

Transpower New Zealand Limited

Submission in Response to Proposed Rule Changes

1. Introduction and Summary

1.1 The Commerce Commission has asked for submissions on two sets of rule changes: first, those proposed by EGEN to incorporate the Conditions imposed by the Commission and secondly, on the changes to the appeal rights in Part F as proposed by the Transport Working Group ("TWG").

1.2 In response to the particular matters that the Commission asked interested parties to address, Transpower's position is as follows:

(a) the Rule Changes to Incorporate the Conditions:

(i) the proposed rule changes go some way towards implementing the Conditions, but do not do so fully. In practice it is likely that the rule changes will be subject to further disputes over interpretation as they are applied, which will reduce their effectiveness. Furthermore, in a number of places the procedural steps and timing delays introduced by the rule changes will limit their effectiveness in addressing the competitive concerns identified by the Commission. In some cases particular rules (e.g. the possible appointment of the Rulings Panel to determine rule changes) are not in keeping with the wording or intention of the Conditions;

(ii) Transpower considers that the rule changes will negate some of the purported competitive benefits (particularly decision-making efficiencies) ascribed to the Rulebook and are likely to give rise to additional and new detriments, particularly in relation to interpretation and process issues;

(b) Changes to Appeal Rights in Part F:

(i) Transpower considers that the appeal rights in the version of the Rulebook originally considered by the Commission were too narrow and so agrees that changes in general are desirable and Transpower supports the proposed removal of the restriction on appeals.

(ii) However, Transpower considers that the other changes to the appeal processes are not necessary either for efficiency reasons or to address concerns identified by the Commission in relation to the risk of under-

investment. These changes may reduce the ability of the Board to make "investor of last resort" decisions and so have adverse public benefit effects.

- 1.3** Transpower's detailed responses to the Commission's questions in respect of each rule change are set out below. In addition, Transpower has provided the Commission with some specific drafting comments in relation to the first set of rule changes in a table format for ease of reference.
- 1.4** Transpower understands that the Commission is seeking comment in accordance with its letter of 18 November 2002 to Russell McVeagh, which stated that the Commission would consult interested parties "when EGEC reaches finality on the final form of these rules" (p2). In fact, EGEC has not itself considered these changes nor made a final decision on the proposed rules. Accordingly, while the rule changes may have been presented to the Commission as an EGEC proposal, this is not the case and they do not necessarily represent the views of all EGEC members. For example, most of the comments Transpower makes in this submission have already been made to the Project Team but have not been incorporated.

2. Proposed Rule Changes to Incorporate Conditions

Condition 1

- 2.1** Condition 1 provides that:

Prior to the Rulebook coming into effect, the Rulebook must be amended to include rules that provide that where the Electricity Governance Board established under the Rulebook ("the EGB"), in its discretion, considers that a proposal for a pro-competitive and public benefit enhancing rule change is being blocked or unduly delayed, the EGB may require that the proposal for such a rule change be put to a vote, notwithstanding that a working group has not completed its consideration of the proposed rule change.

- 2.2** EGEC has proposed to incorporate this condition through a new rule 1.5 to Part A, Section IV.

- 2.3** Clearly the incorporation of this rule, by providing the Board with the ability to put a proposal to a vote, goes some way to incorporating Condition 1. However, Transpower believes that it does not fulfil the intention of the Condition of ensuring that potentially pro-competitive changes are not blocked or unduly delayed. The reasons for this are:

- (a) Transpower is concerned at the potential timeframes required for the proposed rules to be effective in fast-tracking a vote. The fact that the Board will probably not act on a proposal until it has been under consideration for a reasonable period, coupled with the long timeframe for Board intervention, suggests that the potentially pro-competitive benefits to be gained from Board

intervention may in reality be quite limited (especially when the four-year time limit on the authorisation is taken into account);

- (b) In order for the Board to be well-placed to determine whether a rule change needs to be fast-tracked, it should be able to step into the shoes of the working group. Rule 1.6.3 enables it to carry out or repeat working group steps but does not go far enough in giving the Board the same powers as a working group;
- (c) The wording of the Condition does not distinguish different thresholds for the two criteria of pro-competitive and benefit-enhancing, but different thresholds have been adopted throughout Rule 1.6, with references to a rule change that "is pro-competitive" compared to "likely to be of benefit to the public". Rule 1.5 does not frame the competition on threshold as an absolute but as "may". In Transpower's view it is appropriate that both thresholds be framed as "likely to be" rather than absolutes. This is consistent with the tests in the Commerce Act which encompass "likely" thresholds. The absolute threshold may prove to be an unreasonably high hurdle and thus result in very few, if any, instances where the Board is able to fast-track a delayed change.

Condition 2

2.4 Condition 2 requires that:

Prior to the Rulebook coming into effect, the Rulebook must be amended to include rules that provide that the EGB has the discretion to implement a pro-competitive and public benefit enhancing rule change when such a rule change has been rejected by a vote and an independent body chosen by the EGB considers that such a proposed rule change is pro-competitive and public benefit enhancing.

2.5 EGEC is proposing to incorporate this Condition through a new Rule 2.4 to Part A, Section IV.

2.6 Again, this new rule partly implements the Condition but Transpower considers that the inclusion of the Rulings Panel as a potential arbiter of rule changes is inappropriate and fails to properly reflect the Condition. As Transpower noted previously in its submission on the Conditions (12 September 2002, paragraph 3.13) the Rulings Panel is not an appropriate body for this role. The Rulebook is based on a separation of the executive and judicial functions and putting the Rulings Panel into this role merges those functions. Furthermore, the Rulings Panel is unlikely to have the necessary expertise to make this determination.

2.7 Transpower notes that EGEC previously proposed that the Rulings Panel always consider rule change proposals under this rule. It has since acceded to the possibility that a truly independent body might be needed and has provided for the Board to choose between the Rulings Panel and

an independent body. As the Condition requires an independent body the addition of the Rulings Panel is inconsistent with this.

- 2.8** Transpower considers that the Rulings Panel should be specifically excluded from being appointed as an independent body under this new rule. If the option of the Rulings Panel is retained, Transpower believes a specific rule is necessary to provide that where the Rulings Panel has proposed a rule change, it cannot be the body that then considers it under this rule 2.5.
- 2.9** The possibility of appointment of the Rulings Panel could lead to disputes over whether it had a conflict of interest in relation to a particular rule change proposal. Such disputes are a further detriment of the Rulebook process.
- 2.10** The restriction that only "participants" can make submissions to the independent body significantly limits the effectiveness of the rule in implementing the Condition. It is likely that the parties that would benefit from a rule change that requires this level of intervention to be implemented will be outside the existing participation. It is important that new entrants and consumers (including non-major users) can participate in the debate on whether a rule change may be pro-competitive and of benefit to the public. As has been the case throughout the authorisation process, consumers may have quite different views and a different perspective on rule change proposals and in order for the independent body to be able to make a well-informed decision it should have the opportunity of hearing from all "persons". This is also consistent with the fact that public benefit issues are of interest to the wider community not just Rulebook participants.
- 2.11** Transpower reiterates the point made in relation to Condition 1 that the processes and timeframes provided for in the new rules may limit the effectiveness of the rules in achieving the aim of the Conditions. Transpower refers in particular to the requirement that if the independent body finds a rule change is likely to be pro-competitive and benefit-enhancing, the Board must make a further report on it. This seems extraneous and likely to result in unnecessary delay and further costs. There is no need for a further report if the Board is going to adopt the rule change. There will already have been a working group or Board report on the rule change (prior to it going to the vote).

Condition 3 – Completion of Part B

- 2.12** Condition 3 requires that:

That within 12 months from the date of authorisation the Rulebook must be amended to include in Part B of the Rulebook rules drafted in consultation with consumer groups to address consumer issues.

- 2.13** EGEC proposes to incorporate this by the inclusion of a new section of Part A.

- 2.14** The proposed Rule, as drafted, does not actually do what the Condition requires and provide for incorporation of new rules. It only requires the Board to "prepare" Part B. Simply requiring the Board to prepare rules is not the same as causing it to become an effective part of the Rulebook. To help ensure that the latter happens, the Rulebook should specify the process by which the rules will be voted on and adopted, and the required timeframe in which these procedural steps must occur. In addition, specifying the content (at a high level e.g. subject headings) of the rules at this stage would be useful.
- 2.15** Accordingly, the rule needs to specify who is to vote on Part B. Changes will be required to voting arrangements in Part A (Schedule A6 for example) in order for Part B to be completed. These have not been signalled. It is not clear whether all members will be able to vote on these changes or whether voting will be limited to certain classes.
- 2.16** The consultation process is not specified. At the least, it should be made clear that interested parties must include all classes of consumers including small domestic consumers.
- 2.17** In terms of whether the proposed rule has any anti-competitive effect, as the proposed rule simply provides that consumer rules will be drafted, there is little room for anti-competitive effect. However, at the same time the rules as proposed in Section X cannot be pro-competitive (or address the Commission's concerns about consumer issues) as they do not achieve anything substantive.

Condition 4

- 2.18** Condition 4 requires that:

Prior to the Rulebook coming into effect, the Rulebook must be amended to include rules that require the EGB to commission an independent review on the efficacy of Part F, and to publish that review publicly within 2 years from the Rulebook commencement date.

- 2.19** EGEC proposes to incorporate this by providing a new section XI of Part A.
- 2.20** While this broadly reflects the Condition, in order for the review to be effective either the process of review should be specified in the rules or the Board should be given specific power to require co-operation from members (as reasonably required) e.g. in terms of provision of information to the review panel. In addition, all persons should have the opportunity to make submissions to the review.
- 2.21** As is the case with the condition itself, the proposed rule does nothing to require any response to the review.

3. Proposed Rule Changes for Part F - Appeal Rights

- 3.1** During the authorisation process a number of parties, including Transpower, expressed their concern with the very limited appeal rights under Part F. The TWG has proposed rule changes that would widen the rights of appeal and add in reporting requirements and further issues to be considered as part of the appeal process.

Widening of Appeal Rights

- 3.2** Transpower supports the deletion of old rule 4.1.1 which restricted appeals to proposed service changes that had not gone through a specified process.

Changes to Appeal Process

- 3.3** Transpower considers that the further matters to which the Board must have regard under rule 4.12.1.3 and 4.12.1.4 and the requirement to publish a draft report and seek submissions are not desirable or necessary.
- 3.4** These additions further lengthen the appeal process and as a result make it more difficult for the Board to institute a benefit-enhancing change. The likely time lapse lessens the positive impact of that change.
- 3.5** Transpower also notes that the Commission's concerns over the potential risk of under-investment do not indicate any need to further fetter the Board's ability to overturn investment decisions. In fact, rules 4.12.1.3 and 4.12.1.4 could limit the Board's ability to minimise the risk of under-investment.