

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2011-485-1371**

UNDER Section 64 of the Electricity Industry Act  
2010

IN THE MATTER OF an appeal of a decision of the Electricity  
Authority

BETWEEN BAY OF PLENTY ENERGY LIMITED  
First Appellant

AND TODD ENERGY LIMITED  
Second Appellant

**CIV-2011-485-1372**

UNDER the Electricity Industry Act 2010

IN THE MATTER OF an appeal under section 64 of the  
Electricity Industry Act 2010 against a  
decision of the Electricity Authority that an  
undesirable trading situation developed on  
26 March 2011

BETWEEN CONTACT ENERGY LIMITED  
Appellant

**CIV-2011-485-1373**

UNDER the Electricity Industry Act 2010

IN THE MATTER OF an appeal under section 64 of the  
Electricity Industry Act 2010 in respect of a  
final decision of the Electricity Authority  
that an undesirable trading situation  
developed on 26 March 2011

BETWEEN GENESIS POWER LIMITED  
Appellant

Hearing: 25 July 2011

Counsel: A M Stevens for Bay of Plenty Energy Limited and Todd Energy Limited  
J H Stevens for Contact Energy Limited  
J A Farmer QC for Genesis Power Limited  
L A O’Gorman for Electricity Authority  
J E Hodder SC for Meridian Energy Limited  
T Stephens for Mighty River Power Limited  
P Withnall for Vodafone New Zealand Limited  
J Scragg for Pulse Utilities Limited

Minute: 25 July 2011

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**MINUTE OF DOBSON J**  
**(First call)**

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**Service**

[1] In circumstances where an unusually large number of parties are potentially affected by, or interested in, the decision of the Electricity Authority (the Authority), the appellants sought directions as to whether the steps taken thus far to serve their proceedings are adequate. None of the other parties represented contended that a more extensive service obligation should be imposed.

[2] It appears that each of the appeals has been served to the same extent. By reference to the extent of service undertaken in respect of the Contact Energy appeal, I consider it to have been sufficient. That is particularly so in light of the Authority posting details of the existing appeals on its website, and the lesser step of notification to additional parties of the existence of the appeal in terms inviting a request for copies of all the pleadings, as described in paragraph 8(b) of the memorandum of counsel for Contact Energy.

### **Time to respond**

[3] Periods up to three further weeks were proposed on behalf of various of those represented, as the period in which parties with an interest could file a notice of intention to appear. Given that the appeals are to be dealt with on the swift track, and the extent to which those who are likely to wish to participate will be familiar with the issues arising from the Authority's decision, I consider that a period of 14 days from today's date is sufficient for others to take that step.

[4] Counsel appeared for Vodafone New Zealand Limited and for Pulse Utilities Limited, and in both cases those entities wish to consider further the nature and extent, if at all, of their participation. For those entities and any others wishing to be heard on the substantive argument of the appeals, notices of intention to appear are to be filed by *5pm* on *Monday, 8 August 2011*, and served on all those who have filed any documents in respect of the appeals. Such notices of intention to appear ought to indicate the stance to be adopted by the entity, and whether they seek status as respondents to the appeals.

### **Preparation of the record**

[5] By *Monday, 1 August 2011*, the Authority is to circulate to all those that have then filed any documents in the appeals an exhaustive index of the content of the record of proceedings before the Authority.

[6] By *5pm* on *Monday, 8 August 2011*, all those who receive the Authority's index and who wish to contribute to the compilation of parts of it for hearing of the appeals are to respond to the Authority, indicating the contents of the original record considered to be irrelevant to the issues raised by the appeals.

[7] By *5pm* on *Monday, 22 August 2011*, the Authority is to produce a record for hearing of the appeals. It is to contain all of the record of proceedings before the Authority, except documents agreed by all who respond to the Authority as being irrelevant. In its electronic form, the record is to be paginated for ease of electronic cross-referencing. The Authority is to provide one hard copy of the record to

solicitors acting for one of the appellants (it is for the appellants to nominate which solicitors) and additional copies of that record are then to be provided by those solicitors to any entities intending to appear, who are unable to prepare adequately by reference only to the electronic form.

### **Determination of status of those wishing to appear**

[8] Meridian Energy Limited and Mighty River Power Limited seek to be joined as respondents to the appeals. That status is opposed by the appellants.

[9] The Authority anticipates that it ought to be named as a respondent, reserving at this stage its decision as to the extent to which it might present argument, depending on the extent to which other parties who seek to appear intend to oppose the appeals. For Genesis Power Limited, Mr Farmer QC submits that the Authority is the only appropriate respondent.

[10] There is the prospect that other entities who were affected by the Authority's decision may wish to appear as respondents. Others may wish to take a more limited part in the argument of the appeals, as parties affected by the decision.

[11] In addition, Meridian Energy Limited wishes to support the decision of the Authority on other grounds. In doing so, it would seek to argue that the Authority made errors of law, so that if such errors are accepted, additional grounds would exist to uphold the outcome of the decision being appealed. For Genesis Power Limited, Mr Farmer opposes the prospect of such arguments being heard as part of the appeals.

[12] I have directed that there be a hearing on *16 August 2011* to determine the status of all those wishing to be heard on the substantive determination of the appeals. The issues will be:

- what status, if any, is to be attributed to Meridian Energy Limited and Mighty River Power Limited, together with any others who indicate a

wish to contribute to the argument of the appeals by filing and serving documents before 5pm on Monday, 8 August 2011;

- the appropriate status for the Authority; and
- the scope of matters able to be argued by parties such as in the position of Meridian Energy Limited.

[13] In anticipation of that fixture, counsel for each of the appellants who intend to oppose participation by others should file and serve memoranda indicating the extent of constraint for which they would argue, on matters able to be raised by such other parties. Further, the memoranda should address the grounds on which the appellants oppose parties such as Meridian Energy Limited and Mighty River Power Limited being added as respondents to the appeals.

### **Stay application**

[14] In the course of the conference, Mr Stevens for Bay of Plenty Energy Limited and Todd Energy Limited foreshadowed an application on their behalves for a stay of the effect of the Authority's decision. He handed up an application for such interim relief pursuant to r 20.10 of the High Court Rules, together with an affidavit and memorandum in support. As I understood his clients' concerns, they focus on the prospect that if the Authority completes the steps of implementing the decision being appealed, then publication of final prices for the relevant period could not be reversed by Court order, in the event that their appeal is successful.

[15] This concern apparently reflects an analysis of the Electricity Industry Participants' Code 2010, which provides procedural steps in relation to decisions where an Unsatisfactory Trading Situation is found to have existed, and the absence from that Code of any mechanism for re-publication of a final price once it has been published.

[16] My preliminary reaction is that this concern seems likely to be misconceived. Powers of the Court on determination of an appeal extend to confirming, modifying

or reversing a relevant order made by the Authority<sup>1</sup> in circumstances where the pursuit of an appeal does not operate as a stay of the Authority's decision.<sup>2</sup>

[17] In any event, none of those represented opposed the granting of an interim interim stay until this point can be argued. I accordingly made an order for such a limited stay and directed that the application on behalf of Bay of Plenty Energy Limited and Todd Energy Limited is also to be heard on 16 August 2011, to the extent issues still require determination. In anticipation of that, any notices of opposition and affidavits in support of them are to be filed and served by *5pm* on **Thursday, 4 August 2011**. Submissions in support of the application for stay are to be filed and served by *5pm* on **Wednesday, 10 August 2011**. Submissions of those opposing the stay application by *5pm* on **Friday, 12 August 2011**.

[18] For the Authority, Ms O'Gorman pointed out that the step of publishing final prices is a function contracted out by the Authority to NZX, and that the status of the latter organisation as pricing manager may give rise to an interest in respect of the stay application that is discrete from the Authority. Without opposition therefore I direct that this Minute is to be served by solicitors for the Todd companies on NZX, and I confirm that that organisation has leave to participate on the stay argument. If it intends to do so, it should comply with the timetabling directions that I have made.

[19] In the meantime, the interim interim stay is in respect of publishing prices for the whole of the 24 hour period on Saturday, 26 March 2011.

### **Fixture, and exchange of submissions**

[20] I have allocated a fixture for the substantive hearing of the appeals for up to five days commencing **Monday, 28 November 2011**. Prior to that, the appellants are to file and serve a full outline of the submissions in support of their appeals by **Monday, 31 October 2011**.

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<sup>1</sup> Electricity Industry Act 2010, s 67.

<sup>2</sup> Electricity Industry Act 2010, s 69.

[21] Submissions by any other entities given leave to raise arguments that the Authority had erred in law (such arguments being advanced in support of the outcome determined by the Authority) are, to the extent of such criticisms of the Authority decision, also to be filed and served by ***Monday, 31 October 2011***.

[22] The balance of arguments by those supporting the Authority's decision are to be filed and served by ***Monday, 14 November 2011***. Submissions for the appellants opposing any arguments of other errors of law by the Authority (if permitted) are also to be filed and served by ***Monday, 14 November 2011***.

### **Further conference**

[23] The hearing on 16 August 2011 is also to operate as a further conference at which the parties may raise other issues in relation to preparation of the appeals for substantive hearing.

### **Service of this Minute**

[24] The appellants are responsible for serving a copy of this Minute on all those who have been served with the proceedings. The Authority is to post the Minute on its website in like manner to the appellants' pleadings.

**Dobson J**

#### **Solicitors:**

Izard Weston, Wellington for Bay of Plenty Energy Limited and Todd Energy Limited  
Bell Gully, Wellington for Contact Energy Limited  
Russell McVeagh, Auckland for Genesis Power Limited  
Buddle Findlay, Auckland for the Electricity Authority  
Chapman Tripp, Wellington for Meridian Energy Limited  
Simpson Grierson, Auckland for Mighty River Power Limited  
Wilson Harle, Auckland for Vodafone New Zealand Limited  
Duncan Cotterill, Wellington for Pulse Utilities Limited