IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-002774

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	the Electricity Act 1992
BETWEEN	NEW ERA ENERGY INCORPORATED Applicant
AND	THE ELECTRICITY COMMISSION First Respondent
AND	TRANSPOWER NEW ZEALAND LIMITED Second Respondent

Hearing: 18, 19, 20, 21, 22 August 2008

Counsel: P T Cavanagh QC, J T Caunter and S McLaughlin for the Applicant
A R Galbraith QC and L A O'Gorman for the First Respondent
T C Stephens and K R Jackson for the Second Respondent
MT Scholtens QC for Commissioner Pinnell (given leave to withdraw - he not required for cross-examination)

Judgment: 4 May 2009

JUDGMENT OF WILD J

Introduction

[1] The applicant (New Era) applies for judicial review of the decision of the first respondent (the Commission) to approve an amended proposal from the second respondent (Transpower) to upgrade the electricity transmission lines from Whakamaru to Otahuhu.

[2] New Era describes itself in its statement of claim as an incorporated society set up to investigate alternatives to Transpower's proposed transmission line. It claims to represent 10,000 people whose properties will be affected by the

transmission line. The Commission is a Crown Entity established in 2003 under the Electricity Act 1992. It is charged with the regulation and oversight of New Zealand's electricity industry in accordance with the Electricity Act and Government policy. Transpower is the state-owned enterprise which owns and operates the national grid.

[3] On 5 July 2007, the Commission approved the amended North Island Grid Upgrade Proposal presented by Transpower (the Final Decision). New Era argues that the Final Decision, and the deliberations that led to it, were vitiated by predetermination and bias, illegal, irrational, and suffered from a mistake of fact. On those grounds, it asks the Court to quash the Final Decision. Both the Commission and Transpower argue that New Era's application should be dismissed because, in reality, it seeks to challenge the merits of the Final Decision, rather than the process that led to it.

Factual background

[4] The security of New Zealand's electricity supply is a controversial issue. This is particularly true of supply to Auckland, which in recent years has suffered from problems with its electricity infrastructure. The proper functioning of this infrastructure is critical because most of New Zealand's electricity generation capacity is located in the South Island and the Waikato, rather than in Auckland itself. To this end, and to ensure security of supply to Auckland for the next forty years, Transpower sought to upgrade the transmission lines that run from Whakamaru, in the southern Waikato, to Otahuhu, in South Auckland. Otahuhu is the main substation for the Auckland region.

[5] Currently, electricity is supplied to Auckland and the upper North Island via two major transmission power system 'paths'. The 'Western Path' runs south from Otahuhu to the Huntly thermal power station, and then continues south west to Stratford in Taranaki. The 'Central Path' runs south from Otahuhu to the Whakamaru hydroelectric power station on the Waikato River. Each path currently has three 220kV transmission lines. Of the three lines on the Central Path, two are

arranged in 'simplex' and one in 'duplex'. These terms indicate the number of wires bundled in the line. Put simply, duplex lines can carry twice as much electricity as simplex lines. Triplex lines, predictably, carry three times as much electricity as simplex.

[6] On 30 September 2005, Transpower submitted a grid upgrade proposal (GUP) to the Commission to construct a new 400kV duplex transmission line between Whakamaru and Otahuhu (the Original Proposal). The Original Proposal was estimated to cost $622 million (in 2010 dollars). It required a range of new transformers (given the higher voltage), underground cabling and, most importantly, a new 190-kilometre long overhead transmission line. The Commission rejected the Original Proposal in a draft decision issued on 27 April 2006. Compared with a range of options submitted by Transpower, the Commission reasoned that the Original Proposal was not the most preferable option. On 31 May 2006, Transpower informed the Commission that it sought to amend the Original Proposal and asked the Commission to suspend making a final decision on it.

[7] During this period, the issue of security of electricity supply to the upper North Island was very much on the political agenda. On 23 May 2006 the Minister of Finance and, on 20 June 2006, the Minister of Energy, held meetings with the Commission and expressed their concerns over the issue of security of supply. It is this interaction between central Government and the Commission which forms the basis of the first ground of New Era's application for judicial review. On 12 June 2006, between the two Ministerial meetings, a major fault at the Otahuhu substation caused a blackout for six hours, affecting 700,000 people in Auckland.

[8] Transpower submitted its amended GUP on 20 October 2006 (the Amended Proposal). The main differences between the Original and Amended Proposals involved the new transmission line terminating in Pakuranga instead of Otahuhu, deferring the up-rating of the line to 400kV until demand made it practicable (the capacity remaining at 220kV until that point), and changing bundling of the line from duplex to triplex. The expected project cost of the Amended Proposal was $824 million (in 2011 dollars), but contained significantly more sophisticated engineering and scale of economy advantages compared with the Original Proposal.

On 31 January 2007, the Commission notified its intention to accept the Amended Proposal, providing draft reasons for its proposed decision on 23 February 2007. Its Final Decision to accept the Amended Proposal was released on 5 July 2007. The Final Decision was not unanimous; Deputy Chair Mr Peter Harris and Commissioners Messrs David Close and Douglas Dell formed the majority whilst Commissioner Mr Graham Pinnell issued a minority dissenting decision. The factors used in the Commission's decision-making process form the basis of the remaining grounds of New Era's application for judicial review.

[9] Since gaining approval from the Commission, the Amended Proposal has progressed quickly. On 9 August 2007 the Minister for the Environment 'called in' the Amended Proposal pursuant to s 141B Resource Management Act 1991. This delegated the resource consent process to a Board of Inquiry rather than a territorial authority. The Board of Inquiry's hearing concluded on 31 October 2008 and its draft report is awaited.

Statutory framework

The Electricity Act 1992

[10] The Commission was established and began operations on 14 September 2003. It assumed the role of the pre-existing Electricity Governance Board by virtue of the Electricity Amendment Act 2004. This substitution is evident in s 172M of the Electricity Act 1992. Section 172N(1) provides that the principal objectives of the Commission 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.

[11] To this end, s 172O(1)(a) charges the Commission with tasks including the formulation and recommendation of electricity governance regulations and rules in accordance with the Electricity Act. Upon the Commission's recommendation, the relevant minister may, through Order in Council, enact regulations under s 172D and

unilaterally enact rules under section 172H of the Act. Section 172O(1)(b) then charges the Commission with the administration and enforcement of those rules and regulations.

[12] The relationship between the Commission and the Government is reciprocal. Section 172ZK enables the Government to issue a Government Policy Statement (GPS) detailing the objectives and outcomes the Commission should give effect to.

Electricity Governance Rules

[13] Upon its formation, the Commission inherited Electricity Governance Rules (the Rules) promulgated in 2003. They have since been amended several times. Relevant to these proceedings are the rules contained in Part F (Transmission), Section III (Grid Upgrade Plans). Rule 2 details the purpose of this section, including rule 2.1:

> [To] facilitate Transpower's ability to develop and implement long term plans (including timely securing of land access and resource consents) for investment in the grid.

[14] Section III also provides for 'statements of opportunities' (SoO) the purpose of which is to "enable identification of potential opportunities for efficient management of the grid including investment in upgrades and investment in transmission alternatives." (rule 9.1.2.) The Commission's Board prepares a SoO when considering a GUP from Transpower, though Transpower may be called upon to assist with the preparation of such a SoO. A SoO must set out the 'grid reliability standards' (GRS), 'grid planning assumptions' (GPA) and include an analysis of the performance of the power system against those two measures. Rule 10 provides for the GPA, and schedule F3 provides for the GRS

[15] Section III sets out the process for the submission and consideration of a GUP. Rule 12.1 sets out the purpose of a GUP:

> 12.1.1 The purpose of a grid upgrade plan is to enable Transpower to:
>
> 12.1.1.1 propose, and for the Board to review and approve, reliability investments that are justified on the basis of the grid reliability standards and the grid investment test; and

> 12.1.1.2 propose, and for the Board to review and approve, economic investments justified on the basis of the grid investment test […]

[16] 'Reliability investments', such as the Amended Proposal may be approved if a GUP conforms with the process in rule 12, reflects 'good electricity industry practice' by meeting GRS, and meets the 'grid investment test' (GIT). The GIT is defined in schedule F4 of the Rules.

[17] In summary, the GIT is met if a GUP is superior, on a cost-benefit analysis, to other options. The GRS will be met if a GUP is expected to achieve sufficient reliability if all the investments meeting the GIT were to be implemented and if the system could act as a safety net should some credible (i.e. likely) but serious fault occur.

[18] Thus, a complex statutory framework surrounds the preparation and consideration of a GUP submitted by Transpower to the Commission. The process is intended to be a co-operative one, involving the sharing of information, the provision of options, and the measuring of a GUP against objective standards.

Grounds for review

A. Pre-determination and bias

[19] This ground refers to the meetings between the Commission and Government Ministers after the Commission's decision to reject Transpower's Original Proposal. New Era alleges that the Ministers expressed their desire for the proposal to be approved with urgency and established a framework to ensure a positive result was achieved. New Era asserts that this pressure led to the approval of the Amended Proposal by the Commission notwithstanding the Commission receiving contrary advice from its own staff, with the result that the decision to approve the Amended Proposal was contrary to the Commission's statutory function.

[20] The first meeting was on 23 May 2006, when the Commission met with the Hon Dr Michael Cullen, Minister of Finance and Deputy Prime Minister. New Era

alleged that Dr Cullen stated he that would not tolerate a stalemate over Transpower's proposal, and that if the Commission did not solve the issue by the end of July 2006 he would be forced to intervene. New Era also alleges that Dr Cullen stated that, if asked, he would deny that a meeting ever took place.

[21] As a result of this meeting, on 7 June 2006, a steering group was established to facilitate discussions between the Commission and Transpower. A representative from the Ministry of Economic Development was to observe these discussions. New Era alleges that this steering group's purpose was to facilitate an expeditious decision on the Amended Proposal and that the changing membership of the group indicates that it is was designed to usurp the Commission's processes.

[22] On 14 June 2006, the Hon David Parker, Minister of Energy, wrote to the Chairperson of the Commission, Mr Roy Hemmingway. That letter stated that the processing of the intended Amended Proposal should occur as soon as possible, and that he intended to write to Transpower to ask it to prioritise the production of the Amended Proposal. On 20 June 2006, Mr Parker met with the Commission's Board. New Era alleges that Mr Parker's conduct at that meeting amounted to direction and intervention in the Commission's decision-making process.

[23] New Era also alleges that the following events, in addition to those meetings, contributed to predetermination and bias on the part of the Commission when considering the Amended Proposal:

- circulation of cabinet papers on 8 August 2006 and 27 November 2006 which, *inter alia*, recommending no change to the Commission's structure and independence despite detailing dysfunction in the Commission;

- correspondence between Mr Hemmingway and the Department of the Prime Minister and Cabinet on 18 July 2006, requesting an update on the progress on the Amended Proposal;

- the removal of Mr Hemmingway from the Board, effective on 30 November 2006, presumably due to his signalling he would not accept the Amended Proposal; and

- the appointment of Mr Stan Rogers (the former deputy chair of Transpower's board) on 31 August 2006, and his subsequent attendance at Commission meetings deciding the Amended Proposal.

[24] Specifically, New Era alleges that the cumulative effect of this Government action amounted to illegitimate intervention on its part, creating a false sense of urgency and pressure on the Commission to expedite the consideration of, and ultimately to accept, the Amended Proposal. Neither Ministers of the Crown nor Government officials have a statutory power to direct the Commission to accept a GUP or intervene in the evaluation process. The direction and intervention by the Government resulted in the Commission evaluating the Amended Proposal with a predetermined and biased view, and thus the Court should quash its decision to accept it.

[25] The Commission strongly resists any suggestion of predetermination or bias on its part. This is based on its opposing contention that there was no intervention – *de facto* or otherwise – by Government in the Commission's decision-making processes.

[26] The Commission argues that there were strained relations between it and Transpower in the period immediately following the decision to reject the Original Proposal, and since the Minister of Energy has public accountability for the security of the electricity network, it was only natural for him to be concerned. There were no comments from either Minister or officials that related to the substance of the Amended Proposal; only comments about the personalities involved and the function of the Commission, which were entirely legitimate. The Commission contended that the only issue is whether Dr Cullen illegitimately set down a deadline of 31 July 2006 for the Commission to consider the Amended Proposal. The Commission points out that it did not comply with this deadline: the Final Decision was released

on 5 July 2007, 12 months after the deadline. Thus, even if there was a deadline, it was ignored and has no relevance.

[27] The Commission argues that the other interactions between the Government and the Commission were 'sensible, not sinister'. The only outcome of the correspondence was the Government making clear that the Commission should act expeditiously in the processing of the Amended Proposal and that the Ministers' view was that a transmission solution (rather than a generation solution) was most likely. Neither of these messages amounts to direction or intervention; they do not refer to the substance of the amended GUP and could not have affected the outcome of its consideration. That the meetings and correspondence consistently reiterate the Commission's relative autonomy and the importance of due process, evidences this fact.

[28] As to Mr Hemmingway's perception of pressure from the Government, and his subsequent departure, the Commission argues that his experience is at odds with that of the other board members of the Commission. Although each of the others had declined the Original Proposal, none had come under the same perceived pressure. The Commission argues there is no evidence linking the Government's decision not to reappoint Mr Hemmingway to the Commission's board to his inclinations toward the Amended Proposal.

[29] Lastly, the Commission argues that the appointment of Mr Rodger and his presence at meetings cannot be an issue. He declared conflicts of interest appropriately and the few comments he did make referred to the decision-making process – not to the substance of the decision.

[30] Overall, the Commission argues that there is no credible basis for New Era's allegations. In particular there is no evidence of Government intervention or direction. It follows that any allegations of predetermination or bias resulting from such intervention are not made out.

B. Illegality and Unreasonableness

[31] These second and third grounds for review are a composite of a series of alleged incorrect weightings and irrelevant considerations in the Commission's consideration of the Amended Proposal against the GIT. Clarity requires individual consideration of each of the alleged errors.

(1) Failure to apply correct SoO or assess correct market development scenarios

[32] This forms the main basis for New Era's allegation that the Commission failed to take into account relevant considerations. The GIT effectively works by comparing a GUP with a range of options and conducting a cost-benefit analysis of each. There are actually several cost-benefit analyses, each based on a different 'market development scenario' (MDS). MDSs are different future projections of the state of the electricity industry. Those MDSs are underpinned by the SoO that is created by the Commission. A SoO sets out the GPA and GRS for the Commission.

[33] The Commission created an initial SoO and the contingent GPA in 2005. The contingent GPA and MDSs were revised over 14-15 November 2006, and a new SoO containing the revised GPA and MDSs was created in 2007. The Commission eventually decided not to use the 2007 SoO and revised GPA and MDS to assess the Amended Proposal, instead relying on those contained within the 2005 SoO. This was due to the delay consideration of the 2007 SoO would cause. New Era alleges this was a failure to take into account a relevant consideration.

[34] The Commission had discretion to deviate from the MDS included in the 2005 SoO. It exercised that discretion by assuming that there would be less thermal generation in the North Island than the 2005 SoO had projected. New Era submits that exercising this discretion in the absence of the revised GPA and MDS was a failure to take account of a relevant consideration.

[35] New Era also alleges that, when the Commission was considering the Amended Proposal, it failed to take account of economic advice provided to it by its own staff which formed the basis of the revised GPA and MDS, and failed to

consider the 2007 SoO which led to several errors, including erroneous demand forecasts. The incorrect application of the 2005 SoO to the Amended Proposal caused an inappropriate cost-benefit analysis. New Era contends that, had the Commission applied the 2007 SoO, it would not have, and could not have, accepted the Amended Proposal.

[36] The Commission's response to this allegation is straightforward: the 2007 SoO does not exist. Whilst there have been draft new GPA created, and a proposed new SoO was released for consultation in July 2008, the 2005 SoO remains the most current and relevant SoO. On this basis, not having regard to the 2007 cannot be an error. As it does not exist, it cannot be a relevant consideration.

[37] The common denominator in New Era's allegations in this aspect was that the Commission discounted the possibility of higher thermal generation in the North Island. This is exemplified by the fact that the Commission's only deviation from the 2005 SoO was its acceptance of different MDSs which forecast lower thermal generation. The Commission counters that this was legitimate, because after Transpower submitted its Amended Proposal, there were clear political signals that there would not be any new thermal generation in the North Island, which necessarily indicated a transmission solution.

[38] The Government released a draft GPS on 7 August 2006, which introduced a new emphasis on renewable energy in preference to any new thermal generation that had hitherto been absent from such GPSs. That section on renewable energy in the draft GPS remained unchanged in the final version released in October 2006. Moreover, the Government released the draft New Zealand Energy Strategy (NZES), which also contained a preference for renewable over thermal generation. These two major policy documents were symptomatic of a paradigm shift in 2006 to reduce thermal generation and increase renewable energy sources, and so it was entirely legitimate for the Commission to revise the MDSs accordingly in that respect.

[39] Notwithstanding that, when considering the Amended Proposal, the Commission used MDSs that included at least some increase in thermal generation in the Auckland region. Overall, when the Commission considered the Amended

Proposal, the likelihood of substantial thermal generation being developed in the Auckland region was considerably lower than the likelihood of (the Government's preference for) generation from renewable sources. This was confirmed by the final version of the NZES, released in October 2007, which set a target of 90% of generation from renewable sources by 2025. This demonstrates that the Commission's deviation from the MDSs in the 2005 SoO was legitimate.

[40] Lastly, the Commission rebuts New Era's allegation that its reliance on the 2005 SoO caused erroneous demand forecasts. The Commission states that issue of whether to use the 2005 SoO or the draft GPA and associated demand forecasts being prepared for the 2007 was thoroughly debated by the Commission's board. It decided to use the 2005 SoO demand projections because it would be inappropriate to use forecasts that were yet to be consulted on; and there were no clear reasons why reliance on the 2005 SoO demand projections was inappropriate.

(2) Failure to apply the GIT correctly

[41] New Era alleges that the GIT necessarily requires a GUP to meet its requirements before it can be accepted. The Commission therefore made an error of law when it concluded that the GIT allowed it a broad discretion to approve the Amended Proposal if it came close to passing the GIT but did not actually meet its requirements.

[42] The Commission responds by expressly denying this allegation. In any case, it asserts that it is irrelevant because the Commission found that the Amended Proposal did in fact pass the GIT.

(3) Failure properly to assess and maintain grid reliability

[43] New Era alleges the Commission is required, by the provisions of the Electricity Act, the GPS and the GRS, to ensure reliability and security of electricity supply. This manifests itself in a requirement of the GRS that any GUP must have

the capacity to achieve prescribed levels of reliability in the range of MDS identified in the SoO.

[44] The Amended Proposal did not have the capacity to achieve these levels of reliability. The vulnerability of the transmission lines when they are eventually upgraded to 400kV, possibly resulting in double circuit failure (e.g. when a pylon is sabotaged or is toppled by wind), means that it cannot have met the GRS, and so the Commission failed to comply with its statutory obligations.

[45] The Commission rebuts this allegation by stating the probability of double circuit failure (a one in twenty year event) alleged by New Era is not accurate. Transpower's analysis suggested that the probability of double circuit failure was a one in 137-year event. The Commission initially had concerns about this probability and undertook its own analysis. It found that, even if Transpower's stated probability was too generous, it would still have met the GRS, and in any case such issues of reliability affected all the proposed options and so were irrelevant. Either way, the Commission had sufficiently complied with its obligations,

(4) Failure to assess optional reliability investments

[46] The GPS and the Rules require the Commission to be provided with sufficient and accurate information when evaluating a GUP. New Era alleges that Transpower in the Amended Proposal was required to provide optional reliability investments alongside its preferred option, and its reluctance to do so means that the Commission could not and should not have approved the Amended Proposal. New Era alleges that Transpower saw no merit in providing optional reliability investments, and that the Amended Proposal had only a 220kV line as an alternative to the 220kV/400kV line, which was insufficient.

[47] The Commission rebuts this allegation by stating that Transpower considered numerous other options in the Original Proposal, and submitted eight different options in the Amended Proposal. These were narrowed to four different options after consultation and detailed modelling analysis. The 220kV line alternative was not the only realistic option available, but rather the "best of the rest" from an

economic stand point; the others had technology feasibility issues. New Era alleges that the reason these other options were never realistic was because Transpower 'gold plated' them, thus setting them up to fail the GIT from an economic perspective. The Commission rejects this by stating that the Commission's staff carried out their own analysis and arrived at the same result.

(5) Failure properly to consider line duplication and failure properly to consider duplexing of A and B lines

[48] These aspects amounts to a specific objection linked to the previous aspect. New Era alleges that, given the problems with the Amended Proposal and the double circuit failure risk when running a transmission line at 400kV, the Commission should have considered either duplicating or duplexing the current transmission lines. New Era says these options were not considered or, if they were, it was based on inadequate information and thus there could not have been an accurate and fair comparison.

[49] The Commission argues that Transpower's Amended Proposal adequately dealt with the potentiality of a double circuit failure. Thus New Era's argument that the two options should have been given more consideration starts from a false premise that the 400kV option was untenable. The Commission considered line duplication was an irrelevant alternative given the reality of the low potential for double-circuit failure with the 400kV option. Duplexing was given thorough consideration, but was found to cost $813 million (in 2008 dollars, or $125 million in net present value terms), more than the 400kV option. Thus, even adjusting the assumptions to be very favourable to the duplexing alternative, the 400kV option was superior. It is thus clear that the Commission gave these two specific options sufficient consideration and there was no resultant error of law.

(6) Failure to take account of Government's draft NZES

[50] New Era alleges that the Commission did not properly take into account the draft version of the NZES. After being formulated in late 2006, this was

incorporated as part of the 2007 draft SoO, but was not incorporated in the 2005 SoO, which is what the Commission used to evaluate the Amended Proposal.

[51] The Commission labels this aspect of concern as ironic, given that the NZES played a very significant part in the Commission's decision-making process, especially as to the changed assumptions about generation (previously mentioned). The Commission deviated from the MDS in the 2005 SoO partly because of the NZES. To suggest that it did not take account of it is wrong.

(7) Failure properly to evaluate commitment trigger

[52] The last aspect refers to the time by which a GUP must be committed to for timely construction of the transmission line. New Era alleges that the Commission's reliance on the 2005 SoO and its conservative approach to the time it would take to complete processes under the Resource Management Act, giving the Amended Proposal inflated allowances, means that the Commission erred in its evaluation of the commitment trigger.

[53] The Commission resists these allegations by accepting that a less conservative approach to the modelling of a commitment triggers was possible (as was employed by Commissioner Pinnell in his dissent), but that a conservative approach was legitimate given the uncertainties associated with a project of such magnitude.

[54] New Era alleges that the combination and cumulative effects of these relevant considerations ignored, or of irrelevant considerations taken into account by the Commission, indicates that its decision to accept the Amended Proposal was an error of law and/or unreasonable. The Commission replies that New Era's concerns simply recite the reasons given by Commissioner Pinnell in his dissent. They cannot amount to unreasonableness or illegality; merely to a difference in opinion.

C. Mistake of Fact

[55] The final ground for review advanced by New Era is based on the reasoning underpinning the Original Proposal. New Era alleges that the Commission failed to take into account the relevant considerations underpinning the Original Proposal when it considered the Amended Proposal, and this amounts to a mistake of fact. Had the Commission taken into account those same considerations, it could not have concluded that the Amended Proposal was the most economic option available.

[56] The Commission responds to this allegation by stating that the fundamental differences between the Original and Amended Proposals mean they are not directly comparable, and so the considerations that underpin one may not be relevant to the other. The Commission nevertheless rejects that these considerations were ignored; it clearly identified the differences between the proposals and provided detail examination where it was warranted. Accordingly, there is no mistake of fact or error of law.

Preliminary issue: delay

[57] Transpower objects that New Era has delayed in applying for judicial review. Meanwhile, Transpower has begun work on the North Island GUP. As noted, the decision by the Board of Inquiry which is determining whether to grant resource consent to the project is awaited.

[58] Transpower asserts that if New Era does make out its grounds for review and the Court quashes the Commission's decision to approve the Amended Proposal, millions of dollars would be wasted and the security of supply of electricity would be jeopardised. Thus, Transpower submits that even if New Era does succeed, its delay in bringing the application and the resultant prejudice to Transpower should lead the Court to exercise its discretion by declining to grant New Era relief.

[59] The basis for Transpower's objection is that, although the Commission's Final Decision to approve the Amended Proposal was released on 5 July 2007, New Era had formed its views on its grounds of review before this time. Dr Bob

McQueen, the Vice-Chairman of New Era, indicates in his evidence that his concerns about predetermination first arose in September 2006, and had become clear conclusions by February 2007. New Era had the information necessary for the other grounds of review by July 2007. Yet New Era only applied on 19 December 2007.

[60] Transpower estimates (as of the hearing of this proceeding) that about $6 million will have been wasted if this application results in the quashing of the decision and that at least $3 million would be required to progress a new project.

[61] Transpower also highlights the public interest in the efficient construction of such projects, and that New Era's concerns ought to be voiced in the Resource Management Act process, rather than through judicial review.

[62] New Era resists these allegations on two bases. Firstly, New Era could not have known that the Commission's notice of intention to approve the Amended Proposal, released on 31 January 2007, effectively meant the approval of the Amended Proposal was a foregone conclusion. It thought that by participating in the consultation process following that notice, there was potential to change the Commission's intentions, but that was not the case. Thus, the earliest date that New Era could have applied was after the Final Decision was released, on 5 July 2007.

[63] Secondly, New Era could not apply immediately following the release of the Final Decision, because it had to request documents from the Commission pursuant to the Official Information Act 1982. Not until 28 September 2007 were all the documents obtained. A legal opinion which considered the documents and the law involved was provided to New Era on 1 November 2007. The application was filed on 19 December 2007. Therefore, any delay was justifiable, and insufficient prejudice resulted.

[64] Delay is the primary reason which influences Courts to exercise their discretion not to grant relief in applications for judicial review: *Turner v Allison* [1971] NZLR 833 (CA). Amongst the comprehensive authorities provided on the

issue was *West Coast Province of Federated Farmers of New Zealand (Inc) v Birch* (CA25/82, 16 December 1983), in which Cooke J said at 6:

> Review under the Judicature Amendment Act 1972 is generally a discretionary remedy - see for instance s.4(1), (2) and (4). Here the plaintiffs asked primarily for declaratory orders. As has been repeatedly said in this Court, declarations are essentially discretionary relief. It is clear that undue delay by a plaintiff may be fatal, just as it was under the old certiorari procedure. … I add only that the more liberal allowance of standing in administrative law, accorded in recent years and exemplified in the present case, carries with it an obligation to proceed promptly.

[65] Having flagged Transpower's complaint of disqualifying delay, I turn to decide whether any of the grounds for review is made out. If it is, delay will become a consideration.

Standard of review

[66] In the interlocutory judgment he gave in this proceeding on 9 May 2008, MacKenzie J said:

> [12] … As has been frequently emphasised, but as seems to need constant restatement, an application for judicial review is not an appeal on the merits. The question is whether the decision maker has acted lawfully. …

[67] In deciding whether the decision making process was lawful, the Court can – and does – vary the standard or "intensity" of its analysis. The factors governing that were described in the following way by Arnold and Ellen France JJ in their judgment in the Court of Appeal in *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385 per Arnold and Ellen France JJ at [80]:

> In assessing the standard of review (or scope of the procedural obligations) to be applied, it is necessary to look at the nature of the public body, the particular function being performed, the context within which that function is being performed and what it is said has gone wrong.

[68] Review of a specialist body making highly technical decisions, as is the position here, is not an occasion for a high level of intensity of review. I sought to make this point in *Major Electricity Users' Group Incorporated v Electricity*

Commission And Anor HC WN CIV-2007-485-2508 14 March 2008, where the respondents were the same as in this proceeding:

> [80] The first ground of review here alleges misinterpretation by MEUG of the Rules. There is only one standard of review in such a situation: correctness. As it is for the Courts to pronounce on the correct interpretation of the law, there should be no hesitation on their part in doing so. The same is not true of the second and third grounds for review here. They challenge decision making by an expert body in technical areas. *A Judge, with the benefit only of counsel's submissions and unexamined affidavit evidence, is not well placed to review decision making processes in such situations. It is for that reason that review will succeed only if the decision making process is exposed as unreasonable.* To emphasise that this is a tough threshold, bygone Judges have resorted to such terms as "irrational" and "perverse", and have spoken of the decision maker "taking leave of its senses". With respect, such hyperbole adds little to the need to establish an unreasonable decision making process. [Emphasis added.]

[69] Thus, where New Era claims that the Commission acted unreasonably, it must be unreasonableness in the classical sense. I expressed the same view as to the level of scrutiny the Court should apply when analysing technical or commercial decisions in judicial review proceedings in *Powerco and Anor v Commerce Commission* HC WN CIV 2005-485-1066 24 December 2007 and *Air New Zealand Ltd and Ors v Wellington International Airport Ltd* HC WN CIV 2007-485-1756 18 November 2008.

First ground of review: pre-determination and bias

[70] New Era claims that the cumulative effect of various meetings and correspondence between Ministers of the Crown and the Commission amounted to intervention and direction by the Government with the effect that the Commission's decision suffered from bias and predetermination. Despite the parties dealing with these two grounds of review together, I share the view expressed by Hammond J in *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 at 762, that they are best considered separately:

> The notion of predetermination in administrative law is a difficult one. It is often treated in academic works as part of the rule against bias. Whilst it undoubtedly has its roots in that rule, it seems to me that it has grown beyond that and really deserves separate treatment. And the predetermination principle can often shade into another concern - the surrendering of a discretion.

Predetermination

[71] What amounts to predetermination in any given administrative decision varies with the circumstances of the decision and decision-maker. But the general test remains that stated by Richardson J in *CREEDNZ v Governor-General* [1982] 2 NZLR 172 at 194:

> Before the decision can be set aside on the grounds of disqualifying bias [i.e. predetermination] it must be established on the balance of probabilities that in fact the minds of those concerned were not open to persuasion and so, if they did address themselves to the particular criteria under the section, they simply went through the motions.

[72] Although Richardson J treats pre-determination and bias as synonymous, I think he is describing predetermination – minds already made up.

[73] This test was applied by the majority of the Court of Appeal *Awatere-Huata v Prebble* [2004] 3 NZLR 359 at [126]. The common factor is that that decision-makers cannot approach their decisions with 'fixed views' or 'closed minds': they must give due consideration to the merits of the options before them. A blank mind is not required. Decision-makers are not expected to be completely uninfluenced by previous consideration of the matters involved; they are simply required genuinely to apply themselves to the decision at hand: *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 per Richardson J at 559.

[74] Genuine application of a decision-maker's mind will be prevented if he surrenders his discretion to another by effectively acting under dictation, which is what New Era alleges the Commission did here. New Era argues that the Commission was predetermined in its view of the Amended Proposal because Ministers Dr Cullen and Mr Parker intervened in the decision-making process and effectively forced the Commission to accept the Amended Proposal.

[75] The flaw in this submission is that, whilst there was undoubtedly significant interaction between the Government and the Commission, it was not specifically directed towards the acceptance of the Amended Proposal. The Ministers certainly

expressed concerns that a solution which ensured security of electricity supply to the North Island must be found, but this did not extend to pressure to accept the Amended Proposal. The tenor of the meetings between the two Ministers was concern about delay in achieving ***any*** solution – not any particular solution. There was pressure on the Commission to resolve differences and personality clashes and to expedite matters. But I am not persuaded that this amounted to the Government requiring the Commission to reach any particular outcome.

[76] This conclusion is supported by the comments of Minister Parker in particular. In the meeting between Mr Parker and the Commission on 20 June 2006, the Minister emphasised his support for the Commission and its independence and that its final decisions were for the Commission to make. The steering group, the cabinet papers and the other interactions were all based on these premises. The Government impressed its desire for urgency and efficiency on the part of the Commission, but this does not amount to direction to accept the Amended Proposal. The Government's concern referred to the process surrounding – and not the merits of – the Amended Proposal.

[77] Even if I am incorrect on this aspect, and the Government did direct the Commission to accept the Amended Proposal, then I am not persuaded that the Commission followed this direction. The creation of a 'false environment of urgency' and untoward pressure from the Government will only be relevant if the Commission's Final Decision was affected by this pressure. Only then does the allegation of predetermination have the potential to be proved.

[78] The evidence suggests that, if untoward pressure existed, the Commission was unaffected by it. The strongest of the alleged Government interventions – that of Dr Cullen setting the Commission a deadline by which it had to approve the Amended Proposal – was ignored by the Commission. Dr Cullen allegedly stated he would not tolerate a stalemate on this issue of Waikato transmission, and if a solution was not reached by July 2006, he would intervene in the process. Yet the Commission did not release draft reasons – the first hint of a solution to the issue – until February 2007. If Dr Cullen's comments amounted to pressure, the Commission seemed unaffected by it.

[79] The timeframes for deliberation of the Original and Amended Proposals are noteworthy. Transpower submitted the Original Proposal on 30 September 2005, and the Commission released its draft decision on 27 April 2006. Transpower then submitted the Amended Proposal on 20 October 2006, and the Commission released its draft decision on 23 February 2007. There is a three month difference between the two timeframes but, given the Amended Proposal had substantial similarities to the Original Proposal, it is hardly surprising that the second period of deliberation was shorter than the first. Either way, the events that caused the alleged environment of pressure occurred in May-June 2006; long before the actual deliberations on the Amended Proposal. There is too great a disconnect between the alleged cause and effects to convince me of a link, and thus of predetermination.

[80] There are further points. Given the importance of decision-makers approaching the decision-making process with an open mind, that there was a minority and dissenting opinion in the Final Decision of the Commission is significant. There was also outspoken dissent from Chairperson Hemmingway until his removal on 30 November 2006. Also important is the fact that the Commission required further information from Transpower on three separate occasions. These are not the hallmarks of decision-makers who have reached a decision before the deliberative process and are merely going through the motions.

[81] To summarise, there is not the evidence to indicate that the Commission predetermined its views about the Amended Proposal. This ground for review is not made out.

Bias

[82] There is no foundation for 'presumptive' bias here; it is not contended that the Commission or its board members would derive any interest (pecuniary or otherwise) from the outcome of the decision to approve or reject the Amended Proposal. Nor can it be contended that there was actual bias on the part of the part of the decision-makers. Instead, New Era seeks to show apparent bias, i.e. that the Commission approached its consideration of the Amended Proposal favouring one particular outcome for some, non-pecuniary, reason.

[83] The test for apparent bias has a vexed history. However, in *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 the Court of Appeal has endeavoured to clarify the law. The Court rejected the "real possibility" test for apparent bias laid down by the House of Lords in *R v Gough* [1993] AC 646, and applied earlier by the Court of Appeal in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA). The Court preferred the approach of the High Court of Australia and House of Lords in *Webb v R* (1994) 181 CLR 41 and *Porter v Magill* [2002] 2 AC 357 respectively. Delivering the Court's judgment, Hammond J stated the test in this way:

> [62] In our view, the correct inquiry is a two-stage one. First, it is necessary to establish the actual circumstances which have a direct bearing on a suggestion that the Judge was or may be seen to be biased. This factual inquiry should be rigorous, in the sense that complainants cannot lightly throw the "bias" ball in the air. The second inquiry is to then ask whether those circumstances as established might lead a fair-minded lay observer to reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the instant case. This standard emphasises to the challenged Judge that a belief in her own purity will not do; she must consider how others would view her conduct.
>
> [63] We emphasise that the touchstone is the ability to bring an impartial mind to bear on the case for resolution. That does not, however, mean that a Judge needs to be perceived as operating in a sanitised vacuum. […]

[84] Although that test refers to a Judge, it can equally be applied to the Commission.

[85] Applying the first limb of the *Muir* test, what are the actual circumstances founding New Era's allegation of bias? They overlap with New Era's allegations of predetermination. Although I have found that there was no predetermination on the part the Commission, the fair-minded lay observer may nevertheless view the circumstances in which the Commission reached its decision as indicating bias. Thus, I need to look at the particulars of the Government intervention again.

[86] There are three major components of New Era's allegation of bias:

- *Threats of Government intervention:* New Era alleges that the two Ministers' comments at meetings with the Commission put pressure on the Commission to expedite the process and accept the Amended Proposal. Cabinet papers

strengthen this position as they indicate that the Commission's viability would be threatened should it reject the Amended Proposal.

- *The steering group:* New Era alleges that the establishment of the steering group on 7 June 2006 to facilitate relations between Transpower and the Commission had the ultimate goal of having the Commission accept the Amended Proposal.

- *Appointments to and removals from the Board:* New Era alleges that the appointment of Mr Rodger – former Deputy Chair of Transpower – caused a conflict of interest that was not alleviated. Mr Hemmingway, who had been critical of the Government's intervention, was not reappointed to the Board.

[87] Stage 2 of the *Muir* test is to assess whether or not these components, either individually or in concert, might lead a fair-minded observer to believe that the Commission was not impartial when considering the Amended Proposal.

[88] I do not see that either of the first two components has the capacity to indicate bias. I reiterate that the common denominator in the interactions between the Government and the Commission was Government's concern about the process of assessing the Amended Proposal; not about its substance. In both meetings between the Ministers and the Commission was the Ministers' anxiety and concern about progress in finding a solution to the problem of supply of electricity to the North Island. That was justified: it would be they who were politically accountable should supply fail or be threatened. Accordingly, the Ministers spoke bluntly. But what they said was directed to the process of analysing the Amended Proposal, not about its merits. This is demonstrated by one of the more contentious comments made by Minister Parker to the Commission, recorded in handwritten notes he made for the meeting on 20 June 2006:

> You should, in my opinion, be striving to consider the new proposal, when it arrives, as related to the Original Proposal. I have heard it said that it should be treated as a new proposal in terms that make me and my officials worry that unduly lengthy process will follow. If so, then I would find that

> surprising given the we already know that it will follow the same or similar line and most other aspects will have the same or similar outcomes…

[89] I accept that a lay observer would interpret this as the Government putting pressure on the Commission not necessarily to protract its consideration of the Amended Proposal. I do not accept that the same observer would go the further step of interpreting this as indicating bias on the part of the Commission. Pressuring the Commission to expedite its process is not the same thing as pressuring the Commission to accept a particular outcome, leading to an apprehension of bias.

[90] The same can be said for the steering group. It was established against a background of strained relations between the Commission and Transpower. Its intention was to improve communication between the two and allow Transpower better to understand and comply with the Rules and the GIT. That the group's efforts led the Amended Proposal being more sophisticated and compliant than the Original Proposal does not indicate bias; it indicates effective facilitation. Of course, the position would be different if other bodies could submit a GUP – then the Commission would be unduly favouring Transpower over another. But, as the submission of a GUP and the particular Rules are restricted to Transpower, it only makes sense that Transpower and the Commission should work collaboratively. The steering group had the aim of fostering that collaboration. That is quite different from engineering an outcome, and could not be interpreted as engendering bias on the Commission's part.

[91] The last component of New Era's allegation of bias is the strongest. *Prima facie*, the appointment to the Board of the Deputy Chair of the body whose proposal the Board is considering indicates bias. So too does the removal of an outspoken critic from the Board. But, upon closer examination, I find that the particulars of this allegation do not justify the apprehension of bias.

[92] Mr Rodger was appointed to the Board of the Commission on 31 August 2006. When appointing him, Minister Parker stated that he must remove himself from the Board's discussions of the Amended Proposal. New Era alleges that he nevertheless attended the meetings. However, Mr Rodgers declared his conflict of interest and did not participate in the debates or discussions about the Amended

Proposal. One exception, an occasion when Mr Rodger stated that the Commission had the responsibility to make a decision quickly, is the only evidence of Mr Rodger involving himself in the Commission's consideration of the Amended Proposal. A lay observer would not attribute bias to the Board of the Commission simply because one of its members – who did not take part in the decision-making process – had previous links with an interested party. I hold that Mr Rodger's mere presence at Board meetings coupled with his one intervention, is insufficient to indicate bias on the part of the Board.

[93] I reach the same conclusion about Mr Hemmingway's departure. Mr Hemmingway had made it clear that he would not accept the Amended Proposal before his appointment to the Board was not renewed. This was perhaps one reason why Mr Hemmingway's relationship with the Government was strained, as exemplified by his "blunt and frank" letter on 4 July 2006 to Mr Parker in response to the 20 June 2006 meeting. In September, following a straightforward and legitimate process, the Government announced it would not be renewing Mr Hemmingway's appointment to the Board. I see no link between Mr Hemmingway's outspokenness, the fact that he was not reappointed, and the allegation of bias on the part of the Commission. It was not the Commission which removed Mr Hemmingway. So I do not consider the lay observer would interpret this as indicating bias on the Commission's part.

[94] Nor do I consider that the three major components work in concert to give a reasonable apprehension of bias. All the aspects of Government intervention refer to process, not to substance.

[95] For these reasons I hold that New Era's allegations fail the second stage of the *Muir* test. This is a paradigm example of how decision-makers are not expected to operate in sanitised vacuums. The Commission was certainly working in a highly politicised and pressured environment. But this in and of itself is insufficient to prove bias.

Second and third grounds of review: illegality and unreasonableness

[96] The parties have dealt with these grounds in conjunction and I see practical benefit in doing so too. This is because, essentially, New Era alleges the Commission misapplied the GIT by failing to take into account in relevant considerations or taking into account relevant ones. Each of these distinct allegations has the potential to amount to illegality on the part of the Commission. However, as I understand New Era's submissions, even if these distinct allegations are insufficient to amount to illegality, the weighting given to these considerations amounts to manifest unreasonableness. In this way, New Era's second and third grounds of review are inextricably linked. Delivering the judgment of the Court of Appeal in *Official Assignee v Chief Executive of the Ministry of Fisheries* [2002] 2 NZLR 722, Thomas J recognised this:

> [85] … Because these requirements overlap, it does not matter greatly what heading argument proceeds under, that is, improper purpose, failure to take into account relevant considerations or vice versa, or acting unreasonably or unfairly. …

[97] Although it does not matter greatly how these grounds are dealt with, I separate discussion about relevant and irrelevant considerations and weighting for clarity's sake.

Relevance of Considerations

[98] It is trite to say that analysis of this ground of review will almost wholly depend upon the interpretation of the empowering statutory authority. Here that is the Rules, which are delegated legislation permitted by section 172H of the Electricity Act. Specifically, it is the terms of Schedule F4 to Part III of the Rules – the GIT – which will indicate the relevance of considerations adopted by the Commission.

[99] I do not propose to look at every individual allegation by New Era under this head; there are eight and they significantly overlap. They all follow consistent themes, and it is these that I address. New Era's strongest allegation is the

Commission's apparent failure to take into account the 2007 SoO, relying only the 2005 SoO. The SoO becomes relevant by virtue of clauses 5 and 6 of Schedule F4:

> **Methodology for application of the grid investment test**
>
> 5. The market benefits and costs of a proposed investment or alternative project are determined for each of the market development scenarios for the future with that proposed investment or alternative project by comparing that market development scenario with the corresponding market development scenario developed for the base case.
>
> 6. In applying this grid investment test:
>
> 6.1. the market development scenarios must be the possible future scenarios outlined in the statement of opportunities unless the Board determines that market development scenarios proposed by Transpower, the proponent of a transmission alternative or the Board are more appropriate;
>
> 6.2. the probability of occurrence of a market development scenario must be as set out in the statement of opportunities in respect of the relevant possible future scenario; and
>
> 6.3. the number of market development scenarios used in applying this grid investment test must be same as the number of market development scenarios set out in the statement of opportunities.

[100] Thus, since the MDSs were critical for assessing the Amended Proposal against the GIT, and the SoO set out the MDS, the SoO is a relevant consideration. It is clear that it meets the (still authoritative) test set down by Cooke J in *CREEDNZ* at 183:

> What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the Court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the Court itself, would have taken into account if they had to make the decision.

[101] The nub of the issue is *which* SoO is relevant. New Era alleges that, at the time of analysing the Amended Proposal, the Commission had both the 2005 SoO and the 2007 SoO available to it, and decided to use the former, thereby failing to

take into account the later and more relevant 2007 SoO. The Commission counters that only the 2005 SoO was available to it.

[102] I prefer the Commission's position on this issue. At the time the Commission was analysing the Amended Proposal, the 2007 SoO was not yet formulated; it was a *draft* SoO. I base this finding on the affidavit evidence of Messrs Harris and McQueen, despite the latter's evidence being filed in support of New Era's application.

[103] Mr Harris in his affidavit stated that the 2007 SoO did not exist. In reply to this affidavit, Mr McQueen alleged that "no credible reason" had been provided for the rejection of the *draft* 2007 SoO. Mr McQueen's affidavit also refers to the Commission's 2008 draft SoO. In the Executive Summary of that document, the development of the different SoO was explained:

> The Commission had expected to publish a new SoO in 2007, but decided to wait until the New Zealand Energy Strategy (NZES) was released so that the SoO could take into account the anticipated effects of the NZES. In late 2007, following finalisation of the NZES, the Commission resumed its work on the SoO. This included the Commission engaging with stakeholders at an early stage of developing the Grid Planning Assumptions (GPA) so that relevant comments were able to be incorporated.

[104] Thus, it is clear that during the period of analysis of the Amended Proposal, the only *official* SoO that was available to the Commission was the 2005 SoO. At best, during the same period, there was a draft version of the 2007 SoO. Explanation for why this was not relied upon was provided in the Final Decision:

> 8.3.2 As set out in the Reasons for Decision document, the Commission considered whether it would be appropriate to adopt the scenarios in the draft GPAs [as set out in the SoO], in particular the demand forecasts and generation scenarios anticipated by the GPAs, as the market development scenario is used for the purpose of analysing the Proposal.
>
> 8.3.3 The Commission decided not to because, first, Transpower prepared and submitted the Proposal on the basis of the market development scenarios in the Initial SoO and the Commission considered that it would not be appropriate, part way through the process, to adopt the scenarios in the draft GPAs that will underlie the next SoO.

[105] The Commission's decision to use the 2005 SoO and not the *draft* 2007 SoO cannot amount to an irrelevant consideration. The Rules explicitly state that the

MDS in the SoO must be used. The only legitimate interpretation of this is that it refers to the SoO currently in force. The 2007 draft SoO was a document that was *potentially* relevant, but not mandatory. The distinction between these two concepts was made clear in *R (National Association of Health Stores and Anor) v Department of Health* [2005] EWCA Civ 154, where the English Court of Appeal cited *CREEDNZ*, and synthesised Cooke J's dictum. First, Sedley LJ:

> [63] … In *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 Cooke P drew the distinction, which our courts had previously failed to draw, between things which are so relevant that they must be taken into account and things which are not irrelevant and so may legitimately be taken into account. It is axiomatically only a failure to take into account something in the former class that will vitiate a public law decision. …

Then Keene LJ:

> [75] … As a matter of principle, one needs to recognise that there are degrees of relevance. Sedley LJ refers in his judgment to the decision of Cooke J in *CREEDNZ Inc. v. Governor-General,* a case which deserves to be better known. The proposition found therein that, while some matters may properly be taken into account by the decision-maker, not all of those will be ones which the decision-maker is bound to take into account, was approved by the House of Lords in *In re Findlay* [1985] AC 318. It is only a failure to take into account the latter which may render a decision *ultra vires*.

[106] The Commission was *bound* to take into account the 2005 SoO, because it was in force at the time. It was *not* bound to take into account the 2007 draft SoO, because that was not the official version. So, notwithstanding that the GPA and MDS in the 2007 draft SoO would have been relevant, not having regard to them cannot amount to a public law error.

[107] In its decision the Commission did adjust the MDSs to reflect the change in Government Policy that favoured generation from renewable sources over other sources. New Era states that this was an irrelevant consideration in the context where the 2007 draft SoO was not considered, and it partially forms the basis of Commissioner Pinnell's allegations of reverse engineering: the Commission adjusted the MDS to suit the Amended Proposal.

[108] The starting point is that clause 6.1 of Schedule F4 of the Rules permits such a deviation from the MDSs in the SoO. Secondly, far from committing an error, I

consider the Commission would have been acting illegitimately had it *not* adjusted the MDSs in the 2005 SoO. Government policy was clear, both from its issued GPS and the NZES: there was to be an emphasis on renewable energy. This meant that thermal generation in the upper North Island was a less likely scenario. Consequently, the 2005 SoO necessarily had to be altered. Webster J clearly enunciated this point in *London Borough of Newham v Secretary of State for the Environment* (1987) 53 P & CR 98 at 104:

> It is common ground that a circular which comes into existence after an inquiry has been held but before a decision has been made, which contains policy or advice relevant to a significant issue raised at the inquiry, is a material consideration which should be taken into account before the decision is made.

[109] The caveat to this is that the policy in question should not be contrary to the prevailing statutory authority or act as a fetter on the decision-maker's discretion: see *Attorney-General v Unitec Institute of Technology* [2007] 1 NZLR 750 (CA); *Waikato Regional Airport Ltd v Attorney-General* [2001] 2 NZLR 670. That caveat does not apply here: the adjustment of the MDS to take account of Government policy was not a fetter on the Commission's discretion and did not run contrary to Government policy.

[110] Thus, I hold that the general approach the Commission adopted when assessing the Amended Proposal – to use the 2005 SoO with necessary adjustments – was correct. The result is that many of New Era's allegations as to the relevance of the Commission's considerations fail.

[111] The second major theme in New Era's allegations centres around the perceived failure of the Commission to take account of various options to the Amended Proposal. Clause 5 of Schedule F4 to the Rules makes the consideration of other proposals a mandatory consideration. Transpower, when submitting the Amended Proposal provided eight options to attain security of supply, including its preferred 400kV/200kV line upgrade. The Commission narrowed these down to four, then looked in depth at two of these options: the 400kV/200kV option and the 200kV option. New Era alleges that the Commission should have considered other

options, and that it did not consider the 200kV option properly; had it done so, the 400kV/200kV option would not have passed the GIT.

[112] I do not consider the Commission to be in error in this respect. Transpower's identification of eight options in its Amended Proposal was sufficient. The Commission's decision to select only two of those was justified in its 23 February 2007 reasons for its intention to accept the Amended Proposal:

> 6.9.62 In adopting the 220kV Alternative as the only alternative against which the Proposal will be completely compared under the GIT, the Commission notes that the other candidate alternative projects, and in particular the duplexing option, may have similar expected net market costs to either the Proposal or the 220kV Alternative. However, the Commission is satisfied that comparing the Proposal against the 220kV Alternative is the best way to assess whether the Proposal meets the requirements of the GIT.

[113] I am satisfied that this complies with the Rules, because if the 220kV option was the next best of the eight options submitted by Transpower for consideration by the Commission, then it would have been pointless for the Commission to have looked in depth at each of the other six options. To an extent, the 220kV option acted as a representative alternative and, in this way, it was sufficient to use it and it alone to assess the 400kV/220kV option. The Commission discharged the requirements of the GIT by taking this route.

[114] The second question is whether the 220kV option was 'gold-plated' by Transpower so as to steer the Commission, as if by default, to accept the 400kv/220kV option. I am not satisfied that this was the case.

[115] Firstly, the Commission itself admitted that had the 220kV option been used in the Original Proposal, it would have been accepted without question: objectively, it had the potential to pass the GIT. It was thus a legitimate and competitive alternative, whereas the original 400kV option was not. Secondly, I do not accept New Era's submission that, had Transpower amended the 220kV option so it included line duplication or duplexing, it would more likely have been accepted. Both duplication and duplexing involved significantly more costs and would not likely have made a difference to the outcome.

[116] In any event, since I am satisfied as to the procedural sufficiency of the Commission's consideration of the two options, the particular merits of each are not for me to adjudicate upon. I have accepted that the Commission complied with the parameters of the GIT and there was no illegitimate adjustment of the alternatives to render the process a sham. This is sufficient for me to rule that the Commission did not act illegally in this regard.

[117] To summarise, there were two major themes in New Era's allegations of relevant considerations. The first is whether the Commission should have had regard to the 2007 SoO. As to that, I hold that whilst it could have been relevant, not having regard to it is not an error because it was not the official SoO. The second is whether the Commission should have considered more options or applied different analysis of the alternatives it did consider. As to that, I hold that the Commission complied with the GIT. In particular, there is no indication that it tried to reverse engineer the results, and thus its process was legitimate.

[118] Accordingly, this ground for review fails.

Weighting

[119] Inextricably linked with the preceding discussion is the weight the Commission gave to each aspect of the GIT. The barrier to this amounting to a reviewable error of law is high. In *New Zealand Fishing Industry Association* (cited in [73], the Minister, before making a recommendation to vary rentals paid for fishing quotas, had to have regard to a series of criteria. However, as McMullin J states at 568, the weighting of those criteria was a different issue.

> … It would not be surprising if the Minister gave some of these matters a different weighting than would be given to them by the industry. But the Minister was entitled to weigh them as he saw fit so long as he considered them all.

[120] Cooke P in the same decision reached a similar conclusion at 552:

> … As to this head it is elementary law that the question is not whether the Court thinks that this view was right or wrong, but whether it was one which a reasonable Minister could take. The statute required him to have regard to

> all the overlapping matters listed as (a) to (e), but their weight inter se was for him to decide, within the limits of reason. Subject only to that necessary qualification, it is as has been said again and again that policy is for the Minister, not the Courts.

[121] A recent application of this is this Court's judgment in *Prasad v The Deportation Review Tribunal And Anor* HC AK CIV-2007-404-008059 19 February 2008, where the question was whether the Tribunal had given the considerations under the United Nations Convention on the Rights of the Child 1989 sufficient weight. Lang J observed:

> [78] Once it has been shown that the decision-maker has taken into account all relevant considerations, however, issues of weight are very much a matter for it. It is not open to this Court to interfere with a decision on the basis that it would have given different weight to the same considerations.

[122] Weightings that are so perverse as to be unreasonable is an established exception to this rule. As Mason J acknowledged in the High Court of Australia in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41:

> … because both principle and authority indicate that in some circumstances a court may set aside an administrative decision which has failed to give adequate weight to a relevant factor of great importance, or has given excessive weight to a relevant factor of no great importance. The preferred ground on which this is done, however, is not the failure to take into account relevant considerations or the taking into account of irrelevant considerations, but that the decision is "manifestly unreasonable".

[123] This was cited with approval by Morris J in *Begley v Bay of Plenty Regional Council* HC ROT M151/92 5 September 1995.

[124] Although Mason J made his remarks well before varying intensity of review became recognised in New Zealand, the "manifestly unreasonable" standard he mentions is the classical standard applicable here, for the reasons I set out in [66]-[69] above.

[125] This high barrier for review is not met here. New Era's submissions do not make clear which of the particular aspects of the Commission's decision making process it challenges. But I do not see that any of the particular factors the Commission took into account, nor indeed all the factors combined, amount to unreasonableness on the Commission's part. Under the head of illegality, I have

already held that New Era's main allegation – that the Commission's use of the 2005 SoO was illegitimate – fails. It also fails under this head of unreasonableness. The Commission's consideration of the 2007 draft SoO was what the Rules required it to consider.

[126] None of the other allegations – failures to consider the perceived deficiencies in the 400kV/220kV option and failure to consider other options – meet the unreasonableness standard either. The Commission gave due regard to these factors. It thus cannot be an unreasonable decision for the Commission nevertheless to accept the Amended Proposal. For the Court to find otherwise would be to engage in merits-based review.

[127] This ground of review fails also. Simply put, as the second ground of review has failed, so must also this third one, given the high barrier for review and the fact that the two grounds are interwoven.

Fourth ground of review: mistake of fact

[128] This ground of review effectively again raises relevant considerations. New Era alleges that the Commission did not have due regard to the underpinnings of the Original Proposal when it considered the Amended Proposal. The allegation refers particularly to a passage in the Commission's 23 February reasons for its intention to accept the Amended Proposal:

> 5.2.14 In the April 2006 Draft Decision, the Commission also concluded that there were a number of "additional factors" required to be met by a proposed investment.
>
> 5.2.15 On reflection, the Commission does not consider that these factors need to be separately considered when assessing whether a proposed investment meets GEIP.
>
> 5.2.16 The additional factors primarily focus on how a project is executed and as such are likely to have been taken into account by Transpower in determining the expected project cost. Accordingly, they are not separately taken into account in determining costs and benefits in the course of applying the GIT in this case.

[129] I am satisfied that para 5.2.16 is a full answer to New Era's allegations, as is the fact that the Amended Proposal was an adjustment of the Original Proposal. Any factors that were critical to the latter (and it is unclear whether the factors in 5.2.14 are indeed critical) would have been implicitly taken into account during the Commission's consideration of the Amended Proposal.

[130] This ground of review also fails.

Result

None of New Era's grounds for review succeeds. To recapitulate:

- I am not satisfied that the Commission either predetermined or was biased in its approach to the Amended Proposal. The disconnect between the concerns about the process which the Government expressed to the Commission, and the actual substance of the decision, mean that any pressure in terms of the former did not affect the latter;

- The considerations identified by New Era as relevant were either properly taken into account, or did not need to be taken into account. The Commission complied with the procedures provided by the GIT and any further consideration of its process would amount to a review of the merits of the Commission's decision;

- The Commission did not make a mistake of fact in not considering the 'additional factors' identified at 5.2.15 of its Final Decision.

[131] In [57]-[65] I noted Transpower's objection to the delay before New Era brought this application for judicial review. As none of New Era's grounds for review has succeeded, I need not rule on whether the delay is disqualifying.

[132] I also record the strongly expressed submission, both by the Commission and Transpower, that New Era's application invited the Court to review the merits of the Commission's decision. I have said that I agree it did. That is not what judicial

review is about. New Era's challenge to the substance of the decision was appropriately addressed to the Board of Inquiry, and I would be surprised if New Era did not so address it.

[133] Anyone who has read the judgment to this point deserves both a commendation and an apology. The commendation is for their endurance. The apology is for the density of this judgment. An ability to make light work and enjoyable reading when the subject matter is electricity regulation eludes at least this Judge.

Costs

[134] In their 11 February 2008 joint memorandum for a proposed case management conference, New Era and the Commission agreed this proceeding was complex and warranted category 3 costs. Transpower was not a party at that point, but I doubt would disagree. It seems that the proceeding has not been given a costs category, but I now categorise it 3 for costs. My tentative view is that band B costs should be allowed for all steps.

[135] Should costs follow the outcome in the usual way? New Era may resist costs on the basis that this was 'public interest' litigation. My tentative views on that are:

a) New Era's membership had/has proprietary interests in the outcome. The proceeding was driven more by those proprietary interests than by any solely public-spirited concern about the North Island GUP.

b) New Era's grounds for review were very wide, in particular alleging predetermination and bias on the part of the Commission. Relevant to this and the previous point is the judgment of Heath J in *Gibbs v New Plymouth District Council* (No 2) HC NWP CIV 2004-443-115 5 October 2006:

> [16] With respect, the authorities (on public interest litigation) on which Mr Laurenson relied are not truly comparable to the present case. Mr Gibbs was the immediate

> neighbour of the reserve land on which the baches are situated. The central issue was narrow: whether s 73(3) of the Reserves Act 1977 precluded the Council from making a decision of the type challenged. Yet, Mr Gibbs did not restrict his challenge to that legal point. Had he done so, no more than one day would have been needed for the argument.
>
> [17] Instead, Mr Gibbs alleged apparent bias against those involved in the decision making process. He also alleged that the decision was irrational. The extent of those allegations increased significantly the amount of documentary evidence required for consideration. Had the issue been purely one of principle it could have been addressed adequately by reference to s 73(3). There was little prospect that claims of bias or irrationality would succeed. [18] In those circumstances, I cannot accept that the case run by Mr Gibbs falls within the category of public interest justifying no order for costs. Nor, indeed, am I prepared to reduce costs on that basis.

c) By seeking judicial review in addition to or instead of (I am unsure which is the case) making submissions to the Board of Inquiry, New Era could be said to have attempted to circumvent the public consultation process which Government has established. Upon one view, this is acting contrary to the public interest rather than in the public interest.

[136] For those reasons, my tentative view is that New Era should pay the costs of the Commission and Transpower on a 3B basis. If New Era wishes to contend for a different costs position, then it should file and serve a memorandum by 16 May, with any memoranda in response for Commission and Transpower by 30 May.

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