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

AND 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

AND 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: 16 August 2011

Counsel: A M Stevens and S B Kellet for Bay of Plenty Energy Limited and Todd Energy Limited
J H Stevens for Contact Energy Limited
J A Farmer QC and A K Rawlings for Genesis Power Limited
L A O'Gorman for Electricity Authority
J E Hodder SC and T D Smith for Meridian Energy Limited, NZ Steel Limited, NZ Sugar Company Limited, Powershop NZ Limited, Switch Utilities Limited
J A Craig for Mighty River Power Limited
P Withnall for Vodafone New Zealand Limited
J Scragg for Pulse Utilities Limited

Judgment: 22 August 2011

JUDGMENT OF RONALD YOUNG J

Introduction

[1] On 15 June initially and on 4 July 2011 finally the Electricity Authority ("the Authority") found that events in the electricity market on 26 March 2011 constituted an Undesirable Trading Situation ("UTS"). As a result the Authority found in the particular circumstances it could "correct" the UTS by regulatory intervention.

[2] Bay of Plenty Energy Limited, Todd Energy Limited, Contact Energy Limited and Genesis Power Limited have all appealed the Authority's decision. None of the appellants have identified any respondents to the appeal in their notice of appeal. The appeals are simply intituled In Re (name of appellant).

[3] In this application the following parties seek respondent status in this appeal (or say they should have been identified as respondents by the appellants):

(a) The Electricity Authority;
(b) Meridian Energy Limited;
(c) Mighty River Power Limited;
(d) New Zealand Steel Limited;
(e) New Zealand Sugar Company Limited;
(f) Powershop New Zealand Limited;
(g) Switch Utilities Limited; and
(h) Vodafone New Zealand Limited (in a limited capacity).

[4] Pulse Utilities New Zealand Limited seeks intervener status which is not opposed by the appellants. All respondents seek to support the Authority's decision, some on additional grounds.

[5] The appellants opposed all applications save the Authority's prior to the hearing of the interlocutory application. However, at the hearing of this application the appellant's case was that while they considered the applicants were better involved as interveners in this appeal, they did not oppose their application to be joined as respondents subject to an order by me that the respondents could not support the decision of the Authority on other grounds.

[6] The appellants' view was that the Authority should be the "primary" respondent with the other parties limited to what was essentially a supporting role – supporting the reasoning of the Authority. This approach, therefore, substantially limited the breadth of the issues in dispute between the parties and required to be resolved by me in this judgment.

Electricity Authority's Application

[7] I firstly consider the Authority's application to be a respondent. That application is supported by all the appellants and some of the applicant respondents, while other applicant respondents adopted a neutral stance. There was no opposition to the Authority's application.

[8] The relevant High Court Rules provide that a decision-maker should not be named as a respondent (r 20.9(2)). I note this rule does not apply to appeals to the High Court under the Commerce Act from the Commerce Commission (r 20.9.3(a)). I will return to this point later in the judgment. However, r 20.17 permits the decision-maker to be represented and heard at the hearing of the appeal on all matters unless the Court directs otherwise. This rule, therefore, gives expansive rights of audience and participation at the hearing of the appeal but not party rights to decision-makers.[1]

[9] The Authority's application to be a respondent is based on r 4.56 which provides as follows:

> **4.56 Striking out and adding parties**
>
> (1) A Judge may, at any stage of a proceeding, order that—
>
> (a) the name of a party be struck out as a plaintiff or defendant because the party was improperly or mistakenly joined; or
>
> (b) the name of a person be added as a plaintiff or defendant because—
>
> (i) the person ought to have been joined; or
>
> (ii) the person's presence before the court may be necessary to adjudicate on and settle all questions involved in the proceeding.
>
> (2) An order does not require an application and may be made on terms the court considers just.

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[1] See *Attorney-General v Howard* [2010] NZCA 58, for a summary of the authorities on the principle that decision-makers should not become protagonists. See *Fonterra Co-operative Group Ltd v Grate Kiwi Cheese Co Ltd* (2009) 19 PRNZ 824 at [12]–[26].

> (3) Despite subclause (1)(b), no person may be added as a plaintiff without that person's consent.

[10] Although the rule refers to plaintiffs and defendants all parties accepted the rule could equally apply to parties to an appeal.

[11] The Authority identified two reasons why this Court should make an order that it be joined as a party to the appeal rather than exercise its participation rights pursuant to r 20.17.

[12] Firstly, it was concerned to ensure that it had a full opportunity to make submissions at the appeal. The Authority was conscious that this Court could, pursuant to r 20.17, restrict the Authority's participation in the appeal hearing. The Authority took the view that as a respondent party it would have full participation rights.

[13] As to the latter point this Court in *Wilson v Attorney-General*[2] and *Westhaven ShellFish Limited v Chief Executive of Ministry of Fisheries*[3]concluded that this Court could restrict party participation even where an order had been made allowing the joinder of a party to the proceedings. I doubt, therefore, that joining the Authority as a respondent would answer the Authority's concern.

[14] In this case, however, there is no suggestion that any party seeks to limit the Authority's participation rights at the hearing of the appeal (other than the restrictions inherent in the Authority's position as a statutory decision-maker/regulatory body). Nor do I currently consider the Authority's participation in the appeal should be restricted.

[15] The Authority's argument, therefore, that the joining it as a party to the proceedings would ensure it had full opportunity to make submissions at the appeal does not convince me that in fact it requires respondent party status to achieve this end.

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2 *Wilson v Attorney-General* [2010] NZAR 509.
3 *Westhaven Shell Fish Limited v Chief Executive of Ministry of Fisheries* (2002) 16 PRNZ 501.

[16] The second ground advanced by the Authority relates to appeal rights to the Court of Appeal. Section 71 of the Electricity Industry Act 2010 provides that with leave of the High Court or the Court of Appeal any party to an appeal before the High Court may appeal. The basis on which leave might be granted is set out in sub (3). Conditions as to leave may be imposed.

[17] If the Authority is not a party to the High Court appeal then it could not seek leave to appeal the High Court's decision in terms of s 71. Ordinarily this would be appropriate and unobjectionable. An adjudicative body itself should not ordinarily have appeal rights. Those rights should be held by and be exercised by the parties to a dispute. There are exceptions, however, to this approach.

[18] As I have noted, the Commerce Commission is a party to an appeal from decisions made under the Commerce Act 1986.[4] That provision gives the Commission appeal rights as a party to the Court of Appeal.

[19] The exception given for the Commerce Commission in the High Court Rules seems to have arisen from that body's public protective function in the Commerce Act. However, the rule exempting the Commerce Commission from the ordinary position with adjudicative bodies, rule (r 20.9(3)) does not give a similar exception to the Authority. It may be, as the appellants submitted, that given the newness of the Electricity Industry Act (passed in 2010) the Rules Committee have not yet applied their collective mind to whether an exemption should also be given for the Authority.

[20] The question is, therefore, whether the Authority's process and function is sufficiently analogous to the Commerce Commission that joinder as a party to protect appeal rights is appropriate despite the fact that no specific exemption is given in the Rules.

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[4] At [8].

[21] I consider, therefore, the process undertaken by the Authority in this case and its statutory responsibilities. The process undertaken by the Electricity Authority is essentially based on submissions by the complainants and the responders and a decision. In this case the Electricity Authority received a complaint from a total of 35 parties that a situation had arisen on 26 March 2011 that led to interim prices of the wholesale market for electricity exceeding $19,000 per mega watt hour constituting a UTS. The claim, in part, related to the conduct of Genesis Energy. All the current applicants for respondent status submitted complaints to the Authority that a UTS had existed on 26 March.

[22] The process used by the Authority did not involve "parties" in the ordinary sense. The process subsequent to the complaints involved fact collection and then submissions by the claimants and a response by Genesis Energy. The Electricity Authority continued its factual enquiries throughout the process as necessity arose. It then released a draft decision to the parties and both submissions and cross submissions were received. It ultimately released a final decision.

[23] The process could be summarised as a combination of an inquisitorial and adversarial process. The Authority distinguished between the claimants' contribution and those whose actions were complained about.

[24] The purpose of the Electricity Industry Act 2010 Act is "to provide a framework for the regulation of the electricity industry" (s 4).

[25] The Authority has an obligation to promote competition in, and reliable supply by, and the efficient operation of the electricity industry for the long term benefit of consumers (s 15).

[26] These provisions place the Authority in quite a different situation to that of a typical adjudicative body whose decisions are subject to appeal. The Authority has a public function to benefit electricity consumers. None of the other parties to this litigation have this perspective. They have their own interests to look after. The Authority's obligations are similar to the Commerce Commission's obligations under the Commerce Act.

[27] Section 1A and s 3A of that Act provide as follows:

> **1A Purpose**
>
> The purpose of this Act is to promote competition in markets for the long-term benefit of consumers within New Zealand.
>
> ...
>
> **3A Commission to consider efficiency**
>
> Where the Commission is required under this Act to determine whether or not, or the extent to which, conduct will result, or will be likely to result, in a benefit to the public, the Commission shall have particular regard to any efficiencies that the Commission considers will result, or will be likely to result, from that conduct.

[28] In summary, I am satisfied, therefore, that the Authority has a unique position; within these proceedings it alone has public interest responsibilities. Further, it is in a different category to most adjudicative bodies, subject to an appeal. It is both an adjudicator and a regulator with public interest responsibilities quite outside ordinary adjudicative bodies. It is similar in its responsibilities to the Commerce Commission.

[29] In those circumstances, to protect appeal rights relating to public interest issues, the particular responsibility of the Authority, I am prepared to grant the Authority's application to be joined as a respondent party to this appeal.

[30] I do not intend to make any formal orders restricting the Authority's involvement in the appeal as a respondent. I accept the Authority's submissions that it is conscious of its special place as an adjudicative body and a party to an appeal and it will respect the appropriate conventions. I see the Authority's role as providing technical assistance for the High Court on appeal where appropriate and in ensuring that public interest issues in terms of the Act are before the High Court.

[31] I do not see the Authority carrying the main burden of the respondents' submissions, however. For reasons I will give, that should fall to the other respondents to undertake. No formal order, however, beyond that ordering the Authority be joined as a respondent, in my view, is required for the reasons given.

Applications by other parties

[32] The second part of this judgment relates to the other parties application for respondent status. As I have noted[5] the appellants no longer oppose the applications but submit that I should restrict the participation of these applicants at the hearing of the appeal by refusing to permit them to support the Authority's decision on grounds other than those found by the Authority. This restricted participation is, the appellants say, consistent with the approach of this Court in *Wilson* and *Westhaven*.

[33] The appellants say such a restriction is appropriate in this case because the "other grounds" desired to be raised to support the Authority's conclusion are not questions of law at all. Those parties who wish to raise other grounds in support of the Authority's decision also all wish to support the decision of the Authority and the grounds that find favour with it.

[34] Mighty River Power, in its notice, put forth the grounds supporting the Authority's decision this way:

> 3. The additional grounds on which Mighty River Power intends to support the Authority's Decision and oppose the appeals are that the Authority could also have found that there was a UTS on the basis of manipulative or attempted manipulative trading activity under clause (c)(i) of the UTS definition as a result of the Authority's findings that:
>
> (a) Genesis squeezed the wholesale market for electricity (Decision, at paras. 132, 145, 156, 158); and
>
> (b) Genesis offered its Huntly units at exceptionally high prices for the period of the grid outage while it had transitory market power (Decision, at paras. 107–109).

[35] Section 64 of the Act permits appeals from the Authority to the High Court on questions of law only.

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[5] At [5].

[36] I consider it is not appropriate at this stage of the proceedings to decide whether the respondents' "other" grounds in support of the Authority's decision are questions of law or not. That question is properly resolved at the hearing of the appeal. For present purposes, therefore, I assume the alternative grounds of challenge (identified above) are questions of law as the respondents' assert. In approaching the matter in this way I acknowledge the submissions by the appellant that no question of law was raised and the respondents reply. But as I have said, now is not the time to resolve that issue.

[37] Unlike the Court of Appeal Rules (r 33) the High Court Rules do not explicitly allow a respondent to support a decision of a body appealed from on other or additional grounds than those found by the adjudicative body. This is a gap in the High Court Rules which r 1.6 of the High Court Rules is intended to fill.

[38] Rule 1.6 provides as follows:

> 1.6 Cases not provided for
>
> (1) If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.
>
> (2) If there are no such rules, it must be disposed of in the manner that the court thinks is best calculated to promote the objective of these rules (*see* rule 1.2).

[39] Rule 33 of the Court of Appeal Rules provide:

> 33 Respondent who intends to support decision appealed against on other ground
>
> (1) If the respondent intends to support the decision appealed against on a ground other than the one upon which it was based, the respondent must, within the time specified in subclause (2), file and serve a memorandum setting out the ground upon which the respondent intends to support the decision appealed against.
>
> (2) The time is 10 working days after the date on which the appellant's notice of appeal is served on the respondent.

> (3) If the respondent brings a cross-appeal, the memorandum referred to in subclause (1) may be included in the notice of cross-appeal.

[40] It would an anomalous for the parties here to have rights of appeal in the Court of Appeal (assuming leave were granted) to support a decision on different grounds than that of the adjudicative bodies but be unable to do so in this Court.

[41] I consider that the objective of the rules is best promoted by reading into the High Court Rules a provision analogous to r 33 of the Court of Appeal Rules.

[42] I am, therefore, satisfied that there should be an order joining those parties who have applied for respondent status[6] as respondents to the appeal without restriction. Those respondents who wish to support the Authority's decision on other grounds must do so by filing and serving a memorandum setting out the grounds of such support filed within ten working days of this judgment.

[43] One further observation. In this case each of the respondents were complainants before the Authority regarding the events of 26 March; each participated in the process before the Authority; each are industry participants in terms of the Electricity Industry Act 2010 (s 7); each have a financial interest in the outcome of the proceedings; each have long term interest in the electricity market; each would have had appeal rights with respect to the Authority's decision; each will be affected by any appellate decision. In that sense, therefore, this case is quite different than *Canterbury Development Corporation v Charities Commission*.[7] I consider, therefore, that these parties should have been named as respondents to this appeal by the appellants or at least, if the appellants were uncertain about who should be named as respondents, they should have applied to this Court for directions before service of this appeal. The fact that the respondents (except the Authority) were forced to apply themselves to be joined as respondents to the proceeding was, therefore, wrong. Their status as identified above should have been recognised by the appellants, as I have said, either by joining them directly as respondents or applying to the Court for directions before service.

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6 At [3](b)–(g) inclusive.

7 *Canterbury Development Corporation v Charities Commission* [2010] 2 NZLR 707 (HC).

[44] This conclusion supports my view that the respondents should not be restricted in their appeal rights or in their participation at the hearing of the appeal by this Court.

Intervener

[45] Pulse Utilities has asked to be joined as an intervener. There is no opposition to that application and I accordingly make such an order. The basis on which Pulse seeks the leave of the Court to intervene is:

(a) that it has right to contribute to the compilation of the record of documents for the hearing and to receive a copy of the case on appeal. There is no opposition to that application which I grant;

(b) that it have the right to make written submissions on the issues identified at para 3 of its Notice of Intention to Appear as Intervener. There is no opposition to that order and I make an order accordingly;

(c) Pulse wishes to appear at the hearing and make oral submissions in response to submissions presented and on issues that arise during the hearing within the issues identified in Pulse's Notice of Intention to Appear. I see no reason why Pulse should not be able to do so. Their involvement is restricted and their participation restricted in the way identified. I make orders accordingly as to the basis on which they may intervene.

Vodafone

[46] Vodafone has indicated that it wishes to participate as a respondent but only in a restricted way. However, in the meantime it asks that it receive all documents and that it should be able to make submissions at the appeal as required and that there be no current curtailment on its submissions. However, subject to any unpredictable or unexpected developments it proposed to restrict its submissions to advising the Court as to the effect of such a UTS on a consumer. I have joined

Vodafone currently as a respondent. I consider the appropriate approach is for it to decide whether and how it tends to restrict its submissions at the hearing of the appeal.

Stay

[47] Bay of Plenty Energy and Todd had previously made an application to the High Court for a stay of the effect of the Authority's decision. On 25 July 2011 Dobson J made the following order:

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

[48] Without opposition that order is continued until further of the Court.

Confidentiality issues

[49] During the course of its hearing the Authority received commercially confidential information. The question arose, therefore, as to how this information might be dealt with when the Authority came to file its Index of the Record in this Court. The parties were agreed that there should be appropriate confidentiality orders. I agree that such orders are required and appropriate.

[50] The confidential material, therefore, will be held on each of the Court files CIV 2011-485-1371, CIV 2011-485-1372 and CIV 2011-485-1373. These files will be subject to the confidentiality orders set out below proposed by the Authority and agreed to by the parties:

> 2. In this proceeding, confidential information includes all information:
>
> (a) described as confidential in the Index of Record Documents, or otherwise designated as confidential by the parties during the course of these proceedings; or
>
> (b) contained in submissions marked "Confidential" or "Commercially Sensitive"; or
>
> (c) identified in any judgment as confidential.

Information designated as confidential to be treated as confidential

3. Any confidential information filed in the Court (including confidential information contained in the Record Documents and submissions) and confidential information referred to in judgments will be treated by the Court as confidential and will not be available to the public.

4. Any person wishing to search or inspect the Court file may only do so with leave of a High Court Judge, such application for leave to be made on notice to the parties in this proceeding.

5. Leave is reserved for any party to seek directions that any specific confidential information:

    (a) is not to be considered confidential information; or

    (b) should be subject to such other directions as the Court considers appropriate.

[51] In summary, therefore, I make the following orders:

(a) the Electricity Authority is joined as a respondent;

(b) those companies identified at [3](b)–(h) are joined as respondents;

(c) where any respondent wishes to support the Authority's decision on the ground other than the one upon which it was based then that respondent must, within ten working days from the date of this judgment, serve a memorandum setting out the grounds upon which the respondent intends to support the decision appealed against. Those respondents who have already given such a notice need not give a further notice;

(d) Pulse Utilities is joined as an intervener on the conditions set out in [45](a)–(c);

(e) an order for stay is made in terms of para [47]; and

(f) the confidentiality orders are made in terms of para [50].

[52] I consider costs are best left until the substantive hearing.

Ronald Young J

Solicitors:
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