ELECTRICITY AUTHORITY

DRAFT DECISION (28 JUNE 2017) IN RELATION TO THE EXPANSION OF THE NGAWHA POWER STATION

8 AUGUST 2017

Electricity Retailers' Association of New Zealand
PO Box 25596, Featherston Street, Wellington, 6146

Introduction

1. Established in August 2015, the Electricity Retailers' Association of New Zealand (ERANZ) represents a collective voice for electricity retailers. Our role is to promote and enhance a competitive and sustainable electricity retail market for the benefit of customers.

2. ERANZ membership represents 99.5% of the retail market by ICP count and includes Genesis Energy, Contact Energy, Mercury, Meridian Energy, Trustpower, Nova Energy, Pulse Energy, Prime Energy, Powershop, Energy Online, Bosco, Glo-bug, Grey Power Electricity, Just Energy, Electra Energy, Black Box Power, King Country Electricity, Tiny Mighty Power, Wise Prepay and Flick Electric Co.

3. We understand that the Authority is considering two separate applications from Top Energy Limited (**Top Energy**):

    (a) an application to grant designated parties associated with Top Energy and its subsidiary Ngawha Generation Limited (**NGL**) an exemption from compliance with rules 9 and 10 of Schedule 3 of the Electricity Industry Act 2010 (**the Act**) in respect of the expansion of the Ngawha power station from 32MW to 64MW (**the Ngawha expansion**); and

    (b) an application to install and operate an additional 26 MW of diesel generation to be used for network support purposes.

4. The draft decision refers solely to the Ngawha expansion. The Authority proposes to grant this exemption for a period of ten years.

5. The exemption will enable cross-governance of the Top Energy and NGL (the owner of the Ngawha power station). All of the directors of Top Energy will be able to serve concurrently on the board of NGL and Top Energy's senior managers (its Chief Executive Officer, Chief Financial Officer and General Manager Corporate Services) will be able either to serve on the board or to exercise material influence over NGL. However, the other arm's length rules in Schedule 3 of the Act will continue to apply.[1]

6. The Authority considers cross-governance of Top Energy and NGL will not adversely affect competition in either:

[1] However, see comments at 25 below.

(a) the local generation market;

(b) the national wholesale (spot, hedge, and ancillary services) markets; or

(c) the emerging market for network support services.

7. It also considers any adverse effects on the retail market can be addressed by a condition in the proposed exemption which prevents Top Energy and NGL from selling electricity to customers connected to Top Energy's distribution network.

8. A key factor in the Authority's market effects assessment is the Authority's view that that the most likely counterfactual if the exemption is not granted is that Top Energy would proceed with the expansion, and incur the costs of separate governance. These costs are said to be in the region of $1m - $1.3m per annum.

9. The draft decision does not indicate the extent to which the Authority took into account the evolving market conditions in exercising its discretion to grant this cross-governance exemption for a ten-year term.

ERANZ's views

10. ERANZ submits that:

(a) the history of the lines/energy split legislation shows that market conditions have been key drivers of policy changes to the split requirements;

(b) the current threshold of 50MW is very generous, given the context of the trend to smaller-scale, local distributed energy resources;

(c) the Authority's analysis of the extent to which the remaining parts of the legal framework will effectively restrain both:

i. Top Energy's board and management from making decisions in the management of Top Energy's business affairs which best align with the interests of NGL; and

ii. NGL's board and management from making decisions in the management of NGL's business affairs which best align with the interests of Top Energy.

is optimistic and / or flawed;

(d) it follows that granting the exemption may provide the incentive and/or opportunity for the pursuit of common group interests including:

i. the deterrence of investment in distributed energy resources; and

ii. cross-subsidisation of costs.

which would be very difficult to detect or measure;

(e) there may be adverse impacts on the local electricity (wholesale, hedge, and retail) markets if the prohibition on retail sales is restricted to customers connected to the Top Energy distribution market. We think, as a matter of fact and common sense, the various local electricity markets are likely to include customers located in the adjacent network owned by Northpower, as well as those on the Top Energy network;

(f) the 50MW threshold is a "bright line" designed to provide investor certainty, and there is a real risk that the draft decision will undermine this investor certainty in view of these incentive and opportunity risks;

(g) the applicant's acknowledgment[2] that Top Energy's business case for the Ngawha expansion "*assumes that NGL is able to share business support (i.e. general governance, finance and administration functions) with Top Energy*" does not reassure us that cross-subsidies will not occur;

(h) the grant of this exemption would create a worrying precedent for future applications from network companies using similar reasoning; and that

(i) the Authority has a discretion to grant this exemption, and in our view the present circumstances do not warrant the use of this discretion – and certainly not for a period of ten years.

The current legislative framework

11. In preparing this submission we have reviewed the history of the lines/energy structural and operational separation rules, as there have been a number of changes to the thresholds or "bright lines" which have applied to these separation rules.

12. A chronological summary of these changes, and their impact on the Ngawha power station, is set out in Appendix A.

13. The legislative history shows that Government has been prepared to adjust the structural and operational separation rules over time to:

[2] in para 116 of Top Energy's application for exemption

(a) encourage investment in renewable generation; or

(b) encourage investment in other forms of generation when New Zealand was potentially facing a supply shortfall; and then to

(c) tighten the thresholds to more closely protect competition in local network areas depending on market circumstances.

14. ERANZ notes that Part 3 no longer distinguishes between the fuel sources of generation but does provide a clear threshold for locally connected generation of 50MW (increased from 10MW in 2010). ERANZ thinks this threshold is generous to network businesses, and with the benefit of hindsight should probably not have been increased above the previous limit of 10MW.

15. This is because the current framework was designed at a time when the market structure was dominated by large-scale generation, which was situated close to fuel sources and transported long distances to end users through transmission and distribution networks.

16. Advances in storage technology, and the evolution and growth of a range of distributed energy resources, mean that market conditions are now changing. Regulatory decisions need to take this into account.

17. As we noted in our submission on the Authority's "*Enabling Mass Participation in the Electricity Market*" Consultation paper[3]:

> *"Without the right regulatory framework, the development of competitive markets around nascent technologies, and the services they provide, will be stymied, resulting in poor outcomes for consumers".*
>
> *"Monopolies, such as electricity distribution businesses (EDBs), can distort and dominate competitive markets as they are not exposed to the same risks, and have greater opportunities, than other competitors in that market. Prospective entrants might be reluctant to enter a market where their competitor is both a buyer and seller in that market, and could use its monopoly position to advantage itself. Inefficient or unfairly priced emerging technology or services can serve to have a cooling effect on other entrants entering the market, thereby, restricting consumer choice and the development of innovation. "*
>
> *"The only way to ensure a level playing field is to have a greater degree of separation between the provision of regulated assets, and the provision of assets that can be used for both regulated and unregulated services. There are sound reasons for this division which should inform the approach to the rules around monopoly involvement in contestable markets. The underlying rationale for structural separation is to facilitate competition and dynamic efficiencies by appropriately allocating risks. There are already examples were the blurring of this line is causing a cooling effect on competition or on investment into the contestable markets for new technologies or services."*

[3] pages3-4 of our submission

> *"There is currently information asymmetry. Would-be innovators or investors have little information on where services from the contestable market may provide the greatest benefits. Similarly, consumers and third parties need better information to objectively verifying that an EDB has selected the least cost, or most efficient supplier of alternatives to traditional network assets. This transparency of opportunities and maintaining structural separation encompasses a neutral access policy, particularly so that competitors can objectively verify that an EDBs' own businesses have not received favourable treatment regarding connection, use of the network, or investment opportunities."*

18. This suggests that the wider market environment is a factor which the Authority should take into account when deciding if it should exercise its discretion to grant an exemption to Top Energy in relation to the Ngawha expansion. ERANZ thinks this wider market environment weighs against the exemption sought.

Incentives and opportunities provided by cross-governance

19. Currently all six of Top Energy's directors, and its Chief Executive Officer, are on the board of NGL. Top Energy acknowledges that the other persons covered by the application (Top Energy's Chief Financial Officer and General Manager Corporate Services) also exercise material influence on NGL. NGL also has one independent director, as required by its existing exemption (which was granted by the Commerce Commission in 2006, when the plant's output was expanded from 12MW to 34MW).

20. Top Energy has indicated it will increase the number of independent directors to two on each board when the Ngawha expansion is commissioned, as now required by rule 7 of Schedule 3 of the Act. However, ERANZ does not think that compliance with rule 7 will provide any material abatement to the ability and opportunity of the board and senior management to make decisions in the governance of Top Energy and NGL which favour the interests of the Top Energy group.

21. The substantial majority of directors on both boards will continue to be part of the Top Energy group, as will its senior management advisers. Indeed, as noted above, the business case for the expansion assumed common management. This is a material departure from the arm's length rules.

22. ERANZ is concerned about the incentives this departure will have on the emerging network-support services market, given the incentives network companies have for self-supply when operating in an environment where the size of the regulated asset base is a key driver of their returns.

23. We also have concerns that the adverse competition effects in local (generation, wholesale and hedge) markets will not be fully addressed by the proposed prohibition against sale to end users on the Top Energy distribution network. This condition could be extended to Northpower's network as well[4].

24. ERANZ notes that, if the exemption is granted, investors competing or seeking to compete with NGL will be entirely reliant on the efficacy of:

    (a) Part 6 of the Electricity Industry Participation Code 2010 (**the Code**) to;

        i. facilitate the initial connection to Top Energy's distribution network; and

        ii. regulate ongoing connection terms

    (b) the input methodologies (**IMs**) for ensuring there is no cross-subsidisation of the generation and network businesses; and

    (c) the arm's length rules in Schedule 3 of the Act for ensuring that all business decisions by Top Energy and NGL will be made on the same basis as would have been made if NGL and Top Energy were in separate ownership.

25. We are not as optimistic as the Authority on these matters. In relation to the Authority's view that the remaining arm's length rules (excluding 9 and 10 from which Top and NGL would be exempt) will be sufficient to ensure business decisions are made in the same way they would have been if the exemption had not been granted, this seems flawed as a matter of simple construction. Rule 11 of the arm's length rules provides that businesses subject to the arm's length rules may not disclose restricted information to each other. Restricted information is information not available to competitors that would put one of the businesses in a position of material competitive advantage. However rule 11(3) qualifies the application of rule 11, and states that a manager who is not restricted from being a manager of both businesses under rule 9 may use restricted information provided that does not contravene the other arm's length rules. No other arm's length rules restrict the use of restricted information. Thus the effect of exempting the relevant managers from rule 9 appears to be to also allow them, in accordance with rule 11(3), to legally use Top's restricted information to the advantage of NGL.

[4] While we understand and acknowledge that Top Energy's and Northpower's distribution networks are linked only via Transpower's transmission network, and that under Part 3 there are different thresholds for grid-connected generation, we believe the specific topography of the grid in the top of the North Island may have been a relevant consideration.

26. Further, it is exceptionally difficult to cover off all risks in legislative frameworks. For example, although Part 6 of the Code provides a basis for initial connection by distributed generation to a distribution network on the basis of default terms:

    (a) there is considerable variation amongst network companies on the application on the pricing principles included within those terms; and

    (b) a network company is able to amend its connection and operation standards at will – including in ways which could add cost to distributed generation after it is installed.

27. The current voluntary nature of the use of system agreements and distribution pricing principles also provide room for risk allocations and charging structures to be adopted which are not as favourable to NGL's competitors.

28. A number of ERANZ members have reservations about whether the IMs, as currently drafted, are effective in removing all opportunities for cross-subsidisation between Top Energy and NGL.

29. ERANZ also notes the IMs are drafted to protect the interests of the consumers of network services, not the interests of investors in distributed energy resources or consumers of electricity supply services.

30. It is also relevant that on many of the areas where there is interface between the network company and competitors to its generation business (such as access terms and charging structures) there are a range of choices which can be adopted. This is also true for investment in network support services. In such circumstances, it can be very difficult for an external party to establish the particular motives for the choices selected. This impacts on the availability of legal remedies.

31. Thus, a key advantage of the "bright line" operational separation rules is the complete removal of the opportunity for "favouritism" when exercising legitimate choices about network access terms or network investment opportunities. We are troubled by the concept that this bright line test will be undermined by a presumption that this bright line can be waived if an applicant "passes" a substantial lessening of competition test. We do not think that was the intention of Parliament when it set the current threshold.

32. We acknowledge that section 90 of the Act allows the Authority to grant exemptions, but we think these should be reserved for unusual situations and cases of inconsequential breach of the operational separation rules.

Ngawha's unique circumstances

33. The applicants state in their application for exemptions from the operational separation rules in the Act that Top Energy's circumstances are unique in that "*very few network companies own generation with the capacity of Ngawha*".

34. This is simply because the other network companies sold their generation in accordance with the requirements of the Electricity Industry Reform Act 1998 (**EIR Act**). The purpose of the EIR Act was to encourage competition in the generation and retail parts of the sector, and to prevent cross-subsidisation from lines companies. Structural separation was originally required because of the difficulty of administering the other forms of separation.

35. The Ngawha power station was granted a statutory exemption from this mandated split because it had just been constructed, and was considered too small to have adverse competition effects. The current form of this original statutory exemption has been rolled forward into Clause 3 of Schedule 2 of the Act which exempts businesses:

    (a) that generate from a geothermal energy source if the plant was commissioned between 1 January 1998 and 1 January 2009 (*Ngawha was commissioned on 14 June 1998),*

    (b) are currently owned by the person who commissioned it (*There have been no ownership changes of the Ngawha power station*); and

    (c) have an output less than 12 MW (*This was the original capacity of the Ngawha power station before its expansion in 2006*).

36. Relevantly, the heading for this section is "**Interests in generators that are too small to count for the purposes of Part 3**". This gives an idea of where in 2010 Parliament thought the threshold for exemption from the separation rules should lie.

37. ERANZ is sympathetic to the need for the original statutory exemption, as at the time of construction of the Ngawha power station there was no constraints on the ability of Top Energy to own and operate generation as well as carry on its own network business. However, once NGL decided to expand the plant to 32 MW its ability to rely on this statutory exemption ceased.

38. It follows that the plant must now be assessed on the same basis as the rest of the sector.

39. ERANZ does not agree with the applicant's contention that the Commerce Commission's decision in 2006 "*establishes the factual position that Ngawha's current exempted*

generation capacity of 42MW has no adverse effects" or with the argument that as 50MW is permitted by the Act, all that needs to be assessed is the increase beyond that 50 MW threshold.

40. Instead, we agree with paragraph 5.12 of the Authority's draft decision that the:

> "*competitive effects, and related incentives, must be considered in regard to the total involvement*".

Proposed term of exemption

41. Given the rapidly changing landscape we were surprised to see a proposed term for the exemption of ten years. This is longer then the certainty provided by default price quality paths (five years), IMs (seven years) and the rules in the Code which generally can be changed by the Authority at any time provided the process requirements in section 39 are followed.

42. Furthermore, we found it difficult to reconcile the Authority's counterfactual[5]:

> *"The Authority considers that Top would proceed with the expansion of Ngawha regardless of whether the exemption is granted. Proceeding with the Ngawha exemption without an exemption would mean that Top, NGL and their directors would need to comply with all arm's length rules"*

with its grant of an exemption for a ten-year term[6]:

> *"The Authority considers 10 years is appropriate to provide a level of certainty to Top and NGL for their investment, while accounting for the high possibility of major changes in the electricity industry that could impact on the relevant markets".*

Concluding remarks

43. In summary, our view is that a cross-governance of a 64MW power station in the context of an originally permitted *de minimis* of 12MW for the same power station is a very significant departure from the operational separation rules.

44. ERANZ thinks there are risks that this proposal to permit non arm's length relationships, will create both the incentive and the opportunity to inhibit competition, including competition from distributed energy resources and in local electricity markets, and therefore do not think it should be permitted – and certainly not for a ten-year term.

[5] para 5.10

[6] para 7.88

45. Thank you for the consideration of this submission. We are happy to discuss any parts of this submission in more detail if required.

Yours sincerely

Jenny Cameron
Chief Executive
Electricity Retailers' Association of New Zealand

Appendix A: Legislative history of lines/energy structural and corporate separation

Legislation /Dates	Legislative change	Explanation and rationale for policy change	Position of Ngawha
Electricity Industry Reform Act 1998 8 July 1998	**Ownership Separation** **Section 17 Cross-ownership prohibition** 17 (1) No person involved in an electricity lines business may be involved in an electricity supply business. (2) No person involved in an electricity supply business may be involved in an electricity lines business. **Section 28 Exemption for existing involvements until separation** 28 (1) A person is exempt from the ownership separation rules in respect of that person's existing cross-involvements. (2) This exemption applies until whichever is the earlier of the close of **31 December 2003** or the date on which the person first complies with the ownership separation rules. *(emphasis added)* **Corporate separation** **Section 24 Corporate separation** 24. Every person that carries on an electricity business that is exempt from complying with the ownership separation rules by reason of any of sections 28 to 35 (interim exemptions) or sections 37 to 45 (mirror trusts) must, from 1 April 1999, carry on its electricity lines business and its electricity supply business in different companies. **Operational separation** **Section 25 Arms lengths rules** 25 (1) Every person that is involved in an electricity business and that is exempt from complying with the ownership separation rules by reason of any of sections 28 to 35 (interim exemptions) or sections 37 to 45 (mirror trusts), and every electricity business in which any such person is involved, must, from 1 April 1999, comply, and ensure that that person's electricity businesses comply, with the arm's length rules. (2) For that purpose, references in the arm's length rules to business A and business B are references only to the electricity lines business and electricity supply business in which the exempt person is involved. (3) A transfer that implements a separation for the purposes of section 24 need not be on an arm's length basis, but the outcome of the separation must enable compliance with the arm's length rules.	The Act required full ownership separation of distribution (lines) businesses from supply (retail and generation) businesses. The main reasons for the separation were to encourage competition in generation and retailing and to prevent cross-subsidisation of generation and retailing from lines customers. There was an interim exemption for compliance with the ownership separation rules until 31 December 2003, provided that the lines and electricity supply businesses complied with the corporate separation and arm's length rules.	Ngawha was commissioned on 15 June 1998. Top Energy was in the same position as other energy supply businesses. It was required to divest from either its lines or generation businesses by 31 December 2003.

Legislation /Dates	Legislative change	Explanation and rationale for policy change	Position of Ngawha
Electricity Industry Reform Amendment Act 2001 8 August 2001	**Amendment to the definition of "electricity supply business"** The meaning of "electricity supply business" in section 5(2) of the principal Act is amended by repealing paragraph (e), and substituting the following paragraphs: (e) generating electricity from distributed generation, and selling the electricity generated, where— • the generating capacity of the distributed generation is no more, at any one time, than the greater of 5 MW (determined according to nameplate or nameplates) and 2% of the maximum demand, in the immediately preceding financial year, of the system to which the distributed generation is connected; and • the distributed generation is owned or operated by a business that also conveys electricity by line and that distributed generation is connected to those lines: (emphasis added) **New section 19(1) (ga) to disregard involvement in geothermal less than 12MW** **Section 19 Certain businesses involvements to be disregarded** 19 (1) For the purposes of this Act, no account is to be taken of a person's business, or involvement or interest in a business, if—(ga) that person is involved because the person has an interest in a business that generates electricity from a geothermal energy source if—the geothermal plant was commissioned between 1 January 1998 and the date on which this paragraph comes into force, and is currently owned by the person that commissioned it; and i. the output from the geothermal plant is less than 12 MW (determined according to nameplate or nameplates). **Exemption from ownership separation rules for new distributed generation from a new renewable energy source** A (1) The following activities do not cause any person to breach the ownership separation rules: (a) generating electricity from new distributed generation using only— i. a new renewable energy source; or ii. a new renewable energy source and fossil fuels if fossil fuels provide no more than 20% of the total fuel energy input for the	In 2001 there was a relaxation of rules on ownership of electricity generation by lines companies in three respects. First, the rules were relaxed by providing that locally connected distributed generation of no more than 5 MW nameplate capacity (or 2% of the maximum demand of the system to which the distributed generation is connected) which is owned or operated by a lines company and connected to that lines company's network does not make that lines company involved in an "electricity supply business", and therefore the separation of ownership (and hence the corporate separation and arm's length rules) would not apply. The 5MW de minimis figure was a policy decision based on the industry at the time. Second, businesses and involvements to be excluded from the operation of the rules now included involvement in geothermal generation where the plant was commissioned between 1 January 1998 and 8 August 2001 and the nameplate/output is less than 12 MW. The result would be that the separation of ownership rules (and hence the corporate separation and arm's length rules) would not apply. This carve-out appears to be specifically targeted at Ngawha. The third relaxation was the allowance of unlimited ownership in new distributed generation from new renewable energy sources (as those terms were defined). The purpose of this exemption was to promote investment in new renewable energy. However, the exemption from the ownership separation rules only applied if the corporate separation and arm's length rules were complied with.	In relation to the **three** changes: 1. Ngawha did not fall under the relaxation of the definition of "electricity supply business" as its nameplate capacity exceeded 5MW or 2% maximum demand. 2. The apparently bespoke exemption for Ngawha under 19(1)(ga) meant Top Energy's ownership and therefore involvement in Ngawha was to be disregarded for the purposes of the Act. Top Energy was therefore permitted to own and operate Ngawha without the need to comply with the corporate separation or the arm's length rules. 3. In 2001 Ngawha's existing generation was not "new distributed generation" as it was already existing at the date of the amendment, nor was it from a "new renewable energy source" as the definition of new renewable energy source did not include a geothermal plant that has an aggregate generating capacity (determined according to nameplate or nameplates) of more than 5 MW, unless approved by the Minister.

Legislation /Dates	Legislative change	Explanation and rationale for policy change	Position of Ngawha
	generator or generators comprising the generation plant in any 12-month period or any larger amount approved by the Minister under subsection (3): (b) selling electricity referred to in paragraph (a): (c) owning or operating, directly or indirectly, new distributed generation, or any other core generation assets used in connection with new distributed generation, that is capable of generating electricity referred to in paragraph (a). (2) Subsection (1) applies only if and as long as sections 24 and 25 are complied with (corporate separation and arm's length rules). **new generation** means generation that is not existing on the date on which this section comes into force **new renewable energy source** means an energy source that occurs naturally and the use of which will not permanently deplete New Zealand's energy sources of that kind, because those sources are generally expected to be replenished by natural processes within 50 years or less of being used; but does not include hydro or geothermal energy sources at a generator or generators comprising a generation plant that has an aggregate generating capacity (determined according to nameplate or nameplates) of more than 5 MW, unless approved by the Minister under subsection (3).		
Electricity Industry Reform Amendment Act 2004 17 October 2004	**Exemption from ownership separation rules for new non-renewable generation** 46 C (1) The following activities do not cause any person to breach the ownership separation rules: (a) generating electricity from generation commissioned on or after 20 May 2003, and selling the electricity generated, if the generating capacity of the generation is no more, at any one time, than the greater of 50 MW (determined according to nameplate or nameplates) or 20% of the maximum demand, in the immediately	The Act was amended in 2004 with the intention of relaxing the principle of ownership separation to allow for cross ownership to exist in particular circumstances with respect to generation other than a new renewable energy source (so long as the corporate separation and arm's length rules are complied with). The amendment was designed to facilitate the investment by lines companies in new non-renewable generation up to a nameplate/s capacity of 50MW or 20% of the	This section did not apply as Ngawha was not commissioned after 20 May 2003, and in any case, Top Energy did not wish to comply with elements of the arm's length rules as required by subsection (2).

Legislation /Dates	Legislative change	Explanation and rationale for policy change	Position of Ngawha
	preceding financial year, on the lines owned or operated by the person: (b) generating reserve energy and selling the electricity generated in accordance with the terms and conditions for that reserve energy set by the Commission, as those terms are defined in the Electricity Act 1992. (2) Subsection (1) applies only if and as long as sections 24 and 25 (corporate separation and arm's length rules) are complied with.	maximum demand on the lines company's network.	
2006	N/A	N/A	Ngawha's proposed 2006 increase to 42 MW would take it out of its exemption under s 19(1)(ga) Sections 46A and 46C did not apply for the reasons described above. Top Energy applied for, and was granted, a Commerce Commission exemption from elements of the arms lengths rules.
Electricity Industry Reform Amendment Act 2008 16 September 2008	**New ownership separation rules** **connected generation**, in respect of a person, means generation in which the person is involved that is connected to a line in which the person is involved, if the generation and the line are within the same local network area. **Section 17 Ownership restrictions** (1) The purpose of this section is to prevent a person being involved both in a line, and in generation or supply, in certain circumstances. (2) It is a contravention of this Part if a person has an involvement that is a breach of either or both of the following: (a)the connected generation cap: (b)the connected customers selling cap. **Section 17A Connected generation cap rule** (1) The connected generation cap is breached by a person if— (a) any of the person's connected generation with a capacity greater than 5 MW in total (determined according to nameplate or nameplates) was commissioned before 20 May 2003; or	The objective of the 2008 amendment was to encourage the owners of lines businesses to invest in permitted generation, especially generation from renewable energy sources. This policy objective was achieved by: • allowing electricity generated from permitted generation to be traded via financial hedges to manage spot market risks; • lowering the cost of corporate separation and compliance with arm's-length rules by raising the threshold for requiring compliance to 10 MW (up from the higher of 5 MW or 2% of maximum demand); • allowing the same person to be a director of both lines and supply (generation and retailing) businesses, while requiring at least one independent director and not permitting executive directors; • allowing the same person to be a manager of both companies up to a threshold of 30 MW (Joint staff and premises are permitted without limit).	Top Energy's exemption for Ngawha under section 81 continued as it would still exceed the new de minimis 10 MW threshold for the arm's length rules.

Legislation /Dates	Legislative change	Explanation and rationale for policy change	Position of Ngawha
	(b) the person's connected generation has a total capacity (determined according to nameplate or nameplates) that exceeds the greater of— i. 50 MW; or ii. 20% of the average of the maximum demand, in the immediately preceding 3 financial years, on the local network area. This section is subject to section 17B. **Section 17B Small or encouraged connected generation** The following connected generation is not counted for the purpose of section 17A (but is counted for the purposes of section 17D, which relates to the threshold for corporate separation and arm's-length rules): (a) generation commissioned on or after 8 August 2001 if the electricity generated from it is produced only from renewable energy sources: (b) generation commissioned on or after 8 August 2001 if the electricity generated from it is produced partly from renewable energy sources, as long as fossil fuels provide no more of the total fuel energy input for the generator or generators comprising the generation plant in any 12-month period than— i. 20%; or ii. any larger amount approved by the Minister (on the conditions, if any, he or she thinks fit) after first taking into account whether or not the generation uses new or advanced technology: (c) generation where the total capacity (determined according to nameplate or nameplates) of the generator is 5 MW or less if the generation was owned or operated, directly or indirectly, by the relevant person— i. before 23 June 1998; and	The second main change narrowed the scope of ownership separation requirements to focus on the geographic areas where there is potential for the exercise of market power and anti-competitive practices – namely, where lines and supply are co-located. This was achieved by allowing owners of lines businesses to be involved in generation and retailing without limits outside of their lines area. Requirements for corporate separation and compliance with arm's length rules outside their lines area were also to be repealed. Existing ownership separation rules were retained where lines and supply are co-located, because co-owned, co-located lines and supply businesses have both incentive and ability to lessen competition in retailing and local generation. Ownership separation removes this incentive and ability. Where co-located cross-ownership of lines and supply was permitted in order to encourage investment in permitted generation, corporate separation and the requirement to act on an arm's length basis was retained in order to reduce the risks of anti-competitive behaviour. The third main change amended the definition of renewables. Previously the owner of a lines business could only invest without quantity limitations in "new renewables", which were defined to exclude hydro and geothermal generation using traditional technologies. The new definition included all renewables, to reflect the government's policy of encouraging the development of renewable energy. Because s 46A was repealed, this definition applied to the new section 17B (encouraged connected	

Legislation /Dates	Legislative change	Explanation and rationale for policy change	Position of Ngawha
	ii. continuously between that date and the date when the person counts that generation for the purposes of section 17A: (d) generation that is disregarded under section 19. **Corporate separation and arm's-length rules** **Section 17D Threshold for corporate separation and arm's-length rules** A business is a **connected electricity business** if the business, or a person involved in the business, has an involvement in more than 10 MW (determined according to nameplate or nameplates) of connected generation (including any connected generation referred to in section 17B and any generation that the Commission has determined under section 17C(2) should be treated as being within a local network area). **Section 17E Corporate separation and arm's-length rules imposed** (1) Every person or persons who carry on a connected electricity business must carry on the business involving the relevant line in a different company from the company that carries on the business involving the qualifying generation or the selling to connected customers. (2) Every person who is involved in either of the connected electricity businesses must comply, and ensure that the person's electricity businesses comply, with the arm's-length rules. **Definition of renewable energy source** **renewable energy source** means solar, wind, hydro, geothermal, biomass, tidal, wave, ocean current sources, or any other energy source that occurs naturally and the use of which will not permanently deplete New Zealand's energy sources of that kind, because those sources are generally expected to be replenished by natural processes within 50 years or less of being used. ***Removal of exemption for new renewable and new non-renewable generation*** Sections 46A and 46C were repealed.	generation). NB: the renewables still needed to be commissioned after 8 August 2001.	
Electricity Industry Act 2010 5 October 2010	**Section 75 Ownership separation** (1) A person who is involved in a distributor must not be involved in 1 or more generators that have a total capacity of more than 250 MW that is generated by 1 or more generating plants that are directly connected to the national grid.	Whilst owners of lines businesses can be involved in distributed generation without limit outside of their lines area (as was introduced by the 2008 amendment) there is now a prohibition on involvement in more than 250MW of generation directly connected to the national grid.	Top Energy's Commerce Commission exemption became redundant on the enactment of the 2010 Act. Ngawha's current generation is under the connected generator threshold of 50MW so it does not have to comply with the arms length or corporate separation rules and could apply

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	(2) To avoid doubt, generation connected to a distribution network is not directly connected to the national grid. **Corporate separation and arm's-length rules** **Section 76 Corporate separation and arm's-length rules applying to distributors and connected generators and connected retailers** (1) The person or persons who carry on the business of distribution must carry on that business in a different company from the company that carries on the business of connected generator or a connected retailer. (2) Every person who is involved in a distributor, and every person who is involved in a connected generator or a connected retailer, must comply, and ensure that the person's businesses comply, with the arm's-length rules. (3) In this section, unless the context otherwise requires,— **connected generator**, in relation to a distributor, means a generator— (a) that has a total capacity of more than 50 MW of generation that is connected to any of the distributor's networks; and (b) in respect of which the distributor, or any other person involved in the distributor, is involved.	There is no longer an exception for renewables, so any renewables connected to the grid are subject to the 250MW prohibition. The de minimis threshold for the arms length and corporate separation rules was raised to a total capacity of 50 MW.	for the Electricity Authority to remove the current exemption. However, the proposed expansion to 65 MW does require an exemption and Top Energy has now applied for an exemption from certain arms length rules.