THE ELECTRICITY RULINGS PANEL

IN THE MATTER of the Electricity Act 1992 (the **Act**) and the Electricity Governance Regulations 2003 (the **Regulations**)

AND

IN THE MATTER of a costs order under regulation 107(1)(i) of the Regulations in relation to Transpower New Zealand Limited's (the **System Operator's**) admitted breach of rule 1.3.4.5 (now rule 1.3.4.7) of Schedule G6 of Part G of the Electricity Governance Rules 2003 (the **Rules**) as a result of the incorrect remodelling of the Otahuhu substation in the SPD model.

Decision No 1

IN THE MATTER of the Electricity Act 1992 (the **Act**) and the Electricity Governance Regulations 2003 (the **Regulations**)

AND

IN THE MATTER of a costs order under regulation 107(1)(i) of the Regulations in relation to Transpower New Zealand Limited's (the **System Operator's**) admitted breach of rule 4.3 of section II of Part G of the Electricity Governance Rules 2003 (the **Rules**) for trading periods 47 and 48 on 6 September 2004.

Decision No 2

I. RULINGS PANEL - GENERAL PRINCIPLES - COSTS

The Rulings Panel thanks the Commission and the System Operator for their responses to the Panel's request for information and for the submissions that they have made.

The principles will apply in cases where there is an admitted breach and in cases where the Panel finds a breach has been committed.

The Panel has approached the issue of costs from the viewpoint that if participants do not commit breaches of the Rules, the procedures before the Commission and, in proper cases, the Rulings Panel are not triggered and no costs are incurred.

It follows that the party committing the breach should bear the burden of the costs where ordered. It is in part an issue of encouraging sound practice.

The Panel takes the view that it should follow the general principles set out below in ordering costs. In any one case the principles are subject to the rules of natural justice and the test of reasonableness.

Principles:

1. The Panel is a quasi-judicial body created pursuant to an Act of Parliament and its "standing costs" (the Panel's remuneration, its costs of seeking legal advice and its administrative support) should be fixed by appropriation and be a standing charge against the levy system. All other costs are the proper subject of consideration for orders on a case-by-case basis.
2. The Panel will not use orders as to costs as a de facto penalty.
3. The Panel does not accept that its power to order costs should be limited in any of the various ways set out in the submissions - the true test of reasonableness must be applied on a case-by-case basis.
4. The Panel will not order costs that have not been sought.

5. The Panel takes the view that there is an element of "public service" inherent in the regulatory regime and that element of "public service" will be considered by the Panel as a factor in making orders as to costs.

II. DECISION 1

In this case the Commission has sought to recover the costs incurred by it in obtaining, from the Clearing Manager and the Pricing Manager, details of the financial impact of the admitted breach.

This cost was incurred as a result of Contact Energy's request for information as to the financial impact of the breach.

The Commission sought the information from the Clearing Manager and the Pricing Manager who provided same but charged fees for so doing in the sum of $7,620.

The System Operator submitted:

(a) That the Clearing and Pricing Managers' fees should not be ordered as costs against the party in breach in any case.

This submission is not accepted by the Panel. The assessment of the financial impact of any breach may well be a vital part of the Panel's decisions as to the penalty and certainly will be essential in any case where the Panel can order compensation.

Depending on the information laid before the Panel by the submitter the Panel may also require further market assessment studies to be carried out and that other technical information be supplied.

(b) In the case of Decision 1, the Commission ought not to have laid the complaint with the Panel.

This submission is also not accepted. The System Operator admitted the breach and its proposed settlement was not accepted by the Commission. The Commission has the statutory right to consider whether to accept or reject any proposed settlement and to refer a complaint to the Rulings Panel. It was totally appropriate for the Commission to refer the matter to the Panel in the circumstances - the Panel is the

only body with the power to fix penalties for breaches of the Rules and, in appropriate cases, compensation and/or costs.

III. THE PANEL'S DECISION ON COSTS - DECISION 1

The Panel has decided not to order that the costs of the Clearing and Pricing Managers' work in this particular case be paid by the System Operator because this case was the first case taken under the new regime and in some ways was an educational exercise for the Participants, the Commission and the Panel.

All industry participants should be aware that the Panel may make orders in the future to meet costs incurred by the Commission or any other complainant germane to the issues of penalty and/or compensation against the party in breach.

IV. THE PANEL'S DECISION ON COSTS - DECISION 2

The Panel repeats its decision in the case of Decision 1 with the following Decision 2 specific comments.

1. This case did not require recalculation of final prices and the Commission did not seek an order for compensation.
2. The Commission did not seek an order as to costs.
3. The System Operator's submissions includes the following statement:

   "Genesis Energy Limited joined the investigation of this breach as an interested party. Genesis and the System Operator could not agree on a settlement of the breach. This was because Genesis proposed that the System Operator pay compensation for the breach and the System Operator was (and is) opposed to using the settlement process to agree compensation payments for alleged losses caused by a participant."

   That statement indicates that the System Operator is taking a very strong line on settlement issues which is contrary to the spirit and intent of the Act, Regulations and Rules which together constitute a regulatory regime based as far as possible on consultation, each participant self reporting and accepting responsibility for their own acts in breach and sound practice being encouraged.

The System Operator's position on settlements simply shifts the financial consequences of System Operator breaches from the party in breach to the industry as a whole and ultimately the consumer.

4. The System Operator indicated its belief that there was an artificial attempt being made at unbundling the fixed (routine) costs associated with an investigation from the variable (non-routine) costs. The Panel's view is that the debate as to which costs are "fixed" and which are "variable" is functionally irrelevant. The only costs which should not be considered for orders as to costs are the "standing costs" of the Panel as defined in Principle 1 above. The only way to fairly determine the balance between costs being ordered against the party in breach or being allowed to be spread to the industry is to consider each case on its own merits.

No costs order was sought in Decision 2 and none is made (refer Principle 4).

V. CONCLUDING COMMENTS

The conclusions of the Panel from these two initial cases are:

- That there will be costs associated with specific complaints and it is appropriate that those be allocated, in whole or in part, to the party in breach.
- The Commission does have a responsibility to analyse settlements, and in discharging this responsibility it is not frustrating the process.
- The payment of orders as to penalty and costs should be made to the Electricity Commission. The Electricity Commission is required to pay such sums into the Crown Account and they do not act as an offset for levies.

Neville Young

Chairman

7 March 2006