BEFORE	**The Electricity Rulings Panel**
	No: C-2022-001
BETWEEN	**The Electricity Authority** *Complainant*
AND	**Transpower New Zealand Limited** *Respondent*
UNDER	The Electricity Industry Act 2010 (the Act), The Electricity Industry (Enforcement) Regulations 2010 (the Regulations), The Rulings Panel Procedures 2017 and The Electricity Industry Participation Code 2010
IN THE MATTER OF	A complaint made of a breach of clause 4(4)(a) of Technical Code A of schedule 8.3 of the Electricity Industry Participation Code 2010

Rulings Panel Decision C-2022-001

Hearing: 1 July 2022

Counsel: R S May and T G Bain for the Electricity Authority

T D Smith and R J J Wales for Transpower

Finding: Transpower breached clause 4(4)(a) of Technical Code A of schedule 8.3 of the Electricity Industry Participation Code 2010.

Orders: Pecuniary Penalty: Pursuant to section 54(1)(d) of the Electricity Industry Act 2010, Transpower is to pay a pecuniary penalty of $70,000 to the Crown; and

Costs: Pursuant to section 54(1)(g) of the Electricity Industry Act 2010, Transpower is to pay the Electricity Authority the sum of $12,415 in costs.

Rulings Panel Members:

Mel Orange	Chair
Geraldine Baumann	Deputy Chair
Lee Wilson	Panel Member

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Introduction

[1] The Rulings Panel is an independent body that assists in enforcing the Electricity Industry Participation Code by dealing with complaints about breaches of the Code. It is established under Electricity Industry Act 2010.

[2] The complaint before the Panel was filed by the Electricity Authority against Transpower New Zealand Limited in its capacity as an Industry Participant[1] and as Grid Owner.[2] Where a complaint is upheld, the Panel may order a range of actions, including the making of compliance orders, ordering pecuniary penalties or

[1] Pursuant to section 7(1)(a) of the Electricity Industry Act.
[2] As defined by clause 1.1 of the Code.

compensation, and issuing warnings or reprimands. A pecuniary penalty can only be ordered if one is sought by the Electricity Authority.[3]

Notice of Commencement

[3] The Notice of Commencement alleged a breach of clause 4(4)(a) of Technical Code A of schedule 8.3 of the Electricity Industry Participation Code 2010. Technical Code A, Schedule 8.3 to the Code defines obligations for asset owners and technical standards for assets in order to enable the System Operator[4] to plan to comply, and to comply, with the principal performance obligations. Clause 4 of Technical Code A provides:

> ***4 Requirements for grid and grid interface***
>
> *(4) Each asset owner must ensure that it provides grid protection systems for its assets that are connected to, or form part of, the grid. Each asset owner must also ensure that as a minimum requirement—*
>
> *(a) such protection systems support the system operator in planning to comply, and complying, with the principal performance obligations and are designed, commissioned, and maintained, and settings are applied, to achieve the following performance in a reliable manner:*
>
> *(i) electrically disconnect any faulted asset in minimum practical time (taking into account selectivity margins and industry best design practice) and minimum disruption to the operation of the grid or other assets:*
>
> *(ii) be selective when operating, so that the minimum amount of assets are electrically disconnected.*

[4] The specific allegations, as set out in the Notice of Commencement, were that:

> *21. The respondent breached cl 4(4)(a) of Technical Code A between 10.05 PM on 1 December 2020 and 12 December 2020 at 1.42 PM, in that it failed to provide protection systems for its assets that formed part of the grid because the CB92 circuit breaker at Otira was not able to operate following the failure of the SEL421 relay.*
>
> *22. In addition, the respondent breached cl 4(4)(a) of Technical Code A for an unknown period of time ending on 12 December 2020 at 1.42 PM, because it failed to ensure that its protection systems at the Otira substation were maintained to achieve the following performance in a reliable manner:*

[3] Section 56(1) of the Electricity Industry Act.
[4] As defined by clause 1.1 of the Code.

> *22.1. that they would electrically disconnect any faulted asset in minimum practical time and with minimum disruption to the operation of the grid or other assets; and*
>
> *22.2. that they would be selective when operating, so that the minimum amount of assets are electrically disconnected.*

[5] The Electricity Authority sought the following remedial orders:

> *23. The Authority asks that the Rulings Panel determine that the respondent has breached the Code as outlined above and make the following orders:*
>
> *23.1. An order that a public warning or reprimand be issued pursuant to s 54(1)(b) of the Act.*
>
> *23.2. An order that the respondent pays a pecuniary penalty to the Crown in an amount that the Rulings Panel thinks just but not exceeding $200,000, pursuant to s 54(1)(d) of the Act.*
>
> *23.3. An order that Transpower pays the Authority the reasonable costs of these proceedings pursuant to s 54(1)(g) of the Act.*
>
> *23.4. Any other order the Rulings Panel considers just.*

[6] On 31 March 2022, the parties filed a joint memorandum and an agreed statement of facts. The memorandum noted that Transpower had admitted the breach. The Parties jointly requested that the Rulings Panel hold a remedial orders hearing.

[7] On 1 July 2022, a hearing was held in Wellington. Both parties addressed submissions that had been filed with the Panel.

Agreed Facts

[8] The agreed facts set out that Transpower owns the assets comprising the grid on the west coast of the South Island, including circuit breakers located at the Otira substation. At 10.05 PM on 1 December 2020, the SEL421 protection relay associated with the Otira circuit breaker CB92 failed due to a temporary random access memory (RAM) failure. The statement noted that temporary RAM failures are common faults that can often be resolved by restarting the relay. However, the SEL421 protection relay fail alarm was incorrectly wired and did not operate when the relay failed. The statement noted the relevant wires were loose in the trunking instead of being connected to the appropriate terminal blocks, were unlabelled and that the design drawing and diagrams on site were out of date in that they reflected the situation following a line protection upgrade in 2015 and omitted drawings for works after that date.

[9] Because the SEL421 protection relay fail alarm did not operate, the failure of the SEL421 relay was not detected in that no relay fail alarm was flagged on SCADA: the

grid owner's Supervisory Control and Data Acquisition interface.[5] At 7.36 AM on 12 December 2020, the Kumara to Otira circuit 1 tripped due to a red to yellow phase fault. Circuit protection at the Kumara substation operated correctly. However, the failure of the SEL421 relay meant that Otira CB92 failed to open. This caused a cascade trip of the South Island's west coast circuits, namely:

- Hokitika to Otira Circuit 2; and
- Coleridge / Castle Hill / Arthurs Pass / Otira Circuit 1; and
- Coleridge to Otira Circuit 2

[10] The tripping of the above circuits caused an instantaneous 10.8 MW loss of supply to electricity consumers. Supply was restored to all affected consumers by 10.20 AM. The total value of the lost load of consumers who suffered a loss of supply has been assessed to be $840,000. At 1.42 PM on 12 December 2020, the failure of the SEL421 relay was corrected, and Kumara to Otira Circuit 1 was returned to service.

[11] The Electricity Authority noted in its submissions:

> *7. Effective grid protection systems are the primary physical means by which cascade trips are avoided. If they do not function correctly, a minor fault on one circuit can lead to the disconnection of multiple circuits, causing unnecessary consumer disconnections.*
>
> *8. In addition, if a grid protection system does not effectively (and quickly) isolate a fault, serious damage can be caused to connected assets.*

[12] Included with Transpower's reply submissions was an affidavit from John William Clarke, the General Manager Grid Development at Transpower, which provided further background information and facts. He noted:

> *9 The fault was caused by an honest mistake by a maintenance technician from Electronet in 2020. The mistake occurred after various projects had been completed in the substation between 2015 and 2018.*
>
> *10 During maintenance on the Otira 125V battery bank on 30 May 2020, a non-urgent temperature compensation alarm on the 125V DC supply was found to be missing. The technician put a job in MAXIMO, Transpower's asset management system (which service providers have access to), to add non-urgent alarms. Due to the remote location of the Otira substation and to avoid a return visit later he made the changes to add the alarms while he was at the site.*

[5] The Code defines SCADA as meaning "the monitoring and remote control of equipment from a central location using computing technologies".

[13] The Panel questioned the normal processes used for commissioning work of this nature. An affidavit from Roudylynn Cureg Reyes, Grid Compliance Manager at Transpower, was filed following the hearing. It noted the normal work control procedures used and the safeguards incorporated into those procedures. The affidavit stated:

> *10. The process and requirements were followed for the planned works at the Otira substation on 30 May 2020, but unfortunately not for the further work undertaken by the technician which resulted in the disconnection of the protection fail alarm.*

Admitted Breach

[14] Transpower admitted the following breaches:

(a) A breach of clause 4(4)(a) of Technical Code A between 10.05 PM on 1 December 2020 and 12 December 2020 at 1.42 PM, in that it failed to provide protection systems for its assets that formed part of the grid because the CB92 circuit breaker at Otira was not able to operate following the failure of the SEL421 relay; and

(b) A breach of clause 4(4)(a) of Technical Code A for an unknown period of time ending on 12 December 2020 at 1.42 PM, in that it failed to ensure that its protection systems at the Otira substation were maintained to achieve the following performance in a reliable manner:

(i) that they would electrically disconnect any faulted asset in minimum practical time and with minimum disruption to the operation of the grid or other assets; and

(ii) that they would be selective when operating, so that the minimum amount of assets are electrically disconnected.

[15] Having admitted the breaches, the Panel is required to consider the appropriate remedial orders to be imposed under section 54 of the Act.

[16] The Electricity Authority, in its submission on remedial orders dated 27 May 2022, submitted:

> *3. The Electricity Authority (Authority) seeks orders under s 54 of the Electricity Industry Act 2010 (Act), namely:*
>
> *3.1. an order that Transpower pays a pecuniary penalty of $88,000; and*
>
> *3.2. an order that Transpower pays the Authority the reasonable costs of these proceedings.*
>
> *4. It is submitted that such orders are appropriate given the significant consequences of the Code breach, the systemic failures that caused it,*

and the past breaches of this Code provision by Transpower (in its capacity as grid owner).

[17] Effectively, the Electricity Authority only sought a pecuniary penalty order and costs. Transpower did not oppose such an order. The parties differed as to what the quantum of the order should be based on the severity of the breach and the impact of the aggravating and mitigating factors present.

Remedial Order Submissions

[18] Both parties filed submissions and spoke to them at the hearing.

[19] The parties agreed that the Panel should adopt the approach taken by the Panel in its 27 March 2020 decision. It was also agreed that the cascade trip caused an instantaneous 10.8 MW loss of supply and that the value of the lost load was $840,000.

[20] The 27 March 2020 decision adopted the approach in *Stumpmaster v WorkSafe New Zealand*[6]. In the 27 March 2020 decision, the Rulings Panel discussed the increase in the penalties provided for in an amendment to the Act and went on to note:

> *44. Our reading of s.56 of the Electricity Act 2010 is that we have to determine a penalty by reference overall to the "seriousness" of the breach, which are to do by reference first to severity of the breach and the closely related issues of its impact on other parties, and the degree of negligence. We are then required to apply such balancing factors as may mitigate (eg. prompt conduct) or aggravate (eg. previous breaches).*
>
> *45. We consider it helpful to begin the first assessment by assessing the "culpability" factors above by reference to 4 bands suitable for use within our penalty limit:*
>
> | | | |
> |---|---|---|
> | *(1)* | *Low* | *Up to $50,000* |
> | *(2)* | *Medium* | *Up to 100,000* |
> | *(3)* | *High* | *Up to 150,000* |
> | *(4)* | *Very High* | *Up to 200,000 (the maximum)* |
>
> *46. We think the next step is to consider all the mitigating and aggravating factors, making due additions and subtractions as appropriate for relevant conduct.*
>
> *47. Finally, we think we should step back and make an overall assessment of the penalty to ensure that over-mechanical application of a formula has not resulted in distortion or injustice.*

[6] *Summated v Worksafe New Zealand Ltd* (2018) NHZC 2020, (2018] 3 NZLR 881

[21] Section 54(2) of the Act states that the Rulings Panel must take into account its own previous decisions in respect of any similar situations previously dealt with. It is not, however, bound by previous decisions. Notwithstanding, the Panel does recognise the benefit to the electricity industry of consistency in its decisions. At the same time, where underlying legislative or policy considerations have changed or where it is of benefit to the industry, the Panel should be free to depart from earlier decisions.

Electricity Authority Submissions

[22] The Authority noted a pecuniary penalty order of $75,000 was made in the 27 March 2020 decision where a 185MWh loss of supply was caused with an associated economic impact of $3 to $4 million. The Authority submitted that the present breach was comparable in terms of seriousness. Transpower disagreed. The parties also differed on the degree of Transpower's negligence and the extent to which past breaches were an aggravating factor.

[23] In the 27 March 2020 matter, the Panel adopted a starting point of $100,00, meaning it intersected between medium and high culpability.

[24] The Authority submitted, based on the 27 March 2020 decision, an appropriate starting point of $110,000 should be adopted to recognise the severity of the breach and the level of negligence with an uplift of 30% for past breaches[7], and a reduction of 50% from the starting point to account for self-reporting of the breach, the acceptance of it, and the manner in which the investigation and hearing was approached by Transpower. The final recommended pecuniary penalty order was $88,000.

[25] The Authority's starting point was predicated on its view that the conduct was more culpable in terms of the level of negligence than that in the 27 March 2020 decision as it was the result of "extremely poor workmanship". It also submitted that the failure to identify and deal with the issue over an extended period of time, and a commonality of human error in both this matter and the 27 March 2020 decision as a causal factor, were aggravating features.

Transpower Submissions

[26] Transpower submitted that if a pecuniary penalty was to be imposed, an appropriate order would be $25,000. Whilst Transpower did not express a starting point, it based its endpoint on a starting point of low culpability, which it submitted, was warranted on the basis that the conduct was less culpable than that in the 27 March 2022 decision and the breach was less severe. Transpower expressed concern with the Authority's submission that escalating penalties should be imposed by the Panel for

[7] The Authority provided a summary of past self-reported breaches of clause 4(4)(a) of the Code by Transpower.

subsequent breaches of this nature. It did not see that there were any aggravating factors that warranted an uplifted starting point.

Aggravating Factors

Severity and Culpability

[27] As noted above, the Authority argued that the breach was comparable to that which led to the 27 March 2020 decision, notwithstanding the difference in the loss of supply and the value of the lost load. The Authority reasoned that the impact was similar on the basis that, whilst the loss of supply and the value of it was less than that in the 27 March 2020 matter, it was only as a result of the lower population density in the geographic area where the breach occurred, i.e., had the breach occurred in a more populated area then the losses would have been greater. Further, it submitted that the impact on electricity consumers was significant as the power was interrupted between 7.36 AM and 10.20 AM, which was during peak morning demand.

[28] The Authority also argued that the conduct was more culpable than that in the 27 March 2020 decision on the basis of what it considered was extremely poor workmanship, clear evidence of systemic failings that meant the causal issue was not identified when it should have been, and the period of time over which the protections systems were ineffective. It placed the breach in the medium band of culpability noted in paragraph [20] above.

[29] Transpower placed the conduct in the low band of culpability "having regard, as a primary matter, to the limited impact of the breach." Transpower noted the lower value of the lost load and that there was no market impact, whereas there was a market impact in the 27 March 2022 matter.[8] The Transpower submissions also described the underlying conduct as an "inadvertent failure" and that there was no systemic failure or evidence of a systemic failure provided by the Authority.

[30] Both parties addressed the question of severity at the hearing. The fundamental difference was how the impact in terms of lost load and financial impact should be treated. Both parties noted that the geographic location of a grid protection system failure and its proximity to high consumption loads could significantly impact on lost load and the financial impact. The Authority argued that severity had to be viewed in terms of the impact where the breach occurred and the impact on the consumers in that region. Transpower took the position that the impact should be viewed on the basis of the loss of supply and economic impact without any regional adjustment to account for the size of that market.

[31] The Authority also submitted that the Code requires perfection in that Transpower, as the Grid Owner, operates within a strict liability environment. The obligations placed on it in other parts of the Code, such as in Part 7, where the expectation is

[8] The breach in the 27 March 2022 matter caused disconnection of the Karapiro power station meaning that Mercury NZ Limited was unable to cover its position the market.

that of a reasonable and prudent operator. In this respect, the Authority referred to the objectives of the Authority and, by inference, the Code:[9]

> ***15 Objective of Authority***
>
> *The objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.*

[32] Transpower submitted that whilst perfection was expected, its obligations had to be viewed within the economic reality of cost versus performance. Its position was that perfection in all instances was uneconomic and that, in effect, there had to be a trade-off between reliability and efficiency. The Authority submitted the causal factor was not cost but poor systems and processes and, as such, cost was not a factor.

[33] Transpower further submitted that the present matter differed from the 27 March 2020 matter in that it was minor work that did not require supervision and that the technician carried out extra work and then, as a result of COVID-19, family and work commitments, failed to follow through on intended follow up actions. In this respect, the affidavit from John Clarke noted:

> *13 The technician intended to update the site drawings and request a new configuration to update the Transpower Supervisory Control and Data Acquisition interface (SCADA) to show the relabelled alarm. When the technician returned to the office he discovered that the alarm he thought redundant was actually still in use. Unfortunately, between COVID-19, family and work commitments he failed to follow through with the required remedial actions to undo his actions.*
>
> *14 This information was only incorporated into a revised Transpower ICAM report for the incident submitted by the service provider on 2 March 2022, after additional inquiries had been requested by Transpower.*

Past Breaches

[34] The parties differed as to whether past breaches were an aggravating factor. As earlier noted, the Authority provided data on past self-reported breaches, and it submitted that the current breach occurred within a short time of the breach in the

[9] Section 32 of the Electricity Industry Act 2010 uses similar language:

32 Content of Code

(1) The Code may contain any provisions that are consistent with the objective of the Authority and are necessary or desirable to promote any or all of the following:

- *(a) competition in the electricity industry:*
- *(b) the reliable supply of electricity to consumers:*
- *(c) the efficient operation of the electricity industry:*
- *(d) the performance by the Authority of its functions:*
- *(e) any other matter specifically referred to in this Act as a matter for inclusion in the Code.*

27 March 2020 matter and that both breaches had a common feature of a vulnerability of Transpower's systems and processes to human error. The Authority noted in its submissions:

> *21. Since that decision, and not including the present case Transpower has self-reported breaches of cl 4(4)(a):*
>
> *21.1. on 10 occasions between 28 March 2020 and 12 December 2020; and*
>
> *21.2. on 8 occasions between 13 December 2020 and 1 February 2022.*

[35] The Panel queried the seriousness of those breaches and the outcomes of the self-reported breaches. The Authority indicated that two of the breaches resulted in settlements and that the more serious breaches are put before the Panel. In this respect, it is noted that under the Regulations 2010, where there are parties to an investigation, an investigator "must endeavour to effect an informal resolution (a settlement) of every matter under investigation".[10] If a settlement is not reached or there are no parties to the investigation of a self-reported breach, then an investigator must prepare a report that "includes a recommendation on whether the Authority should discontinue the investigation or make a formal complaint to the Rulings Panel".[11] After receiving a report, the Authority must, as soon as is practicable, "discontinue an investigation" or "lay a formal complaint with the Rulings Panel".[12] Given those provisions, it follows that the other 16 breaches most likely did not proceed past an investigation.

[36] Transpower, whilst accepting that any previous breach of the Code is a relevant factor to be taken into consideration by the Panel, did not view past breaches as an aggravating factor in this matter. Transpower cautioned against a simple comparative analysis and submitted that its compliance record had improved. It supported the submission with evidence from Mr Clark, who provided a table that showed a downward trend over time in relation to grid protection asset operations, and he provided his opinion that those improvements were attributable to proactive steps taken by Transpower.[13] Mr Clarke also noted that there was a range of causes of past breaches.

[37] Transpower also made submissions to put the number of self-reported breaches into context. The submissions noted:

> *23 … Transpower has approximately 10,860 protection relays on the grid. Around 900 protection operations occur annually during grid operations, of which only a very small proportion result in potential breaches of the Code.*

[10] Regulation 22 of the Electricity Industry (Enforcement) Regulations 2010.
[11] Regulation 23(1) of the Electricity Industry (Enforcement) Regulations 2010.
[12] Regulation 23(3) of the Electricity Industry (Enforcement) Regulations 2010.
[13] Mr Clark's affidavit traversed the various initiatives undertaken to improve performance.

> *However, as the Investigator's Report itself recognises, the scale of the grid and the nature of the assets mean that it is likely that failure effects will occur,15 despite Transpower acting diligently and in accordance with Good Electricity Industry Practice.*

[38] With regard to the above, Transpower noted the potential exposure for Transpower of ever-increasing penalties in a strict liability system when there was an inevitability that there would be future breaches.

[39] In summary, Transpower submitted it had responded to previous breaches and, in particular, the 27 March 2020 matter, and had taken steps to improve performance. As such, past breaches should not be viewed as an aggravating factor vis-à-vis the present breach.

Mitigating Factors

Past Conduct

[40] Transpower went further, in terms of past breaches, to submit that the steps taken to improve grid asset and protection asset protection performance since the 27 March 2020 decision were a mitigating factor. The submission was supported by Mr Clarke's affidavit, which traversed the steps taken following the Otira breach. Transpower submitted:

> *31 In its 27 March 2020 decision, the Rulings Panel incorporated into its discount for mitigating factors the fact that Transpower had produced a report into the incident that had highlighted areas for future improvement.18 It is submitted that the steps identified and taken by Transpower in the present case should equate to an at least equal, if not greater, discount.*

[41] The Authority submitted that there was an element of double-counting in Transpower claiming a discount for its remedial actions since 27 March 2020 and through the Panel disregarding the former breaches as an aggravating factor.

Admitted Breach

[42] The parties agreed that self-reporting, acceptance of the breach, and the approach to the complaint before the Panel were mitigating factors. It was generally agreed that a 50% discount from the starting point was appropriate.

Costs

[43] It was agreed that costs on a District Court 2B scale were appropriate. The Authority sought an award of $14,235, and it provided the basis for its calculation. Included was an uplift for the Authority's reply on the basis of the late affidavit evidence of Mr Clarke filed by Transpower. Transpower opposed the uplift and questioned the time calculation for filing and serving directions conference memorandum.

[44] The Panel put the question of the Panel's costs to the parties at the hearing and invited written submissions on whether the party in breach should contribute to those costs.

[45] The Authority submitted:

> *3. The Authority submits that there are good policy reasons why such orders should be made in some cases. If orders are sufficiently routine, then this provides a meaningful reduction in the costs of enforcing the Act and the Electricity Industry Participation Code. These costs are otherwise borne by all industry participants, including those that are compliant with the Code. It would be a principled outcome for such costs to be borne by those who are found to be in breach of the Code.*
>
> And
>
> *7. However, the Authority recognises that there will be cases where the Rulings Panel ought to decline from making an order. In some cases, difficult points of interpretation may arise which the Rulings Panel can clarify for the benefit of the industry as a whole. It is submitted that this can be assessed on a case-by-case basis.*

[46] The Authority referred to other regulatory regimes where costs are provisioned for and noted the provisions of regulation 90 of the Regulations, which provided for the Panel's costs, albeit in the context of the Panel resolving an industry participant dispute.

[47] Transpower submitted:

> *2.1 the Rulings Panel should not order that it pay a contribution towards the Panel's costs in this proceeding; and*
>
> *2.2 accordingly, the Panel need not decide the availability of such an order in this case.*

[48] Transpower went on to submit that section 54(1)(g) of the Act 2010, which provisions for costs did not, arguably, extend to the Panel's costs as:

> *4.1 s 54(1)(g) must be read in conjunction with s 128(3)(e), which requires the annual levy to be prescribed on the basis that "the following costs should be met fully out of the levy: … the costs of the Rulings Panel"; and*
>
> *4.2 consistent with this, the Electricity Industry (Levy of Industry) Regulations 2010 permit the costs of monitoring the enforcement of the Code by the Rulings Panel as an "other activity".*

[49] Transpower noted the difference between disputes and complaints in respect of regulation 90 and that the services provided by the Panel are an alternative to other mechanisms for which the participants would have to pay.

[50] Transpower also referred to a decision of the Panel dated 7 March 2006, which it acknowledged was decided within a different statutory context, but in which the Panel noted:

> *8.1 the Panel will not use orders as to costs as a de facto penalty;*
>
> *8.2 the Panel does not accept that its power to order costs should be limited in any of the various ways set out in the submissions - the true test of reasonableness must be applied on a case-by-case basis;*
>
> *8.3 the Panel will not order costs that have not been sought; and*
>
> *8.4 the Panel takes the view that there is an element of "public service" inherent in the regulatory regime and that element of "public service" will be considered by the Panel as a factor in making orders as to costs.*

[51] In response to the Authority's submissions, Transpower submitted that all industry participants benefit from the effective enforcement of the Code and the possible negative impact the Panel's costs may have on self-reporting. Finally, Transpower submitted that if the Panel was to consider its costs, it was not appropriate in the present case to seek a contribution given the nature of the issues and Transpower's subsequent conduct with respect to it.

Ruling Panel's Remedial Order Decision

Pecuniary Penalty Order

[52] A pecuniary penalty order can only be imposed if the Authority seeks one.[14] If one is sought, then the Panel must consider the seriousness of the breach of the Code. Specifically, section 56 of the Act stipulates:

> *(2) In determining whether to make a pecuniary penalty order and, if so, the amount of the order, the Rulings Panel must consider the seriousness of the breach of the Code, having regard to the following:*
>
> *(a) the severity of the breach:*
>
> *(b) the impact of the breach on other industry 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 the Code by the industry participant:*

[14] Section 56(1) of the Electricity Industry Act 2010.

(f) whether the industry participant disclosed the matter to the Authority:

(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.

[53] The section makes it clear that there are factors that the Panel "must" consider. It is not, however, limited to those factors that are listed. The overall consideration is "seriousness". The list that follows are the factors that determine the seriousness of the breach. The list includes what could be considered as aggravating and mitigating factors.

[54] The parties agreed that the Panel should consider seriousness and set the starting point with reference to the Panel's 27 March 2020 decision. The Authority submitted that the matter was in the medium band of seriousness with reference to the earlier decision. Transpower submitted it was less serious and in the low band. The divergent positions were based on the severity of the breach and the degree of negligence.

[55] The Panel formed the view that the breach was in the medium band of seriousness which places it in the $50,000 to $100,000 pecuniary penalty order range. It adopted a starting point of $80,000, which was less than that adopted in the 27 March 2020 matter on the basis that the Panel found that the matter was less serious. The Panel applied a 25% uplift from the starting point ($20,000) for what it saw as aggravating factors. The Panel then applied a 30% discount to the uplifted amount ($30,000) for mitigating factors. The resulting pecuniary penalty order is $70,000 as per the following:[15]

(a) starting point - $80,000;

(b) uplift of 25% - $100,000 ; and

(c) total discount of 30% - $70,000.

[56] The pecuniary penalty order is based on the following section 56 factors, which the Panel took into account:

(a) the severity of the breach:

(c) the extent to which the breach was inadvertent, negligent, deliberate, or otherwise:

[15] This differs from the methodology used in the 27 March 2020 decision but it is in accordance with *Stumpmaster.* See, for example, paragraph [87].

(d) the circumstances in which the breach occurred:

(e) any previous breach of the Code by the industry participant:

(g) the length of time the breach remained unresolved:

(h) the participant's actions on learning of the breach:

(f) whether the industry participant disclosed the matter to the Authority: and

(j) any other matters that the Rulings Panel thinks fit.

Severity

[57] The Panel decided that the breach was less severe than the 27 March 2020 breach. The Panel noted the post-code lottery with regard to breaches of this nature, which can result in disparate outcomes in that the lost load and financial impact will be far greater in areas where there is high demand. This, in turn, translates into greater severity. The Panel does not, however, consider that a straight numerical comparison can be made between a breach in a high-demand region and a low-demand one. Other factors also need to be taken into consideration and, in this respect, whilst all consumers deserve a reliable supply and the Grid Owner's strict liability duty is the same regardless of location, regional factors, and the flow on impact to the consumer have to be taken into consideration to adjust for the post-code lottery. Having said this, the Panel would expect that the Grid Owner would have more robust systems and processes in place where there will be a greater impact flowing from a breach, and a failure to recognise and implement more robust systems and processes in such locations could result in the breach being more severe or the failure might be seen as an aggravating factor.

[58] Balancing the factors noted above, the Panel found that the breach was less severe than the 27 March 2020 matter on the basis that the amount of loss load, the financial impact, the duration of the breach, and the potential impact the loss of supply would have had on consumers was, having taken regional factors into account, less.

Aggravating Factors

Negligence

[59] There were similar features in the present matter to those in the 27 March 2020 matter. Both breaches were caused by human error, and controls and oversight that should have prevented the error failed to do so.

[60] Moreover, whilst the Panel accepts, on the basis of the affidavits filed by Transpower, that it does have good work order processes in place, the Panel has taken into account that those processes were not followed and that the failure to adhere to them or the error that was caused was not identified by subsequent checks, testing or audits. The Panel considered that this was an aggravating factor.

Circumstances in which the breach occurred

[61] The breach was the result of unauthorised work carried out by a contractor. As noted above, Transpower's systems and processes should have prevented this from occurring but did not. Intervening factors that were out of the control of Transpower then occurred. The contractor was ill, and Covid lockdowns occurred. Again, systems and processes should have accounted for this. Notwithstanding, the Panel has taken those factors into account and has decided that it is neither a mitigating nor an aggravating factor.

Previous breaches

[62] The Panel considered the previous breaches, in this instance, to be an aggravating factor, but not to the extent submitted by the Authority. In this respect, the Panel noted Transpower's submissions as regards ever escalating penalties in a strict liability regime. The Panel is of the view that whilst escalating penalties can provide an effective deterrence, caution is required and that the conduct in this matter needs to be viewed within the overall scale of the Grid Owner's obligations.

[63] As noted by Transpower, it has some 10,860 protection relays, and around 900 protection operations occur annually. On a percentage basis, the number of past breaches is small and the number that have been serious enough to warrant settlements or the laying of a complaint with the Panel even less. At the same time, it is a strict liability regime that Transpower knowingly operates within. As such, if there is evidence of systemic issues or a pattern of similar breaches, then the conduct might be an aggravating factor.

[64] In this instance, the Panel considered that the was some evidence of systemic issues or a pattern, but that, viewed within the context of Transpower's overall operations, it was a limited aggravating factor. It is also to be noted that the Panel has taken the systems and process failure, which caused the error, into account as an aggravating factor under negligence and, as such, it would be wrong to double count it under past breaches by applying too greater an uplift for it.

Length of time the breach remained unresolved

[65] The error that led to the breach was not identified and remained unresolved for an extended period of time. This is an aggravating factor.

Combined Effect of Aggravating Factors

[66] Taking all of the noted aggravating factors into account, the Panel decided that a 25% uplift in the penalty should be applied.

Mitigating Factors

Participant's actions on learning of the breach

[67] The Panel viewed Transpower's actions as a mitigating factor, but not to the extent submitted. The Panel saw the actions that were taken, which were set out in Mr

Clarke's affidavit, as being somewhat offset by a failure to fully investigate the true causes of the incident. In this respect, it was noted that it was only as the hearing drew near that the true cause of the error was identified as a result of further investigations.

Participant disclosure

[68] Transpower self-reported the breach. It was, however, required to do so under the provisions of regulation 7 of the Electricity (Industry) Enforcement Regulations 2010, which states:

> ***7 Mandatory reporting of common quality or security breaches***
>
> *(1) If an industry participant believes on reasonable grounds that it or another industry participant has breached a provision of Part 7, 8, 9, or 13 of the Code that is about common quality or security, or any related provision in Part 17 of the Code, the industry participant must report the alleged breach to the Authority as soon as practicable after it becomes aware of the alleged breach.*

[69] Technical Code A forms part of Part 8 of the Code. As such, Transpower was doing no more than it was obliged to do. It follows that self-reporting is not a mitigating factor. A failure to report would, however, be an aggravating factor.

Any other factor – Conduct

[70] The Panel has taken Transpower's cooperation and responsible attitude toward the matter into account as a mitigating factor.

Combined Effect of Aggravating Factors

[71] Taking all of the noted mitigating factors into account, the Panel decided that a 30% reduction should be applied. In making that decision, the Panel decided to depart from the reduction applied in the 27 March 2020 on the basis that Transpower's post event conduct, especially in relation to its investigations, was not as extensive or forthright.

<u>Costs</u>

[72] Transpower is to pay the sum of $12,415 to the Authority. The costs have been calculated on the basis of a 2B matter using the District Court scale without the uplifts sought by the Authority. The calculations are as follows:

Description	Time allocation	Category 2 Rate	Subtotal
Preparing notice of formal complaint	1.5	$1,910	$2,865
Filing notice of formal complaint	0.25	$1,910	$478
Filing and serving memorandum in respect of directions conference (x 2)	0.5	$1,910	$955
Preparing statement of agreed facts	0.5	$1,910	$955
Preparing submissions on remedial orders	1	$1,910	$1,910
Preparing reply submissions on remedial orders	2	$1,910	$3,820
Appearing before the Rulings Panel for hearing on remedial orders	0.75	$1,910	$1,433
		Total	**$12,415**

[73] The Panel declined to grant the uplift to "preparing reply submissions on remedial orders" as it did not consider that the new matters raised by Transpower in its late evidence were overly complex. The Panel also retained the amount sought by the Authority for "filing and serving memorandum" which was disputed by Transpower on the basis that the amount sought was, in the circumstances, reasonable and justifiable.

Panel Costs

[74] No order for the Panel's costs is made. The Panel does, however, take this opportunity to comment on its position vis-à-vis its costs.

[75] As Transpower noted, the Panel considered general principles as regards costs in a decision dated 7 March 2006. In it, the Panel noted the following principles:

1. *The Panel is a quasi-judicial body created pursuant to an Act of Parliament and its "standing costs" (the Panel's remuneration, its costs of seeking legal advice and its administrative support) should be fixed by appropriation and be a standing charge against the levy system. All other costs are the proper subject of consideration for orders on a case-by-case basis.*
2. *The Panel will not use orders as to costs as a de facto penalty.*
3. *The Panel does not accept that its power to order costs should be limited in any of the various ways set out in the submissions - the true test of reasonableness must be applied on a case-by-case basis.*
4. *The Panel will not order costs that have not been sought.*
5. *The Panel takes the view that there is an element of "public service" inherent in the regulatory regime and that element of "public service" will be considered by the Panel as a factor in making orders as to costs.*

[76] A decision of 28 February 2013 noted the principles in the 7 March 2006 but did not build on them. The decision did note the element of "public service", as did a Rulings

Penal decision issued in March 2019. The question of the Panel's own costs has not previously been addressed by it.

[77] Transpower further submitted that a combined reading of sections 54(g) and 128(3)(e) of the Act was that costs are and should be met out of the industry participant levy and that this was also consistent with the Regulations. This position can also be seen as being consistent with the provisions of section 26 of the Act, which provides:

> ***26 Funding of Rulings Panel and remuneration of members***
>
> *(1) The Authority must fund the Rulings Panel.*
>
> *(2) The Authority may recover the costs of that funding from industry participants through levies payable under section 128.*

[78] The levy referred to in section 128 of the Act also provisions for the Authority's costs:

> *(3) The levy must be prescribed on the basis that the following costs should be met fully out of the levy:*
>
> *(a) the costs of the Authority in performing its functions and exercising its powers and duties under this Act and any other enactment;*

[79] As such, the same argument could be used with respect to the Authority's costs in complaints that it pursues before the Panel. It is fully funded and should not be able to recover costs. The Panel also notes that section 54(g) of the Act refers to making "orders regarding the reasonable costs of any investigations or proceedings". The wording does not limit an order of costs to those of the successful party. On the basis of those factors, the Panel considers that it is able, as part of an order under section 54(g), to make an order for the payment of or a contribution towards the Panel's costs. The Panel also believes there are good policy reasons for it to take this position.

[80] The Authority put forward that a reduction in the costs incurred by other participants could be a good reason to order costs but noted that there might be some cases where an order would not be appropriate, such as where there is a benefit to the industry as a whole from a proceeding before the Panel. The Panel agrees, and to assist in future matters, it sets out the following principles, which build on those stated in the 7 March 2006 decision.

[81] Firstly, each matter must be decided on its own merits and in light of an overall public or industry service element afforded by matters being brought before the Panel. The Panel does not want to deter industry participants from using it as there is a potential benefit to all industry participants when matters come before it. At the same time, there should be an element of users pays where and when appropriate.

[82] Whilst not directly analogous, the question of costs has been considered in other regulatory regimes and, in particular, in disciplinary regimes. Those regimes, which are normally funded by license fees, have provisions for costs orders. In *Collie v Nursing Council of New Zealand,*[16] the High Court noted:

> *But for an order for costs made against a practitioner, the profession is left to carry the financial burden of the disciplinary proceedings, and as a matter of policy that is not appropriate.*

[83] In *O'Connor v Preliminary Proceedings Committee*[17] Jeffries J said:

> *It is a notorious fact that prosecutions in the hands of professional bodies, usually pursuant to statutory powers, are very costly and time consuming to those bodies and such knowledge is widespread within the professions so controlled. So as to alleviate the burden of the costs on the professional members as a whole the legislature had empowered the different bodies to impose orders for costs.*

[84] The same could be said about complaints that come before the Panel. Whilst the costs may not be as great, and the costs of the Authority are dealt with separately, there is the potential that continued, and wilful breaches which are dealt with by the Panel could put an unwarranted burden on other industry participants. In such cases, where there is limited or no "industry or public service" value in the proceedings, an order for the Panel's costs might be appropriate.

[85] In terms of how much might be sought, it is noted that the courts have, generally, in disciplinary matters, stated that 50% of actual costs should be a starting is a starting point[18] but that a purely mathematical approach should be avoided. It has been noted that "in some cases 50 per cent will be too high, in others insufficient".[19] Each matter has to be determined based on its own merits. Further, the courts have noted that the manner in which a complaint is responded to and the manner in which a defence is conducted can be taken into consideration as an adverse factor when determining costs, especially if they do so in a belligerent way.[20]

[16] [2001] NZAR 74
[17] HC Wellington AP280/89, 23 August 1990
[18] *Collie v Nursing Council of New Zealand* [2001] NZAR 74,
[18] *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*, CIV-2011-485-000227 8 August 2011 at [46], *Cooray v Preliminary Proceedings Committee* HC Wellington AP23/94, 14 September 1995 at 9
[19] *Kenneth Michael Daniels v Complaints Committee 2 of the Wellington District Law Society*, CIV-2011-485-000227 8 August 2011 at [47]
[20] *Daniels v Complaints Committee* [2011] 3 NZLR 850.

Orders

[86] The Rulings Panel orders:

(a) Transpower is to pay the Crown the sum of $70,000 as a pecuniary penalty for the admitted breaches; and

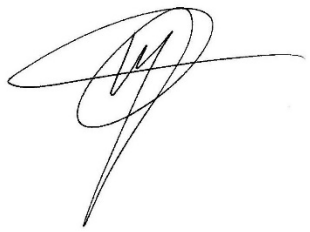
(b) Transpower is to pay the Authority the sum of $12,415 in costs.

[87] This decision is, in accordance with regulation 44 of the Electricity (Industry) Regulations, to be published by the Electricity Authority within ten (10) working days of receipt.

Right to Appeal

[88] The right to appeal Panel decisions is set out in sections 64 and 65 of the Act.

Issued this 16th day of August 2022



M.J. Orange
Rulings Panel Chair