

**MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE ELECTRICITY COMMISSION  
AND  
THE COMMERCE COMMISSION**

**16 August 2007  
(as amended on 13 November 2008)**

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This **Memorandum of Understanding** was made on 16 August 2007, and updated on 13 November 2008 to reflect:

- (a) amendments made to the Commerce Act 1986 by the Commerce Amendment Act 2008;
- (b) Transpower's administrative settlement, accepted by the Commerce Commission on 13 May 2008; and
- (c) a new protocol in response to the Government Policy Statement on Electricity Governance issued in May 2008.

between (1) **the Electricity Commission**

and (2) **the Commerce Commission**

## **Background**

- A. The Electricity Commission is a Crown entity established under section 172M of the Electricity Act 1992. Section 172N of the Electricity Act provides that the principal objectives of the Electricity Commission in relation to electricity are:
  - (a) to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable and environmentally sustainable manner; and
  - (b) to promote and facilitate the efficient use of electricity.
- B. The Commerce Commission is an independent Crown entity established under section 8 of the Commerce Act 1986. The Commerce Commission has certain functions, powers and duties in relation to the electricity industry, particularly (but not exclusively) under Part 4 of the Commerce Act. The Commerce Commission's jurisdiction under Part 4 includes setting regulation of the price and quality, and information disclosure requirements, for goods or services regulated under the Commerce Act.
- C. From time to time, the Government publishes statements of government policy in relation to the governance of the electricity industry (Government Policy Statements). Amongst other things, Government Policy Statements set out the Government's expectations and intentions regarding the interrelationship between the Electricity Commission and the Commerce Commission with regard to the regulation of Transpower and electricity lines businesses by the Electricity Commission under the Electricity Act and the Commerce Commission under the Commerce Act. Government Policy Statements have also recorded the Government's expectation that the two Commissions will work closely together to ensure that their respective roles are well coordinated, and to minimise any scope for uncertainties regarding jurisdictional issues.
- D. Paragraph 107 of the October 2004 Government Policy Statement provided:

*The Government requests the two Commissions to develop and publish a Memorandum of Understanding on how they propose to operationalise the coordination of their respective roles.*

Subsequent Government Policy Statements (issued in October 2006 and May 2008) have included requests that the two Commissions review the Memorandum of Understanding to specifically address matters raised in the Government Policy Statements.

- E. This Memorandum of Understanding explains how the Electricity Commission and the Commerce Commission intend to coordinate their respective roles under the Electricity Act and the Commerce Act. The two Commissions consider that, in respect of any detailed operational statements regarding the coordination of their respective roles, contemplated by the Government Policy Statements, these statements are best issued as protocols to this Memorandum of Understanding. The reasons for this approach are to:
- (a) ensure consistency with the Memorandum of Understanding as an umbrella document providing a general overview of the respective roles of, and the interrelationship between, the two Commissions; and
  - (b) facilitate the development by the two Commissions of detailed operational statements regarding the coordination of their respective roles without requiring formal amendments to the Memorandum of Understanding each time such statements are issued.

## THE PARTIES AGREE:

### 1. Interpretation

- 1.1 In this memorandum, unless the context otherwise requires,—

**administrative settlement** has the same meaning as in section 54B of the Commerce Act 1986

**electricity lines services** has the same meaning as in section 54B of the Commerce Act 1986

**Transpower** means Transpower New Zealand Limited or any subsidiary of, or successor to, that company.

### 2. Purpose of this Memorandum of Understanding

- 2.1 The Electricity Commission and the Commerce Commission, in entering into this Memorandum of Understanding, recognise that they share certain common interests in relation to their respective statutory functions with regard to the electricity industry, and therefore wish to record their mutual expectations as to communication and co-ordination between the two Commissions. The two Commissions agree to work together to further this objective in good faith.
- 2.2 For the avoidance of doubt, nothing in this Memorandum of Understanding is intended to limit or affect the independence of the Electricity Commission and the Commerce Commission or the requirement that each Commission act to fulfil its legal functions and obligations.



### **3. Term**

- 3.1 This Memorandum of Understanding becomes effective when signed by the Electricity Commission and the Commerce Commission, and remains effective unless terminated by either party.
- 3.2 From time to time, as circumstances require, the Electricity Commission and the Commerce Commission may develop protocols to be incorporated by reference into the Memorandum of Understanding.
- 3.3 This Memorandum of Understanding (including any protocols) may be amended at any time during its term by written agreement between the two Commissions.
- 3.4 The Electricity Commission and the Commerce Commission may terminate this Memorandum of Understanding at any time and without cause by giving three months notice in writing to the other Commission.

### **4. Roles and Responsibilities of the Electricity Commission**

- 4.1 Section 172ZK of the Electricity Act requires the Minister to give the Electricity Commission a statement of government policy containing objectives and outcomes that the Government wishes the Electricity Commission to give effect to in relation to the governance of the electricity industry, and against which the Electricity Commission must report and be examined in accordance with subpart 2 of Part 15 of the Electricity Act 1992.
- 4.2 Section 172O of the Electricity Act provides that the functions of the Electricity Commission are to:
  - (a) formulate and make recommendations concerning electricity governance regulations and rules in accordance with the Electricity Act;
  - (b) administer, monitor compliance with, investigate, enforce, and apply penalties or other remedies for contraventions of electricity governance regulations and rules;
  - (c) establish, operate, and facilitate the operation of markets for industry participants or consumers, or both;
  - (d) use reasonable endeavours to ensure security of supply (including contracting for reserve energy), without assuming any reduction in demand from emergency conservation campaigns, while minimising distortions to the normal operation of the market;
  - (e) undertake forecasting and modelling of future electricity supply and demand;
  - (f) promote and facilitate the efficient use and conservation of electricity (including funding programmes that provide incentives for cost-effective energy efficiency and conservation);

- (g) manage emergency conservation campaigns to avoid material risk of supply shortages;
  - (h) approve one or more complaints resolution system for the purpose of section 158G of the Electricity Act;
  - (i) develop best practice methodologies and other standards and model agreements for use by industry participants;
  - (j) give effect to Government Policy Statement objectives and outcomes; and
  - (k) provide advice to the Minister on matters concerning the electricity industry.
- 4.3 Under section 54V of the Commerce Act, the Electricity Commission must advise the Commerce Commission as soon as practicable after making any recommendation for an electricity governance regulation or rule under subpart 2 of Part 14 of the Electricity Act, or after making any decision under electricity governance regulations or rules, or after issuing any guidelines, that is or are likely to be relevant to the powers, duties or functions of the Commerce Commission under Part 4 of the Commerce Act.

## **5. Roles and Responsibilities of the Commerce Commission**

- 5.1 The Commerce Commission is an independent Crown entity established under section 8 of the Commerce Act. The Commerce Commission performs statutory functions and duties, and exercises statutory powers, under:
- (a) the Commerce Act 1986;
  - (b) the Dairy Industry Restructuring Act 2001;
  - (c) the Fair Trading Act 1986;
  - (d) the Electricity Industry Reform Act 1998;
  - (e) the Telecommunications Act 2001; and
  - (f) the Credit Contracts and Consumer Finance Act 2003.
- 5.2 Section 26 of the Commerce Act provides for the Minister of the Crown, who is for the time being responsible for the administration of the Commerce Act, to formally communicate statements of the economic policy of the Government to the Commerce Commission. The Commerce Commission is required to have regard to such statements in exercising its statutory functions. Apart from the requirement to have regard to such statements, the Commerce Commission is independent of the Government in carrying out its functions.
- 5.3 The Commerce Commission's role under the Commerce Act is to promote competition in markets for the long-term benefit of consumers within New Zealand by prohibiting contracts or arrangements by businesses that could lead to a substantial lessening of competition, the taking advantage of substantial market power to deter or eliminate competition, and mergers or acquisitions that would substantially lessen competition. The Commerce Commission



enforces, adjudicates and provides information and advice relating to generic competition law that prohibits anti-competitive behaviour and structures in markets. The Commerce Commission also conducts regulatory inquiries where there is little or no competition and little or no likelihood of a substantial increase in competition, to determine whether to recommend that goods or services should be regulated.

- 5.4 The Commerce Amendment Act 2008 has introduced a number of changes to the Commerce Commission's functions and powers in relation to regulated electricity lines services. This Memorandum of Understanding reflects these changes, however, until Part 4A is repealed on 1 April 2009, the Commerce Commission continues to exercise its functions and powers under Part 4A. Part 4 also sets out the transition from Part 4A thresholds to default price-quality paths following the repeal of Part 4A.

Part 4A also continues to apply to breaches of thresholds under Part 4A up to 31 March 2009, and breaches of the default price-quality path before 31 March 2010, provided the Commerce Commission has published a notice of intention to declare control under Part 4A within specified timeframes (refer section 54N of the Commerce Act).

- 5.5 Section 52A of the Commerce Act provides that the purpose of Part 4 of the Commerce Act, which relates to controlled goods or services (including electricity lines services), is to promote the long-term benefit of consumers, by promoting outcomes that are consistent with outcomes produced in competitive markets such that suppliers of regulated goods or services:

- (a) have incentives to innovate and invest, including in replacement, upgraded and new assets;
- (b) have incentives to improve efficiency and provide services at a quality that reflects customer demands; and
- (c) share with consumers the benefits of efficiency gains in the supply of the regulated goods or services, including through lower prices; and
- (d) are limited in their ability to extract excessive profits.

- 5.6 In addition, section 53A of the Commerce Act provides that the purpose of subpart 4 of Part 4 of the Commerce Act, which relates to information disclosure, is to ensure that sufficient information is readily available to interested persons to assess whether the purpose of Part 4 is being met.

- 5.7 The Commerce Commission's responsibilities under Part 4 of the Commerce Act include:

- (a) determining input methodologies relevant to the various forms of regulation of goods or services under that Part;
- (b) setting default/customised price-quality paths for those suppliers of goods or services that are subject to default/customised price-quality regulation;
- (c) assessing any proposals for customised price-quality paths received from such suppliers;
- (d) monitoring compliance with such price-quality paths;

- (e) requiring the disclosure of certain information by those suppliers of regulated goods or services that are subject to information disclosure regulation; and
- (f) publishing a summary and analysis of the publicly disclosed information for the purpose of promoting greater understanding of the relative performance of individual suppliers, their relative performance, and the changes in performance over time.

5.8 Section 54V of the Commerce Act provides that, before exercising any of its powers, duties or functions under Part 4, the Commerce Commission must take into account:

- (a) any electricity governance regulation or rule, or decision made under them, that relates to or affects the quality standards or pricing methodologies applicable to Transpower;
- (b) any electricity governance regulation or rule, or decision made under them, that relates to or affects the pricing methodologies applicable to any other line owner;
- (c) any guidelines of which it receives advice from the Electricity Commission that are likely to be relevant to the exercise or performance of the powers, duties, or functions of the Commerce Commission under Part 4;
- (d) the levy payable by Transpower or any other line owner under section 172ZC of the Electricity Act; and
- (e) the continuance of supply obligations imposed by section 62 of the Electricity Act.

5.9 The Commerce Commission must, if asked by the Electricity Commission to do so, reconsider a section 52P determination made under the Commerce Act and, to the extent that the Commerce Commission considers it necessary or desirable to do so, amend the determination to take account of any matter referred to in paragraph 5.8.

## **6. Relationship Management**

6.1 The Electricity Commission and the Commerce Commission acknowledge their respective roles and responsibilities and agree to cooperate to ensure the most efficient and effective outcomes for the electricity industry having regard to their respective statutory functions with regard to the electricity industry:

- (a) the Electricity Commission – ensuring electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable and environmentally sustainable manner and to promote and facilitate the efficient use of electricity; and
- (b) the Commerce Commission – to promote competition in markets for the long-term benefit of consumers within New Zealand by prohibiting contracts or arrangements by businesses that could lead to a substantial lessening of competition, the taking advantage of substantial market power to deter or eliminate competition, and mergers or acquisitions that would substantially lessen competition. The Commerce Commission also, with respect to Part 4 of the Commerce Act, promotes the long-term benefit of consumers of electricity lines services by promoting outcomes that are consistent with outcomes produced in competitive markets.



- 6.2 The Electricity Commission and the Commerce Commission will work closely together in the spirit of this Memorandum of Understanding to ensure that their respective roles are well coordinated, and to minimise any scope for uncertainties regarding jurisdictional issues.
- 6.3 The Electricity Commission and the Commerce Commission agree that there are a number of principles which will govern the relationship between the two Commissions under this Memorandum of Understanding. Specifically, but without limitation, the two Commissions agree to:
- (a) use all their reasonable endeavours to consult with each other on all matters of common interest;
  - (b) keep each other reasonably advised at all times of any matter which that party becomes aware of that may affect the operations of the other Commission;
  - (c) focus on the need to work together to keep the other Commission as fully informed as possible and to act in good faith;
  - (d) focus on the need to reduce, if not eliminate, the need for a duplication of efforts between the two Commissions in respect of any projects or initiatives falling, or likely to fall, within the ambit of the memorandum;
  - (e) communicate with each other and advise on the activities of each other in areas affected by this memorandum; and
  - (f) engage with each other in respect of all aspects of this Memorandum of Understanding.
- 6.4 The General Manager of the Electricity Commission and the Chief Executive of the Commerce Commission, or their appointees, shall meet with each other at least once every three months, and more frequently should the two Commissions consider it necessary. At each three-monthly meeting the two Commissions shall undertake:
- (a) an update of each Commission's current and anticipated projects;
  - (b) an assessment of the workings of this Memorandum of Understanding and the relationship between the two Commissions generally; and
  - (c) such other matters as the two Commissions consider appropriate.
- 6.5 The Electricity Commission and the Commerce Commission agree to review this Memorandum of Understanding, and review the need for and terms of an updated Memorandum of Understanding, at least annually.

## **7. Areas of Common Interest**

- 7.1 The Electricity Commission and the Commerce Commission acknowledge that from time to time they may have overlapping areas of common interest, particularly with respect to the:
- (a) price of goods and services provided by Transpower; and

- (b) quality standards for the transmission system, and information disclosure requirements, particularly with respect to lines businesses.

7.2 The two Commissions agree, to the extent they may properly do so, that in order to coordinate their respective roles and responsibilities:

- (a) the Commerce Commission will take into account, before exercising any of its powers under Part 4 of the Commerce Act, the matters specified in section 54V of the Commerce Act, including any electricity governance regulation or rule made by the Electricity Commission, or decision made under them, or any relevant guideline, that relates to or affects the quality standards or pricing methodologies applicable to Transpower or to any other line owner. In making a section 52P determination in respect of quality standards of Transpower, the Commerce Commission will only include requirements that give effect to quality standards set by the Electricity Commission (as required under section 54M(6) of the Commerce Act);
- (b) the Electricity Commission will take into account the price-quality paths set by the Commerce Commission in relation to suppliers of electricity lines services, and the information disclosure requirements imposed by the Commerce Commission on suppliers of electricity lines services under Part 4 of the Commerce Act. The Electricity Commission will also consult with the Commerce Commission where a new or changed rule under the Electricity Governance Rules 2003, or a new or changed regulation under the Electricity Governance Regulations 2003, may have an impact on or introduce uncertainty surrounding the determinations on price-quality and information disclosure regulation under the Commerce Act;
- (c) the two Commissions will keep each other informed of information and initiatives that may affect the other Commission's role in relation to the objectives outlined in this Memorandum of Understanding;
- (d) the two Commissions will work together closely to ensure that their respective roles are well-coordinated;
- (e) the two Commissions will seek to minimise any scope for uncertainties regarding jurisdictional issues; and
- (f) the two Commissions will work together to clearly communicate their respective roles and responsibilities as are set out in any protocols established under this Memorandum of Understanding from time to time.

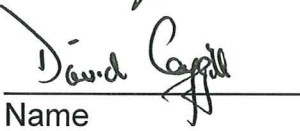
## **8. Requests for Information**

- 8.1 Both the Electricity Commission and the Commerce Commission are subject to the Official Information Act 1982 and the two Commissions acknowledge that the information contained in this Memorandum of Understanding and other information held by either of them in relation to this Memorandum of Understanding is official information under that Act, and may be released to the public upon request unless there is good reason, in terms of that Act, to withhold the information.

8.2 Subject to any requirements as to confidentiality, the two Commissions will respond promptly to requests for the supply of information or documentation from each other and agree that all such requests shall be treated as being made under the provisions of the Official Information Act.

**SIGNED** for and with the authority of  
the **ELECTRICITY COMMISSION** by:

  
\_\_\_\_\_  
Signature


  
\_\_\_\_\_  
Name

  
\_\_\_\_\_  
Designation

**SIGNED** for and with the authority of  
the **COMMERCE COMMISSION** by:

  
\_\_\_\_\_  
Signature

  
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Name

  
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Designation



