BEFORE	**THE ELECTRICITY RULINGS PANEL**
UNDER	the Electricity Industry Act 2010,the Electricity Industry (Enforcement) Regulations 2010 and the Electricity Governance Rules 2003
IN THE MATTER OF	a formal complaint against Transpower New Zealand Ltd in relation to admitted breaches of clauses 1.3.1.3(a), 1.3.2.4(a) and 1.3.4.7(a) of Schedule G6, and of rule 3.3 of section III of part G of the Rules, and alleged breach of Rule 4.2 of section III of part G of the Rules

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DECISION OF THE ELECTRICITY RULINGS PANEL

DATED 27 September 2013

Rulings Panel Members

Peter Dengate Thrush - Chair
Geraldine Baumann - Vice Chair
John O'Sullivan - Panel member

Background

The relevant facts

1. On 27 October 2010 the power supply to the Carter Holt Harvey Pulp & Paper Ltd (‘‘CHH’’) pulp and paper mill at Kinleith was cut. Power was restored some 30 minutes later, but CHH allege that the mill lost a day’s production as a result of the outage.

2. The reasons for the outage are not in dispute and may accordingly be described briefly.

3. The System Operator is obliged to provide security during 220kV circuit outage and during periods of higher flows into the Bay of Plenty. It manages this by providing a bus split, which manages a contingency on either Ohakuri- Wairakei or Atiamuri-Whakamaru 220kV circuits into the Bay of Plenty and which have the potential to overload the 110kV lines through Kinleith. The Kinleith – Tarukenga circuits may be removed by use of splits in the KIN-TRK circuits. This leaves two ARI_KIN circuits in place supplying Kinleith.

4. This system was set up in 2005. In November 2005 the Grid owner offered an over current protection scheme to the 2 ARI-KIN circuits (‘‘AK1’’ and ‘‘AK2’’). A Special Protection System (‘‘SPS’’) is an automated control system designed to respond to conditions on the power system in a pre-determined manner and which is intended to provide protection to the Grid. The SPS consisted of a relay installed on each line, set to trip if either circuit overloaded for more than 8 seconds. This system could only be used in conjunction with the split mentioned above. One range of settings was offered, namely ‘‘Winter’’; in December 2005 a second, ‘‘Summer’’ setting, was provided. The offer stated that the SPS was only to be used for specific outages, subject to prior agreement between the Grid owner and the System operator.

5. The offer also specified 3 performance parameters for each circuit under both conditions. A ‘‘Rating’’ was given, along with a ‘‘Guaranteed Maximum Load’’ and a ‘‘Guaranteed Trip Level’’. These were given in terms of the load in amperes (‘‘A’’) that the circuits could handle. As of December 2005 the summer settings, for AK1 and AK2 respectively, were 300A/247A/300A and 333A/274A/333A. The winter settings were 366A/302A/366.7A and 406A/329A/400A.

6. In January 2009 the Grid owner revised its offer for the ARI_KIN SPS, changing the availability to an ‘‘as and when required’’ basis, but it did not change the settings. In March 2009, the System Operator removed the setting details, assuming that, as the ‘‘Rating’’ was the same as the ‘‘Guaranteed Trip Level’’, only that number was required. This was the number that was entered in the

System Operator's modeling and monitoring systems, that is, the SCADA (Supervisory Control and Data Acquisition) and RTCA (Real Time Contingency Analysis) systems. The numbers that in each case should have been documented and used in the supervisory systems were the Guaranteed Maximum Load numbers. At some subsequent time a further "shoulder" category was added.

7. Because of unusual conditions prevailing, the SPS was activated 24 times in September and October 2010. It is unclear if the Grid owner was made aware of the frequency of use of this SPS, and whether there were processes in place to audit the state of the network configuration, including protection systems.

8. The status of the KIN circuits was discussed by email on 8 October 2010; the System Operator confirmed that the summer/shoulder/winter[1] ratings for AK1 and AK2 respectively were 300/335/366, and 333/371/406. CHH was concerned at the risk scenario, as its own generation capacity was reduced because of scheduled maintenance of its generator plant. It wrote to the System Operator on 13 October 2010 expressing concerns about the security of supply to the Kinleith Mill. It noted that the System Operator had activated the KIN-TRK split, effectively reducing Kinleith's security of supply. By email on 26 October 2010 it asked explicitly: "***What is the maximum load we can take if the ARI_KIN 1 and 2 the ARI_KIN Overload scheme is enabled… ?*** At 8.22 on the morning of 27 October the System Operator replied, explaining that from 7 am until 2100, AK1 would trip after 8 seconds at 335A, and between 2100 and 7 am would trip at 366A. In the same time periods, AK2 would trip at 371A and 406A.

9. At 8.27 on the morning of 27 October, power on the AK1 circuit suddenly spiked by 10%, and the SPS closed the circuit under a load of approximately 272A. Approximately 8 seconds later, AK2 tripped at a load in excess of 500A. Power was cut to the Kinleith mill, Tokoroa and surrounding areas ("the event"). The bus was restored by Transpower at 11.58, and load came back on gradually after this time, once PowerCo and the Kinleith Mill had completed their restoration efforts. Mr. Mistry, at para 13, states that the System Operator's immediate response to the 27 October 2010 event was to set the asset ratings for the ARI_KIN circuits in the System Operator's modeling tools to the "Guaranteed Maximum Load" levels offered by the Grid owner (i.e., the SPS-on asset ratings for the circuits). It is not clear what drew the attention of the System Operator to the issue of asset rating so immediately. The System Operator's own report into the SPS states that the Grid owner changed the settings on 29 October 2010.[2]

10. On 9th December, the Terms of reference for a review of the incident had been established, and on 22 December a detailed report of the incident was published by the System Operator. On 14 February 2011 a "Stakeholder"

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[1] Reference at this time to "shoulder" ratings was in error. This category was not added until after the event.

[2] See Investigator's report 3-26

meeting was convened at Kinleith to discuss the report and future remediation, and on 24 February 2011, Transpower followed that up with an email report to stakeholders with an ‘‘action items’’ list arising from that meeting.

11. On 9 March 2011 the System operator self-reported a breach of Schedule 13.3 part 13 (4)(c)(i) in relation to the outage on 27th October 2010.

The Complaint

12. On 27 April, in reply to an email from the Authority, the System operator agreed with the Authority’s statement that: ***“…the ARI_KIN SPS settings were misinterpreted since the time it was designed back in 2005.”*** The System Operator also agreed that it had breached the equivalents of Rule 1.3.2.4(a) and 1.3.4.7(a) of schedule G6 of Part G.

13. On 13 May CHH alleged breaches of additional Rules, namely Rule 5 of section VI of part F, rule 5.1 of section II of part G, rule 4.1 of section IIII of part C, rules 2.5.1, 2.5.5 and 3.1 of technical code A of schedule C3 of Part C, rules 2.1 and 2.2 of section I of Part G. CHH alleged breaches by both the System Operator and the Grid owner.

14. On 16 May CHH supplied details in support of a slightly different slate of breaches, namely of rule 4.1 and 4.4 of section III of part C, rules 2.5.1, 2.5.5 and 3.1 of technical code A of schedule C3 of part C, rule 2 of technical code B of schedule C3 of part C, and rule 5 of section VI of part F.

15. On 26 May 2011 the Compliance Committee of the Authority appointed an investigator to investigate the self-reported breach, and the additional breaches. Notice of the investigation was sent out dated 30 May 2011. There was an exchange of correspondence by the affected parties via the Investigator, which culminated in the System Operator refusing to pay any compensation to CHH in response to a request from that party for specified compensation. As required by regulation 19(b) the investigator then prepared his report and delivered it to the Authority.

16. On 22 March 2012 the Compliance Committee received that report from the Investigator that, in substance, did not support the complaints by CHH against the Grid owner, and recommended to the Board that it lay a complaint with the Rulings Panel. On 2 May 2012 the Authority decided to lay a formal complaint in relation to the admitted breaches of rules (1.3.1.3(a), 1.3.2.4(a) and 1.3.4.7(a) of Schedule G6, part G, and in the alternative, in relation to breaches of rules 3.3 and 4.2 of section III of part G of the Rules by way of a breach of clauses 1.3.1.3(a), 1.3.2.4(a) and 1.3.4.7(a) of Schedule G6, and also rule 5 of section VI of part F.

17. The Authority gave the following reasons for deciding to lay the complaint:

    a. In relation to the Alleged Breach, rule 5 of section VI of part F applies to

Transpower.

b. The Admitted Breaches and Alleged Breach caused significant market impact, and resulted in total loss of supply for at least 30 minutes to Carter Holt Harvey Pulp & Paper Limited's (CHH) Kinleith Paper Mill and the wider Tokoroa area.

c. The underlying issue that caused this to happen was systemic. This event demonstrated that the System Operator's information assessment and peer review process was in this case deficient.

d. No settlement was reached between the parties to the investigation. CHH wanted compensation to be paid under any settlement. The System Operator would not agree to any compensation on principle.

e. Under the Authority's breach assessment guidelines and breach criteria matrix, the Admitted Breaches and the Alleged Breach have been assessed as being of high severity. In particular, the Admitted Breaches and the Alleged Breach met the following high severity criteria:
    i. wide spread security impact;
    ii. high operational impact;
    iii. significant to severe market impact; and
    iv. systemic (deficient procedures).

18. The issue of the applicability of rule 5 of section VI of part F was the subject of an interlocutory decision by the Rulings Panel, delivered on 28 February 2013[3].

19. On 16 April the parties filed a joint memorandum setting out the remaining issues for decision by the Rulings Panel, and agreeing on a timetable. In that memorandum, the System Operator admitted breach of rule 3.3 of section III of Part G. The parties agreed the issues remaining for determination were

    (a) whether the System Operator breached rule 4.2 of section III of part G; and

    (b) what remedial orders, if any, the Rulings Panel should make in respect of the admitted breaches and as a result of the finding on (a) above.

20. In accordance with that timetable the Authority and CHH filed submissions, the System operator filed submissions in response, and the Authority and CHH filed further submissions in reply. No party has requested a hearing under rule 15 of the Rulings Panel Procedures, and accordingly this matter has been decided upon the papers under rule 16 of those procedures.

[3] Decision 28 February 2013 (183 KB)

Decision

The legislative framework

21. As the Panel noted in the interim decision in this matter, the event that is the subject of this complaint occurred on 27 October 2010. The relevant legislative framework in place at that time was:

    a. The Electricity Act 1992;
    b. Electricity Governance Regulations 2003 (the Regulations); and
    c. The Electricity Governance Rules 2003 (the Rules).

22. The Panel is required under Section 139 (2)(b) of the Electricity Industry Act 2010 (the Act) that came into effect on 1 November 2010, to apply that Act to substantive matters, as if the event had occurred after the commencement date. However, under Section 139 (3) any penalties should be those that applied under the earlier legislation. As to procedural matters, we are bound by the Electricity Industry (Enforcement) Regulations 2010 (the 2010 Regulations).

Breach of rule 4.2 of section III of Part G

23. As noted above, the parties agreed at the time of filing the joint memorandum that a question for determination by the Rulings Panel is whether the System Operator breached rule 4.2 of section III of part G. The Authority, in its submissions, argued for a finding of breach. In its response, the System Operator pointed out that rule 4.2 was relevant to the adjustment of a dispatch schedule, yet no such adjustment had been identified. In its submissions in reply, the Authority withdrew this allegation of breach.

Penalty

24. The parties agree that the applicable statutory provision is s 174KE(1)(f) of the Electricity Act 1992. That provides that the Rulings Panel may order an industry participant to pay a pecuniary penalty of up to $20,000 after the hearing of a complaint of a breach of electricity governance regulations or rule. In making any such an order, the Rulings Panel is bound by regulation 109 (3) of the Electricity Governance regulations 2003 to consider various factors. Detailed submissions on these factors were received from the Authority and the System Operator. Under s 174KE(2), the Rulings Panel is also obliged to take into account previous rulings in similar situations. The Rulings Panel is aware that the penalty provision has been substantially increased for cases occurring after 1 November 2010, but has approached the matter only on the basis that a penalty of up to $20,000 may be imposed in this case.

(1) Severity of the Breach

25. The case has some similarities with the Rulings Panel decision of 22 September 2005, in that a modeling error was made by the System Operator in breach of clause 1.3.4.5 of Schedule G6 of Part G. Inputs to the dispatch schedule were incorrect. However, in that situation no outages occurred. There were increased costs to some parties as a result of incorrect data. The Rulings Panel found that the breach was ‘‘not severe’’ and penalised the System Operator $1000. A breach of clause 1.3.4.7 of Schedule G6 of part G was the subject of the Rulings Panel decision of 19 March 2008. Incorrect information was included in the dispatch schedule resulting in trading at incorrect prices. Approximately $250,000 in overcharging occurred as a result. Consistent with submissions made by the Commission and the affected parties, a finding of ‘a reasonable degree of severity’’ was made. A penalty of $4000 was ordered.

26. ‘‘Severity’’ was also considered in the Ruling Panel’s decision of 26 September 2005, which involved a breach of clause 4.3 of Section II of G. A computer error caused the System Operator to fail to implement the dispatch schedule for two trading periods, for reasons not provided in clause 4.3. The Rulings Panel found that the breach was ‘‘moderate’’- balancing a potentially serious situation, but one in which little actual impact, as neither the safety nor security of the system was at risk and no threat to the Principal Performance Obligations had occurred. A penalty of $2,500 was imposed.

27. ‘‘Severity’’ was also discussed in the Rulings Panel decision of 22 November 2010, which involved the deliberate supply of inaccurate information to the Reconciliation Manager. In the decision the Rulings Panel noted that severity was a ‘‘relative concept’’, and could be determined in part by the impact of the breach on others. The Rulings Panel held that the impact was limited to ‘‘…one ICP, one site/customer …’’ and that severity was ‘‘quite high, but not as high as a deliberate breach that affects the security of supply’’. There were no outages in that case.

28. In this case, the Rulings Panel notes that security of supply to the Tokoroa area failed for approximately half an hour. Included in that area is the CHH mill, one of New Zealand’s major electricity consumers. The impact on that individual customer is addressed below, in relation to the CHH claim for compensation. In the Investigator’s report the estimate of losses of $860,000 - $1M is given, but there is no substantiation of that amount. The Authority said that under its own Breach Assessment Guidelines the breach met its own ‘‘high severity’’ criteria, having a widespread security impact, a high operational impact, a ‘‘significant to severe’’ market impact and was ‘‘systemic’’, resulting from a lack of procedures. The System Operator submitted that the outage was limited to the Kinleith Grid Exit Point (‘‘GXP’’), and was of no more than 30 minutes duration. Its Principal Performance Obligations were not breached. It argued that any penalty should be in line with the previous decisions discussed above, and that a penalty of between $1000 and $4000 was appropriate. However, the Rulings Panel

observes that the penalties in those previous cases turn on a consideration of more factors than severity alone.

29. Having regard to the fact that an outage occurred, and noting its duration the Rulings Panel finds this breach to be at the moderate to higher to end of the continuum.

(2) The impact of the breach on other industry participants

30. The only evidence before the Rulings Panel that related to this issue is that submitted by CHH in support of its compensation claim. CHH lost production for a full day as a result of the half hour outage. The Rulings Panel notes that CHH, aware of the unusual conditions prevailing, and because its own generation capacity was off-stream for scheduled maintenance, sought advice from the System Operator prior to the breach. Despite its endeavours, it suffered a break in its electricity supply.

(3) The extent to which the breach was inadvertent, negligent, deliberate or otherwise.

31. The Authority submits that the breach was negligent and falls towards the "*high end of negligent conduct*" and the penalty therefore should be at the "*high end of the middle band*". We have received no legal submissions in relation to the scope of the term "negligence" in this provision. We apply the commonly accepted understanding of the term – failure to do something to the standard reasonably accepted in the circumstances, in the presence of a duty, or contractual obligation, of care. The Authority points to the error in reading and interpreting the grid owner's information as supplied with the SPS offer in 2005, and in processing that information into its systems. It notes that the error was not identified by any peer review process subsequently. The error was repeated, not identified and corrected when the SPS offer was re-offered in 2009. Although designed as a short-term solution for maintenance, the SPS became a routine way of managing flow. Given the increased use, the opportunity should have been taken to review it, but was not. Further opportunities for scrutiny which were not taken were the several requests for specific information on the circuits affected by the SPS made by CHH and PowerCo prior to the event.

32. The System Operator submits that the information from the Grid owner used terms not standard in the industry, and was not clear, but acknowledges that that should have led it to request clarity from the Grid owner. It acknowledges at least inadvertence or that its conduct was "at the low end of negligence".

33. Mr.Heaps states in para 10 of his evidence that he had an expectation that the System Operator would have implemented risk management practices at least to the level of ISO 31000. The principles of effective risk management in ISO 31000 are that it should take into account human and cultural factors, be

systematic, structured, and timely, be based on the best available information, be dynamic, iterative, and responsive to change. Given the extensive application of SPSs within the system and the apparent lack of a process for quality assurance it would confirm the systemic nature of the breach.

34. The Rulings Panel accepts the evidence of Mr. Mistry on the point that nothing in the design of the SPS meant that it should not have been used more frequently. We note the argument made in several places that the modeling tools could not handle multiple data. We think that misses the point that in this case, the wrong data was used. We note that in his evidence for CHH, Mr Heaps, who is widely experienced in this field both in New Zealand and abroad, agreed with the Investigator that the terminology used by the grid owner should have been understood by the System Operator staff, and should not have been misinterpreted by them. Given the statements regarding the confusing terminology used in the Grid owner/System Operator interface then this should have been considered a risk factor and taken account of within a risk management framework.

35. The Rulings Panel agrees with the Authority, and finds the making of the original error and the failure to discover it, despite several opportunities, was negligent at a moderate to high level.

(*4) The circumstances in which the breach occurred*

36. Features in the circumstances which the Authority submitted were relevant include:
    i. The error was made in 2005, and was obvious and fundamental;
    ii. Peer review processes failed to identify the error;
    iii. The mistake was not picked up when the SPS was updated in 2009;
    iv. Shortly prior to the event, both PowerCo and CHH asked for, and were given wrong information.
37. In response and in its early correspondence, the System Operator submitted that:
    i. The event occurred because of the misunderstanding as to the correct rating of the SPS circuits. If it had understood them correctly, it would have raised the issue with the Grid owner;
    ii. The opportunity to review the error was lost once the System Operator removed the table with the Maximum Guaranteed Load value, and used the incorrect value for modeling;
    iii. The System Operator was not reckless and although mistaken, because its real time tools did not provide any indication of a problem, proceeded properly on the information available to it.

(5) Any Previous Breaches

38. The Authority points out that there have been 113 previous breaches relating to incorrect inputs to the market models, two of which have been referred previously to the Rulings Panel (see above). Seven were investigated and closed with no settlement, 75 were closed with warnings and 28 were closed with no warnings. The Authority says this history supports a penalty at the higher end of the range.

39. The System Operator says that this needs to be seen in the overall context of the industry. It says it processes between 10,000 and 12,000 grid outage and reconfiguration offers per year: 113 errors is therefore about 0.13%. The percentage proceeding to a penalty finding is obviously much smaller. Mr Avery gave evidence of the risk management practice of the System Operator, and that management of SPS risks is one of the top ten risks on the risk register. It is trite to observe that the System Operator's risk management practice was insufficient to prevent this event. However, since the upgrade of its modeling tools in 2009 there has been a major improvement in the number of grid input information breaches, declining from a high of 25 in that year to 3 in 2011.

40. The Rulings Panel does not agree with the Authority that the history of previous breaches supports the imposition of a higher penalty.

(*6) Whether the participant disclosed the matter to the Authority*

41. The System Operator published the terms of reference for a review of the event on 9 December 2010, and published the results of that review on 22 December 2010. It convened a stakeholder meeting on 14 February 2011, published a follow-up action list on 24 February 2011, and self-reported the breach on 9 March 2012. It fully co-operated with the Investigator, and admitted the relevant breaches.

(*6) Whether the participant disclosed the matter to the Authority*

42. We agree with the Authority that this conduct is a mitigating factor in considering a pecuniary penalty.

43. However, the error made in 2005 in modelling the wrong information for the SPS was fundamental. The System Operator's peer review process failed to identify it. The mistake was not identified in 2009 when the SPS was re-offered with some different conditions, despite the correct information being supplied for the second time by the Grid owner. Therefore the breaches in 2005 and 2009 were unreported since they were not accompanied by an event.

44. Following the event on 27 October 2010 when the Kinleith GXP was on reduced security, the System Operator carried out a review. That review was completed in December 2010. In that review it is stated that "the Grid owner is undertaking a review on the asset related aspects of this event." That review does not mention SPS protection settings. Yet, as noted above the Grid owner had changed the SPS settings 2 days after the event, so was clearly aware that this may have been an area of immediate concern.

45. On 9 March 2011, Transpower as System Operator self-reported a potential breach of clause 4(c)(i) of schedule 13.3 of the Electricity Participation Code 2010. The System Operator submission states that the System Operator self-reported the breach on 9 March 2011 after an internal investigation (shared with affected stakeholders). However there is no explanation for the time difference between the change to the SPS settings on 29 October 2010, the review of the event and the self-reporting of the breach on 9 March 2011. For these reasons, we are inclined to discount the mitigation effect of the System Operator's post-event conduct somewhat.

(7) The length of time the breach remained unsolved

46. The breach occurred in December 2005. It lay undiscovered, despite a risk management system that might have been expected to detect it. It could have been corrected when the SPS was updated in January 2009, but continued until the event on 27 October 2010. It was in place for almost 5 years, during which it was unknown. We interpret this provision as referring primarily to the time after knowledge of the breach, during which remediation is to be expected. Delay then would have to be justified. In this case, we think it important that although the breach lay undiscovered, several opportunities over a long period were not taken to discover the situation, and a system that should have operated to focus enquiry failed. These are factors that support the imposition of a penalty at the higher end of the scale.

(8) The participant's actions when it learned of the breach.

47. The System Operator's immediate response after the event is described above under paragraph (6). Since that response, the System Operator has put in place a series of steps agreed with the stakeholder panel. Although there are some criticisms of the completion of these items by CHH, the Authority submitted that this conduct was a mitigating factor in relation to penalty. The Rulings Panel agrees. However, for the reasons relating to the apparent delay between learning that the Grid owner had adjusted the SPS settings on 29 October 2010 and the date of self-reporting on 9 March 2011, we have discounted that mitigation.

(9) Any benefit the participant obtained

48. The Parties agree that the System Operator derived no benefit, economic or otherwise from the event. We do not accept that the benefit that CHH derived from the SPS can be offset in some way against the losses CHH suffered from the outage and hence any real or perceived benefits should not be used as mitigation factors.

Conclusion on Penalty

49. The Rulings Panel finds that a penalty at the higher end of the scale is suitable. The entry of incorrect technical data was negligent and continued in place for nearly 5 years. The peer review and risk management systems which were put in place to detect this sort of error failed. Opportunities to detect and correct were not taken. The consequence was a power outage to a community, including a significant commercial entity heavily dependent on continuous supply. That party had contacted the System Operator shortly before the event and been given wrong information. The impact of the consequences of the breach are considerably greater than in previous Rulings Panel decisions on similar cases discussed above. On those grounds we set the penalty at $16,000. To that we apply the mitigating effect of the System Operators actions since the breach, and reduce that penalty by $1000, leaving a penalty of $15,000.

Compensation

The Law

50. There is no equivalent provision to s 139 (3) in relation to compensation matters; accordingly s 54 (1)(e) of the Act applies to matters of compensation. Compensation is discretionary. The sum that may be awarded under this provision is unlimited, however regulation 53 (a) limits the liability to $200,000 in respect of any one event or a series of closely related events. S 54(2) requires the Rulings Panel to take into account its own previous decisions in similar situations.

51. In its 26 September 2005 decisions, the Rulings panel said that compensation would have the effect of providing the System Operator with ***"incentives"***. We also said: ***"… as a matter of general principle, that compensation should be paid to, and funded by, participants to put them back in the position they would have been in, but for the breach occurring."***[4] We adopt both principles as applicable in this case.

52. The System Operator has submitted that the considerations in s 56(2) applying to the setting of a pecuniary penalty, apply also to the setting of an award of compensation. The Authority and CHH disagree, we think rightly. Section 56 is manifestly directed at pecuniary penalties; compensation is dealt with, along

[4] See Decision, page 11

with other non-penalty remedies, in s 54. Section 54 does contain a requirement applicable to compensation orders: s 54(2) requires that the rulings Panel must consider its previous decisions. The presence of this requirement and the absence of further conditions is telling under the "*expressio unius*" [5] principle. Further, as the Authority points out, many of the s 56(2) provisions are inapplicable in a compensation case, such as the impact of the breach on other industry participants, and the actions of the party in breach in learning of the breach. We accept that the exercise of the discretion conferred by s 54 (1)(e) must be exercised in a reasonable manner, not capriciously, and by taking into account relevant matters and not giving weight to irrelevant matters. It should be used to promote the policy and objectives of the Act. That may involve looking at one or more of the s 56(2) factors – the "*circumstances in which the breach occurred*" [6] being one obvious one.

The Facts

53. CHH is seeking compensation for a day's lost productivity at its Kinleith mill. It filed comprehensive submissions and a report detailing its losses through the sworn evidence of Mr. Fausett, the CHH Commercial Manager, and Mr. Haugh, the CHH Energy Manager, which remains subject to a confidentiality order made by the Rulings Panel during the course of this matter. A copy has been provided to all parties. In general terms, this reports describes the operation of the mill, said to be the largest of its kind in New Zealand. The processes operated by the mill are (other than for well-planned maintenance interruptions) continuous, running 24 hours a day, 365 days a year. These processes run on electricity. Any outages result in major problems to those processes, such as blockages in pipes, settling in process containers, and heat loss.

54. CHH says that it can sell a predictable amount of its production. It therefore sought compensation based on:
    1. the sales revenue lost on output not produced because of outage;
    2. less delivery costs for that product;
    3. less the variable costs of production avoided when production ceased; and
    4. plus the variable energy costs required to "warm up" the mill after the outage.

55. In its report, CHH set out prices, sales figures, costs, average net sales revenue, and diagrams and reports, which it establishes that the outage cost it [sum redacted pursuant to confidentiality order][7]. That methodology, and the sum arrived at by its operation, have not been challenged by the System Operator. The Authority made no submission on the methodology or the amount of loss

[5] The maxim of legal construction known as "expressio unius est exclusio alterius", which means when one thing is expressed, it excludes an assumption that other things were intended to be included.
[6] S 54 (2)(d)
[7] This is the amount claimed before us by CHH; an earlier, slightly lesser amount is referred to in the Investigator's report, and is assumed to be an estimate, later clarified by the production of the report filed in evidence.

claimed, saying only that if the amount of loss were established, the onus would fall on the System Operator to establish why the principle of compensation quoted above should not apply.

56. The methodology and its application by CHH appear to be reasonable, and have not been subjected to challenge. We therefore adopt the sum sought as the measure of loss suffered by CHH as a result of the event.

57. We accept there is some force in the System Operator's submission that full compensation for losses in such cases may not always be appropriate. Notwithstanding the statement of principle in the Ruling Panel's earlier decision, we accept the submission that the "***power system and its operation are highly complex, and electricity industry participants must accept a degree of operational and financial risk as a result"*** may apply in some cases. Participants that suffer losses will have other remedies at law[8], and will have insurance and other business strategies to cope with unexpected interruptions to business. For the Rulings Panel to provide compensation at the indemnity level is a substantial issue, on which we would have liked to have had the benefit of fuller submissions. We note that these provisions are limited in two important ways – the first is that they relate to complaints by industry participants (not the general public) and second, that Parliament has limited the liability of the System Operator to $200,000, which prevents, in all cases of compensation above that level, compensation being made at the indemnity level. Accordingly, we order compensation at the amount claimed and proven by CHH, namely [sum redacted pursuant to confidentiality order]

Costs

58. There are 2 issues as to costs. The first is the allocation of costs arising from the Ruling Panel's decision into the applicability of Rule 5 to the System Operator, which was held over from that matter. The second is the costs in this substantive matter.

The Rule 5 decision

59. In its decision of 28 February 2013, the Rulings Panel invited submissions on the power to order costs in interim decisions, and on the issue of costs in that particular hearing. We indicated that in our view the position with regard to interim decisions was not clear, and that our preliminary view was to order a payment of $5000 by the Authority as costs on that matter.

60. The Authority has made detailed submissions on these points, which the Rulings Panel has found very helpful. The Authority submits, correctly, that s 54 (1)(g) is activated by a determination by the Rulings Panel, of a complaint, and that that does not necessarily mean that there has to be a finding of breach, merely a

[8] Note that s 55(4) preserves actions in breach of contract, for example.

determination of the complaint.

61. Given that s 55 (1) limits the remedies for breaches of the Code to those contained in s 54, we find that cost orders on interim hearings must wait until the Rulings Panel makes a determination of a complaint.

62. In relation to ordering costs against the Authority, that body submitted that s 54 (1)(g) is limited to making costs orders against an industry participant. After a careful reading of s 54 we find that while many other remedial powers are limited to actions against industry participants[9], s 54(1)(g) is not so limited; it provides simply that the Rulings Panel may: "***make orders regarding the reasonable costs of any investigations or proceeding***s". There is no limit to industry participants, and we see no reason to write that limitation into the section. The express restrictions contained in s 55 do not apply to s 54 (1)(g). Costs are typically only awarded against parties to a proceeding. In this case the Authority is a party.[10]

63. The Authority submitted that the fact that regulations 45 and 46 require only industry participants to comply with Rulings Panel orders, and sums to be paid by industry participants as debts recoverable in court, respectively, indicate a legislative intent to exclude the Authority from liability for costs. We think it as likely that Parliament assumed that the Authority would need no compulsion to abide by Rulings Panel decisions, and would pay its debts when due, or simply overlooked the issue.

64. The Authority stressed that the orders in s 54 (1) were 'remedial". The System Operator made comments on these submissions, submitting that an order for costs against the Authority would be remedial in favour of any party wronged by Authority action found to be unjustified. Although the section heading supports the Authority's position, several of the 'remedies" are directed at parties other than an industry participant in breach; ss 54(1)(h) and (i) are directed at actions involving the Authority and the Minister respectively. We do not find the heading dispositive.

65. We find that the Rulings Panel has the power to order the Authority to pay reasonable costs of any proceedings in which a complaint is made that an industry participant has breached the Code. Although any such order must wait the determination of that complaint, it may cover all aspects of the proceeding, including costs on any interlocutory or interim hearings.

66. We turn then to the issue of whether in this case, an order against the Authority should be made. The Authority is a public body, performing an essential function, which combines a mixture of regulatory, investigative, prosecutorial, and quasi-judicial activities. We accept that bodies performing public service can be exempted from the usual rule that costs follow the event. It should only be on rare occasions that the Rulings Panel should consider a costs order against the

[9] For example s 54 (1)(a) permits issuing a private warning or reprimand to an industry participant
[10] See regulation 32 (c)

Authority.

67. The Authority submits that it did not act improperly, and that it acted in good faith. However, it has not responded in its submissions to the matters raised by the Rulings Panel in its preliminary decision, where we said:
"*We find that contrary to the Authority's submission, there was little ''genuine uncertainty'' surrounding this issue. Nothing has been advanced to explain that uncertainty. It was contrary to the advice of the experienced Investigator, and we note that no reasons have been advanced as to why the findings of the Investigator have been departed from, which would have been helpful. It appears to have come as a surprise to both the System Operator and the Grid owner. It was a departure from a well-established industry position*".[11] At [65] we held that the Authority's argument was "*clearly untenable*". We find that the Authority's argument in the Rule 5 matter went further than advancing an argument that was ultimately unsuccessful. In essence it amounted to attempting to make the System Operator liable for matters that were the responsibility of a grid owner- in this case Transpower.

68. At the same time, we have some sympathy for the detailed arguments presented by CHH in its letter to the Investigator dated 28 June 2012 (Investigator's Report at page 3-151) at paragraphs 12-54 about the possible liability for breaches by the Grid owner. The Investigator's report reduces all the issues to a case of mistaken data entry by the System Operator, but as that letter points out, there are requirements of two-way communication between the parties, and specific obligations on the grid owner that were questioned. Why a higher trip setting was not used, why it was set at 272A, who was informed about that, why the setting was readily changed immediately after the event, and what impact the admitted failure by the Grid owner to update the settings are matters which may have had a bearing on the case. That said, we note that CHH abided the decision of the Investigator and the Authority once the latter decided not to lay a complaint on those matters. CHH did not, for example avail itself of regulation 31 and lay a private complaint with the Rulings Panel. The Rulings Panel has insufficient information on those matters. A hearing of this nature is not suited to exploring the possible impact of those complaints

69. The Rulings Panel finds that the present case is one in which it should depart from the usual rule that bodies acting in the public interest should not pay costs, and orders costs of $5000 payable by the Authority to the System Operator.

The Substantive decision

70. The Authority has substantially succeeded against the System Operator on the matters dealt with in this decision. It has sought costs, and on the principle that 'costs follow the event' they will be ordered against the System Operator.

[11] See [71], Decision of 28 February 2013

71. The Authority submitted that it had sustained costs of $13,391 (excluding GST) not including costs sustained in relation to the question of costs on the Rule 5 hearing. Under a "two thirds" rule, this would entitle the Authority to an award of approximately $9,000. We accept the Authority's suggestion that an award of $5,000 costs be made, counterbalancing the award made on the Rule 5 hearing.

72. CHH has succeeded in its claim for compensation against the System Operator. It submits it has incurred costs of $50,000 including expert witness fees, but provided no details of the breakdown of those costs. In the circumstances, further details of the actual costs are not warranted in this case, but for future cases where costs are sought the Rulings Panel would appreciate a memorandum setting out with a little more particularity the details of costs incurred, with service on other parties.

Orders

73. The following orders are made:

(1) The System Operator will pay a penalty under s. 56(2) of $15,000.

(2) The System Operator will pay compensation under s. 54(1)(e) to CHH of [sum redacted pursuant to confidentiality order].

(3) The System Operator will pay costs under s. 54(1)(g) to the Authority on this (substantive) matter of $5,000.

(4) The Authority will pay costs under s. 54 (1)(g of $5,000 to the System Operator arising from the interim hearing.

(5) The System Operator will pay costs under s. 54(1)(g) to CHH on this (substantive) matter of $50,000

Issued 27 September 2013

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P.C. Dengate Thrush
Chair, Electricity Rulings Panel