

File: 77130011  
Ref: TMS2911-284524.1

13 July 2011

Electricity Authority  
Level 7  
ASB Bank  
2 Hunter Street  
Wellington 6143

**Tony Stevens**

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**Joanne Verbiesen**


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**DELIVERED**

**APPEAL AGAINST ELECTRICITY AUTHORITY'S DECISION THAT A UTS DEVELOPED ON  
26 MARCH 2011**

1. We act for Bay of Plenty Energy Limited and Todd Energy Limited (**Appellants**).
2. We have today filed in the High Court at Wellington a notice of appeal pursuant to section 64 of the Electricity Industry Act 2010 appealing the Electricity Authority's decision that an undesirable trading situation developed on 26 March 2011 (the **UTS Decision**).
3. Under High Court Rule 20.6(1)(b) the Appellants are required to file a copy of the notice of appeal in the administrative office of the Authority. A copy of the notice of appeal is therefore **enclosed** in accordance with that Rule.
4. The High Court Rules also require the Appellants to serve a copy of the notice of appeal on every other party "directly affected" by the appeal. Also **enclosed** is a memorandum of counsel for the Appellants to the High Court which sets out the steps the Appellants are taking to ensure relevant parties are notified of the fact of the appeal and receive a copy of the notice of appeal, and seeking a fixture to obtain any necessary procedural directions.
5. Given its position and role both in relation to UTS Decision itself, and in overseeing the industry, the Appellants would welcome the Authority's input as to whether there are other parties the Authority considers should receive a copy of the notice appeal and/or if there are further steps the Appellants should be taking to ensure relevant parties are sufficiently notified. It may be that the Authority itself could assist in ensuring the notice is adequately brought to relevant parties' attention.
6. Please direct any comments either to counsel for the Appellants (as set out in this letter) or via the filing of a memorandum with the High Court.

Yours faithfully  
**IZARD WESTON**



**Tony Stevens**  
Partner

PS We have also enclosed a copy of the notice of date of case management conference

Encl



**NOTICE OF DATE OF CASE MANAGEMENT CONFERENCE FOR APPEAL  
(IN PERSON)**

Tony (Antony) Maxwell Stevens  
Izard Weston  
P O Box 5348  
Lambton Quay  
Wellington

**DATE:** 13 July 2011                      **TRACK:** Swift HC - Appeals  
**REFERENCE NO:** CIV-2011-485-001371  
**CASE NAME:** Bay of Plenty Energy Limited

Take notice that a Case Management Conference will be held on this appeal as follows:

**Date:** Monday 25th day of July 2011 at 10.00 AM  
**Place:** High Court, Wellington HC, Courtroom 4

Please note the **list of standard directions** for appeals and the other information and requirements set out on the back of this notice.

**Notification to other parties**

You must give notice of the date and time of this conference to everyone who has been, or is to be, served with a copy of the notice of appeal or originating application. You should ensure that the appeal is served without delay, and in good time before the conference.

**Conference memorandum**

Unless excused by the Court, you must, not later than 2 working days before the case management conference being the Wednesday 21st July 2011 file and serve a joint memorandum or your own memorandum (see reverse for details). Please note the standard directions require that proposed timetables run forwards from the conference date, and not backwards from the date of hearing (whether fixed or prospective).

**Cancellation of conference**

The Court may cancel the case management conference if, after reading memoranda, the Court is satisfied that all orders sought can be made by consent, and the attendance of counsel is not required. You are required to attend unless notified by the Court that the conference is cancelled.

If you have any queries please contact Julie Pereira, (04) 914 3604, Julie.Pereira@justice.govt.nz.

Julie Pereira  
Deputy Registrar

**Copy to:**

**High Court**  
2 Molesworth Street, Wellington 6011, Box 1091, Wellington 6140, New Zealand  
**Telephone:** (04) 914 3600 **Fax:** (04) 914 3603

## CONFERENCE INFORMATION AND REQUIREMENTS

### ATTENDANCE

The attendance of counsel instructed to appear in the case, or of the solicitor responsible for the case, is required. The parties may attend the conference but are not required to do so unless unrepresented by counsel.

In Courts other Auckland, Wellington and Christchurch, it may be necessary for the case management conference to be conducted by telephone. If this is the case, you will be advised. In such case, please ensure that you notify the Court of your appropriate contact details.

### CONFERENCE MEMORANDUM – r.7.5 (3) - (5)

Unless excused by the Court, you must, not later than 2 working days before the case management conference file a joint memorandum or your own memorandum. Any memorandum must –

- (a) estimate the time required for the hearing; and
- (b) suggest the costs category for the appeal for the purpose of rule 14.3 and, where applicable, for the purpose of rule 20.13; and
- (c) advise if any party has been granted legal aid under the Legal Services Act 2000 or has applied for legal aid and is awaiting a decision; and
- (d) if a full Court is sought, set out the reasons for that; and
- (e) in the case of an appeal under Part 20, specify any directions in Schedule 6 (see below) that should be deleted or modified, and why; and
- (f) in the case of an appeal under Part 26, specify any directions in Schedule 6 that would be appropriate for the appeal, and
- (g) set out any additional directions sought, and why.

You may file this memorandum by facsimile.

### Schedule 6 - Standard directions for appeals

- 1 The appeal will be heard (*at [time] on [date]*) [*or*] (*at a time and date to be allocated by the Registrar*).
- 2 The time for the hearing is estimated to be [half days or days].
- 3 The appeal is categorised as a category [type] proceeding for the purposes of rule 14.3.
- 4 The appellant must pay security in the sum of amount (\$) not later than 10 working days after the conference.
- 5 Unless detailed and specific points on appeal have been included in the notice of appeal, the appellant must file and serve, not later than 10 working days after the conference, points on appeal that clearly state the issues on appeal.
- 6 If the appeal involves a significant issue under the New Zealand Bill of Rights Act 1990, or an issue affecting New Zealand's international obligations or the Crown's obligations under the Treaty of Waitangi, or an issue arising in the appeal is otherwise of significant public interest, the Judge may direct that the Solicitor General be served with the notice of appeal, and with documents subsequently filed in the appeal.
- 7 The appellant must file and serve, not later than 20 working days after the conference, a common bundle of paginated and indexed copies of all relevant documents, including, if applicable,—
  - (a) the reasons for the decision; and
  - (b) the sealed order or judgment appealed from; and
  - (c) the pleadings; and
  - (d) the statements of evidence or affidavits; and
  - (e) the exhibits; and
  - (f) the notes of evidence, to the extent that they are relevant to the issues on appeal.
- 8 If a party insists on including a document in the common bundle even though another party objects to its inclusion on the ground that it is unnecessary or irrelevant, the objection must be recorded for the purpose of any award of costs relating to the inclusion of the document.
- 9 The appellant must file and serve, no later than 25 working days after the conference,—
  - (a) the appellant's submissions; and
  - (b) chronology (if relevant).
- 10 The appellant's submissions must contain—
  - (a) references to any specific passages in the evidence that the appellant will refer to at the hearing; and

- (b) a list of the names and correct citations of any authorities mentioned.
- 11 The respondent must file and serve, not later than 30 working days after the conference,—
- (a) submissions that meet the requirements set out in clause 10; and
- (b) if the respondent disagrees with the appellant's chronology, a separate chronology noting areas of disagreement.
- 12 The appellant must prepare a bundle of any authorities referred to in the submissions provided in accordance with clauses 9 and 11 that the appellant or the respondent considers ought to be produced to the court. The bundle may be produced at the hearing of the appeal or filed before the appeal is heard.
- 13 If the appeal is to be heard by a single Judge, 1 copy of each document must be filed.
- 14 If the appeal is to be heard by a full court, 2 copies of each document must be filed.

DUPLICATE

CIV-2011 -485- 1371

In the High Court of New Zealand  
Wellington Registry

CIV

**Under** Section 64 of the Electricity Industry Act 2010

**In the matter** of an appeal of a decision of the Electricity Authority

**In Re** **Bay of Plenty Energy Limited**, a company duly registered under the Companies Act 1993 carrying on business as an electricity provider and having its registered offices at Level 15, The Todd Building, 95 Customhouse Quay, Wellington.

**First Appellant**

**And** **Todd Energy Limited**, a company duly registered under the Companies Act 1993 carrying on business as an energy provider and having its registered offices at Level 15, The Todd Building, 95 Customhouse Quay, Wellington.

**Second Appellant**

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Notice of appeal against the decision of the Electricity Authority that an Undesirable Trading Situation occurred on 26 March 2011

Dated: 13<sup>th</sup> day of July 2011

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Event date: To be advised

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**IZARDWESTON**  
LAWYERS

Solicitors  
Level 13  
89 The Terrace  
WELLINGTON  
PO Box 5348  
DX: SP27002, Railway Station  
Phone: +64 (4) 473 9447  
Fax: +64 (4) 473 4457  
Contact solicitors: Tony Stevens/Joanne Verbiesen

**TAKE NOTICE** that the appellant appeals against parts of the Electricity Authority's (**Authority**) decision (or purported decision) regarding an alleged Undesirable Trading Situation (**UTS**) on 26 March 2011 that are referred to in paragraphs (i) and (ii) below (**the UTS Findings**). The decision is the Authority's decision published on 15 June 2011 (**15 June UTS Decision**) and/or the material parts of the decision which were repeated in the Authority's 4 July 2011 decision (**4 July UTS Decision**). Copies of the 15 June UTS Decision and the 4 July UTS Decision are **attached**.

- (i) The Authority's findings that the events on 26 March 2011 satisfy the definition of a UTS under Parts 1 and 5 of the Electricity Industry Participation Code 2010 (**the Code**); and
- (ii) the Authority's findings that in the circumstances it had the power pursuant to clause 5.2 of the Code to correct the UTS by a regulatory intervention revising prices in the wholesale market for electricity.

**UPON THE GROUNDS THAT:**

1. The first and second appellants:
  - 1.1 are industry participants in the wholesale electricity market and are materially affected by the UTS Findings;
  - 1.2 provided submissions (the first appellant through its parent company, the second appellant) in relation to the UTS Findings and were parties to the process by which the UTS Findings were made and provided information to the Authority on request; and
  - 1.3 will be directly affected by any remedy as to price arising from the UTS Findings.
2. The 15 June UTS Decision and the 4 July UTS Decision were purportedly taken on behalf the Authority by the "UTS Committee" pursuant to Part 5 of the Code.
3. The Authority erred in law in making the UTS Findings:
  - 3.1 It failed to properly identify the "contingency or event" said to comprise the UTS.
  - 3.2 It wrongly concluded (so far as it actually so concluded) that any such contingency or event threatens, or may threaten, trading on the wholesale market for electricity. In particular by:
    - 3.2.1 applying the wrong legal test and/or misdirecting itself by:
      - (a) failing to recognise (and apply) the high threshold that applies to the UTS definition, such that only "abnormal" or extraordinary contingencies or events could constitute a UTS, given that:
        - (i) the serious nature of the examples identified in the UTS definition in part (c) afford context and guidance as to the proper interpretation of the UTS definition as a whole;

- (ii) the Authority correctly determined that a UTS must be a contingency or event outside of the “normal operation of the wholesale market for electricity” (paragraph [16]).<sup>1</sup>
  - (b) the Authority failed to confine its considerations to serious threats to the “wholesale market” itself (which market includes market participants but not those trading with market participants);
  - (c) it concluded in its analysis that “the indications are that, if the high market prices of 26 March 2011 are allowed to stand [which the UTS Findings confirm is not a UTS in itself – paragraph [127]], the reputation of the wholesale market may be damaged to the point where trading on the market may be threatened”: paragraph [152];
- 3.2.2 reaching a decision that was so unsupportable and/or so clearly untenable on the facts, and/or on the basis of the Authority’s findings on the facts, as to amount to an error of law:

*Particulars*

- (i) by finding that a combination of normal market events arising in combination amounted to a UTS, and an abnormal event, notwithstanding that the contingency or event (so far as it can be ascertained) involved management of price risk caused by constraints on the national grid that are inherent in the normal operation of the market, and that the normal hedge and other price risk management options were available;
  - (ii) by failing to take into account that a number of participants appropriately managed their risk and that trading and settlement has continued;
- 3.3 The Authority wrongly concluded (so far as it actually so concluded) that any such contingency or event would, or would be likely to, preclude the maintenance of orderly trading or proper settlement of trades. In particular it erred by:

3.3.1 applying the wrong legal test and/or misdirecting itself by:

- (a) failing to recognise the high threshold as particularised in 3.2.1(a);
- (b) not applying the correct test in the UTS Findings analysis or in its conclusion of its analysis that (in addition to, and based on, the equivocal conclusion at 3.2.1(c)) “the adverse impact on some parties may preclude the maintenance of orderly trading or the proper settlement of trades”: paragraph [152]; and/or

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<sup>1</sup> All references to paragraph [x] are to paragraphs in the 15 June UTS Decision unless otherwise stated.

3.3.2 reaching a decision unsupportable or clearly untenable on the facts as particularised in 3.2.2 and 3.2.2(ii) above, and in particular failing to provide any analysis or conclusions as to whether the contingency or event would or would be likely to have the effect of preventing continued orderly trading and settlement of trades.

3.4 The Authority wrongly concluded (so far as it actually so concluded) that any such contingency or event in the reasonable opinion of the Authority could not successfully be resolved by any other mechanism available under the Code. In particular it erred by:

3.4.1 applying the wrong legal test and/or misdirecting itself by:

- (a) failing to recognise the high threshold as particularised in 3.2.1(a) above;
- (b) failing to apply the correct test in the UTS Findings analysis in that it simply concluded that “The UTS Committee’s view is that there are no other mechanism available under the Code to resolve the event” without:
  - (i) referring to or considering any other possible mechanisms under the Code;
  - (ii) referring to or considering its statutory powers and obligations in accordance with section 42(2)(c) and 42(g) of the Electricity Industry Act 2010 (**Act**); or
  - (iii) forming a reasonable opinion on the basis of such considerations as to whether any identifiable contingency or event could successfully be resolved by any other such mechanism,

3.4.2 reaching a decision unsupportable or clearly untenable on the facts as particularised in 3.2.2 and 3.2.2(ii) above.

3.5 The Authority wrongly concluded (so far as it actually so concluded) that any such contingency or event was an undesirable practice. In particular by:

3.5.1 conflating “undesirable trading practice” with the UTS definition;

3.5.2 applying the wrong legal test and/or misdirecting itself by:

- (a) failing to recognise the high threshold as particularised in 3.2.1 above;
- (b) concluding that “the exceptionally high interim prices on 26 March 2011 are the result of a squeeze, which is an undesirable trading practice, rather than an underlying supply-demand imbalance” (paragraph [155]), in that:
  - (i) it failed to recognise that an “undesirable practice” would involve abnormal or extraordinary contingencies or events; and



- (ii) it applied a definition of a “squeeze” that did not involve any element of manipulative trading;
- 3.5.3 reaching a decision unsupportable or clearly untenable on the facts as particularised in 3.2.2, 3.2.2(i) and 3.2.2(ii) above, and in particular by finding an “undesirable practice” arose as a result of a “squeeze” notwithstanding that, and having determined that:
  - (a) there was no manipulative or attempted manipulate trading (paragraph [106]) or misleading or deceptive or likely to mislead or deceive conduct (paragraph [117]) and that Genesis Power Ltd’s (**Genesis**) offer strategy was consistent with managing its own risk position; and
  - (b) opportunities existed within the market to seek price hedges from at least two parties and/or to take other steps to reduce spot market exposure;
- 3.6 The Authority wrongly concluded (so far as it actually so concluded) that any such contingency or event was an exceptional or unforeseen circumstance that is at variance with, or that threatens or may threaten, generally accepted principles of trading or the public interest. In particular by:
  - 3.6.1 applying the wrong legal test and/or misdirecting itself by:
    - (a) failing as particularised in 3.2.1(a) above;
    - (b) failing to provide any analysis but simply repeating elements of the test in concluding that the events (in addition to, and based on, the conclusion at 3.5.1(b) above) “resulted in an exceptional and unforeseen circumstance that threatened, or may have threatened, generally accepted principles of trading and the public interest”, without any consideration of what those generally accepted principles or the relevant public interest involved, or what threat was posed; and/or
  - 3.6.2 reaching a decision unsupportable or clearly untenable on the facts as particularised in 3.2.2, 3.2.2(i) and 3.2.2(ii) above; and
- 3.7 The Authority generally (and in addition to the preceding points) reached a decision that was so unsupportable and/or so clearly untenable on the facts, and/or on the basis of the Authority’s findings on the facts, as to amount to an error of law, including in particular by:
  - 3.7.1 concluding that any price signal failure is a UTS;
  - 3.7.2 concluding or effectively concluding that the market would not have been forewarned notwithstanding that:
    - (a) the possibility of scarcity was signalled by Transpower’s planned outage;
    - (b) Genesis’ public offer price signalled high demand;

- (c) prices at the level offered by Genesis had been forecast on 25 March 2011;
  - (d) at least some hedge cover was available and was actually sought and offered; and
  - (e) at least one market participant took steps to reduce demand;
- 3.7.3 finding that a combination of normal market events arising in combination amounted to a UTS;
- 3.7.4 finding that a price directive remedy that would be available if there was a UTS would enhance hedge market operations when:
- (a) the hedge market is a mechanism to assist wholesale market participants to manage price risks (including any price risk that arose on 26 March 2011); and
  - (b) it would undermine both supply and demand in the hedge market if a market price (or some market prices) were retrospectively “smoothed” by the Authority.
- 3.8 The Authority misinterpreted the proper scope of its power, and as a consequence acted unlawfully or for a purpose other than that for which its powers provide, by:
- 3.8.1 using the potential availability of the remedy identified in paragraph [185] to complete a trade at a specified price (and thereby retrospectively to cap a one-off series of trades) to inform or dictate its approach to whether there was a UTS;
- 3.8.2 determining that in the circumstances it had the power (notwithstanding and in effect contrary to, the Authority’s finding that high prices are not to be regarded per se as a UTS (paragraph [127]) to:
- (i) smooth what it considered to be an exceptional price;
  - (ii) use the UTS regime to introduce an unheralded market factor whereby the regulator would or might smooth “exceptionally high prices” unless: (a) they resulted from a genuine scarcity; and (b) high offer prices were well signalled in advance - neither of which was defined.
- 3.8.3 determining that in the circumstances it had the power to protect those who elected to take spot market price risk and who did not protect their position by hedging and/or otherwise managing their risk (including protecting some who were not directly involved and were not wholesale electricity market participants), at the expense of those who did;
- 3.8.4 proceeding contrary to the Authority’s statutory objective pursuant to section 15 of the Act to promote competition in, reliable supply by,

and the efficient operation of, the electricity industry for the long-term benefit of consumers;

3.8.5 proceeding contrary to the Authority's statutory objectives pursuant to section 42(2) of the Act to:

- (i) provide "mechanisms" to "help wholesale market participants" [themselves] to manage price risks caused by constraints on the national grid; and
- (ii) facilitate or provide an active market for trading financial hedge contracts for electricity; and

3.8.6 failing to address any issues it had arising out of events on 26 March 2011 pursuant to the Authority's statutory objectives (as set out in 3.8.5 and 3.8.6 above).

4. It is in the interests of justice that this Court should grant relief reversing and declaring void the UTS Findings and all subsequent steps relying directly or indirectly on the UTS Findings.

#### **RELIEF SOUGHT**

- (a) that the UTS Findings be reversed and declared null and void;
- (b) that any consequential effects of the UTS Findings be reversed and/or declared null and void and/or orders made to ensure settlement as would have occurred if there had been no UTS; and
- (c) such other relief that the Court thinks just.

This application is made in reliance on sections 7, 64 and 66 of the Act, Part 5 of the Code and the Part 20 of the High Court Rules.

**DATED** this 13<sup>th</sup> day of July 2011



Tony Stevens/Joanne Verbiesen  
Solicitors for appellant

TO: The Registrar, High Court, Wellington

AND TO: Electricity Authority

AND TO: Contact Energy Ltd

AND TO: Fletcher Building Limited (including on behalf of Golden Bay Cement)  
AND TO: King Country Energy  
AND TO: Meridian Energy Limited  
AND TO: Mighty River Power Limited  
AND TO: New Zealand Steel Limited  
AND TO: NZX Limited  
AND TO: Norske Skog Tasman  
AND TO: Powershop New Zealand Limited  
AND TO: Prime Energy Limited  
AND TO: Switch Utilities Limited  
AND TO: Todd Energy Limited  
AND TO: Transpower New Zealand Limited  
AND TO: Trustpower

**THIS NOTICE OF APPEAL** is filed by **ANTONY MAXWELL STEVENS**, solicitor for the first and second appellants. The address for service of the first and second appellant is at the offices of Iazard Weston, Level 13, 89 The Terrace, Wellington (marked for the attention of **Tony Stevens**).

Documents for service on the above named appellants may be left at that address for service or may be –

- (a) Posted to the solicitor at PO Box 5348, Wellington;
- (b) Left for the solicitor at a document exchange for direction to DX SP27002; or
- (c) Transmitted to the solicitor by facsimile to 04 473 4457.

In the High Court of New Zealand  
Wellington Registry

CIV

**Under** the Electricity Industry Act 2010/Electricity Act 1992

**In the matter** an appeal in respect of a decision of (or on behalf of) the Electricity Authority

**In Re** **Bay of Plenty Energy Limited**, a company duly registered under the Companies Act 1993 carrying on business as an electricity provider and having its registered offices at Level 15, The Todd Building, 95 Customhouse Quay, Wellington.

**First Appellant**

**Todd Energy Limited**, a company duly registered under the Companies Act 1993 carrying on business as an energy provider and having its registered offices at Level 15, The Todd Building, 95 Customhouse Quay, Wellington.

**Second Appellant**

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**Memorandum of counsel for the appellants**

**Dated: 13th day of July 2011**

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**Next event date: To be advised**

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**IZARDWESTON**  
L A W Y E R S

**Solicitors**  
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89 The Terrace  
WELLINGTON  
PO Box 5348  
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Fax: +64 (4) 473 4457  
Contact solicitors: Tony Stevens/Joanne Verbiesen  
tony.stevens@izardweston.co.nz

## Memorandum of counsel for the appellants

### May it please the Court:

1. Bay of Plenty Energy Limited and Todd Energy Limited (**Appellants**) have filed a notice of appeal pursuant to section 64 of the Electricity Industry Act 2010 (**Act**) and in accordance with Part 20 of the High Court Rules.
2. The appeal is brought in respect of a decision of the Electricity Authority which concluded that an undesirable trading situation developed on 26 March 2011 (**UTS Decision**). The UTS Decision was published in a final form on 15 June 2011. It was repeated in a further decision dated 4 July 2011 (that additionally directed actions to be taken). Copies of both decisions are attached to the notice of appeal.

### Filing and service

3. Rule 20.6(1)(c) of the High Court Rules requires a copy of the notice of appeal to be served on “every other party directly affected by the appeal”.
4. The Appellants recognise that there is some difficulty in properly identifying those parties who are or who might be “directly affected”. This is due to the following factors:
  - 4.1 The nature of the regulator/decision maker, which makes decisions that affect the wholesale electricity market.
  - 4.2 The process leading up to the UTS Decision, which included:
    - 4.2.1 35 parties making claims with the Electricity Authority that a UTS developed on 26 March 2011;
    - 4.2.2 12 further parties who did not specifically make UTS claims but otherwise made submissions in the investigation undertaken by the Electricity Authority; and
    - 4.2.3 17 further parties who were required by the Electricity Authority to respond to statutory information requests in relation to the investigation.
  - 4.3 The status of the persons identified at paragraph [4.2] above, some of whom are participants in the wholesale electricity market, others are not.
  - 4.4 The nature of the regulator and the appeal power involved. This is not an appeal from a determination of a Tribunal or inferior Court ruling on a dispute between party A and party B. Parties are entitled to make complaints and submissions to the Electricity Authority, but ultimately it investigates as it sees fit and makes determinations.
  - 4.5 A significant number of parties had some involvement in the Authority process and that raises a practical issue in terms of whether particular parties actually want to be involved in this appeal.
5. In that context there is no certainty as to which entities are or might be said to be directly affected.

6. The Appellants have taken a cautious approach as to whom this Court may consider needs to be served under Rule 20.6(1)(c).
7. In addition to filing in the Court, the Appellants are today seeking to:
  - 7.1 file a copy in the administrative office of the Electricity Authority;
  - 7.2 serve those parties who either made a claim or filed submissions *and* are a participant in the wholesale electricity market (service being effected in the usual way); and
  - 7.3 notify each of the remaining parties identified above of the fact of this appeal and to provide a copy of the notice of appeal.

(see Schedule 1 for details)
8. Given the number of parties, the notice referred to at paragraph [7.2] is occurring mainly by email. The email addresses used are those that were provided as contact details by these parties:
  - 8.1 in their original claim or any subsequent submission to the Electricity Authority; or
  - 8.2 to the Electricity Authority for inclusion in the publically available *Participation Register*.
9. Parties who receive notice have been invited to indicate if they require hard copy service.
10. The Appellants have also invited the Electricity Authority to indicate its views on the appropriate parties to be notified of the appeal and any steps the Authority considers it can take to assist further in ensuring all potentially affected parties are sufficiently notified of the bringing of this appeal (see copy of cover letter **attached** marked "A").
11. Furthermore, the Appellants seek a directions hearing (see below) to address any residual service issues.

#### **Form of intitlement**

12. The appeal relates to a regulatory decision by the Authority (and is not a determination of rights between parties who have had a dispute), and the outcome of the appeal will ultimately directly bind only the Authority. As a consequence, the Authority is the proper respondent.
13. However High Court Rule 20.9(2) prohibits the decision maker being named as the respondent to an appeal.
14. That said, there are a large number of parties involved in and potentially affected by the UTS Decision. Some of those parties may consider that they wish to be involved to seek to oppose the appeal or be heard. Equally, some parties may not wish to be involved at all in the appeal and be put to the potential inconvenience and expense in obtaining advice and considering their position as a named party (or even as an affected party).

15. In light of these considerations, the Court will note that the Appellants have adopted the formulation suggested by His Honour Justice Young in *Canterbury Development Corp Trust v Charities Commission* [2010] 2 NZLR 707 (CA) of intituling this appeal document as “In Re Bay of Plenty Energy Limited”. If any further directions are required in this regard, such as if for example particular parties wish to be named (or consider they should be named) this could also be addressed at the directions hearing sought in paragraph [16] below.

**Directions hearing sought**

16. The Appellants seek a directions hearing within the next seven days to address any issue as to whether this Court requires any further parties to be served and any other service requirements.
17. It is noted that this Court may:
- 17.1 allow additional time for service (pursuant to s 66 of the Act); and
  - 17.2 dispense with service on a party of a notice of appeal on any terms the court thinks just (pursuant to High Court Rule 20.7).
18. If any issues arise as to the form and/or content of the notice and/or any service issues, a dispensation under that section and/or that Rule will be sought.

**Other similar appeals**

19. Finally, the Appellants understand that similar appeals in relation to the UTS Decision are also being brought by Contact Energy Limited and Genesis Power Limited in this Court. In that event, it will likely be desirable to have those appeals case managed together in the first instance, including the initial hearings direction – at which it is anticipated similar issues will arise in relation to each appeal.

**DATED** this 13<sup>th</sup> day of July 2011



Tony Stevens/Joanne Verbiesen  
Solicitors for appellant



## SCHEDULE 1

## A. Claimants

Party	Service or email?	Address for service / email address	Contact person	Complaint made to Authority?	Submission made to Authority?	Provided information to Authority?	Industry participant?
Abe's Real Bagels	email	brent@abesrealbagels.com	Brent Milburn	yes			
Air New Zealand	email	mandy.varney@airnz.co.nz	Mandy Varney	yes			
ASB Bank	email	perry.waldman@asb.co.nz	Perry Waldman	yes		yes	
Auckland War Memorial Museum	email	jglen@aucklandmuseum.com	John Glen	yes		yes	
Bupa Care Services	email	Allan.Cawood@bupa.co.nz	Allan Cawood	yes		yes	
Chris Brady	email	power.brokers@slingshot.co.nz	Chris Brady	yes			
Convex Plastics Ltd	email	tony.l@convex.co.nz	Tony Letcher	yes			
Cynotech Holdings Ltd	email	brett@cynotech.co.nz	Brett Tawse	yes			
Fletcher Building Ltd	serve	810 Great South Road, Penrose, Auckland, 1061, New Zealand		yes	yes		yes
Goodwood Industries Ltd	email	charlesblack@goodwood.co.nz	Charles Black	yes			
Juken NZ Ltd (via SmartPower)		Peter.alderdice@smartpower.co.nz	Peter Alderdice (SmartPower) on behalf of Graham Maples (JNL)				
Masterton District Council	email	davidp@mstn.govt.nz	David Paris	yes		yes	

Mercy Ascot Hospitals	email	98 Mountain Rd, Epsom, Newmarket, Auckland, New Zealand	Clive Rous	yes		
Meridian Energy Limited	serve	33 Customhouse Quay, Queens Wharf, Wellington, New Zealand		yes	yes	yes
Mighty River Power Limited	serve	L14, Anz Centre, 23-29 Albert Street, Auckland, New Zealand		yes	yes	yes
New Zealand Steel Limited	serve	131 Mission Bush Road, Glenbrook, South Auckland, New Zealand		yes	yes	yes
Nufarm NZ Ltd	email	Brendan.redmond@nz.nufarm.com	Brendan Redmond	yes	yes	yes
NZ Sugar	email	adobbie@nzsugar.co.nz	Allan Dobbie	yes	yes	yes
Open Dairy Country Ltd	email	wayne.leach@opencountry.co.nz	Wayne Leach	yes	yes	yes
PMP Print	email	kathy.voss@pmpprint.co.nz	Kathy Voss	yes		
Powershop New Zealand Limited	serve	Level 6, 56 Victoria Street, Wellington, New Zealand		yes	yes	yes
Prime Energy Ltd	serve	Level 5, 8 Commerce Street, Auckland City, Auckland 1143, New Zealand		yes		yes
Smart Power Ltd	email	anne@smartpower.co.nz	Anne Herrington	yes	yes	yes
Southern Cross Hospitals Ltd	email	glenn.beaman@southerncrosshospitals.co.nz	Glenn Beaman	yes	yes	yes
Southern Spars	email	david.glen@southernspars.com	David Glen	yes		
Switch Utilities Ltd	serve	33 Waiake Street, Torbay, Auckland, New Zealand		yes	yes	yes
Telecom (via Chorus)	email	Rebecca.McKenzie@chorus.co.nz	Rebecca McKenzie	yes		yes
Television New Zealand Ltd	email	Gary.Watkins@tvnz.co.nz	Gary Watkins	yes		
The New Zealand Refining Company	email	david.martin@nzrc.co.nz	David Martin,	yes	yes	yes
Total Utilities Management Group Ltd	email	richard@tung.co.nz	Richard Gardiner	yes		
Vital Healthcare Property Trust	email	dwoods@vhpt.co.nz	Drugh Woods	yes		
Vodafone NZ Ltd	email	marka.jones@vodafone.com	Mark Jones	yes	yes	yes
Wallace Corporation Ltd	email	neville.cross@wallace.co.nz	Neville Cross	yes		yes
Waratah Farms Ltd	email	martin@waratahfarms.co.nz	Martin Ellis	yes		
Westpac (NZ) Ltd	email	Dean_adams@westpac.co.nz	Dean Adams	yes	yes	yes

B. Further parties who provided a submission to the Electricity Authority

Party	Service or email?	Address for service/email address	Contact person	Complaint made to Authority?	Submission made to Authority?	Provided information to Authority?	Industry participant?
Bryan Leyland	email	bryanleyland@mac.com	Bryan Leyland		yes		
Contact Energy Limited	serve	Level 1, Harbour City Tower, 29 Brandon Street, Wellington, New Zealand			yes	yes	yes
Employers and Manufacturers Association (Northern)	email	bruce.goldsworthy@ema.co.nz	Bruce Goldsworthy		yes		
Genesis Power Limited (trading as Genesis Energy)	serve	Level 3, The Genesis Building, 602 Great South Road, Greenlane, Auckland, New Zealand			yes	yes	yes
King Country Energy Ltd	serve	Served by email by agreement: rfoster@kce.co.nz;	Rob Foster		yes	yes	
Major Energy Users Group	email	pwalklin@kce.co.nz	Pamela Walklin		yes	yes	yes
Norske Skog Tasman	email	info@meug.co.nz	Ralph Matthews		yes		
NZX Limited	serve	Served by email by agreement: gracme.everett@norseskog.com	Graeme Everett		yes	yes	yes
Todd Energy Limited	serve	Level 2, Nzx Centre, 11 Cable Street, Wellington, 6140, New Zealand			yes		yes
Transpower	serve	Level 15, The Todd Building, 95 Customhouse Quay, Wellington, New Zealand			yes	yes	yes
TrustPower	serve	Level 7, Transpower House, 96 The Terrace, Wellington, New Zealand			yes	yes	yes
	serve	Truman Lane, Rd 5, Tauranga, 3143, New Zealand			yes	yes	yes

Vector	serve	33 Waiake Street, Torbay, Auckland , New Zealand				yes
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### C. Further parties who responded to information requests from the Electricity Authority

Party	Service or email?	Address for service/ email address	Contact person	Complaint made to Authority?	Submission made to Authority?	Provided information to Authority?	Industry participant?
Alinta ENZ Ltd	email	John.simmons@bbpower.com; Dan.jury@bbpower.com	John Simmons; Dan Jury			yes	yes
Bay of Plenty Energy Ltd	email	cpower@bopelec.co.nz	Chris Power			yes	yes
Bosco Connect Ltd	email	Bryan.dobson@bosco.co.nz	Bryan Dobson			yes	yes
Carter Holt Harvey Pulp & Paper Ltd	email	Christopher.brown@cch.co.nz; Rodney.horn@cch.co.nz	Christopher Brown; Rodney Horn			yes	Yes
Energy Direct	email	Michael.ram@energydirectnz.co.nz	Michael Ram			yes	yes
Energy Online Limited	email	Dean.carroll@genesisenenergy.co.nz; Peter.mccomish@genesisenenergy.co.nz	Dean Carroll; Peter McComish			yes	yes
Fonterra Co-operative Group	email	Roger.keedwell@fonterra.com; Doug.watson@fonterra.com	Roder Keedwell; Doug Watson			yes	yes
Mercury Energy		Email address could not be located. The documents will be delivered to the company's address for service at: L14, ANZ Centre, 23-29 Albert Street, Auckland, New Zealand					
Methanex New Zealand Limited	email	Lodea@methanex.com; I.Jamieson@methanex.com	Louise Odeat; Ian Jamieson			yes	yes

New Zealand Railways Corporation (trading as Kiwirail)	email	Email address could not be located. The documents will be delivered to the company's address for service at: Level 3, 8 - 14 Stanley Street, Parnell, Auckland, 1010, New Zealand				yes	
Opunake Hydro Limited	email	Simon.young@thekarogroup.net	Simon Young			yes	yes
Pacific Steel	email	Email address pending.				yes	yes
Pan Pac Forest Products Limited	email	Fred.staples@panpac.co.nz; Gerald.cowan@panpac.co.nz; Roger.jones@panpac.co.nz	Fred Staples; Gerald Cowan; Roger Jones			yes	yes
Pulse Utilities New Zealand Limited	email	Dene.biddlecombe@punz.co.nz	Dene Biddlecombe			yes	yes
Simply Energy Limited	email	info@simplyenergy.co.nz; operations@simplyenergy.co.nz	Stephen Peterson; Stephen Kemp			yes	
Southpark Utilities	email	gary@southparkcorp.co.nz; property@southparkcorp.co.nz	Gary Wang; Peter Saunders			yes	
Winstone Pulp International	email	Paul.saunders@wpi-international.co.nz	Paul Saunders			yes	yes

File: 77130011  
Ref: TMS2911-284524.1

13 July 2011

Electricity Authority  
Level 7  
ASB Bank  
2 Hunter Street  
Wellington 6143

COPY

**Tony Stevens**  
Direct Dial: (04) 471 5855  
tony.stevens@izardweston.co.nz

**Joanne Verbiesen**  
Direct Dial: (04) 494 6271  
joanne.verbiesen@izardweston.co.nz

**DELIVERED**

**APPEAL AGAINST ELECTRICITY AUTHORITY'S DECISION THAT A UTS DEVELOPED ON  
26 MARCH 2011**

1. We act for Bay of Plenty Energy Limited and Todd Energy Limited (**Appellants**).
2. We have today filed in the High Court at Wellington a notice of appeal pursuant to section 64 of the Electricity Industry Act 2010 appealing the Electricity Authority's decision that an undesirable trading situation developed on 26 March 2011 (the **UTS Decision**).
3. Under High Court Rule 20.6(1)(b) the Appellants are required to file a copy of the notice of appeal in the administrative office of the Authority. A copy of the notice of appeal is therefore **enclosed** in accordance with that Rule.
4. The High Court Rules also require the Appellants to serve a copy of the notice of appeal on every other party "directly affected" by the appeal. Also **enclosed** is a memorandum of counsel for the Appellants to the High Court which sets out the steps the Appellants are taking to ensure relevant parties are notified of the fact of the appeal and receive a copy of the notice of appeal, and seeking a fixture to obtain any necessary procedural directions.
5. Given its position and role both in relation to UTS Decision itself, and in overseeing the industry, the Appellants would welcome the Authority's input as to whether there are other parties the Authority considers should receive a copy of the notice appeal and/or if there are further steps the Appellants should be taking to ensure relevant parties are sufficiently notified. It may be that the Authority itself could assist in ensuring the notice is adequately brought to relevant parties' attention.
6. Please direct any comments either to counsel for the Appellants (as set out in this letter) or via the filing of a memorandum with the High Court.

Yours faithfully  
**IZARD WESTON**



**Tony Stevens**  
Partner

Encl