Parliament for Invercargill
39.	Shelley Clark
40.	Solar City
41.	South Port New Zealand Limited
42.	Southern Generation Limited Partnership
43.	Southland Disability Enterprises Limited
44.	Southland District Council
45.	Southland Regional Development Agency Limited
46.	Taitokerau Education Trust
47.	Tauhara North No 2 Trust

	Entity / individual(s)
48.	The Chamber of Commerce and Industry of Northland Incorporated
49.	The Office of the Māori Climate Commission
50.	Thomas Guy
51.	Waitaki Power Trust
52.	Whangārei District Council
53.	Zero Carbon Nelson Tasman

Attachment to Memorandum of Counsel

8 July 2020

BY HAND

[Entity]

Trustpower Limited – appeal under s 64 Electricity Act 2010: service of Notice of Appeal

1. We act for Trustpower Limited in an appeal against a decision of the Electricity Authority under section 64 of the Electricity Industry Act 2010, which was filed today in the Wellington High Court.
2. The appeal is against the Electricity Authority's decision to make and publish new transmission pricing methodology guidelines on 10 June 2020, on the basis of, and for the reasons provided in, its decision paper titled *Transmission pricing methodology 2020 Guidelines and process for development of a proposed TPM* (also published on 10 June 2020).
3. Due to your recent involvement in the Authority's consultation processes preceding the decision paper and/or being identified as a designated transmission customer under the Electricity Industry Participation Code 2010, you have been identified as a party that may be directly affected by the appeal. As such, we **enclose** a copy of the Notice of Appeal, pursuant to rule 20.6 of the High Court Rules, and a memorandum of counsel also filed today.
4. If you would like to be served with details of the first case management conference and may proceed to seek to be joined as a party to the appeal and/or wish to be heard on the matters in the **enclosed** memorandum of counsel, please contact us (by email antonia.leggat@minterellison.co.nz, copy to briony.davies@minterellison.co.nz) within 10 working days of the filing of the Notice of Appeal on 8 July 2020 i.e. no later than 22 July 2020.

Yours faithfully
MinterEllisonRuddWatts

Briony Davies / Antonia Leggat
Partner / Solicitor

Contact: Antonia Leggat, Solicitor
T: +64 4 498 5010 E: antonia.leggat@minterellison.co.nz
Partner responsible: Briony Davies T: +64 4 498 5134
OUR REF: 301007291

enclosure