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 of Schedule G6 of the Rules, and in relation to an alleged beach of Rule 5 of Section VI of Part F of the Rules.

DECISION OF THE ELECTRICITY RULINGS PANEL
ON THE PRELIMINARY QUESTION OF THE APPLICABILITY OF RULE 5 OF SECTION VI OF PART F TO TRANSPOWER

DATED 28 February 2013

Rulings Panel Members

Peter Dengate Thrush - Chair
Geraldine Baumann - Vice Chair
Nicola Wills - Panel member

Background

The complaint

1. On 2 May 2012 the Electricity Authority (the Authority) laid a formal complaint with the Panel pursuant to regulation 30 of the Electricity Industry (Enforcement) Regulations 2010, in relation to:

    a. admitted breaches of clauses 1.3.1.3(a), 1.3.2.4(a) and 1.3.4.7(a) of schedule G6 of part G of the Electricity Governance Rules 2003 (the Rules) (Admitted Breaches) by the System Operator, 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 of the Rules on 27 October 2010; and

    b. an alleged breach of rule 5 of section VI of part F of the Rules on 27 October 2010 (Alleged Breach).

2. 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).

The System Operator's response

3. The complaint arises out of the operation of the ARI_KIN SPS (special protection scheme). On 27 October 2010, the ARI_KIN SPS was activated; the ARI_KIN 1 and 2 110kV circuits' breakers tripped and disconnected 86 MW of load at the Kinleith GXP causing a loss of supply to CHH's Kinleith paper mill and the wider Tokoroa area.

4. In regard 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) the System Operator acknowledged that it used the wrong information to formulate the pre-dispatch schedule, the schedule of dispatch prices and quantities and the dispatch schedule.

5. The System Operator does not admit the alternative breaches alleged in paragraph 1 (a) of the Notice.

6. The System Operator denies paragraph 1 (b) of the Notice and says that Rule 5, Section VI of Part F of the Rules (rule 5) does not apply to the System Operator.

Relevant chronology

7. The parties were notified of the complaint by the Electricity Rulings Panel (the Panel) on 15 May 2012.

8. On 16 May 2012 Transpower, in its capacity as System Operator, sought clarification about which industry participant/s were the subject of the complaint.

9. On 28 May 2012 Transpower, in its capacity as Grid Owner, sought further particulars of the alleged breach of rule against it.

10. On 1 June 2012 the Authority clarified its position in respect of the Alleged Breach, saying that it was alleged against Transpower in its capacity as System Operator, saying:

    a. *"Rule 5 of Section VI of part F applies to Transpower in all of its roles and capacities, including in its capacity as System Operator.*

    b. *Transpower, in its capacity as System Operator, breached that rule.*

11. At that point Transpower as Grid Owner withdrew from active participation in the proceeding.

12. On 7 June 2012 Transpower expressed surprise that the allegation of breach of rule 5 had been made against it as System Operator, and suggested a preliminary hearing into that issue.

13. On 8 June 2012 the Authority did not oppose a preliminary hearing, and suggested a timetable for the conduct of that hearing, including the filing of further particulars.

14. On 15 June 2012 the Authority provided further particulars of the Alleged Breach of rule 5:

    a. *Transpower, as System Operator, had an obligation to operate the ARI-KIN1 and 2 circuits and/or the ARI-KIN SPS in accordance with good electricity industry practice.*

    b. *Given the System Operator's reliance on the use of system models, good electricity industry practice required the System Operator to have, among other things, an adequate information assessment, management and review system in place to ensure that the interconnection assets were modelled, and thus operated, in accordance with the asset ratings provided by the Grid Owner.*

    c. *The System Operator failed to comply with good electricity industry practice in the following respects:*
        i. *The System Operator misinterpreted the information provided by the Grid Owner and modelled incorrect asset ratings in or around 2005; and/or*
        ii. *The System Operator's information assessment and peer review processes failed to identify the modelling error prior to the ARI-KIN SPS being operationalised by the System Operator in or around 2005; and/or*
        iii. *The System Operator's quality assurance programmes failed to identify the modelling error; and/or*
        iv. *The System Operator failed to review its model and/or operational procedures once the pattern of ARI-KIN use was changed in 2009, and again in mid April 2010 and/or*
        v. *The System Operator operated the assets with incorrect asset ratings.*

15. On 19 June 2012 the Panel ordered the hearing of the preliminary issue of the applicability of rule 5 to Transpower in its capacity as System Operator, and set out a timetable substantially as proposed by the Authority.

16. The parties complied in a timely fashion with the timetable. There was no *viva voce* hearing sought by the parties or suggested by the Panel. The matter was considered by the Panel on the papers; this decision is the Panel's ruling on that preliminary issue

The preliminary issue

17. Rule 5 (section VI of Part F) provides:

> **"5. Transpower to maintain interconnection assets**
>
> Transpower must design, construct, maintain and operate all **interconnection assets** in accordance with **good electricity industry practice**. "

18. "Transpower" is defined in Part A of the Rules as:

> "**Transpower**" means Transpower New Zealand Limited.

19. "good electricity industry practice" is defined in Part A of the Rules as:

> "**good electricity industry practice**" in relation to transmission, means the exercise of that degree of skill, diligence, prudence, foresight and economic management, as determined by reference to good international practice, which would reasonably be expected from a skilled and experienced **asset** owner engaged in the management of a transmission network under conditions comparable to those applicable to the **grid** consistent with applicable law, safety and environmental protection. The determination is to take into account factors such as the relative size, duty, age and technological status of the relevant transmission network and the applicable law;"

20. The parties agree that the issue for determination is whether "Transpower", in the context of rule 5, means:
    a. Transpower in its various relevant roles and capacities, including in its capacity as System Operator; or
    b. Transpower as Grid Owner only, and not in its capacity as System Operator.

The Positions

21. The Authority says, in summary, that the rule is plain on its face – Transpower is named explicitly in rule 5, and Transpower is a defined entity. It goes on to say that Transpower has many roles under the statutory framework, and that generally, where a specific role is

intended, it is mentioned specifically. Where "Transpower" is used in rule 5, it is intended to mean any of such roles. The Authority says such an approach is consistent with the intent of the legislation.

22. Transpower as System Operator ("Transpower") says, in summary, that on a proper interpretation of the legislative framework, rule 5 can only have been intended to refer to Transpower in its role as Grid Owner, and not to its role as System Operator. It sets out a number of consequences of adopting an inclusive definition that it says are inconsistent, and which require a restricted interpretation in relation to matters such as its liability. It says that the Authority has previously stated that the rule does not apply to Transpower as System Operator, and points to industry practice that that is so.

The Rulings Panel's approach

23. We have proceeded on the basis that Transpower bears the burden of establishing that the Authority's approach is not to be followed, and that the reference to Transpower in rule 5 should not be read as including Transpower as System Operator. We approach this in a manner somewhat akin to the way the courts have dealt with applications for a strike out of one of the parties to a proceeding. Transpower is arguing that "Transpower" does not mean Transpower in all its roles, but seeks to "strike out" the role of Transpower as System Operator. We are guided by the summary of the established criteria for a strike out of a cause of action set out by the Court of Appeal in *A-G v Prince* [1998] 1 NZLR 262, (1997) 16 FRNZ 258, [1998] NZFLR 145 (CA) at 267, and endorsed by the Supreme Court in *Couch v A-G* [2008] NZSC 45 at [33], per Elias CJ and Anderson J. (See McGechan; Rules of Civil Procedure, HR15.1.02.)

24. Elements of that approach that influenced the Panel are that a striking out power should be sparingly used, and only in clear cases where it is obvious that the argument cannot succeed, being "clearly untenable". In this case we have taken that to mean that Transpower has to show convincingly that the rule cannot have intended the word "Transpower" to include Transpower in its role as System Operator. We appreciate that that sets a high bar for Transpower; unless we are certain that "Transpower" cannot mean Transpower in its role as System Operator, we must let the matter proceed to the Hearing on the basis alleged. Transpower has to show that interpreting "Transpower" as including the role of System Operator is clearly untenable, not that it is merely a possible interpretation, or even a likely interpretation.

The legislative framework

25. 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).

    As to substantive matters, we are required under Section 139 (2) (b) of the Electricity Industry Act 2010 (the Act) which came into effect on 1 November 2010, to apply that Act, 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).

Interpreting Rule 5

26. It is common ground that the meaning of an enactment must be ascertained from its text and in light of its purpose.[1]

The text

27. The obligation under rule 5 is imposed on "Transpower" which is defined in the Act as meaning Transpower New Zealand Limited.

28. The Authority says that the words are plain on their face. Transpower means Transpower in all of its roles. We have to say that, in the absence of any other considerations, we would find this *prima facie* a persuasive argument.

29. We accept however, the submission made by both Transpower and the Authority, that S .5 Acts Interpretation Act 1999 provides that a full interpretation requires an analysis of the context, to ensure that applying the textual meaning does not result in a result that is meaningless or inconsistent with the intent and purpose of the legislation. The approach taken by the Panel is therefore to begin by assuming that the literal meaning of the text is intended, and to test whether this is rebutted by context, or the intent of the rules as that can be discerned. We bear in mind and adopt the requirement set out by the learned authors in JF Burrows & RI Carter *Statute Law in New Zealand*, 4th Ed Lexis Nexis 2009, that we must adopt an interpretation that is sensible, just, and practical.

30. Our starting point is to consider the basis on which Transpower becomes a party to the investigation of breach before us.

[1] Section 5, Interpretation Act 1999

31. Under the Act, Transpower is a "participant" (and therefore open to an allegation of breach of the Rules) because it is both a "line owner" and a "service provider" (System Operator) (and possibly meets other criteria under the definition). The Panel notes that a "grid owner" is not a participant *per se* under the Regulations and further that the definition of "grid owner" contemplates the possibility of multiple grid owners (being defined as *"any person who owns or operates any part of the grid"*).

32. An early point to note is that the rules themselves require the same party fulfilling different roles to be treated as two separate parties; Rule 2.1 of part A reads:

> "In these rules:
>
> 2.1 Any participant who carries on the functions or business of a **generator**, **purchaser**, **distributor**, **grid owner** or **service provider** is, for the purpose of the rules, to be treated as a separate person for each such function or business, notwithstanding that at law, all or any of the functions or business may be carried on by the same person".

33. This artificial separation of a single entity into separate functional parties is maintained and clarified in the Regulations: Reg. 50 provides:

> "Separation of Transpower roles
>
> [1] Transpower's role as system operator under these regulations and the rules is distinct and separate from any other role or capacity that Transpower may have under these regulations and the rules, including as a grid owner or transmission provider.
>
> [2] For this purpose, when assessing any aspect of the performance, or non-performance, of the system operator, —
>
> (a) the assessment must be made on the basis that the system operator had no other role or capacity; and
>
> (b) the system operator must be treated as if it did not have any knowledge or information that may be received or held by Transpower unless Transpower receives or holds that information or knowledge in its capacity as system operator.
>
> [3] Subclause (2) applies, with necessary modifications, to any assessment of any aspect of the performance, or non-performance, of Transpower in any other role or capacity under these regulations or the rules."

34. It is common ground that Transpower is the System Operator and Grid Owner. These provisions do not help us answer the questions as to the meaning in rule 5, but they do show that the question is properly asked – is the intention of rule 5 to provide obligations on Transpower (the company) in each and every role, or to provide obligations on Transpower when performing one of its roles, and if so which?

35. Both parties have advanced arguments about the conclusions that may be drawn about Transpower's role in reference to the legislative framework, the purpose and scheme of the Rule and the wider context of the Rule. We go on to consider those.

Transpower's role under the legislative framework

36. The Authority says that Transpower has many roles under the Act, Regulations and Rules (System Operator, Grid Owner, Asset Owner and HVDC owner), each with specific obligations under the Rules. It points to a series of provisions in the legislation that specifically mention Transpower's roles, and says that the absence of a specific role in rule 5 means that no specific role is meant and that Transpower in any role is covered by the provision.

37. Transpower says that Transpower is named as "Transpower" in rule 5, and throughout Part F, to mean Transpower as Grid Owner. It is helpful to briefly look at the overall structure of the rules, and the way parties are named to understand the context of rule 5. We have already referred to the definition of Transpower, and "grid owner" in Part A, and to Rule 2.1 of Part A. Elsewhere in the definitions in Part I, it seems to us that Transpower is generally used in those definitions in the context of Transpower's operations as a grid owner.

38. There is no Part B – it was reserved for future use. Part C deals with the principal performance obligations of the System Operator and the performance obligations of the asset owners. It deals also with the technical codes and the arrangements concerning ancillary services. It is 146 pages long. Other than mentioning Transpower as having signed the SOSPA, it doesn't mention Transpower. It refers throughout to the System Operator. It sets out in considerable detail the scope of responsibilities and duties of the System Operator, not least in Part II, which sets out the principal performance obligations.

39. Part D deals with electricity metering, including best practices for metering houses, codes of practice for metering installations, and certificates for modems, meters etc. Part E deals with metering and customer switching, setting up IPCs and the operations of the Registry. Neither mentions Transpower, and so is of little assistance in showing a pattern of nomenclature in relation to Transpower.

40. Part F deals with the operation of the Grid – with transmission agreements i.e. connecting to the grid, and with building, maintaining and operating the grid, the cost of transmission across the grid, what can and must be connected to the grid, and what will happen when the grid fails. It is approximately 980 pages long. It mentions Transpower frequently and consistently in the context of its role as a grid owner i.e. the types of obligations imposed are imposed in relation to Transpower's role as a grid owner. Part F of the Rules single out Transpower as a grid owner with obligations that are not imposed on any other grid owner. It appears that the intent in doing so is that Transpower in particular takes responsibility for specific matters associated with its role as a grid owner. The matters covered in Part F are matters that could not logically be undertaken by every grid owner – in the event that there was more than one. (For example, Transpower has responsibility for development of the Connection Code under Section II, rule 3.3 and must develop that code in such a way that all grid owners can meet their obligations under Part C.)

41. In Schedule B of their submissions, counsel for the Authority says there are 2 instances in addition to rule 5 where reference to Transpower means the company as System Operator; Rule 5.6.1.1 of Part II, and Rule 12 (A) of part III. The first requires a grid reliability estimate, which comes, the Authority says, from understanding economic issues within the purview of the System Operator, not the Grid Owner. The second refers to a grid reliability report, which requires an economic analysis of grid operations, again, so it is argued by the Authority, within the sole responsibility of the System Operator.

42. Transpower disagrees, and says both those are plain examples of the functioning of a grid owner. Simply because the System Operator may also have useful information on this point does not mean that the obligation in relation to a grid matter shifts to becoming a System Operator obligation. We agree with Transpower. The uses of the word Transpower in these instances does not indicate an intention to create obligations other than on Transpower as a grid owner. We find instead that the evidence of the very large number of uses of the word Transpower in Part F in the context of obligations as a grid owner shows that the word is intended and does refer to Transpower in its grid ownership role and not its System Operator role.

43. That would leave the reference to Transpower in Rule 5 to be the sole instance in the Rules, if we so found, to be interpreted to encompass Transpower's role as System Operator. Before we examine the actual text of rule 5 more closely, we continue with the context review of part F. In this regard, Transpower says that if the Authority is correct, and some references in Part F include the System operator, that throws the

interpretation into confusion. Counsel for Transpower points in paragraphs 84.1-84.6 of its submissions, to: Rules 11. 1, Part IV; 6.1, Part VI; 7, Part VI; 10.8, Part VI; 11, Part VI; and 15, Part VII. They say that the uncertainties introduced by a clause-by-clause analysis of Part F to ascertain the correct identity of Transpower cannot have been intended. We agree; the context of Part F other than rule 5 strongly suggests that all references are to a grid owner.

44. We come then to the text of rule 5. It will be recalled that the obligation is obligation is on Transpower to "...design, construct, maintain and operate all **interconnection assets** in accordance with **good electricity industry practice**." The Authority says that use of the word "operate" necessarily means invoking the role Transpower has as Systems Operator in relation to the word "operate", but not to the other obligations (to design construct and maintain), which remain with Transpower as a grid owner. We find that there is no precedent in the Rules that the Authority has cited, nor any logical reason why a rule should be broken into component parts in this way, with different obligations on different parties being created. We think it unlikely the rule was constructed in the way the Authority contends.

45. We note Transpower's submission that other asset owners are also required to "operate" their assets to stated standards (rule 2.1.2 Code A, Schedule 3, Part C), yet no claim is made that that use of the verb "operate" invokes the role of the System Operator. We note that Transpower as a grid owner does in fact operate assets. We can see no inconsistency in rule 5 requiring Transpower as grid owner to operate its assets to the named standard. We think that interpretation is further support for the argument that the rule should not be broken into components to be performed by separate parties. There is no logical or contextual requirement that prevents the rule from applying to a grid owner.

Good electricity industry practice

46. Rule 5 imposes a requirement on Transpower to (among other things) operate interconnection assets in accordance with "good industry practice". Both parties have sought to rely on the definition of "good industry practice" in support of their argument.

47. Transpower says that this obligation could not be imposed on the System Operator because the standard required is that "which would reasonably be expected of a skilled and experienced **asset owner**" so the obligation only applies to asset owners. Further, because it is an "asset owner" standard, the System Operator could not logically be expected to comply with it. Transpower points out that the System

Operator is subject to its own performance standard – that of a "reasonable and prudent system operator" and that if the Authority's position were accepted the System Operator would be simultaneously subject to different performance standards under the Rules.

48. The Authority's argument is that the "good industry practice" standard is imposed by referring to the standard of a skilled and experienced asset owner but that this does not necessarily mean that the "operator" is required to be the owner of the asset.

49. We understand the logic of the Authority's argument on this point. This is an issue of setting a standard by which performance is to be measured. The standard selected is that of an owner, but that does not, of itself imply that people meeting the standard are required to be owners, or that only owners are expected to be measured. It may be that owners of an asset would be expected to set a higher standard of care than an operator of the asset. That might be reasonable, for example, in a landlord and tenant agreement, in which the tenant agreed to maintain the assets to the standard of a landlord – a higher standard than might otherwise apply were the standard to be that of the good tenant. We note that Transpower does not argue that the standard of an asset owner cannot be readily and objectively identified. Given that the System Operator is not an asset owner, using the standards of someone that is an asset owner may be logical.

50. However, we conclude that it is more likely that the rule was constructed by reference to a grid owner standard because it was intended to apply to the conduct of a grid owner. We think that finding supports, or is at least consistent with, the finding about the word "operates" above.

51. Transpower points to its "tailor made" standard of care as System Operator, found in rule 2, Part II, Section C of the Rules. It says that if the "good industry practice" applies to Transpower in its capacity as System Operator then an odd result would arise: the standard applied to the operation of interconnection assets would vary depending on whether the asset was being operated by the System Operator or the Grid Owner. It would be simultaneously subject to differing standards.

52. We do not think it inconceivable that two different standards could apply to Transpower acting in its different functions. As the Authority points out, that is expressly contemplated by Regulation 50 (Appendix C to the Authority's submissions).

The purpose and scheme of the rule

53. The Authority says the purpose of rule 5 is to ensure that when interconnection assets are operated, they are operated in accordance with good industry practice. Because the System Operator plays an integral part in ensuring the secure operation of the power system, interpreting rule 5 so that it does not apply to the System Operator would frustrate that purpose of the Rule.

54. The Authority points out that in this case the primary cause of the loss of supply to KINLEITH GXP was the System Operator's operation of the ARI_KIN SPS – in particular the rating on the SPS was exceeded. Narrowly interpreting rule 5 so that it does not apply to the System Operator would frustrate the objective of ensuring that interconnection assets are operated with good industry practice.

55. We think the answer to that is for the Authority to use the provisions relating to the conduct and standard of care applying to the System Operator that clearly apply to the System Operator, including those in Part C. If those are inadequate, that is a matter that should emerge through the process of resolving this complaint and become the subject of possible amendment of the Rules. We do not think that because there may have been a wrong committed we should strive to find an interpretation of the Rules that will deliver a remedy.

The "Without Prejudice" provisions.

56. The Authority says this argument is supported by the scheme of the Rules as a whole. In particular:

    a. Rule 3 of Section I of Part F (set out in Schedule A). In particular the Authority interprets the without prejudice rules (Rules 3.3 and 3.4) as an indication that breaches of obligations by Transpower and the System Operator under Part C and F must be treated independently. The Authority concludes that if "Transpower" in Part F does not include Transpower in its capacity as System Operator, Rules 3.3 and 3.4 would be redundant because on that interpretation there is no overlap of functions and obligations (between Part C and Part F of the Rules); and

    b. Regulation 50, which requires any assessment of Transpower's performance as "System Operator" to be carried out on the basis that Transpower has no other role or capacity and erects a Chinese wall around information held by the System Operator and Transpower so that knowledge on the part of one cannot be imputed to the other.

57. Transpower's response to these arguments is:

    a. Transpower does not agree that Rule 3 suggests an overlap between Transpower's obligations and the System Operator's obligations and says that the without prejudice Rules are simply making clear that the tasks undertaken by the System Operator under Part C do not derogate from the tasks undertaken by Transpower as a grid owner under Part F (and vice versa);

    b. Transpower also points to the fact that 3.4 includes: "… any claim against Transpower under part F or a transmission agreement, is without prejudice to the functions and obligations of the system operator under part C." Transpower points out that only the grid owner is a party to and liable under a transmission agreement, further indicating that "Transpower" in relation to part F is intended as a reference only to the role of grid owner.

58. We agree with Transpower – the *without prejudice* provisions strengthen the notion of the independence of the roles played by Transpower. We disagree that they are redundant. The fact that Transpower plays both roles, and that they are interlinked, is a complicated and unusual situation. These provisions clarify that liability for each is independent of the other.

The SOSPA and liability

59. The SOSPA ("System Operator Service Provider Agreement") is the contract under which Transpower is appointed System operator, and which defines, inter alia, the services to be provided, and the liability for breach. Transpower puts forward further arguments in relation to the interpretation of rule 5:

    a. The definition of services Transpower has to provide are set out clause 2.1 and are those of the System Operator. Transpower notes that this does not include the System Operator acting in relation to Grid Ownership matters, nor is there any additional compensation provided were Transpower to do so.

    b. The liability limits under the SOSPA reflect those of the System Operator under the Rules, which are much lower than the liability limits that apply to "Transpower". In both the Regulations (2003) and the 2010 Regulations we see a clear distinction between the liabilities of the "System Operator" and Transpower. Regulation 53 (2010 Regulations) and Regulation 112 (2003 Regulations) both refer to "Liability of system operator" without naming Transpower,

and put a $200,000 limit on liability from a single event or closely related events, with a total cap in any financial year of $2,000,000. Regulations 56 and 114A, (2010 and 2003 respectively), deal with the liability of asset owners. In contrast to the System Operator liability regulations, Transpower is specifically named in these regulations. In both Regulations 56 and 114A it is clear that Transpower is being described in its role as an asset owner (which by definition includes its role as a grid owner) – the regulations are embedded in that part of the rules dealing with asset owners. The limit on liability is $2,000,000 for a single event/closely related series of events, with a cap in any financial year of (the significantly larger) $6,000,000.

c. Transpower had provided an affidavit from Mr Dan Twigg (the System Operator's System Operations Manager). Mr Twigg was involved in the negotiation of the SOSPA and confirms that the prospect of the System Operator having obligations under Part F of the Rules was not discussed during those negotiations, but that the issue of liability in relation to the System Operator role was. Transpower says the issue of liability was being carefully considered at the time, and any suggestion that the System Operator could incur liability under Part F would have been noted and caused concern.

60. We agree that the careful drafting of terms of the SOSPA, and the different liability standards imposed on Transpower in relation to its different roles are strong indicators that references to the System Operator are likely to be specific, not inferred. Mr Twigg confirms that any suggestion that the System Operator might be exposed to the higher levels of liability was not intended, and would have been resisted in the negotiations he refers to.

Industry and Authority Practice

61. We find the argument that the industry view of the application of rule 5, and the Authority's practice both support Transpower's interpretation to be persuasive. It seems to have been the industry view for some time. Transpower points to two previous decisions of this Panel concerning self-reported breaches of the equivalent of Rule 1.3.4.7, which is in suit in this proceeding, in neither of which was the claim that rule 5 applied to the System Operator advanced. Nor has it been in the 90 breaches apparently reported under the equivalents of the other rules in play in this case. We note that this view of the applicability of rule 5 is incorporated in the findings of the Investigator.

62. Transpower relied on comments made by the Authority during the formation of the Benchmark agreement, quoting it thus: *"The Commission notes that the responsibilities of the system operator for common quality should continue to be addressed under Part C and, therefore, the Commission does not consider that bundling together the role of system operator and grid owner will promote efficiency."* We do not find that dispositive, as there is no question that the roles have not been bundled, but are maintained separately.

63. We are cognizant of the risks, and future remedial work that may flow from a ruling that changes long-held industry understandings. We appreciate that our task is to interpret the rule as we find it. In general, we are aware that this is a sophisticated industry. There is a high appreciation of the Rules. Substantial sums of money are involved. Parties are well served by legal advisers. These rules are developed and amended in a way that is transparent to the industry, involving substantial input on occasions by way of submissions from industry members. In those circumstances, we regard the industry view, and the view of the experienced investigator with some respect.

CONCLUSION

64. Transpower has, we conclude, met the high threshold that the strike out standard imposed. We find that the structure of the Rules, the text and - just as importantly, the context, point in favour of Transpower's interpretation that when rule 5 refers to "Transpower" it does not mean Transpower as System Operator. In the context of the Rules, and especially noting their structure, "Transpower" in rule 5 of Section VI, Part F imposes obligations on Transpower in the context of its role as grid operator. In terms of the question posed by the parties as set out in paragraph 20 above, we find that "Transpower "in Rule 5 does not mean Transpower in all its various relevant roles and capacities, but means Transpower in its capacity as a grid owner.

65. We find that the Authority's argument that Rule 5 is to be broken into parts, with separate parts ascribed to each party is "clearly untenable, not that it is merely a possible interpretation, or even a likely interpretation".

66. This conclusion, particularly in the light of industry experience, and past practice by the Authority is sensible, just, and practical.

Costs

67. Both parties sought costs, and made helpful submissions on that topic. Mindful of the advantages in such disputes of keeping costs orders on

interlocutory matters up to date, rather than waiting for a final decision, we would prefer to make an order now.

68. In relation to the jurisdiction to order costs, the position in a case of an interlocutory hearing in a Complaint, such as this one, is not straightforward. The Authority is correct that the power to make orders under Section 54 of the Act is subject to a prior finding of breach, but it is not clear that this is precludes a costs order in interlocutory cases. In relation to disputes falling within Regulations 78-90 there are specific costs provisions, and the power to make other orders. Regulations 87 (1) (a) and (c) of the 2010 Regulations allow the Panel to order that one party pay money to another party, and to make damages and compensation orders at this stage in the dispute. Section 61 of the Act is to the same effect. Regulation 90 requires the parties to meet their own costs, with other costs, such as the Panel's cost, to be met by an allocation order. Cases falling within this disputes regime are either restricted to the two classes of dispute prescribed in Regulation 78, or a voluntary submission of a dispute to the Panel. In the end, we gain no useful direction on interlocutory costs from the dispute provisions.

69. We are aware that the Panel has an inherent power to determine its own procedure, [Section 53 (2)] and think it arguable that this extends to ordering costs in interlocutory cases. However, we note that the Panel's Procedures have only recently been reviewed and rewritten, and while other areas of procedure were changed in that review, no changes were made in relation to costs. We conclude that this is something on which we would like to hear submissions in the resolution of the substantive part of this complaint, noting that changes to the Procedures on notice may result, and, possibly, changes to the Regulations.

70. Because it may be helpful in making those submissions, we set out our thinking on the merits of the costs issue. We refer to the principles enunciated by the Panel in its 7 March 2006 decision in relation to costs, in particular noting that principle relating to the element of public service. We would add that costs are a contribution to a party's expenses, not a reimbursement. A full refund of costs on an indemnity basis would be made only in conditions where circumstances demanded it.

71. 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. Both parties acted promptly in attempting to resolve the issue, and filed helpful submissions. Resolving it has, however, delayed the substantive matter, which is one in which breaches have been admitted, and which the parties might have expected could be dealt with promptly. Transpower estimates its costs to date on this matter at between $7,000 and $10,000.

72. Had we been free to do so, under the principles that costs should normally follow the event, and should be a contribution, not an indemnification of a party's costs, we would have ordered the payment by the Authority of the sum of $5000 to Transpower, the System Operator.

73. Accordingly, we reserve our position on costs in relation to this interlocutory proceeding, and invite the parties to address this issue in later submissions.

Further Directions

74. We will, within 28 days of this Decision call a Directions Conference, to deal with hearing the remainder of this case.

Issued 28 February 2013

_____

P.C. Dengate Thrush
Chair, Electricity Rulings Panel