



Richard Fletcher
richard.fletcher@transpower.co.nz

1 May 2009

Bronwyn Christie
Electricity Commission
PO Box 10041
WELLINGTON 6143

Dear Bronwyn

Re: Draft Electricity Rulings Panel Procedures 2009

This is Transpower New Zealand Limited's submission on the draft Electricity Rulings Panel Procedures 2009 ("Procedures") recently published by the Electricity Commission.

General Comments

The summary of the Procedures is lengthy and, apart from paragraphs 1, 2 and 4, appears to serve little purpose. It is also not clear what the status of the summary is vis-à-vis the Procedures proper. Transpower recommends that paragraphs 1, 2 and 4 of the summary be retained (as an introduction and application of the Procedures, rather than a summary) and the remainder deleted as unnecessary.

Many relevant provisions of the Electricity Governance Regulations 2003 have been replicated in the Procedures, but some have been omitted. It would be helpful if the rationale supporting the decisions to omit particular provisions but include others could be provided. By way of example, the reasons for the following omissions are unclear:

- The provisions of regulation 134 of the Electricity Governance Regulations 2003, which relate to final decisions of the Rulings Panel, do not appear to have been replicated in the draft Procedures; in Transpower's view, they should be. Regulation 134 states:

134 Rulings Panel decisions

- (1) The Rulings Panel must use reasonable endeavours to make its final decision on each matter under its consideration within 40 working days of the date that it has received all written and oral submissions on the matter.
- (2) The Rulings Panel must give the decision, in writing and together with the reasons for the decision, to the participants that were entitled to be heard under regulation 95(2).
- (3) The Rulings Panel must notify the decision to the [Commission] as soon as practicable after it has made a final decision.

- Regulation 178 of the Electricity Governance Regulations requires the Rulings Panel to keep confidential all information provided or disclosed to it under the regulations or the rules except in particular circumstances. This provision is not replicated in the draft Procedures, although regulation 179, which permits the Rulings Panel to prohibit the publication of information, is replicated. The Rulings Panel may be called on to make decisions in relation to transmission agreement disputes. Such disputes are between two contracting parties and, in Transpower's view, information relating to them should be kept confidential unless disclosure is legally required for a specific purpose. Transpower therefore recommends that a provision replicating regulation 178 of the Electricity Governance Regulations 2003 be incorporated into the Procedures.

Specific Comments

Clauses 1.5, 1.6 and 2.5 – varying procedures versus procedural directions with respect to submission timings

When the Rulings Panel has given directions as to the timing of submissions and cross-submissions, it has been unclear whether it has been varying the procedures in clause 2.5 using the provisions in clause 1.5 or merely issuing, or purporting to issue, a procedural direction under clause 1.6. Transpower has assumed the latter, because there has been no evidence that the submission timings have been "publicised" (in the sense used in the Electricity Governance Regulations) under clause 1.5(2) of the procedures.

This is a significant concern, because the Rulings Panel's directions as to the timing of submissions have conflicted with the deadlines set out in clauses 2.5(2) and (3) (i.e. the deadlines set by the Rulings Panel have been earlier and have consequently limited the number of submissions allowed). However, a procedural direction that conflicts with the procedures is not permitted under clause 1.6. The result has been uncertainty as to when submissions are in fact required and how many there will be.

Transpower's recommended solution to this problem is to amend clause 2.5 to make the timing of submissions a matter for routine procedural directions under clause 1.6. The heading of clause 2.5 should also be amended, as the clause relates to submissions and evidence whether or not a hearing is to be held.

As an aside, we note that the cross-references in clause 1.7(1) to clauses 1.4 and 1.5 should be to clauses 1.5 and 1.6.

Clause 1.12(3) – self-incriminating evidence

Clause 1.12(3) has been added in reliance on section 172KC of the Electricity Act 1992. That section states that a person under investigation by the Electricity Commission is not excused from providing self-incriminating evidence, but that the evidence cannot be used in Rulings Panel proceedings except insofar as it is introduced as part of the self-report evidence.

If the Rulings Panel is not permitted to use self-incriminating evidence, then it is not clear why there is a prima facie obligation in clause 1.12(3) for it to be provided to the

Rulings Panel in the first place outside of the self-report. The provision makes no sense. Consequently, Transpower recommends that the first sentence of clause 1.12(3) be deleted.

Clause 1.15 – changes to draft decisions

Decision No. 3 of the Rulings Panel was issued initially in draft under clause 1.15. The parties to the proceedings were given an opportunity to comment on the draft decision, which they did.

When the final decision was issued there were two very significant changes:

- a dissenting decision by one of the Rulings Panel members had been removed; and
- the penalty had been increased by one third (from \$6,000 to \$8,000).

Transpower was not given an opportunity to comment on whatever third party submissions the Rulings Panel relied on when making those significant changes. In Transpower's view, that was a serious process failure by the Rulings Panel and inconsistent with the emphasis in the procedures on natural justice and allowing opportunities for cross-submissions.

Although clauses 1.15(3) and (4) have been added, they do not go far enough to prevent a repeat of this incident, as too much discretion is left with the Rulings Panel. There should instead be a requirement to share any submissions received, and allow time for cross-submissions, if the Rulings Panel is considering making any significant change to a draft decision.

Clause 1.15 – power to give copies of draft decisions and comments received on draft decisions to “such persons as it sees fit”

Clause 1.15(1) of the draft Procedures permits the Rulings Panel to prepare a draft decision, determination, order, penalty or award and give a copy of the draft to “such persons as it sees fit”. In Transpower's view, this is far too broad. Copies of draft decisions, etc, should be provided to the parties to the proceedings, but should not be provided to other parties. Consequently, Transpower recommends that clause 1.15(1) be amended by omitting the words “such persons as it sees fit” and substituting “the parties to the proceedings”. For the same reason, subclause (3) of clause 1.15 should not permit the Rulings Panel to give a copy of any comments it receives to “such persons as it sees fit” – these words should also be deleted and substituted by “the parties to the proceedings”.

Clause 1.15 – period specified for provision of comments should be reasonable

In subclauses (2) and (4) of clause 1.15, Transpower recommends that the expression “a period specified” be deleted and “a reasonable period specified” be substituted.

Clause 4.1(1) – incomplete replication of rule 6.1 of section II of Part F

Clause 4.1(1) sets out the disputes arising from the negotiation of transmission agreements that may be referred to the Rulings Panel. However, the rule referred to (rule 6.1 of section II of Part F) is not replicated completely – other matters such as those specified in rules 6.1.4 and 6.1.5 of section II of Part F are omitted without any rationale provided for so doing. Transpower recommends that the provisions of rule 6.1 of section II of Part F be replicated in their entirety.

Clause 4.2 – ability of other designated transmission customers to join a dispute arising from the negotiation of a transmission agreement

Clause 4.2 provides for a dispute between two parties to be publicised and for any other designated transmission customer to become a party to the dispute, provided the Rulings Panel has been notified in writing that the third party considers that it is affected by the subject of the dispute and the Rulings Panel agrees that it should become a party to the dispute. In Transpower's view, this is inappropriate. Disputes arising from the negotiation of transmission agreements are contractual and should be limited to the two parties to the contract or prospective contract. Other designated transmission customers should not be permitted to join.

Clause 4.3(10(b) – discretion for Rulings Panel to make a dispute hearing private

Clause 4.3(1)(b) provides for the Rulings Panel to decide "whether to make that hearing private". In Transpower's view, disputes arising from the negotiation of transmission agreements are contractual and therefore should be private, with hearings restricted to the two parties to the dispute.

Yours sincerely



Richard Fletcher
Regulatory Strategy Manager