

DUPLICATE

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2011-485-1373

UNDER Section 64 of the Electricity Industry Act 2010

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

BETWEEN **GENESIS POWER LIMITED**
APPELLANT

AND **THE ELECTRICITY AUTHORITY**
FIRST RESPONDENT

AND **MERIDIAN ENERGY LIMITED**
SECOND RESPONDENT

AND **MIGHTY RIVER POWER LIMITED**
THIRD RESPONDENT

(Continued over page)

**MEMORANDUM OF COUNSEL FOR GENESIS POWER LIMITED IN
SUPPORT OF APPLICATION FOR LEAVE TO APPEAL**

Dated: 26 March 2012

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26/3/2012
Time 16:22
Sarah Barton

**AND NEW ZEALAND STEEL LIMITED
FOURTH RESPONDENT**

**AND NEW ZEALAND SUGAR COMPANY LIMITED
FIFTH RESPONDENT**

**AND POWERSHOP NEW ZEALAND LIMITED
SIXTH RESPONDENT**

**AND SWITCH UTILITIES LIMITED
SEVENTH RESPONDENT**

**AND VODAFONE NEW ZEALAND LIMITED
EIGHTH RESPONDENT**

**AND PULSE UTILITIES NEW ZEALAND LIMITED
INTERVENOR**

MAY IT PLEASE THE COURT:

1. This memorandum is filed with an interlocutory application by Genesis Power Limited (**Genesis**) for an order granting leave to appeal to the Court of Appeal against the decision of the Honourable Justice Ronald Young dated 27 February 2012 in this proceeding (**Judgment**) (**Application**).
2. The purpose of this memorandum is to summarise the basis for this application and Genesis' position, and to suggest to the Court a process for dealing with this application.

The relevant law is s 71 of the Electricity Industry Act 2010

3. Appeal to the Court of Appeal is governed by s 71 of the Electricity Industry Act 2010 (**EIA**). Section 71(3) sets out matters that the Court must have regard to in determining whether to grant leave to appeal:

71 Appeal to Court of Appeal in certain cases

- (1) *Any party to an appeal before the High Court under this part who is dissatisfied with a decision or order of the High Court, may, with the leave of the High Court or of the Court of Appeal, appeal to the Court of Appeal.*
 - (2) *Section 66 of the Judicature Act 1908 applies to the appeal.*
 - (3) *In determining whether to grant leave to appeal under this section, the Court to which the application for leave is made must have regard to the following matters:*
 - (a) *whether any question of law or general principle is involved;*
 - (b) *the importance of the issues to the parties;*
 - (c) *the amount of money in issue;*
 - (d) *any other matters that in the particular circumstances the Court thinks fit.*
 - (4) *the Court granting leave may, in its discretion, invoke any conditions that it thinks fit, whether as to costs or otherwise.*
4. The Court, in considering whether leave to appeal should be granted, should consider all relevant factors as a whole and in the light of the Court of Appeal's function, which is to clarify the law and to determine whether it has been properly construed by the Court below.

Genesis' position on this application

5. It is submitted that all relevant considerations favour Genesis and therefore leave to appeal should be granted because:
- (a) questions of law are involved;
 - (b) questions of general principle are involved;
 - (c) the issues are very important to the parties;
 - (d) there is a significant amount of money in issue;
 - (e) The proper interpretation and application of Part 5 of the Electricity Industry Participation Code 2010 (**Code**) is a matter of importance to the electricity industry and to the wider public.

Process for dealing with this application

6. It is not known whether any party will oppose this application and therefore how the Court ought best to deal with it.
7. The submission of counsel for Genesis is that it would be appropriate for the Court to convene a telephone conference, perhaps a week from now, so the parties can inform the Court of their position. If appropriate, timetable orders for the filing of submissions can be made at that time.

DATED this 26th day of March 2012

p.p. Richard Gordon

J A Farmer QC / M Dunning / A E Simkiss
Counsel for the applicant

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APPLICATION FOR LEAVE TO APPEAL BY
GENESIS POWER LIMITED

Dated: 26 March 2012

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26.3.2012
Time: 16:22
Sara Barron

**AND NEW ZEALAND STEEL LIMITED
FOURTH RESPONDENT**

**AND NEW ZEALAND SUGAR COMPANY LIMITED
FIFTH RESPONDENT**

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SIXTH RESPONDENT**

**AND SWITCH UTILITIES LIMITED
SEVENTH RESPONDENT**

**AND VODAFONE NEW ZEALAND LIMITED
EIGHTH RESPONDENT**

**AND PULSE UTILITIES NEW ZEALAND LIMITED
INTERVENOR**

To: The Registrar of the High Court at Wellington

And to: The respondents

And to: The intervenor

This document notifies you that:

1. Genesis Power Limited (**Genesis**), the applicant, will on apply to the Court for an order that leave be granted to appeal to the Court of Appeal against the decision of the Honourable Justice Ronald Young dated 27 February 2012 and delivered in the High Court of New Zealand, Wellington Registry, in proceeding CIV 2011-485-1373 (**Judgment**, copy attached), declining an appeal from the Final Decision of the Electricity Authority (**Authority**) on the Undesirable Trading Situation (**UTS**) of 26 March 2011 and the Final Decision on Actions to Correct the Undesirable Trading Situation of 26 March 2011 dated 4 July 2011 (**Decision**).
2. The grounds on which the order is sought are set out below.

The leave application

3. Leave to appeal to the Court of Appeal should be granted because:
 - (a) questions of law and of general principle are involved;
 - (b) the issues are important to the parties;
 - (c) a significant amount of money is at issue; and
 - (d) the proper interpretation and application of Part 5 of the Electricity Industry Participation Code 2010 (**Code**) is a matter of importance to the electricity industry and to the wider public.

Grounds of appeal

The intended grounds of appeal are:

4. The High Court erred in concluding that the Authority made no error of law in deciding that clause (a) of the definition of a UTS was satisfied because the events of 26 March 2011:

- (a) threatened or may threaten trading on the wholesale market for electricity [210]; and
- (b) would, or would be likely to, preclude the maintenance of orderly trading or the proper settlement of trades [211]-[227].

5. Having correctly ruled that:

- (a) a UTS must be something outside the normal operation of the market; and
- (b) the overarching test in clause (a) of the UTS definition is that the relevant event “threatens, or may threaten, trading on the wholesale market for electricity” and it “would, or would be likely to, preclude the maintenance of orderly trading”;

the High Court erred:

- (a) in construing “orderly trading” by reasoning from the examples in clause (c) of the definition of a UTS as involving a “level playing field” [97 [101]], no imbalance in knowledge about the market [98], that “market traders be equally well informed of market conditions” [99], “equal access to relevant market information” [101] and “equal access to market information” [102]; and
- (b) if correct that the legal meaning of “orderly trading” includes equal access to such information as is available in the market, by wrongly:
 - (i) equating this aspect of the legal test with being “equally well informed of market conditions” [99] and with a “properly informed market” [241]; and
 - (ii) misapplying, or failing to apply, its own ruling on the meaning of “orderly trading” to the facts as found by the Authority and as a result wrongly concluding that the events of 26 March 2011 would, or would be likely to, preclude the maintenance of orderly trading.

6. Having correctly endorsed the Authority’s ruling that a contingency or event that would, or would be likely to, preclude the maintenance of orderly trading

must be an event or contingency outside the normal operation of the wholesale market for electricity [88] [201], the High Court failed to consider the meaning of the normal operation of the market and/or erred in ruling that any of the following events or contingencies (either alone or taken together) were exceptional and/or were sufficient to amount to an event outside the normal operation of the market [172].

- (a) The information available to industry participants and others on, and leading up to, 25 and 26 March 2011 [99] [101] [160(f)] [163(b)] [183] [184] [185] [213] [241];
 - (b) Under-forecast of demand by the System Operator [160(g)];
 - (c) High offer prices [160(i)];
 - (d) High market prices [256];
 - (e) The failure of industry participants to anticipate that high offer prices would translate into high market prices [181] [186] [188];
 - (f) The failure of industry participants and their customers to react to and/or avoid the impact of high market prices on 26 March 2011 [181] [182] [186] [188];
 - (g) An inability to predict with certainty what market prices would be in advance of any relevant trading period [169] [182] [188]; and
 - (h) The relationship between the cost of generation and offer prices and/or market prices on 26 March 2011 [122] [160(o)] [243].
7. The High Court erred in ruling that a number of events or factors (including those referred to at 6 above), each on their own forming part of the normal operation of the market, could in combination constitute a UTS, being a contingency or event outside the normal operation of the market [197]-[199] [256], and misinterpreted the Decision in concluding that that was the Authority's reasoning [199].
8. The High Court misinterpreted the Decision in concluding that the Authority's conclusion as to whether the situation on 26 March 2011 was exceptional was not "pivotal to the case" [168] [171] and misdirected itself in ruling that the

question of whether the events and circumstances of 26 March 2011 were exceptional was not a question of law [168] because:

- (a) the interpretation of statutory language is a question of law;
- (b) the Authority's Decision was largely based on its interpretation of clause (c)(v) (and not (a)) of the UTS definition;
- (c) the Authority's ruling that the events and circumstances of 26 March 2011 were both exceptional and unforeseen was critical to its conclusion that there was a UTS; and
- (d) the High Court itself wrongly relied on the Authority's ruling that the circumstances were exceptional as support for its conclusion that the events and circumstances of 26 March 2011 were outside of the normal operation of the market [170] [172] and therefore could amount to a UTS.

9. The High Court erred in concluding that the circumstances of 26 March 2011 were unforeseen and/or sufficient to amount to an event outside the normal operation of the market and a UTS because:

- (a) it wrongly ruled that the legal test of an "unforeseen" event for the purposes of clause (c)(v) of the UTS definition included whether a diligent market participant could have foreseen the prices on 26 March 2011 [175] [178]; and
- (b) in any event, and regardless of whether the High Court correctly stated the legal test (see 9(a) above), it misinterpreted the Decision and misapplied the test in that it:
 - (i) wrongly found that the Authority had applied the correct legal test [178] [189];
 - (ii) only considered the subjective expectations of industry participants and their customers, thereby asking itself the wrong legal question and applying the wrong legal test [179]-[188]; and
 - (iii) wrongly concluded that the evidence of what industry participants and others subjectively foresaw and/or what they predicted [169]

justified an inference that that the relevant events were not objectively foreseeable [181] [182] [186] [187] [188] [189].

Judgment sought from the Court of Appeal

10. If leave is granted, Genesis will seek judgment from the Court of Appeal:
 - (a) allowing the appeal;
 - (b) declaring the Authority's findings that:
 - (i) a UTS developed on 26 March 2011; and
 - (ii) it had the power to correct the UTS on 26 March 2011;are null and void or should be set aside; and
 - (c) granting such other consequential orders as the Court thinks just to ensure that the trades for trading periods 22 to 35 on 26 March 2011 are settled as though no UTS occurred.
11. This application is made in reliance on Rule 20.22 of the High Court Rules, s71 of the Electricity Industry Act 2010 and s66 of the Judicature Act 1908.

DATED this 26th day of March 2012



J A Farmer QC / M Dunning / A E Simkiss
Counsel for the applicant