

BEFORE

The Electricity Rulings Panel

BETWEEN

Transpower New Zealand Limited
Disputant

AND

The Electricity Authority
Respondent

UNDER

The Electricity Industry Act 2010 (the Act), The Electricity Industry (Enforcement) Regulations 2010 (the Regulations), The Rulings Panel Procedures 2017 (the Procedures) and The Electricity Industry Participation Code 2010 (the Code), and

IN THE MATTER OF

A disputed determination as to the causer of an Under Frequency Event (UFE) on 14 December 2018, referred to the Electricity Rulings Panel under Clause 8.62 of the Electricity Industry Participation Code by Transpower New Zealand Limited

Rulings Panel Decision

Transpower as Grid Owner was the causer of the 14 December 2018 Under Frequency Event.

Rulings Panel Members:

Mel Orange	Chair
Geraldine Baumann	Deputy Chair
Lee Wilson	Panel Member

Table of Contents

Procedure	2
Introduction	2
The UFE	3
The dispute	4
Causer	4
The UFE regime	5
Transpower’s submissions on the (a)(i) definition	5
The Authority’s submissions on the (a)(i) definition	6
Transpower’s submissions in reply	7
Post Draft Decision Submissions	7
Was Transpower as Grid Owner the causer under (a)(i) of the definition?	7
Force majeure events and provisions.....	8
The 6 June 2014 Rulings Panel decision.....	10
Transpower’s submissions on the exclusion in (c)	11
The Authority’s submissions on the exclusion in (c)	12
Transpower’s submissions in reply	13
Post Draft Decision Submissions	14
Does the exclusion in (c) apply?	14
Panel’s Orders	17
Costs	17
Publication	18

Procedure

- [1] On 13 July 2020, the Panel issued a Draft Decision¹ and called for submissions. Both parties filed further submissions. Neither sought a hearing. The Panel has considered them and made the following final decision.

Introduction

- [2] This decision arises out of an Electricity Authority (the Authority) determination that Transpower New Zealand Limited (Transpower) as Grid Owner was the causer of an under frequency event (UFE) which occurred on 14 December 2018. The Authority considered the circumstances of the UFE met the definition causer in the Code and that an exception in subclause (c) of the definition did not apply.

¹ The Draft Decision was issued under the provisions of clause 1.19 of the Rulings Panel Procedures 2017

- [3] Under cl 8.60 of the Code, the System Operator must investigate the causer of a UFE and provide a report to the Authority with its view as to the identity of the causer. The Systems Operator reported that, in its view, there was no causer of the UFE.
- [4] Clause 8.61 of the Code requires that the Authority, following receipt of the System Operator report, determine the identity of the causer using a draft and then final determination. The Authority released its Draft Determination on 16 July 2019 identifying the Grid Owner as the causer. As required, the Authority called for submissions and, on 14 January 2020, it published an un-dated Final Determination confirming its determination that Transpower, as Grid Owner, was the causer.
- [5] Any party that is substantially affected by a UFE determination can refer the matter to the Rulings Panel under cl 8.62 of the Code.
- [6] On 28 January 2020 Transpower, as an affected party, filed a Notice of Commencement with the Rulings Panel seeking the following relief:
- Transpower seeks a determination by the Rulings Panel that there was no causer of the 14 December UFE, and substitution of this determination for the Authority's final determination under clause 8.63(1)(c) of the Code.*
- [7] On 4 March a Revised Procedural Directions Notice was issued providing a timetable for filing submissions. Following the parties filing submissions, the Rulings Panel issued a Procedural Notice to ascertain if a hearing was required. The parties consented to the Rulings Panel deciding the matter on the papers.

The UFE

- [8] The parties to the dispute agreed on the facts as set out in the Notice of Commencement. Those facts were that on 14 December 2018, the generation bus at Huntly power station was split as part of a planned outage for maintenance work between 9.30 am and 3.00 pm. This meant that generating unit 4 at Huntly power station (Unit 4) was connected to the grid through only one circuit of the double circuit 220 kV transmission line between Huntly and Stratford – the Huntly-Stratford one circuit (the Circuit).
- [9] At 12.20 pm on 14 December 2018, lightning struck the Circuit in North Taranaki. Transpower's protection system for the Circuit detected the disturbance created by the lightning strike and the Circuit automatically disconnected to prevent further damage. The protection system operated correctly and as intended. The disconnection of the Circuit removed Unit 4 from the power system, which resulted in the frequency in the North Island falling to 49.207 Hz. This constituted an under-frequency event (UFE).

The dispute

- [10] The fundamental difference in the positions of the parties is that the Authority considers that Transpower met the definition of “causer” in the Code and that an exception provided for in subparagraph (c) of the definition was not available to Transpower.
- [11] Transpower, in turn, submits that its property did not cause the interruption of electricity that led to the UFE, in terms of the definition of causer. It further submits that if it was the causer, then the exception in subparagraph (c) applies.

Causer

- [12] The Code defines “causer” in Part 1, Preliminary Provisions, as:

causer, in relation to an under-frequency event, means—

- (a) if the under-frequency event is caused by an interruption or reduction of electricity from a single generator’s or grid owner’s asset or assets, the generator or grid owner; unless—
- (i) the under-frequency event is caused by an interruption or reduction of electricity from a single generator’s asset or assets but another generator’s or a grid owner’s act or omission or property causes the interruption or reduction of electricity, in which case the other generator or the grid owner is the causer; or
- (ii) the under-frequency event is caused by an interruption or reduction of electricity from a single grid owner’s asset or assets but a generator’s or another grid owner’s act or omission or property causes the interruption or reduction of electricity, in which case the generator or other grid owner is the causer; or
- (b) if the under-frequency event is caused by more than 1 interruption or reduction of electricity, the generator or grid owner who, in accordance with paragraph (a), would be the causer of the under-frequency event if it had been caused by the first in time of the interruption or reduction of electricity; but
- (c) if an interruption or reduction of electricity occurs in order to comply with this Code, the interruption or reduction of electricity must be disregarded for the purposes of determining the causer of the under-frequency event

The UFE regime

- [13] Under frequency events are provided for in Part 8 of the Code which deals with Common Quality. Subpart 6 deals with allocating costs for ancillary services. Included are provisions which stipulate how “event charges” payable by a causer are to be calculated and paid².
- [14] The Authority submits that the UFE regime operates on a strict liability basis and that, during policy design, there was a deliberate decision to allocate event charges to a causer even where the root cause of the event was a force majeure type event. Transpower submits that force majeure type events can, nevertheless, be taken into account when considering the root cause of a UFE and in determining the causer.

Transpower’s submissions on the (a)(i) definition

- [15] Transpower’s position was that the lightning strike was the real cause of the UFE and, as such, there was no “causer” and that pursuant to a 6 June 2014 decision of the Rulings Panel it was possible for there to not be a causer. It submitted that the paragraph (a)(i) definition requires an inquiry beyond the immediate cause of the interruption and that, if this is done, the cause of the interruption was Transpower’s protection system operating, as designed and as required by the Code, to disconnect the Circuit when it was struck by lightning. It submitted there was not any suggestion that there was any act or omission of Transpower that was causal.
- [16] Transpower took issue with the Authority’s strict liability position. Transpower submitted that the circumstances of the particular event, including some force majeure type events, should be taken into account in determining the causer under paragraph the (a)(i) definition. Transpower noted that it did not engage in conduct that was unreasonable or in any conduct that should be discouraged. It submitted that the Rulings Panel has previously recognised that the reasonableness of the alleged causer’s conduct is a relevant factor in making a causer determination.
- [17] Transpower also made submissions with regard to the impact imposing UFE event charges could have. Firstly, Transpower noted that an event charge did not change the costs of instantaneous reserve procurement, merely the allocation of those costs. Secondly, Transpower submitted that a determination that it was the causer could have the effect of incentivising behaviour that could increase the cost of instantaneous reserve procurement. It submitted that an overly cautious approach to maintenance outages, driven by the risk of being determined a causer if an event occurs, could create an elevated risk of unplanned outages. Thirdly, Transpower submits that the Authority’s incentive argument³ fails in the case of a generator that is connected to the grid by a single circuit as Transpower cannot reduce its risk from a UFE caused by a lightning strike in such a case.

² Clause 8.64 of the Code

³ As outlined in paragraph [24]

[18] Transpower noted:

35. *Transpower submits that it is not possible to reconcile these consequences with the reliability and efficiency limbs of the Authority’s statutory objective, which the Code is required to be consistent with. Transpower also submits that it is not appropriate for the Authority to brush off these consequences on the basis that they could potentially be addressed by way of a Code change. Section 5(1) of the Interpretation Act 1999 requires an enactment (including the Code) to be interpreted “from its text in light of its purpose”.*

The Authority’s submissions on the (a)(i) definition

- [19] The Authority took the position that its interpretation under (a)(i) was available on the clear terms of the Code, that it was consistent with the broader statutory purpose, and that it did not create unexpected incentives. It also submitted that its determination was not inconsistent with an earlier decision of the Panel.
- [20] The Authority did not agree that the paragraph (a)(i) definition required, as submitted by Transpower, an inquiry beyond the immediate cause and to identify the real cause. It submitted that the plain language of (a)(i) only required an inquiry into whether there had been an interruption or reduction in electricity. There was nothing on the face of (a)(i) to suggest that the interpreter should go beyond identifying what the immediate cause was.
- [21] The Authority pointed to the amendments made to the UFE regime in 2010 as reinforcing its position that force majeure did not apply to the determination of a causer. It noted that an April 2010 Consultation Paper on the matter⁴ considered and dismissed causal factors such as weather events.
- [22] The Authority submitted that the reasonableness of Transpower’s actions were not relevant and that the 2014 Rulings Panel decision did not apply to the present case. With regard to the Transpower submission that instantaneous reserve procurement costs were not impacted the Authority’s view was that more frequent UFEs would impact instantaneous reserve prices over time. The Authority did accept that there might be occasions where a UFE was unavoidable, or where it would be costly to avoid an event. It submitted, however, that these factors were considered and implicitly accepted when strict liability was introduced. The Authority noted that if force majeure type exemptions were allowed, it could incentivise asset owners to prove an event was out of their control. It submitted that would be unproductive and undermine the benefits of the strict liability regime. Its submission was that a policy choice was made to proceed with a strict liability risk and cost allocation, as per the present case, in full knowledge of the consequences and of the alternative

⁴ Under-Frequency Event Charge Causer Determination

options⁵. As such, the Authority submitted the determination that Transpower met the definition in (a)(i) should stand.

Transpower's submissions in reply

[23] Transpower reiterated its position that all of the surrounding circumstances of a UFE need to be taken into account in determining whether there is a causer:

7. Transpower submits that the Authority's interpretation of the causer definition, and heavy reliance on statements made by the Electricity Commission when the definition was amended in 2010, gives insufficient weight to the Authority's statutory objective (which the 2010 amendment preceded). The Code is subordinate legislation and is expressly required to be consistent with the Authority's statutory objective contained in the Act. The Panel must consider the statutory objective when it interprets the causer definition. If any authority is needed for this standard proposition, see paragraph [45] of Vector v Transpower.

[24] Transpower submitted that it was not suggesting that a general force majeure exemption be created. Instead, it submitted, all of the surrounding circumstances of a UFE need to be taken into account. It advocated against a "one size fits all" exercise.

Post Draft Decision Submissions

[25] Following the release of the Panel's Draft Decision, Transpower reiterated its earlier submissions. It emphasised its position that the Panel's 6 June 2014 decision was an authority for the proposition that the Panel can find that there is no causer in the present case and that the Panel should look behind the immediate cause to other contributing factors.

[26] The Authority supported the Panels Draft Decision and reasoning.

Was Transpower as Grid Owner the causer under (a)(i) of the definition?

[27] The Rulings Panel finds that Transpower was the causer as per the (a)(i) definition. It prefers the strict liability approach adopted by the Authority. It does not consider that the System Operator or the Authority need to look beyond the immediate cause. In making this decision, the Rulings Panel has decided that force majeure type events do not apply to Part 8 of the Code and that the 6 June 2014 Rulings Panel decision does not support the Transpower submissions.

⁵ Electricity Commission, 'Recommendation to the Minister of Energy and Resources to make amendments to the Electricity Governance Rules 2003: Under-frequency event causer determination', page 31.

Force majeure events and provisions

[28] The Code provides definitions for force majeure for Parts 3, 4 and 13 of the Code and detailed provisions in those Parts for dealing with force majeure events. Part 3 deals with market operation service providers appointed by the Authority to perform specified market roles. Part 4 deals with force majeure provisions relating to ancillary service agents who contract services to the System Operator. Part 13 covers trading arrangements. There is a commonality in the three Parts in that they each cover commercial inter-party arrangements. Part 8 Common Quality, and the other Parts of the Code not covered by force majeure provisions, deal with the fundamental mechanics of the electricity industry.

[29] Where provision is made in one Part of the Code and not in another, the Rulings Panel considers it must follow that the intention was that force majeure would not be available. The result is that those Parts of the Code are strict liability regimes.

[30] The Authority noted, in its Final Determination:

The Code was intentionally drafted so that the determination of causer was clearer and more enforceable. The UFE regime operates on a strict liability basis and there was a deliberate policy choice to allocate an event charge to a “causer” for a UFE even where the root cause of the relevant interruption or reduction in electricity was a force majeure event (such as extreme weather). This was a deliberate policy choice by the Electricity Commission when it added the current causer definition to the Electricity Governance Rules in 2010.

[31] The Rulings Panel was provided with copies of:

- Consultation Paper, Under-Frequency Event Charge Causer Determination, Prepared by the Electricity Commission, April 2010; and
- Recommendation to the Minister of Energy and Resources to make amendments to the Electricity Governance Rules 2003, Under-frequency event causer determination.

[32] The meaning of an enactment is ascertained from its text and in light of its purpose.⁶ The leading case on the interpretation of a statutory provision is *Commerce Commission v Fonterra Co-Operative Group Ltd*.⁷ It establishes the following principles:

- (a) The statutory test must be considered in isolation of purpose to determine its plain and ordinary meaning(s).

⁶ Interpretation Act 1999, s 5.

⁷ *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

- (b) The meaning(s) of the test must then be cross-checked against the purpose of the legislation.
- (c) In determining the purpose, regard must be had to both the immediate and general legislative context; it may also be relevant to consider the social, commercial or other objective of the legislation.

[33] In *R v Pora*, the majority of a Full Bench of Court of Appeal accepted that materials such as select committee reports and parliamentary debates may be relevant to the interpretative exercise.⁸

[34] The Rulings Panel considers the same applies to the interpretation of the Code which, under s 33 of the Act, is a disallowable instrument.⁹ It has adopted the above approach and has used the Consultation and Recommendation papers in ascertaining the meaning of Code provisions.

[35] Using that approach, it finds that Transpower was, using the plain and ordinary meaning of the words in the (a)(i) definition, the causer and that such an interpretation is consistent with the legislative intent of the UFE provisions.

[36] The Rulings Panel notes the submission made by Transpower as regards statutory interpretation and reference to *Vector Ltd v Transpower NZ Ltd*¹⁰ at paragraph [45]. In that case, the Court noted the purposive approach outlined in *Commerce Commission v Fonterra Co-Operative Group Ltd*¹¹ and that the Court could not rewrite a provision of the Code noting:

I must strive of course to find consistency in the words with their statutory purpose, but I may not ignore those words to achieve that purpose except in cases of obvious error – and there is no suggestion of that here.

[37] The wording of (a)(i) supports the definition put forward by the Authority and relied on in its Final Determination. The Rulings Panel does not consider that there is an obvious error in its interpretation. The interpretation adopted is also consistent with the legislative framework. In this respect, the Act creates a regulatory framework for the electricity industry. The Act provides for the Code and states that the Code may contain “provisions that are consistent with the objective of the Authority and are necessary or desirable to promote the reliable supply of electricity to consumers¹² and the efficient operation of the electricity industry.¹³ Section 15 states “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”. There is nothing in the plain words and ordinary meaning of the words in (a)(i) definition that is inconsistent with those purposes. The Rulings Panel does

⁸ *R v Pora* [2001] 2 NZLR 37 (CA).

⁹ Disallowable instruments are provided for in Part 3 of the Legislation Act 2012.

¹⁰ [2014] NZHC 3411

¹¹ *Commerce Commission v Fonterra Co-Operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

¹² Section 32(1)(b) of the Electricity Industry Act 2010.

¹³ Section 32(1)(c) of the Electricity Industry Act 2010.

not see any requirement to look beyond the immediate cause and finds that the Authority's determination that the Grid Owner is the causer is consistent with its statutory objective.

- [38] The Rulings Panel also notes that the overall scheme of Part 8 is to ensure that event costs are allocated to the causer irrespective of intent or other contributing factors¹⁴. This means other participants do not bear event costs, and it places the incentives to prevent events from occurring on those that are best placed to prevent them. Again, the Panel finds that this is consistent with the legislative intent behind the provisions.

The 6 June 2014 Rulings Panel decision

- [39] The Rulings Panel notes that the 2014 decision took issue with the analysis of who the causer was, suggesting that the determination was “a description of the event, not an analysis of its cause”.¹⁵ The 2014 decision noted:

75. *In a dynamic situation, with several potential factors in play such as the HVDC, the obligation remains on the SO to first identify the cause of the UFE.*

76. *Accordingly, we hold that although the 135MW drop load test conducted by Meridian on 1 May was the occasion of the UFE, we do not think the SO has established that that was its cause. It cannot therefore be said that Meridian is the causer of that event under clause 8.61.*

- [40] Transpower submitted that this supported a proposition that the Authority could look beyond the occasion of a UFE. It further submitted that paragraph 82 to 84 of the 2014 decision supported the reasonableness of the alleged causer's conduct being a factor that could be taken into account in determining the causer. The Authority submitted that the references to reasonableness were with respect to the exception contained in paragraph (c) of the causer definition.

- [41] The Rulings Panel notes that paragraph 84 of the 2014 decision stated:

The SO has not established that it was not some other factor, such as the loss of response from the HVDC that caused the problem.

- [42] Paragraph 90 of the 2014 decision stated it was “open to the SO, in the context of the Code, to find that there was no causer”. It is noted, however, that it is the Authority, under cl 8.61, that must “determine whether an under-frequency event has been caused by a generator or grid owner and, if so, the identity of the causer”.

¹⁴ The only exception is that provided for in subclause (c) of the causer definition which is discussed later in this decision.

¹⁵ Rulings Panel decision 6 June 2014 at para 54.

The system operator must investigate, the Authority must determine. As such, it is always open to the system operator to find that there was no causer.

- [43] The 2014 decision went on to note that the system operator had not established the required elements to show who the causer was and in paragraph 92(1) it ruled that the “cause of the UFE remains unknown”.
- [44] The Rulings Panel considers that the 2014 decision, when read in the context, was stating that the cause of the event had not been established and, as such, it was possible to determine that there was no causer. The 2014 decision does not apply to the UFE under consideration.
- [45] In the present case, the cause of the UFE is known. As such, the matter before the Panel can be distinguished from the 2014 Decision. Given that, and the Panel’s interpretation of the wording in (a)(i) that Transpower was the causer, the Panel finds that it is not necessary to look beyond the immediate cause to other or contributing factors.
- [46] The Panel further notes that even if it were to look beyond the immediate cause, Transpower’s own actions were a contributing factor. Those actions are discussed further at paragraphs [66] to [68].

Transpower’s submissions on the exclusion in (c)

- [47] Transpower submits that even if it was the causer under paragraph (a)(i), it is exempt under paragraph (c) because the interruption of electricity occurred in order to comply with the Code. It submitted that the Authority’s position that the Grid Owner is to minimise, but not cause interruptions, cannot be correct.
- [48] Transpower stated:
- 39. The purpose of the protection system in this case was to electrically disconnect the Circuit to prevent further damage to the Circuit and grid-connected assets. The protection system operated correctly and as intended when the Circuit “faulted” due to the lightning strike. Transpower is obliged under clause 4(4)(a) of Technical Code A of Schedule 8.3 of the Code to both have the protection system in place and ensure it operates correctly.*
- [49] Transpower noted that if the protection system had not been in place, or had not operated correctly to disconnect the Circuit when the lightning struck, Transpower would have been in breach of other provisions of the Code. It further submitted if the protection system had not operated, then another participant would have then been the causer. Transpower submitted, on this basis, the Authority’s interpretation could lead to irrational outcomes.
- [50] Transpower submitted:
- 44. Transpower submits that it is artificial to say that the design and operation of property in compliance with the Code, resulting in an outcome*

expected by the Code, does not meet the threshold of “in order to comply with the Code” in the definition of “causer”.

45. For completeness, Transpower’s interpretation of paragraph (c) would not operate to mean that Transpower could never be the causer in any other case involving grid protection operation. The particular reason why the protection system operated will always be relevant, and if the protection system operated incorrectly or due to some other failure in the grid then it is possible that Transpower could be the causer.

The Authority’s submissions on the exclusion in (c)

[51] The Authority submitted that the exception in (c) did not apply to Transpower and that the interruption or reduction of electricity did not occur in order to comply with Code. The Authority noted the requirement to have protection systems in place. However, it submitted that a reduction or interruption of electricity caused by the automatic operation of such systems does not occur in order to comply with the Code. Nor, it submitted, could it be said that a UFE is the inevitable consequence of the installation of such systems.

[52] The Authority submitted:

4.4 The Authority submits that the words “in order to” in paragraph (c) cannot be read in isolation from the words that precede them (“if an interruption or reduction of electricity occurs”). It is clear, when the opening clause of paragraph (c) is read as a whole that some purposeful action is required – that is that the interruption or reduction in electricity is intentional. Although Transpower’s installation of the protection equipment in the first place was done to comply with the Code, the reduction of 240 MW of electricity at Huntly Unit 4 by the automatic operation of those systems following a lightning strike did not occur “in order to” comply with the Code.

[53] The Authority referred to the Consultation Paper and the Rulings Panel’s 6 June 2014 Decision as supporting that interpretation, noting a common thread to the application of paragraph (c) that the interruption or reduction in electricity was both an intended and an inevitable consequence of actions taken. The Authority submitted the same cannot be said of the present matter.

4.6 The common thread to the application of paragraph (c) in both the Commission’s example and the 2014 Decision is that the interruption or reduction in electricity was both intended and an inevitable consequence of the actions that are taken. The same cannot be said in the present circumstances. The installation of the protective equipment does not mean that there will be an interruption or reduction of electricity because: (a) there is no certainty of a lightning strike activating the protective equipment; (b) in the normal course of events, such a lightning strike and subsequent disconnection would likely not have caused an interruption, as the Huntly-

Stratford One Circuit would not have been the only connection between Huntly Power Station Unit 4 and the grid; and (c) Unit 4 might not have been operating at all, or might have been operating at a lower output, such that a UFE would not result from the interruption or reduction.

- [54] The Authority submitted that if Transpower’s interpretation were accepted, it would undermine the strict liability nature of the UFE causer regime and result in fewer UFE causer findings which would be contrary to the policy intent of allocating responsibility in the manner provided for in the Code.

Transpower’s submissions in reply

- [55] Transpower submitted, in reply, that the existence and correct operation of Transpower’s protection systems is purposeful action by Transpower in order to comply with the Code. Any resulting interruption to electricity was, it was submitted, intentional and conscious. Transpower stated:

20. The Authority’s submission is that the automatic operation of the protection system did not occur in order to comply with the Code. The automatic nature of the protection system should not have any bearing on the application of paragraph (c) of the causer definition. Almost everything that happens in the power system involves some degree of automatic action. This is because manual actions lack the necessary reliability, precision and speed to always achieve the desired outcomes.

21. The Authority does not dispute that Transpower would have breached the Code if the protection system had not been in place, or had not operated correctly to disconnect the circuit when the lightning struck. That cannot be reconciled with the Authority’s argument that Transpower’s compliance with the same Code obligations does not invoke paragraph (c) of the causer definition.

- [56] Regarding the 2014 decision Transpower submitted that the Rulings Panel decided that, if necessary, Meridian could have relied on paragraph (c) of the causer definition to avoid being the causer, because Meridian was complying with a test plan under the Code.
- [57] Transpower argued that whilst it was not inevitable that the Circuit would be struck by lightning in the present case, it was an inevitable consequence of Transpower complying with its Code obligations that the protection system would disconnect the Circuit when it was struck. It submitted that there was no difference between the positions of Meridian in 2013 and Transpower in 2018 and that, as (c) applied to Meridian, it should also apply to Transpower.

Post Draft Decision Submissions

- [58] Transpower made further submissions following the release of the Draft Decision. The submissions asserted that the event came within the plain and ordinary words of the exclusion in (c) as the Transpower protection system operated as intended and in order to comply with Transpower’s Code obligations. Transpower submitted that the Panel should not look beyond the plain and ordinary wording of the clause when interpreting as there was no obvious error in the drafting. It supported the submission by noting that the Panel’s interpretation would disincentivise compliance with the Code.
- [59] Transpower further submitted that if the Panel were to look beyond the plain and ordinary meaning to take into account the underlying legislative intent that the Transpower interpretation was still in alignment with that purpose. It argued that the exclusion in (c) was intended to be an exception to the strict liability regime in (a)(i) and submitted:
17. *The operation of the transmission system requires a compromise between full protection and cost. The objective of “efficient operation” requires a balanced approach to be taken. Cancelling long-planned outages and maintenance work is expensive and itself creates risk of failure. Building fail safe redundancy into the system, even if the transmission customers who pay for the redundancy do not want it, is also expensive, potentially prohibitively so.*
 18. *It is efficient for Transpower to operate the grid with some risk of there being an UFE. If Transpower gets the balance wrong and creates too much risk then it may breach the Code (e.g. clause 12.113, which requires Transpower to operate interconnection assets in accordance with good electricity industry practice). No such breach is alleged by the Authority or anyone else in this case.*
- [60] The Authority supported the Panels Draft Decision and reasoning as regards the exclusion in (c).

Does the exclusion in (c) apply?

- [61] The same rules of statutory interpretation noted in paragraphs [32] to [34] herein apply.
- [62] The parties accept that Transpower’s protection system for the Circuit detected the disturbance created by the lightning strike and that the Circuit automatically disconnected to prevent further damage. The parties also accept that the protection system operated correctly and as intended and that a UFE then occurred.
- [63] The question to be decided is whether the interruption or reduction of electricity occurred in order to comply with the Code.

[64] The Panel notes the Transpower submission that the plain and ordinary meaning of the exclusion in (c) should apply because the operation of the protection system occurred “in order to comply with the Code”. However, the Panel prefers the Authority’s position that the words “in order to” in (c) cannot be read in isolation from the words that precede them, and that some purposeful action is required. The Panel agrees with the Authority’s submission that installation of the protection system was done in order to comply with the Code, but that the automatic operation of protection systems did not occur “in order to comply with the Code.”

[65] The Consultation Paper and Recommendation to the Minister referred to in paragraph [31], make it clear that force majeure type events (such as a lightning strike) were intended to be caught by the strict liability regime. The same interpretation principles and reasoning noted with respect to the (a)(i) definition apply to the (c) exemption. As such, adoption of the interpretation advanced by Transpower that the (c) exemption applies would, in effect, defeat the strict liability regime the legislative provisions intended to create.

[66] Even if the Panel’s view is not correct, it has noted that Transpower did not have to carry out the maintenance at the time that it did. The weather was, at the time the maintenance was undertaken, a known risk. The Authority’s Draft Determination noted:

5.3 *The circumstances described in the system operator’s report are summarised below:*

(a) *On 14 December there was a planned outage of Huntly’s bus B. A known consequence of the outage was that the output of Huntly Unit 4 would have only one electrical path available the Stratford circuit. Prior to the outage, the grid owner considered:*

(i) *overall system security*

(ii) *the weather situation*

(iii) *details of the outage.*

(b) *Grid owner staff were aware of a potential thunderstorm and took into account the system risk and outage circumstances before deciding to proceed with the outage.*

[67] Had the maintenance been deferred, then the second circuit would have been available when the lightning struck. Transpower chose to proceed, notwithstanding a known electrical storm risk. As such, whilst it could be stated that the lightning was a causal factor, it can also be said that the decision to proceed in adverse conditions was, itself, causal. That decision was first in time, and it may have led to the eventual

UFE.¹⁶ Accordingly, even if the Panel’s decision that the (c) exemption was not intended to apply to force majeure type events is wrong, it finds that the exemption does not apply in this instance.

- [68] A question arises, in this respect, as to whether the exemption in (c) would have been available if a UFE occurred in circumstances where there was a single circuit, and automatic protection operated correctly causing a reduction or interruption of electricity supply. As noted, in the present case, but for Transpower’s decision to undertake maintenance at the time it did, the UFE may not have occurred. In the single circuit scenario, a UFE could happen without the Grid Owner having taken any other action. In this respect, the Panel does, however, note that the Grid Owner should take into account any potential liability when considering whether to rely on a single circuit or to provide a double circuit. Allowing the exemption in (c) to apply would not incentivise the Grid Owner to invest in reliable assets. Again, this would be contrary to the overall intention of the strict liability regime that was introduced.
- [69] The Rulings Panel notes that the outcome of its decision is harsh on Transpower. It is, however, consistent with the strict liability regime that was designed and implemented. The Panel also notes that the decision promotes cautious behaviour which is consistent with the regulatory purposes of reliability and efficiency.
- [70] In this respect, the Panel notes the Transpower argument that its interpretation requires an industry participant to choose between complying with the Code or avoiding a fee imposed by the Code. The Panel does not agree. Rather, it sees its decision as requiring an industry participant to choose between incurring costs allocated by the Code or avoiding them by investing in and maintaining their assets. The Panel considers that this trade-off is envisaged by and provisioned for in the Code’s UFE regime, which encourages industry participants to weigh up investing to avoid UFE costs or incurring them if an event occurs.
- [71] It must also be noted that when a UFE occurs, there are event charges associated with it¹⁷. Unlike other aspects of the Code, the UFE regime does not impose penalties or sanctions. Rather the Code establishes a framework where event charges are borne by the party that is best able to manage them.
- [72] Transpower also submitted that the Panel’s decision that the exclusion in (c) does not apply means that no action taken to comply with the Code in relation to a force majeure event would ever be captured by the exclusion in (c). The Panel does not agree, and in this respect, it notes the Authority’s submissions that the intention of the (c) exception was for it to apply to situations where the interruption is

¹⁶ The Consultation Paper stated “event charge methodology was intended to make explicit the costs of asset owners’ decisions (both investment and maintenance) that affected the cost of Instantaneous Reserve procurement and use” and “In the circumstances described above, the asset owner has undertaken maintenance of assets and should bear the consequences of the Under Frequency Event that arose due to the manner in which the maintenance was carried out”.

¹⁷ Clause 8.64 of the Code provides a formula by which event charges are calculated and allocated to the causer.

purposefully brought about in order to comply with the Code. The example put forward was a test plan as compared with an interruption that eventuates from a commonplace and remote Code compliant activity such as that which occurred when the lightning strike caused the protection mechanisms to operate. The Panel considers that this demonstrates that there may be situations where the exclusion in (c) might apply.

Panel's Orders

- [73] Pursuant to clause 8.63(1)(a) of the Code, the Panel confirms the Authority's determination.
- [74] Pursuant to regulation 87(1)(a) of the Electricity Industry (Enforcement) Regulations 2010 the Panel orders that Transpower pays the "event charges" as calculated under the clause 8.64 of the Code.

Costs

- [75] The Panel notes that in its 7 July 2014 Decision¹⁸ ruled that the Panel does not have the power to make party costs orders in disputes referred to it under clause 8.62 of the Code.
- [76] In this respect, the Panel notes that the matter comes within the "disputes" provisions of the Act and Regulations and that neither the Act nor the Regulations provide for any express powers for the Panel to order costs in relation to a dispute. This can be compared to the provisions in section 54(1)(g) which allows for an order for costs in relation to a breach of the Code. Regulation 87(1)(c) does, however, state that the Panel can make "any other order it thinks fit". Such an order could include a costs order. Given this, the Panel invites the parties to make submissions on costs as follows:
 - (a) The Authority may make submissions within 15 working days of this decision;
 - (b) Transpower may make submissions in reply within 10 working days of receipt of submissions from the Authority.
- [77] Once received, the Panel will consider the submissions and make a decision on costs.

¹⁸ A decision on a dispute under clause 8.62(1) of the Electricity Industry Participation Code 2010 by Meridian Energy Limited relating to the System Operator's causer determination for an under--- frequency event on 1 May 2013.

Publication

[78] Pursuant to reg 44 of the Regulations the Authority is to publish this decision within 10 working days.

Issued this 28th day of September 2020

A handwritten signature in black ink, appearing to be 'M. J. Orange', written in a cursive style.

M. J. Orange
Rulings Panel Chair