IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2020-485-367
[2022] NZHC 1444

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review of a decision of the Electricity Authority pursuant to the Electricity Industry Act 2010 and the Electricity Industry Participation Code 2010 to issue new guidelines for the development of a new transmission pricing methodology
BETWEEN	MANAWA ENERGY LIMITED Applicant
AND	ELECTRICITY AUTHORITY First Respondent

Continued . . .

Hearing:	18 to 22 and 26 to 27 October 2021
Counsel:	J E Hodder QC, B A Davies and A M B Leggatt for the Applicant D A Laurenson QC, J H Stevens and L J Hardcastle for the First Respondent J D Every-Palmer QC and T Mijatov for the Second Respondent Appearances excused for the First Interested Party I R Millard QC and J A Tocher for the Second Interested Party M N Dunning QC for the Third Interested Party (by VMR) T D Smith and C J Edwards for the Intervener
Judgment:	20 June 2022

JUDGMENT OF PALMER J

Continued . . .

	MERIDIAN ENERGY LIMITED Second Respondent
AND	NEW ZEALAND STEEL LIMITED First Interested Party
	NOVA ENERGY LIMITED Second Interested Party
	FONTERRA CO-OPERATIVE GROUP LIMITED Third Interested Party
AND	TRANSPOWER NEW ZEALAND Intervener

Solicitors:
MinterEllisonRuddWatts, Wellington
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Nova Energy Limited, Wellington
Chapman Tripp, Wellington

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Summary

[1] Virtually all New Zealanders use electricity. Most electricity in New Zealand is transmitted by Transpower New Zealand Ltd (Transpower) from its point of generation to wholesale suppliers, who then transmit it to retail suppliers. As a natural monopoly, Transpower's pricing affects the whole electricity industry and the allocation of some $800 million of charges each year. It is accordingly subject to regulation by the Electricity Authority (the Authority). In 2020, the Authority issued guidelines (the Guidelines) under the Electricity Industry Act 2010 (the Act) for Transpower to develop a Transmission Pricing Methodology (TPM). Different entities are affected differently by the Guidelines.

[2] Manawa Energy Ltd (Manawa), formerly known as Trustpower Ltd, applies for judicial review of the Authority's decision on the Guidelines (2020 Decision) in imposing a benefit-based charge. It submits the Authority misconceived its statutory objective or role, was biased and pre-determined, and erred in law in conducting its cost-benefit analysis (CBA). New Zealand Steel Ltd supports the challenge but does not appear. Nova Energy Ltd (Nova) and Fonterra Co-Operative Group Ltd (Fonterra) support the challenge in relation to the residual charge. They also submit the residual charge is unlawful on a number of additional grounds. Transpower abides the Court's decision. The Authority opposes the challenge. Meridian Energy Ltd (Meridian) supports the Authority's 2020 Decision.

[3] I hold that:

(a) The Authority did not err in its interpretation of its statutory objective or role. It has a broad objective to regulate the electricity industry for the long-term benefit of consumers. It did not issue Guidelines that usurp or unlawfully fetter Transpower's role in developing the TPM and it did not trespass on the role of the Commerce Commission.

(b) There is no evidence the Authority's decision was biased or pre-determined. If the Authority considers that a proposal best meets its statutory objective, it is obliged to pursue it.

(c) The Authority's use of CBA was not unlawful. The Act does not require quantification at all, let alone quantification to a particular standard, or quantification of each element of the Guidelines. It is not the Court's role to imply such requirements into the legislation. The Act delegates the evaluative decision to the Authority. None of the challenges to the CBA persuade me the 2020 Decision is close to unreasonable.

(d) The Authority's 2020 Decision in relation to the residual charge does not take into account irrelevant considerations or fail to take into account relevant considerations, does not impose an unlawful tax, is not based on a material error of fact, and is not unreasonable.

[4] Overall, the challenges to the Authority's 2020 Decision largely reflect the challengers' disagreement with it and seek to draw the Court into the economic merits of the 2020 Decision. But it is the Authority's role, not the Court's, to assess the merits of the competing policy arguments. The application for judicial review is dismissed.

Electricity Transmission pricing regulation

Phases of regulation

[5] Electricity is generated in New Zealand by more than 100 power stations owned by 34 generating companies.[1] Almost all wholesale electricity is bought and sold on a spot electricity market. The price at each of around 260 points of connection to the national grid (called nodes) is set at the marginal cost of the final unit of supply that meets demand (called the locational marginal price or LMP). These markets face a degree of disruption from technological change associated with distributed energy sources such as solar panels, batteries and demand side management.[2]

[6] Transpower owns the high voltage transmission grid, or national grid, which transmits 93 per cent of all electricity around New Zealand.[3] The national grid links electricity generators to electricity distribution businesses, which convey electricity to

1 Affidavit of Peter Calderwood, 9 April 2021 [Calderwood Affidavit] at [20]–[24].
2 At [49].
3 At [30].

consumers and some industrial users. Transpower's regulated asset base was valued at around $4.9 billion as at 30 June 2020. Transpower has a natural monopoly over the services it provides using the national grid. Accordingly, its pricing has long been the subject of contention and different phases of regulation. The overall costs of transmission allocated by transmission pricing are currently around $800 million each year.[4] That accounts for about 10.5 per cent of the average residential customer's power bill.[5] How they are allocated between generators, distributors and directly connected industrial end users has a significant impact on consumption and investment decisions in the industry. The cost allocation is determined by the TPM which is at the heart of these proceedings.

[7] Mr Calderwood's evidence for Manawa, and Transpower's and Meridian's submissions, outline the development of electricity supply and transmission in New Zealand. In broad summary, there have been several phases of regulation of transmission charges since the corporatisation of the national grid:[6]

(a) In 1988, the transmission assets were transferred to Transpower, which was established as a wholly-owned subsidiary of the Electricity Corporation of New Zealand (ECNZ), a State-Owned Enterprise (SOE). From 1988 until 1996, there was a progressive unbundling of charges from the bulk supply tariff which covered wholesale electricity including transmission. In 1994, Transpower was separated out from ECNZ to be an SOE itself, under the State-Owned Enterprises Act 1986.

(b) From 1996 until 1999, Transpower enjoyed a period of self-regulation while being subject to the market power provisions of the Commerce Act 1986, information disclosure requirements and the threat of regulation. In 1996, Transpower developed a TPM that allocated costs to beneficiaries using load-flow methodology. In 1998, ECNZ was

4 Electricity Authority *Transmission pricing methodology 2020 Guidelines and process for development of a proposed TPM* (10 June 2020) [2020 Decision Document] at vi.
5 Calderwood Affidavit at [19].
6 Calderwood Affidavit at [60]–[94]; Manawa Synopsis of submissions, 6 August 2021 [Manawa Submissions] at Appendix 1.

separated into competing generator-retailing companies including Meridian.

(c) Prior to 2001, Transpower relied on industry participants to enter bilateral contracts to recover its transmission costs. There were disputes over this, as might be expected. In 2000, a Ministerial Inquiry, chaired by the Hon David Caygill, recommended Transpower be brought into the market as a participant and for the industry to have input into the TPM.[7]

(d) Electricity Governance Rules (EGRs), developed by an industry working group in 2000-2001, did not get sufficient industry support to become operationalised. By 2001, Transpower had developed a TPM with separate charges for connection, interconnection, and use of the High Voltage Direct Current (HVDC) as described below. In 2001, the Electricity Amendment Act 2001 imposed Transpower's TPM on the industry as a transitional requirement. Transpower's TPM was later replaced by transitional regulations which survived until 2008.

(e) In 2003, the Electricity Commission was established under the Electricity Act 1992 (as amended in 2001). Electricity Governance Regulations were promulgated under pt 14 of that Act. They required Transpower to develop, and the Commission to approve, a TPM in accordance with a process and guidelines published by the Commission. They also required the Commission to approve grid investment or expenditure by Transpower. In 2004, the Commission consulted on new TPM guidelines. In May 2005, the Commission finalised its guidelines and process for Transpower to create a TPM. The Minister approved the resulting TPM in 2007 and it was implemented on 1 April 2008. The Commission initiated a review of the TPM in 2009 and worked on that until it was disestablished in 2010.

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7 David Caygill, Susan Wakefield and Stephen Kelly *Inquiry into the electricity industry: report to the Minister of Energy* (June 2000).

(f) The Commerce Act 1986 always applied to Transpower. In 2001, after a review, pt 4A was inserted, specifically covering the electricity industry. In 2008, pt 4A was repealed and replaced by specific provisions in pt 4 dealing with electricity lines businesses. The purpose of pt 4 is "to promote the long-term benefit of consumers" in markets where there is little or no competition, "by promoting outcomes that are consistent with outcomes produced in competitive markets" in specified ways. Under the Commerce Act, Transpower's services are subject to individual price-quality regulation which caps its allowable revenue, sets quality (including reliability) standards and requires approval of major capital expenditure. Transpower is also subject to information disclosure regulation under s 54F.

(g) The Electricity Industry Act 2010 replaced the Electricity Commission with the Electricity Authority. The Commerce Commission picked up the Electricity Commission's function of approving major capital expenditure under the Commerce Act. The EGRs were consolidated into the Electricity Industry Participation Code 2010. The Authority continued the review of the TPM.

[8] Transmission pricing in New Zealand over these different regulatory phases has involved several basic components:

(a) A connection charge is recovered from generators, distributors and others directly connected to the national grid for their access to connection assets. The connection charge has been based on the annualised cost of the relevant assets through all the phases of regulation, including under the Authority's Guidelines.

(b) An interconnection charge is currently levied for the use of core transmission assets that interconnect generators and distributors or those directly connected to the grid. This charge has varied from a three-part charge to a two-part charge to a one-part charge in previous phases of regulation. It has historically involved a form of peak-

pricing, the Regional Coincident Peak Demand (RCPD) charge, to signal the cost of electricity use at peak times. The RCPD uses a "postage stamp" (or geographically averaged) approach, where the costs of interconnecting assets are shared amongst load users depending on their impact on system peak demand.

(c) A charge is also levied for use of the HVDC link which interconnects the national grid between the North and South Islands. Since 1996, this has been paid only by South Island generators who, historically, wanted access to the high demand centres in the North Island.

[9] The current transmission pricing regime, in place since 2008, involves the above three basic components plus a prudent-discount policy (PDP). The PDP allows customers a discount who show they can supply themselves with electricity at a lower cost than it pays in transmission charges, or where transmission charges exceed the cost Transpower would incur if it supplies the customer from the grid. This is to discourage customers from disconnecting from the grid, which would result in increased costs to other parties.

[10] Transpower also receives a loss and constraint excess (LCE) generated by differences between the amounts paid by purchasers to Transpower, and the amounts Transpower pays to generators, in the nodal market.

Electricity Industry Act 2010

[11] The Act is the currently applicable legislative regime. I detail the statutory objective and functions of the Authority, and the statutory provision regarding costs and benefits, in relation to Issues 1 and 3 respectively. I provide an overview here.

[12] Section 4 provides that the purpose of the Act "is to provide a framework for the regulation of the electricity industry".

[13] Part 2 of the Act, entitled "Electricity industry governance", sets out the functions of industry participants, Transpower, the Minister and the Authority. In general, and relevantly:

(a) Section 7 defines industry participants to include, for example, generators, Transpower, distributers, retailers, lines-owners, those who consume electricity directly from the national grid, and industry service providers. Section 9 requires industry service providers to register and comply with the Electricity Industry Participation Code (the Code).

(b) Section 8 provides that Transpower is the "system operator" which is defined to be "the person who ensures the real-time coordination of the electricity system".

(c) Under s 18 the Minister may request that the Authority review and report on any matter relating to the electricity industry. The Minister must consult with the Authority prior to issuing such a request. Fifteen days after receiving a final report, the Minister must make that report publicly available.

(d) Section 12 establishes the Authority as an independent Crown entity. Section 7(3) provides it is not an industry participant except to the extent it performs industry service provider functions. The Authority comprises between five and seven members appointed by the responsible Minister who must, under s 13(2):

> have regard to the need to ensure that the Authority has amongst its members knowledge and experience of, and capability in:
>
> (a) the electricity industry:
>
> (b) consumer issues:
>
> (c) business generally.

(e) In addition to the duties on independent Crown entity board members in the Crown Entities Act 2004, s 14(1) provides:

> No member of the Authority, when acting as a member, may represent, or promote the interests or views of, any organisation or any particular industry participant or group of industry participants.

[14] Subpart 4 of pt 2 of the Act confers powers on the Authority to carry out its functions by monitoring compliance, monitoring market facilitation measures, monitoring the industry and market, investigating breaches and enforcing the Act, regulations and Code:

(a) Section 19 requires the Authority to make publicly available a charter about how it will establish, interact and consult with advisory groups established under ss 20 and 21.

(b) Section 20 requires the Authority to appoint an independent Security and Reliability Council to advise it on the performance of the electricity system and the system operator, and reliability of supply issues.

(c) Section 21 requires the Authority to establish one or more other advisory groups to provide independent advice on the development of the Code and market facilitation.

[15] The purpose of pt 3 of the Act, as set out in s 72, is "to promote competition" by providing for the separation of electricity distribution from certain generation and retailing activities. Part 4 of the Act relates to industry participants and consumers. It provides for: a dispute resolution scheme regarding disputes with Transpower; regulation of financial statements of customer and community trusts; and electricity supply obligations of distributors.

Empowering framework for the Electricity Industry Participation Code 2010

[16] Under s 33(2) of the Act, the Code is subject to the Act and any regulation made under the Act. Section 32(1) provides:

> (1) The Code may contain any provisions that are consistent with the objective of the Authority and are necessary or desirable to promote any or all of the following:
>
> (a) competition in the electricity industry:
>
> (b) the reliable supply of electricity to consumers:
>
> (c) the efficient operation of the electricity industry:

(d) the performance by the Authority of its functions:

(e) any other matter specifically referred to in this Act as a matter for inclusion in the Code.

(2) The Code may not—

(a) impose obligations on any person other than an industry participant or a person acting on behalf of an industry participant, or the Authority; or

(b) purport to do or regulate anything that the Commerce Commission is authorised or required to do or regulate under Part 3 or 4 of the Commerce Act 1986 (other than to set quality standards for Transpower and set pricing methodologies (as defined in section 52C of that Act) for Transpower and distributors); or

(c) purport to regulate any matter dealt with in or under the Electricity Act 1992.

[17] Section 34 provides that the initial Code must comprise a consolidation of EGRs and specified regulations. It must not include provisions relating to statements of opportunities or grid planning assumptions. They were within the Electricity Commission's functions but are now incorporated in outputs of the Ministry of Business, Innovation and Employment and of Transpower.

[18] Section 38 provides that the Authority may amend the Code, subject to:

(a) general consultation requirements under s 39 (which are explored further in relation to Issue 3); and

(b) a requirement to consult with the Commerce Commission in relation to amendments that are likely to affect its functions or powers, under s 54V of the Commerce Act. Section 54V, as amended by the 2010 Act, requires the Electricity Authority to consult with the Commission before amending the Code "in a manner that will, or is likely to, affect the Commission in the performance of its functions or exercise of its powers" under pt 4 of the Commerce Act.

[19] Section 44 provides that, without limiting s 32, the Code may require Transpower and one or more industry participants to enter into transmission

agreements for investment in the national grid. The Code may prescribe default terms and conditions required to be included in transmission agreements, which may be modified by mutual consent of the parties if the Code so allows. Section 44(4) deems every transmission agreement to include a provision under which the industry participant pays Transpower any amount Transpower charges in accordance with the TPM. A transmission agreement is binding and enforceable as if it were a contract.

[20] Sections 23 to 26 of the Act provide for an independent Rulings Panel, appointed by the Governor-General. Its function is to assist in the enforcement of the Code by hearing and determining breaches of, appeals under, and disputes about, the Code. Its powers and procedures are also set out in the Act. Appeals on questions of law and specified orders lie to the High Court.

[21] Part 5 of the Act empowers the Governor-General in Council, on the recommendation of the Minister, to make regulations including relating to monitoring, investigating and enforcing the Code.

The Electricity Industry Participation Code 2010

[22] The Code, particularly in pt 12, provides for the criteria and process for amending the TPM:

(a) Clauses 12.85–12.86 empower Transpower to submit a proposed variation of the TPM to the Authority or, if it considers there has been a material change in circumstances, the Authority to review an approved TPM. That is what the Authority has done here.

(b) Clause 12.77 provides that Transpower's costs in relation to an approved investment are recoverable from designated transmission customers on the basis of the TPM and must be paid accordingly.

(c) Clause 12.78 provides that the purpose of the TPM "is to ensure that, subject to pt 4 of the Commerce Act, the full economic costs of

Transpower's services are allocated in accordance with the Authority's objective in section 15 of the Act".[8]

(d) Clause 12.79 requires Transpower and the Authority, in developing and approving the TPM respectively, to assess it against the Authority's s 15 objective.[9]

(e) Clauses 12.81–12.83 require the Authority to prepare an issues paper, and consult on the process for developing and approving the TPM and the guidelines Transpower is required to follow in preparing a TPM, in accordance with the Authority's s 15 objective.

(f) Clause 12.83 of the Code states:

> After consideration of submissions in clause 12.82(3), the Authority must, as soon as reasonably practicable, publish–
>
> (a) The process for the development of the transmission pricing methodology; and
>
> (b) any guidelines that Transpower must follow in developing the transmission pricing methodology.

(g) Clause 12.89 requires Transpower to "develop its proposed [TPM] consistent with" any determination under pt 4 of the Commerce Act, the Authority's s 15 objective, and any guidelines published under cl 12.83(b).

(h) Clause 12.88 requires Transpower to submit a proposed TPM to the Authority within 90 days of the Authority's request for it, unless the Authority extends the period. Here, the Authority extended the period to just over one year. The Guidelines were released on 10 June 2020.

(i) Under cl 12.90, if the Authority considers Transpower has not provided sufficient information for the Authority to assess the proposed TPM, it

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8 This provision was amended in 2011 to substitute the reference to the Authority's objective for principles that were specified in cl 12.79.

9 This provision was also amended in 2011 to substitute the reference to the Authority's objective for specified principles.

may decline to consider it and Transpower must provide a revised TPM. Otherwise, under cl 12.91(1), the Authority may approve the TPM or refer it back to Transpower if it considers the TPM does not adequately conform to the requirements of pt 4 of the Commerce Act, the s 15 objective or the Guidelines. If a resubmitted TPM does not comply with those requirements, the Authority may make any amendments it considers necessary to ensure it does, under cl 12.91(2).

(j) Under cl 12.92–12.94, the Authority must publish a proposed TPM and receive submissions on it, must consider the submissions and determine when it will take effect. After the TPM has been approved, under cl 12.96, Transpower must then develop and publish transmission prices and demonstrate to the Authority that they are consistent with the TPM. Clause 12.102 requires transmission customers to pay for transmission services in accordance with the TPM.

[23] These steps have all been followed. They are not challenged in these proceedings. At the time of the hearing, the Authority was satisfied in principle with the TPM developed by Transpower on the basis of the Guidelines and was consulting on the proposed TPM itself. Since then, from 28 April 2022 to 18 May 2022 according to the Authority's website, the Authority has consulted on proposed Code amendments relating primarily to implementation of the TPM.

[24] Part 12 of the Code also requires the Authority to determine which assets comprise the core grid and what service levels and grid reliability standards Transpower must meet.

The 2020 Guidelines

[25] The Authority issued and consulted on a first proposal for the TPM Guidelines in 2012, a second proposal in 2016 and a third proposal in 2019. The Authority points out that it produced a total of 21 papers, including three detailed issues papers, for 16 consultation processes. It held workshops and other engagements and received over 1,000 submissions. On 10 June 2020, under cl 12.83 of the Code, the Authority published a decision document regarding the Guidelines (the Decision document), of

some 144 pages in length, and the Guidelines themselves. That is the decision under challenge.

[26] Mr Laurenson QC, for the Authority, says the Authority considers the current TPM is no longer fit for purpose. The Authority considers the current TPM creates significant distortions which are becoming more acute as new technologies emerge and which ultimately increase the overall cost of consuming electricity in New Zealand, in that it:

> (i) inefficiently discourages consumption at peak times, even where there is capacity on the transmission grid. In so doing, it also encourages parties to invest and act specifically to avoid paying transmission charges, thereby forcing others to contribute more in order for costs to be recovered in full;
>
> (ii) creates significant volatility in transmission charges which in turn encourages further avoidance behaviours;
>
> (iii) discourages investment in South Island generation due to imposition of an additional charge without good reason, while otherwise failing to signal to users the costs of their locational decisions, thus encouraging decisions which might increase costs overall; and
>
> (iv) fails to incentivise customers to scrutinise grid investments or otherwise participate in grid investment processes, since costs are socialised nationwide.

[27] At the beginning of the six-page Executive Summary of its Decision document, the Authority states:[10]

> We expect the new approach to paying for transmission assets will deliver significant benefits to consumers. The 2020 guidelines will give electricity consumers and generators much-improved signals of the cost and value of using the transmission grid. They will stop overly high transmission charges for using electricity at times when consumers most want it and will stop rewarding parties that shift costs on to other consumers for no overall benefit.
>
> The guidelines will also promote the right investment at the right time in renewable generation, transmission and electrification of industrial processes and transport, as we transition to meet New Zealand's low-emissions challenge at least cost to consumers.
>
> The Authority estimates the new approach to transmission pricing will deliver consumers a net quantified benefit of $1.3 billion (within a range of $0.3b–$2.2b) over the next 30 years. This estimate is conservative.

[10] 2020 Decision document at i.

[28] The Decision document states:

> 1.4 In broad outline, the main features of the 2020 guidelines are that they require a TPM to include the following:
>
> - a connection charge to recover the cost of assets that connect customers to the grid
> - a benefit-based charge to recover the costs of grid investments from parties who benefit from those specific investments
> - a residual charge to recover remaining transmission costs
> - a prudent discount policy to allow Transpower to discount charges for a customer whose charges would otherwise be inefficiently high or who may otherwise inefficiently bypass the grid (raising costs for all other customers)
> - a cap that protects consumers (including directly connected businesses) from price shocks from the initial rebalancing of transmission charges
> - seven additional components that Transpower must include in the proposed TPM if that would, in Transpower's reasonable opinion, better meet the Authority's statutory objective, including an optional transitional congestion charge where market and regulatory settings are not yet sufficiently developed to be able to rely on nodal prices and other available tools to efficiently manage congestion on the grid.
>
> 1.5 The main consequence of the new guidelines will be to replace the current RCPD and HVDC charges.

[29] So the Guidelines retain the connection charge, abolish the RCPD and HVDC charges and instead institute:

(a) a benefit-based charge for at least seven existing, and future new, interconnection and HVDC assets, in proportion to the benefits received from those assets over their remaining life; and

(b) a residual charge on distributed suppliers and those directly connected to the grid based on gross "anytime maximum demand" (AMD), not on peak demand. This is the main charge in the initial years of the new

regime, with the Authority's models predicting the residual charge would initially comprise 70 per cent of all interconnection charges.[11]

The application for judicial review

The parties

[30] The applicant, Manawa, was known as Trustpower until May 2022. It started life as the Tauranga Electric Power Board. It is now a private generator and retailer of electricity in both the North and South Islands. It owns and operates 19 hydroelectric generation schemes, one diesel peaking unit and co-owns another five hydroelectric schemes.[12] Manawa's power stations are primarily connected to local electricity distribution networks. But several of its larger power schemes are connected directly to the national grid.

[31] Manawa has about eight per cent of the generation market and 12 per cent of the retail market.[13] It stands to lose revenue over $20 million of revenue each year from the Guidelines' removal of RCPD charges.[14] That is revenue Manawa currently earns under joint venture agreements with distributors for operating its generation plant so as to lower the distributors' RCPD charges. Manawa applies for judicial review of the Authority's decision to replace the RCPD charges with the benefit-based charge for interconnection. Manawa files affidavits by:

(a) Peter Calderwood, General Manager of Strategy and Growth for Manawa.

(b) Expert economists: Professor George Yarrow from Oxford University and previous Chair of the Council of Management of the Regulatory Policy Institute; and Daniel Young of HoustonKemp Economists.

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11 Houston Kemp Economists *Review of the Electricity Authority's TPM Third Issues Paper* (September 2019) at fn 24.
12 Calderwood Affidavit at [42].
13 Calderwood Affidavit at [27].
14 Calderwood Affidavit at [47].

(c) Professors of Law expert in law and psychology: Professor Jeffrey Rachlinski of Cornell Law School; and Professor Mark Seidenfeld of Florida State University College of Law.

[32] New Zealand Steel Ltd supports Manawa's challenge. It is an industrial customer with a direct connection to the grid. Significant electricity, 60 per cent of their energy needs, is co-generated on-site at its Glenbrook site, fuelled from off-gases and waste heat. It filed an affidavit by Alan Eyes, Energy Manager at New Zealand Steel. It did not file submissions and I excused its appearance at the hearing.

[33] Nova owns the largest co-generation portfolio in New Zealand. Its two biggest plants are directly connected to the national grid and, except during maintenance periods, it exports electricity to the grid. Its co-generation plants were constructed primarily to supply, and are located beside, particular industrial plants: Fonterra's factory at Whareroa; the Kapuni gas treatment plant; a Fonterra lactose factory near Kaponga, South Taranaki; and within Fonterra's dairy factory at Edgecumbe. These supply electricity and steam simultaneously, with steam demand determining the size of the plant and excess electricity being exported to the grid. Nova challenges the Authority's decision in basing the residual charge on the grossed-up AMD, including loads supplied by co-generation behind the point of connection with the national grid. Nova estimates this will impose on it charges of several million dollars each year (depending on how much is passed on).[15] Nova files affidavits by Mahadevan Bahirathan, Chief Executive of Nova, and Charles Teichert, a General Manager of Todd Corporation (which includes Nova).

[34] Fonterra supports Nova's challenge and also challenges the determination of the residual charge and its imposition on load customers. It files an affidavit by Glenn Sullivan, the senior electrical technical manager at Fonterra.

[35] I have explained the Authority already. It files affidavits by:

(a) Authority Board members: Lana Stockman; Susan Paterson; Allan Dawson;

[15] Affidavit of Mahadevan Bahirathan, 23 April 2021, at [74] and [78].

(b) An economist seconded to the Authority, Jean-Pierre de Raad of Sense Partners Ltd;

(c) Expert economists: Jason Mann of FTI Consulting; Professor James Cooper from George Mason University Antonin Scalia Law School; and Professor William Hogan from the John F Kennedy School of Government at Harvard University and the Research Director of the Harvard Electricity Policy Group.

[36] Meridian, the second respondent, is a Mixed-Ownership Model company with the largest single share (31 per cent) of the generation market and 15 per cent of the retail market.[16] Meridian benefits financially from the Authority's decision, though it does not agree with the Authority on all major aspects of the proposed Guidelines. But it supports the Authority's decisions. It files an affidavit by expert economist James Mellsop, Managing Director of NERA Economic Consulting.

[37] Transpower appears as intervener to assist the Court and abides the Court's decision. It does not resile from the strong views it expressed in its submissions to the Authority about the TPM. But it accepts those views were heard by the Authority and Transpower's role is to give effect to the Guidelines in good faith. Transpower limits its submissions to issues that give rise to the potential for adverse consequences for Transpower and any technical matters concerning the TPM that may assist the Court.

[38] Originally, the applicants for judicial review also appealed the Authority's decision under s 64 of the Act. However, the appeal was discontinued on the basis that no party would take issue with the appeal not being pursued.

Approach to judicial review

[39] As Mr Hodder QC submits, for Manawa, various grounds of judicial review challenge commonly overlap. Elsewhere, they have been analogised to the ingredients of Mexican food, which can be similar but arranged in different combinations to

[16] Calderwood Affidavit at [27].

constitute different dishes.[17] Here, the grounds of review include unlawfulness; pre-determination and bias; taking into account irrelevant considerations; failing to take into account relevant considerations; and unreasonableness. They are brought to bear by different parties on different aspects of the Authority's 2020 Decision. Manawa challenges the imposition of a benefit-based charge on a variety of grounds. Nova and Fonterra challenge different aspects of the residual charge on the basis of some grounds that are similar to those advanced by Manawa and some that are different.

[40] I have found it easiest to address this smorgasbord by dealing first with two grounds of review, then with a challenge to a substantive aspect of the Decision, and then with the other grounds of review of the residual charge:

(a) whether the Authority erred in interpreting its statutory objective and role in making its decision in relation to the benefit-based charge and the residual charge;

(b) whether the Authority's decision was pre-determined or biased;

(c) whether the Authority erred in law in its CBA of the benefit-based charge and the residual charge; and

(d) whether the Authority's decision in relation to the residual charge was unlawful on other grounds.

[41] In relation to each issue, with one exception, the nature of the grounds of judicial review are relatively straightforward and uncontested. Before starting on the menu of four issues, I address, as an appetiser, the spicy ground of unreasonableness.

[42] Mr Hodder, for Manawa, submits that unreasonableness "may be established where a decision is untenable such that proper application of the law requires a different answer, including on the inadequacy of the evidential foundation or the lack

[17] Matthew S R Palmer "Indigenous Rights, Judges and Judicial Review in New Zealand" in Jason N E Varuhas and Shona Wilson Stark (eds) *The Frontiers of Public Law* (Hart Publishing, Oxford, 2019) at 145, citing submissions by Mr Isaac Hikaka.

of logic in the reasoning".[18] He cites New Zealand cases such as *Vodafone New Zealand Ltd v Telecom New Zealand Ltd, Hu v Immigration and Protection Tribunal* and *New Zealand Council of Licensed Firearms Owners v Minister of Police.*[19]

[43] Mr Hodder puts more emphasis on the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov* as cogent and more recent.[20] He emphasises the Court there asking whether the decision "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision", as well as the Court's requirements for addressing and resolving central issues with internally coherent reasoning.[21] Mr Hodder submits that *Vavilov* resonates with the culture of justification referred to in the last three editions of De Smith's English text on Judicial Review. Mr Millard QC, for Nova, supports these submissions.

[44] Mr Laurenson, for the Authority, submits that *Hu v Immigration and Protection Tribunal* is an appropriate formulation of how unreasonableness should be applied. He submits the approach of adopting a lower threshold for reasonableness review based on the culture of justification was roundly rejected by the minority in the Supreme Court of Canada and has been resoundingly rejected by the New Zealand courts. Dr Every-Palmer QC, for Meridian, agrees and adds that the Canadian emphasis on justification appears to be a quid pro quo for a high degree of deference in the interpretation and application of empowering legislation.

[45] Mr Hodder's proposed formulation of unreasonableness reflects the formulation in *Hu* which went on to identify three scenarios which assist in identifying what constitutes unreasonableness:[22]

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18 Manawa Submissions at [67].

19 *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [52]; *Hu v Immigration and Protection Tribunal* [2017] NZHC 41, [2017] NZAR 508 at [28]–[31]; and *New Zealand Council of Licensed Firearms Owners Inc.v Minister of Police* [2020] NZHC 1456 at [81]-[85].

20 *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65, (2019) 441 DLR (4th) 1.

21 At [99].

22 *Sweeney v The Prison Manager, Spring Hill Corrections Facility* [2021] NZHC 181 at [57]; citing *Hu v Immigration and Protection Tribunal*, above n 19, at [30].

(a) if the decision is not supported by any evidence;

(b) if the evidence is inconsistent with, or contradictory to, the decision; or

(c) if the only reasonable conclusion contradicts the decision ("if there is a material disconnect in the chain of logic from a fact or a legal proposition to a conclusion, a decision may be unreasonable and therefore unlawful").

[46] The approach to unreasonableness set out in *Hu* has been cited in at least 35 senior court cases to date. It has been adopted by the High Court in several cases, including: *Galani v Chief Executive of the Ministry of Business, Innovation and Employment*; *Jiang v Immigration Advisers Complaints and Disciplinary Tribunal*; and *Zhang v Minister of Immigration*.[23] Unreasonableness challenges were upheld based on the *Hu* formulation in the last two of these. In 2021, the New Zealand Court of Appeal endorsed the *Hu* conception of unreasonableness as a "useful formulation".[24]

[47] Mr Hodder submits that the *Vavilov* concept of unreasonableness fits comfortably within New Zealand jurisprudence, in that a decision must be based on reasoning that is both rational and logical. As Mr Millard quotes, from the eighth edition of De Smith:[25]

> Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decision, or where there is absence of evidence in support of the decision.

[48] I agree that these statements, and others in *Vavilov*, are consistent with the *Hu* approach to unreasonableness in New Zealand, as far as they go. I also accept Mr Hodder's characterisation, in reply, of *Hu* as an elegant version of a narrow view of unreasonableness. But I do not accept the wholesale importation to New Zealand of the *Vavilov* approach to judicial review.

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23 *Galani v Chief Executive of the Ministry of Business, Innovation and Employment* [2018] NZHC 383 at [19]; *Jiang v Immigration Advisers Complaints and Disciplinary Tribunal* [2018] NZHC 3152 at [57], [59] and [80]–[88]; and *Zhang v Minister of Immigration* [2020] NZHC 568 at [86]–[93].

24 *C P Group Ltd v Auckland Council* [2021] NZCA 587 at [135].

25 Lord Woolf and others *De Smith's Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at [11-033].

[49] Canada's traditional contextual approach to judicial review has been quite different to that in New Zealand.[26] Its approach to deference to administrative decision-makers in particular, influenced by United States jurisprudence, has not been consistent with the New Zealand approach. In *Vavilov* and its accompanying cases, assisted by 27 interveners, the Canadian Supreme Court offers a new framework for judicial review of administrative action, with a new form of robust but inherently deferential "reasonableness review" as the starting point.[27] It encompasses what New Zealand courts regard as separate, and more routinely used, grounds of review, including judicial review of regulations. Canada also does not distinguish between judicial review of legislative and non-legislative decisions to the extent New Zealand does. *Vavilov* comes out of a different tradition of constitutional and administrative law.

[50] Accordingly perhaps, while Mr Laurenson overstates the rejection of Mr Hodder's advocacy of *Vavilov* in other cases, it has certainly not been embraced by the New Zealand courts, as Grice J stated in *New Zealand Steel Limited v Minister of Commerce and Consumer Affairs*.[28] In *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police*, Cooke J put Mr Hodder's submission about *Vavilov* to one side in the course of resisting varying intensity of review and characterising *Wednesbury* unreasonableness as a residual ground of review.[29]

[51] The *Hu* line of authority is one available approach to unreasonableness as a ground of review in New Zealand law. It is all that is required in this case. Other approaches would not give a different result.

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26 Dean Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018) at 204–205 and 233.

27 Paul Daly "The Supreme Court of Canada's administrative law trilogy" [2020] Public Law 408 at 414.

28 *New Zealand Steel Limited v Minister of Commerce and Consumer Affairs* [2021] NZHC 966 at [72].

29 *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police*, above n 19, at [81]–[84].

Issue 1: Statutory objective and role

Relevant provisions

[52] Sections 15 and 16 of the Act set out the objective and functions of the Authority:

> **15 Objective of Authority**
>
> The objective of the Authority is to promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers.
>
> **16 Functions of Authority**
>
> (1) The Authority's functions are as follows:
>
> (a) to maintain a register of industry participants in accordance with subpart 2, and to exempt individual industry participants from the obligation to be registered:
>
> (b) to make and administer the Electricity Industry Participation Code in accordance with subpart 3:
>
> (c) to monitor compliance with the Act, the regulations, and the Code, and to exempt individual industry participants from the obligation to comply with the Code or specific provisions of the Code:
>
> (d) to investigate and enforce compliance with this Part, Part 4, the regulations, and the Code (*see* subpart 4 of this Part):
>
> (e) to investigate and enforce compliance with Part 3 (*see* subpart 2 of Part 3):
>
> (f) to undertake market-facilitation measures (such as providing education, guidelines, information, and model arrangements), and to monitor the operation and effectiveness of market facilitation measures:
>
> (g) to undertake industry and market monitoring, and carry out and make publicly available reviews, studies, and inquiries into any matter relating to the electricity industry:
>
> (h) to contract for market operation services (but *see* subsection (2)) and system operator services:
>
> (i) to promote to consumers the benefits of comparing and switching retailers:
>
> (j) to perform any other specific functions imposed on it under this or any other Act.

(2) Instead of, or as well as, contracting for market operation services, the Authority may itself perform—

(a) the functions of the market administrator, if the Authority considers it desirable to do so; and

(b) any other market operation service, but only on a temporary basis (such as when there is no current contract, or the contractor is unable or unwilling to perform the service).

Submissions

[53] Mr Hodder, for Manawa, submits that:

(a) The Authority misunderstands its objective; it does not have a general power to pursue its view of overall economic efficiency. Its belief that it does collapses the three limbs of s 15 into one and taints every aspect of its decision on the Guidelines. Instead, "promoting competition" is the most relevant of the three limbs, because the focus is on the long-term benefit to consumers which is provided by competition.

(b) In pursuing its misconceived objective, the Authority has taken on a larger role in regulating the industry than Parliament intended. The Act establishes a more subtle tripartite regulatory structure with the Commerce Commission, Transpower and the Authority. The Authority has trespassed on the more expert role of the Commerce Commission to set price-quality settings, including ensuring efficient transmission investment. The Authority has also usurped Transpower's role to "develop" the TPM by providing highly restrictive guidelines, that cl 2 means are more akin to rules than guidelines, and limiting the time Transpower had to engage with customers and develop the TPM. Instead, the Authority has a specific and relatively confined role in ensuring Transpower's TPM aligns with the right policy objectives for competitive markets.

(c) Accordingly, the Authority did not act reasonably and/or failed to take into account all relevant considerations. The Guidelines are so detailed and prescriptive that they fetter Transpower's discretion to "develop"

the TPM. Alternatively, Mr Hodder submits that, because any new TPM is a Code change, the Authority is effectively pre-empting or paralleling a Code change process as part of its decision on the Guidelines.

[54] Mr Millard, for Nova, supports Manawa's submissions in relation to the statutory objective. He submits that the Authority does not have a role in promoting general economic efficiency, general competition or general reliability. Each of the three limbs of s 15 is a mandatory relevant consideration. He submits the residual charge decision is contrary to all three limbs of the Authority's statutory objective and is not necessary or desirable to meet that objective. He submits the charge:

(a) distorts the competitive process to the disadvantage of co-generation which is a form of generation the Authority acknowledges is beneficial;

(b) reduces reliability of supply to the extent it leads to early exit or "islanding" of embedded co-generation plants; and

(c) will also reduce the efficient operation of the electricity industry.

[55] Mr Dunning QC, for Fonterra, makes similar arguments to Manawa regarding the statutory objective: efficiency does not satisfy the statutory objective; and the approach is more reflective of a command economy than the promotion of competition. He submits the Authority's decision was really about pragmatically identifying how to collect revenue in the administratively easiest manner, which does not conform with the statutory objective.

[56] Mr Smith, for Transpower, agrees that, on some topics, the Guidelines are highly detailed and afford little meaningful discretion. However, Transpower accepts that on some topics the Guidelines are materially less detailed and, over them, it has retained a significant degree of discretion over the development of the TPM. Transpower accepts the approach to determining the benefit-based charge is not prescribed in detail, though there is some prescription in cl 22(c) of the Guidelines. Transpower takes no view on whether the degree of prescription is inconsistent with

the statutory framework. In making its own decisions Transpower submits that cl 1 of the Guidelines, primarily robustness, simplicity and certainty, provide the framework for having regard to the statutory objective in s 15.

[57] Mr Laurenson, for the Authority, submits:

(a) The Authority did not interpret its statutory objective as a single economic efficiency objective. While it considered the efficiency limb was the most relevant, it considered each limb separately and recognised the inevitable relationships between them. The "efficient operation" limb of s 15 is not limited to operational efficiencies, nor is this consistent with the Act's focus on the long-term benefit of consumers. If Parliament had wanted to provide a narrower objective it could have made that clear. But the legislative history shows s 15 was intended to capture wider efficiencies, consistent with case law on similar provisions. A narrow interpretation would leave a significant gap in the regulatory regime. There was nothing to prevent the Authority from considering efficiency, as it did, to remove costly distortions from the current transmission pricing.

(b) The Guidelines do not exceed the function of the Authority which has appropriately considered Transpower's role and expertise and has not usurped the distinct role of the Commerce Commission. The Authority is the independent expert regulator and has the ultimate say on the proposed TPM for consultation and whether it is incorporated into the Code. The Code's reference to "guidelines" does not preclude more detailed provisions where the Authority considers that appropriate to promote its statutory objective. The Guidelines provide Transpower with appropriate flexibility to develop a proposed TPM that implements the changes the Authority considers necessary to promote its statutory objective.

The Authority's statutory objective and role

[58] In *Unison Networks Ltd v Commerce Commission*, the Supreme Court stated:[30]

> [51] Public bodies must exercise their statutory powers in accordance with the statutes which confer them. If they make decisions that are outside the limits of their powers they abuse them. The courts control any misuse of public power through judicial review.
>
> ..
>
> [53] A statutory power is subject to limits even if it is conferred in unqualified terms. Parliament must have intended that a broadly framed discretion should always be exercised to promote the policy and objects of the Act. These are ascertained from reading the Act as a whole. The exercise of the power will be invalid if the decision maker "so uses his discretion as to thwart or run counter to the policy and objects of the Act". A power granted for a particular purpose must be used for that purpose but the pursuit of other purposes does not necessarily invalidate the exercise of public power. There will not be invalidity if the statutory purpose is being pursued and the statutory policy is not compromised by the other purpose.
>
> [54] Ascertaining the purpose for which a power is given is an exercise in statutory interpretation which is not always straightforward. This is partly because legislative regimes differ in the specificity with which they grant powers. In this area the courts are concerned with identifying the legal limits of the power rather than assessing the merits of its exercise in any case. They must be careful to avoid crossing the line between those concepts.
>
> [55] Often, as in this case, a public body, with expertise in the subject-matter, is given a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed. In such instances Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers. The courts in those circumstances are unlikely to intervene unless the body exercising the power has acted in bad faith, has materially misapplied the law, or has exercised the power in a way which cannot rationally be regarded as coming within the statutory purpose.

[59] So, decisions made under the Act must be consistent with its purpose. Decisions made by the Authority must be consistent with its statutory objective and in accordance with its statutory role.

[60] The Authority's objective is stated in s 15. The text indicates that the end goal is "the long-term benefit of consumers". Parliament expects that to be achieved by the Authority promoting "competition in, reliable supply by, and the efficient operation

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[30] *Unison Networks Limited v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 (footnotes omitted).

of, the electricity industry". Given the scheme of the Act, and allocation of other powers to other statutory decision-makers, the Authority achieving its objective is a core element of the purpose of the Act, which is expressed by s 4 to be "to provide a framework for the regulation of the electricity industry".

[61] Nothing in the text of s 15, the scheme of the Act, or the other provisions, suggests that it should be read narrowly or technically to restrict the Authority's ability to achieve the end goal of promoting the long-term benefit of consumers. Section 18 empowers the Minister to request the Authority review and report on "any matter relating to the electricity industry". The Authority's members are required by ss 13(2) and 14(1) to have knowledge, experience and capability in the electricity industry, consumer issues and business generally, and to be independent. The Authority has powers to monitor compliance, market facilitation measures, the industry and market and investigate breaches and enforce the Act, regulations and Code. These are not the hallmarks of a constrained objective. An orthodox purposive approach to statutory interpretation suggests the objective of the Authority is not particularly constrained.

[62] Mr Hodder submits the Authority is really talking about some concept of overall efficiency. He criticises the use of "efficiency" rather than "efficient operation" in the third bullet point of paragraph [2.1.1] of the Authority's 2011 summary of its interpretation of its statutory objective:[31]

> 2.1.1 The Authority interprets its statutory objective as requiring it to exercise its functions in section 16 of the Act in ways that, *for the long-term benefit of* electricity consumers:
>
> - facilitate or encourage increased competition in the markets for electricity and electricity-related services, taking into account long-term opportunities and incentives for efficient entry, exit, investment and innovation in those markets;
>
> - encourage industry participants to efficiently develop and operate the electricity system to manage security and reliability in ways that minimise total costs whilst being robust to adverse events; and
>
> - increase the efficiency of the electricity industry, taking into account the transaction costs of market arrangements and the administration and compliance costs of regulation, and taking into account Commerce Act implications for the non-competitive parts

[31] Electricity Authority *Interpretation of the Authority's statutory objective* (14 February 2011) (footnotes omitted).

> of the electricity industry, particularly in regard to preserving efficient incentives for investment and innovation.

[63] The 2011 statement is not necessarily a good indicator of whether the Authority has acted unlawfully in making its 2020 Decision. But even if it were, the criticism splits a rather thin hair. It is true that, as terms of economic art, there is a difference between overall efficiency and operational efficiency. But there is nothing in the statutory text to indicate that such economic art was intended to be reflected in the legislative drafting here. And, as Mr Laurenson submits, "operational efficiency" is not "efficient operation", which is the phrase used by Parliament here.

[64] Rather, the objective accorded to the Authority appears from the legislative text to be a paradigmatic case of "a broadly expressed power that is designed to achieve economic objectives which are themselves expansively expressed", as the Supreme Court said in *Unison Networks Ltd*.[32] Accordingly, the Court went on to state, "Parliament generally contemplates that wide policy considerations will be taken into account in the exercise of the expert body's powers". I accept Mr Laurenson's submission that by using the words it does, the Act provides the Authority with broad powers to regulate the electricity industry. The objective is broadly drafted.

[65] Manawa seeks to rely on expert evidence by Emeritus Professor George Yarrow from Oxford University about "the meaning of section 15 as a matter of regulatory economics".[33] Mr Hodder characterises this as an economic backdrop, saying something about the language used in the Act. This does not assist me. The interpretation of the meaning of s 15 is a matter of law for the Court, not economic experts. I accept that economic terms can, of course, be useful background context and therefore relevant to statutory interpretation of a statute dealing with economic issues. But Professor Yarrow's count of the number of times the words "efficiency", "reliable" and "competition" are used in the Authority's decision is not relevant. And, in purporting to opine on what was within and without the "remit and functions" of the Authority, Professor Yarrow's evidence goes beyond his expertise and trespasses upon that of the Court.[34] Earlier this year the Court of Appeal noted that "[l]awyers

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32 *Unison Networks Ltd*, above n 30, at [55].
33 Manawa submissions at [25].
34 Affidavit of George Yarrow, 27 April 2021, at [13], [88], [95].

should know better" than to permit affidavits to be filed on questions of law.[35] I uphold the Electricity Authority's objection to his evidence to that extent. I do not need to consider Professor Hogan's evidence in response.

[66] Mr Hodder and Mr Millard submit that the Authority's interpretation of its objective collapses the three limbs of s 15 into one. Mr Hodder is troubled by an explanation by the Authority that:[36]

> … where it is considering initiatives that have conflicting effects within its statutory objective, the Authority will seek to make decisions consistent with maximising overall efficiency benefits for the long term benefit of electricity consumers.

[67] Mr Hodder criticises a statement in an appendix of that document, that the Authority interprets the third limb of s 15 "as providing an over-riding efficiency criterion for the Authority's decisions".[37] Mr Hodder points to the Authority's 2020 Decision in favour of the benefit-based charge as promoting the efficient operation of the electricity industry and "efficient investment and the efficient operation" of the industry.[38]

[68] In its decision on the Guidelines, the Authority rejects the suggestion that it has given primacy to the "efficient operation" limb of the statutory objective or reduced the three limbs into a single overall efficiency objective.[39] It sets out why it considered the benefits of the Guidelines tied directly into all three limbs.[40] Ms Stockman's evidence is that the Board considered its decision would promote each limb of its statutory objective.[41] Mr Dawson's evidence is that all three limbs were considered.[42] Ms Paterson's evidence is that the objective was at the core of the Authority's work.[43] Mr Hodder submits that they would say that, wouldn't they. And it is true that such assertions would not save an unlawful decision that went beyond the statutory objective. But I do not consider the premise of the challenge is well founded.

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35 *Newton v Family Court at Auckland* [2022] NZCA 207 at [191].
36 *Interpretation of the Authority's statutory objective,* above n 31, at [2.4.1(c)].
37 At [A.54].
38 2020 Decision document at [9.17] and [9.83].
39 At [4.20].
40 From [4.18].
41 Affidavit of Lana Stockman, 9 June 2021 [Stockman Affidavit] at [2.15], [8.7] and [10.14].
42 Affidavit of Allan Dawson, 8 June 2021 [Dawson Affidavit] at [3.12].
43 Affidavit of Susan Paterson, 9 June 2021, [Paterson Affidavit] at [1.7].

[69] In identifying the three elements of competition, reliable supply and efficient operation of the electricity industry that it expects the Authority to promote, Parliament has not specified that they must be promoted equally. It has not specified that "promoting competition" is the most relevant. It has specified that the end goal of the three elements to be promoted is the long-term benefit of consumers. And it has specified that the Act provides a framework for the regulation of the "electricity industry" as a whole. These are all broad concepts. They indicate Parliament must be taken to envisage that the Authority will mix and match between the three elements, guided by that overall goal. Indeed, s 32(1) indicates that explicitly when it provides that the Code may contain any provisions consistent with the objective of the Authority and necessary or desirable "to promote any or all of": the three limbs of s 15; the Authority's performance of its functions; or other matters specifically referred to in the Act for inclusion in the Code.

[70] Mr Laurenson points to *Vector Ltd v Transpower New Zealand Ltd* where Williams J took no issue with the Authority's characterisation of its role as considering "overall efficiency of the electricity industry for the long-term benefit of consumers".[44] Case law regarding the scope of the "efficient operation of dairy markets" in the Dairy Industry Restructuring Act 2011 is similarly expansive.[45] He also points to case law interpreting the Commerce Act that links efficiency and long-term benefits to consumers.[46] These references do not determine the point, but they are consistent with my conclusions based on the text here.

[71] There is no need in law for each of the three limbs to be promoted equally or even at all, as long as one of them is promoted consistently with the long-term benefit of consumers. Where the Authority considers a particular measure in the Guidelines, consistent with one of the limbs of s 15, will achieve the long-term benefit of consumers, it is entitled to pursue it. I consider Mr Millard's submission that each of the three limbs of s 15 is a mandatory relevant consideration fails for that reason.

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44 *Vector Ltd v Transpower New Zealand Ltd* [2014] NZHC 3411 at [25].
45 *Open Country Dairy Ltd v Commerce Commission* [2020] NZHC 334 at [60]–[61].
46 *Wellington International Airport Ltd v Commerce Commission* [2013] NZHC 3289 at [660]; *NZME Ltd v Commerce Commission* [2018] NZCA 389, [2018] 3 NZLR 715 at [71].

[72] This interpretation is consistent with the above summary of the Authority's 2011 interpretation, which italicises "long-term benefit" of electricity consumers. It is consistent with the Authority's 2012 Decision-Making and Economic Framework, which Mr Hodder also criticises, in saying:[47]

> 12 The Authority considers that the TPM should focus on overall efficiency of the electricity industry for the long-term benefit of electricity consumers. This reflects the Authority's interpretation of its statutory objective. It also recognises that efficiency, and reliability, in the electricity industry involves facilitating:
>
> (a) efficient investment in the electricity industry through providing incentives so that the right investments of the right amount occur at the right time, are in the right place and use the right technology. These investments can be in the transmission grid, generation (including distributed generation), distribution networks or by electricity consumers; and
>
> (b) efficient operation of the transmission grid, generation (including distributed generation), distribution networks and demand-side management. This means providing incentives so that the day to day operation of transmission, generation, distribution and electricity demand-side infrastructure involves an efficient trade-off between reliability and cost.

[73] It is also consistent with the Authority's 2019 Issues Paper which Mr Hodder submits is similarly tainted:[48]

> 4.223 The Authority's statutory objective in section 15 of the Electricity Industry Act is to "promote competition in, reliable supply by, and the efficient operation of, the electricity industry for the long-term benefit of consumers". In the context of transmission pricing, the Authority has interpreted this statutory objective to mean that the TPM should promote overall efficiency of the electricity industry for the long-term benefit of electricity consumers.
>
> 4.224 The Authority's proposal is primarily targeted at the efficiency limb of the statutory objective. This is because the proposal promotes efficient investment in and operation of the electricity industry. There is a trade-off between a high level of granularity in providing benefit-based charges and the costs of developing and administering the methodology. There is also a trade-off between dynamic efficiency, which the Authority considers supports benefit-based charges, and operational efficiency where charges need to avoid distorting operational decisions. The Authority considers that the proposal promotes efficient investment and operation while seeking to minimise inefficient avoidance through the inclusion of ex-ante charges that are aligned

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47 Electricity Industry *Decision-making and economic framework for transmission pricing methodology: Decisions and reasons* (7 May 2012).

48 Electricity Authority *2019 Issues paper: Transmission pricing review consultation paper* (23 July 2019) (footnotes omitted) [2019 Issues Paper].

> to benefits and a historical-AMD-based residual charge, both of which promote efficient operation.

[74] Accordingly, I consider that the rather ironic challenges, by Manawa to the benefit-based charge and Nova to the residual charge, as being too much based in the objective of overall economic efficiency, fail. The Authority's statutory objective is wide enough to encompass such an approach.

[75] Manawa relies on criticism by Transpower of the proposed Guidelines during the process. For example, in its submissions on the Authority's 2019 Issues Paper, Transpower said "the Authority's current TPM proposal runs a risk of not being in consumers' best interests and may not meet the Authority's statutory objective of delivering significant long-term benefits to consumers".[49] Mr Hodder submits this is extremely significant and the Court is entitled to give Transpower's views an extra degree of attention. It is clear that Transpower did not support the Authority's approach. It was concerned that the pricing signals sent by the interconnection charges may be too strong and that the problem had not been adequately defined. But Transpower's interpretation of s 15, which it does not advance in these proceedings, has no particular weight. It is answered by the point that it is the Authority's role to formulate the Guidelines, not Transpower's role.

[76] In terms of legislative history, Mr Hodder points to the Electricity Commission having the principal objectives under s 172N of the Electricity Industry Act 1992 "to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable, and environmentally sustainable manner" and "to promote and facilitate the efficient use of electricity". By contrast, he submits Parliament intended to provide for a much narrower role for the Authority.

[77] It is true that there were references in the Parliamentary debates to the Authority having narrower functions than the Electricity Commission.[50] This is obvious from the reallocation of functions among the new organisations. The Commission's energy efficiency objectives were proposed to be undertaken by the

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[49] Transpower "Submission to the Electricity Authority on the Transmission pricing review 2019 issues paper" (1 October 2019) at 1.

[50] (15 December 2009) 659 NZPD 8567; (20 July 2010) 655 NZPD 12474.

Energy Efficiency Conservation Authority, the environmental objectives under the Resource Management Act 1992 and climate change policy and the fairness objective by the Minister's regulatory powers.[51] As mentioned above, the Electricity Commission's function of approving major capital expenditure under the Commerce Act was transferred to the Commerce Commission by s 54R of the Commerce Act.

[78] But, as Mr Laurenson submits, the legislative history does not support the technical reading advocated by Mr Hodder:

(a) In August 2009, the Electricity Technical Advisory Group (ETAG) and Ministry of Economic Development (MED) proposed for the Ministerial Review of Electricity Market Performance that the Authority's sole objective would be ensuring "efficiency" for the "longterm benefit of consumers" which it envisaged would ensure the market was governed to ensure efficient prices, efficient investment and managing short and longer term security of supply risks.[52]

(b) In response to submissions, in October 2009, ETAG and MED proposed a revised objective, "to promote secure and efficient operation of, and competition in, the electricity market for the long-term benefit of consumers".[53] That report formed the basis of a Cabinet paper on the Ministerial Review of the Electricity Market. The Cabinet paper noted that the Authority should be responsible for transmission pricing, given it is "strongly interrelate[d] with the overall operation and efficiency of the market".[54]

(c) The November 2009 Cabinet Committee paper reformulated the objective to read "to promote competition, reliable supply and efficient

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51 Electricity Technical Advisory Group and Ministry of Economic Development *Improving Electricity Market Performance – Volume one: Discussion paper* (August 2009) at [202].

52 At [201]–[202].

53 Electricity Technical Advisory Group and Ministry of Economic Development *Improving electricity market performance: Summary note on recommendations taking account of submissions* (October 2009) at 42.

54 Office for the Minister for Energy and Resources *Ministerial Review of the Electricity Market* (Paper for the Cabinet Economic Growth and Infrastructure Committee, 2009) at fn 34.

operation of the electricity market for the long-term benefit of consumers".[55]

(d) When the Electricity Industry Bill was introduced in December 2009, the objective was drafted with the text that was eventually passed. The Bill's Explanatory Note appears to use the phrases "efficient operation" and "efficiency" interchangeably.[56]

(e) Ministry of Economic Development reports to the Finance and Expenditure Committee referred to the Authority's "overall efficiency mandate" and "efficiency objective".[57] Similar references were made in the Parliamentary Debates in the Second and Third Readings of the Bill.[58]

[79] None of this context is determinative. But it reinforces, rather than disturbs, the conclusions I come to above based on text, scheme and purpose. Given the context and legislative history of the evolution of the regulatory framework for electricity, it would be an unduly artificial constraint on the Authority's ability to regulate the electricity industry to interpret the words of s 15 as narrowly or technically as Manawa submits.

[80] The submission that the Authority is acting beyond its role, and trespassing on the role of other regulators, is the flip side of the submission that the Authority has misinterpreted what is a narrower role. I do not accept that either. The roles of the Authority, the Commerce Commission and Transpower are evident from the scheme, purpose and provisions of the Act and related provisions as outlined above. Each has its own role. Labelling the regulatory framework for electricity transmission as a "tripartite" arrangement involving the Authority, Transpower and the Commerce Commission does not assist determination of whether the Authority has transgressed its role in making the 2020 Decision.

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55 At [126].

56 Electricity Industry Bill 2009 (111–1) (explanatory note) at 2 – 3, 8, 12 and 17.

57 Ministry of Economic Development *Electricity Industry Bill -Briefing by Ministry of Economic Development* (17 February 2010) at 8; and *Electricity Industry Bill Official's report on submission to the Finance and Expenditure Committee* (16 April 2010)

58 (20 July 2010) 655 NZPD 12474; and (23 September 2010) 667 NZPD 14292.

[81] The Authority's role in making the 2020 Decision is to issue Guidelines for the TPM. Transpower has the role of using its own specialised expertise and knowledge to develop a proposed TPM based on those Guidelines. But Transpower, pursuing its objectives as an SOE, is a regulated monopoly whose prices affect the whole industry. The Authority is the industry regulator. The Authority's statutory role extends to determining whether and when the TPM proposed by Transpower is ready for consultation. It also extends to deciding whether to issue the TPM itself after it has been developed by Transpower in accordance with the Authority's Guidelines. And the Authority's role extends to amending the Code which regulates the criteria and process for amending the TPM, consistent with the requirements of s 39 of the Act and s 54V of the Commerce Act.

[82] The Authority would be acting outside of its role if it were to develop such a detailed TPM under the guise of Guidelines that Transpower had no TPM to "develop". But that is not what the Authority has done. The Authority consulted on how much flexibility should be provided in the Guidelines for Transpower's development of the TPM.[59] The 2020 Decision discusses the feedback it received.[60] As Mr Smith submits, for Transpower, the Authority's Guidelines are more restrictive in relation to some elements of the TPM than others. Transpower retains a fair degree of discretion over the development of the TPM, including in relation to the benefit-based charge. And cl 2 of the Guidelines provides a general ability for Transpower to depart from particular requirements in the Guidelines, though not its intent, if Transpower reasonably considers that doing so would better meet the Authority's statutory objective. It provides:[61]

> 2. The TPM may differ in its details from the particular requirements in these Guidelines (but not their intent, including as set out in the Authority's intent section of these Guidelines), if Transpower considers, in its reasonable opinion, that doing so would better meet the Authority's statutory objective than complying with these Guidelines in their entirety. For the avoidance of doubt, neither this clause (nor any other clause) limits the Authority's powers under clause 12.91 of the Code, including the power to refer back to Transpower a proposed TPM which it considers does not best meet its statutory objective and subsequently to amend a proposed TPM, nor

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59 2019 Issues Paper at 110.
60 2020 Decision document at [7.10] onwards.
61 Electricity Authority *Transmission pricing methodology: 2020 Guidelines* (10 June 2020).

> its ability to interpret the Guidelines or its statutory objective in exercising those powers.

[83] That provides Transpower with wriggle-room that is explicitly consistent with s 15 of the Act. The Guidelines do not usurp Transpower's role or act as an unlawful fetter on Transpower's discretion. Given Transpower's opposition to aspects of the proposals for the Guidelines, it is understandable that the Authority considered it needed to be more specific or restrictive in relation to some topics.

[84] Neither do the Guidelines pre-empt a Code change. Rather, the Code specifically envisages the Authority's role as explained above. The Code provides for the Authority to:

(a) prepare an issues paper on the process for the development and approval of a TPM;[62]

(b) consult on the issues paper;[63]

(c) publish the Guidelines;[64]

(d) receive the proposed TPM;[65]

(e) decide whether to consider it or not;[66]

(f) approve it for consultation or refer it back to Transpower;[67]

(g) amend the proposed TPM and to consult on the proposed TPM;[68] and

(h) consider whether to incorporate it into the Code.[69]

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62 Electricity Industry Participation Code 2010, cl 12.81.
63 Clause 12.82.
64 Clause 12.83.
65 Clause 12.88.
66 Clause 12.90.
67 Clause 12.91.
68 Clauses 12.91(2) and 12.92.
69 Clause 12.93.

[85] Under the Code, the Authority controls the content of the TPM, as it should as the industry regulator.

[86] The respective roles of the Authority and the Commerce Commission do not undermine the lawfulness of the Authority's 2020 Decision either. The Commerce Commission is responsible for the price-quality regulation of Transpower and approving Transpower's major capital expenditure as a natural monopoly. The Authority is responsible for regulating the whole of the electricity industry. In relation to the 2020 Decision, the Authority is given explicit statutory responsibility for the initial guidelines for, and final shape of, the TPM. That must be seen in the context of the Authority's wider objective explained above. The Act provides the framework for regulation of the electricity industry. The Authority's functions are set out in s 16, including monitoring, investigating and enforcing compliance with the Electricity Industry Act and the Code, undertaking market-facilitation measures, industry and market monitoring, contracting for market operation services and, potentially, itself performing the functions of the market administrator.

[87] The understandings of the Authority and the Commerce Commission of their respective roles is illustrated by their 2010 Memorandum of Understanding.[70] They recognise they share common interests in relation to their respective statutory functions. They set out their understanding of those roles in relation to monitoring and promoting competition and regulating lines services, including their common interest in regard to the regulation of Transpower. Ms Stockman's evidence is that the Authority worked with the Commerce Commission to ensure there were no issues with the Decision from its perspective and was aware of Transpower's role in making the 2020 Decision.[71]

[88] Manawa makes what Mr Hodder submits is a related but separately pleaded point about peak pricing and nodal pricing. The point is that peak pricing is vital in providing a signal that discourages peak demand in an efficient TPM. Mr Hodder submits there is no credible basis for removing peak pricing signals completely and

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70 Electricity Authority and Commerce Commission *Memorandum of Understanding between the Electricity Authority and the Commerce Commission* (December 2010) at [3]–[15].

71 Stockman Affidavit at [4.16]–[4.20].

relying only on nodal pricing. For that reason too, he submits that the Authority has misinterpreted s 15.

[89] But this, like other aspects of Manawa's submissions, simply suggests Manawa does not like the Authority's decision. The existence of views in a regulated industry that are opposed to regulatory decisions does not render the decision unlawful. The Authority has given its reasons for its decision. It considers the previous charging regime "inefficiently suppress[ed] electricity consumption at peak times and distort[ed] choices between transmission infrastructure, demand-response or generation options".[72] It considers the RCPD was a significant cause of year-to-year unpredictability and its removal would further its statutory objective.[73] The decision is not unreasonable in terms of the *Hu* test. It is not the Court's role to second-guess the Authority's decision on this basis.

[90] Similarly, Mr Hodder submits that "damning critiques" of the Authority's benefit-based charges illustrate the Authority's misinterpretation of s 15. He points to Covec's critique that the benefits-based charges will not send the desired price signals and that expert reports weigh heavily against the proposal promoting the long-term benefit of consumers.[74] He points to Transpower's 2019 submission to the Authority that the proposed benefit-based charges method "has a non-trivial risk of undermining New Zealand's climate change objectives and being detrimental to the long-term benefits of consumers".[75] These submissions also reflect disagreement with a policy decision that the Authority was entitled to make, in the absence of unreasonableness.

[91] Mr Millard contrasts the Authority's 2020 Decision to base the residual charge on the grossed-up AMD with comments by the Authority in papers in 2016, when it identified this option, that militate in a different direction. But previously identifying countervailing relevant considerations does not prevent the Authority from making the decision it did at law. The same is true of Mr Millard's criticisms of the residual charge as being inconsistent with each of the three limbs of s 15. Each of the arguments he

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72 2020 Decision document at [4.18(c)]

73 At [4.19(c)(v)].

74 John Small *Expert Review of Expert Reviews of Transmission Pricing Methodology Reform Proposals* (Covec Ltd, 23 February 2017) [Covec Report] at [39]-[44]

75 Transpower "Cross-submission: transmission pricing review 2019 issues paper" (31 October 2019) at 1.

makes is a consideration relevant to the three limbs. But they do not collectively or individually render the Authority's 2020 Decision about the residual charge unlawful for being inconsistent with its statutory objective.

Issue 2: Pre-determination and bias

Relevant law of pre-determination and bias

[92] Pre-determination and bias are aspects of decision-making that transgress the principles of natural justice. The right to the observation of the principles of natural justice is recognised by the common law of judicial review and guaranteed by s 27(1) of the New Zealand Bill of Rights Act 1990. The rule against bias requires a decision-maker to be impartial. Pre-determination is where the decision-maker has a closed mind, having already effectively made the decision. It can be seen as a form of bias for that reason. What is required will depend on the statutory and factual context.

[93] In *CREEDNZ Inc v Governor-General*, the Court of Appeal dismissed a challenge based on pre-determination or bias in a decision by the Executive Council under the National Development Act 1979:[76]

(a) Cooke J stated that "if Ministers had approached the matter with minds already made up, the inference would readily be drawn that they could not genuinely have considered the statutory criteria when advising the making of the Order in Council".[77]

(b) Richardson J held that the Act assumed that the Governor-General in Council had the ability to review the application without a closed mind, even though an earlier Ministerial decision, and considerable consultation and negotiation with the applicant, was required to initiate the application.[78] He stated that "[w]hat is fair in a given situation must depend on the circumstances" and that, to set a decision aside on the ground of bias:[79]

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76 *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172 (CA).
77 At 179.
78 At 192–193.
79 At 194.

> … 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.

(c) McMullin J stated:[80]

> It would be surprising if they did not have views. But that was not a disqualification so long as they approached the application with an open mind bonda fide prepared to consider any contrary views on their merits.

Submissions

[94] Mr Hodder, supported by Mr Millard, submits:

(a) The Authority has been committed for a decade or so to one "solution" without open-minded consideration or justified rejection of credible options to amend the current TPM. The Authority's early enthusiasm for its solution became entrenched to the exclusion of other options to which it had a closed mind. No doubt decision-making involves taking a provisional view, which is not challenged here. But it did not remain open to persuasion to change course. The Authority did not ask whether some other course was open to it.

(b) The Authority consistently preferred an asset-specific benefit-based charge, ignoring its own expert peer reviews of the 2019 CBA, consistently dismissing views of Transpower, Manawa and a majority of other industry participants and their experts, and failing to engage in active and transparent intellectual dialogue with them. This was pre-determination and was also unreasonable.

(c) The Court will be assisted by independent expert evidence of Professor Jeffrey Rachlinski and Professor Mark Seidenfeld in the field of law and psychology in relation to cognitive bias, including confirmation bias. Mr Hodder submits this is not a new standard of review but an

[80] At 214.

explanation of how a long-standing standard incorporates issues that go to what constitutes an open mind. In summary:

(i) Professor Jeffrey Rachlinski, of Cornell Law School, outlines the influence of cognitive bias on expert decision-makers in psychology. In his opinion, what he identifies as the Authority's failures to fully evaluate the implications of the existing pricing model, alternative reform options and assess objections to their own proposed model "are characteristic of the patterns of biased decision making that the research identifies as inconsistent with the kind of full rationality required by law of the [Authority]";[81] and

(ii) Professor Mark Seidenfeld, of Florida State University, addresses how the psychology of decision-making applies to the structure and processes of regulatory agencies. That includes the role of "confirmation bias" which he characterises as "a tendency to confirm an initial hypothesis in the face of later-acquired disconfirming evidence, even though the hypothesis may not have been based on substantial or reliable evidence".[82] He suggests the Authority's engagement of Professor Hogan in 2020 did not counteract confirmation bias.

[95] These opinions are supported by a report by Dr John Small of Covec in 2017 for nine stakeholders, including Manawa. Dr Small suggests that the Authority's definition of the existing TPM as including the absence of its preferred solution was compelling evidence of a problem.[83] He said:[84]

> 57. This review has left with me the strong impression that the EA has not been heavily influenced by the criticism these experts have made of its proposals. While there have been many consultation papers since the first issues paper, and the EA's proposals have changed over that time, the original firm commitment remains to eliminating the HVDC charge and introducing a

81 Affidavit of Jeffrey Rachlinski, 7 April 2021, at [12].
82 Affidavit of Mark Seidenfeld, 5 April 2021, at [13].
83 Covec Report at [1.2.2].
84 At [1.5].

> node-based beneficiaries-pay charge for all new assets and a subset of existing assets. In the face of strong and detailed criticism from many different experts, the EA has modified its proposals, shifting wealth around between different participants, but never deviating from these two consistent goals, neither of which emerged from a disciplined policy development process.

[96] Mr Laurenson, for the Authority, submits there is absolutely no evidence of pre-determination or bias having affected the Authority's decision. There is significant evidence to the contrary; in the extensive consultation process over a prolonged period, consideration of submissions, revision of approach and multiple expert individuals being involved in the decision. Manawa is attempting to invent a new decision-making standard based on the opinions of two United States law professors, who make incorrect factual assertions and misread a tiny fraction of the documentary record, without regard to the law of judicial review or the practicality of their requirements.

[97] Dr Every-Palmer, for Meridian, supports the Authority's submissions. He submits no good reasons have been articulated as to why the Court should recognise the ground of review proposed by Manawa, and good reasons exist not to do so. It would reverse the onus of proof, impose new process requirements on decision-makers, and create a thinly disguised merits assessment. He further submits that, applying the tests put forward by Professors Rachlinski and Seidenfeld, there is a high likelihood their own views suffer from cognitive bias.

Was the 2020 Decision biased or pre-determined?

[98] Section 13 of the Act requires that the Authority is composed of members with knowledge, experience and capability in the electricity industry, consumer issues and business generally. Section 14 requires that no member may represent or promote the interests of any particular industry participants. That requirement of independence is a legislative indication that bias in favour of, or against, any particular industry participants would not be acceptable.

[99] But there is no evidence of bias or closed minds on the part of the staff of the Authority, the four Board members who made the 2020 Decision or the three other board members who had previously been involved in more than eight years of

consultations that preceded the decision.[85] The fact that the Authority tended to consistently hold a particular view, or disagreed with others' views about a significant proposed regulatory change to the allocation of transmission costs, is not, in itself, evidence that the members of the Authority were biased or not open to persuasion.

[100] There are no smoking emails showing closed minds. Rather there were many meetings, discussions, requests for further information, reviewing of documents, and issuance of responses to criticisms. Appendix B of the 2020 Decision itself provides the Authority's views on the alternative proposals offered by submitters. And the Authority did make some changes to its position over the course of the consultation process including to: the method of assessing benefits; moving from a modified RCPD residual charge to a fixed-like charge based on maximum demand of individual customers; proposing and withdrawing a deeper connection charge and a LRMC charge; and adding a transitional congestion charge.

[101] The process for amending the TPM, which is set out in the Code, envisages consultation by the Authority about the Guidelines. The consultation has been exhaustive. In the process of that consultation, the Authority can be expected to make proposals and express views about their advantages and disadvantages. There is nothing to prevent it, having heard others' such views, from deciding to pursue a proposal which it had initially proposed. Indeed, if it considers that proposal best meets its statutory objective, it is obligated to do so.

[102] The evidence is that Authority staff were encouraged to raise questions or doubts throughout the process.[86] Board debates are described as "robust" and "lively".[87] The evidence of the new Board members, appointed in 2017, is that they did not have particular views on these issues before they encountered them at the Authority.[88] Ms Stockman undertook considerable further personal research into the issues in order to critically consider the Authority's thinking.[89] Mr Dawson also undertook independent research.[90] After consultation in 2012, the Authority paused

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85 Paterson Affidavit at 69.
86 At [3.12].
87 At [3.11]; and Stockman Affidavit at [3.22]–[3.23].
88 Stockman Affidavit at [1.9]; Dawson Affidavit at [2.4]–[2.5].
89 Stockman Affidavit at [1.11], [3.19], [5.5]–[5.19].
90 Dawson Affidavit at [2.6]–[2.8], [3.15]–[3.18].

and produced a series of working papers exposing its detailed thinking in relation to key points. The Authority also paused to reassess their position after the discovery of errors in the CBA in 2017 and the appointment of new board members. Ms Paterson characterises the decision this way:[91]

> The decision I reached on the TPM Guidelines was based on the hard work of Authority staff, comprehensive advice given to the Board by staff and others, detailed submissions received from a wide range of industry participants that provided a large number of perspectives on the issues, my own detailed consideration and analysis of all of these inputs and a significant amount of debate and challenging discussion between all Board members. I have been fortunate to have been part of an exceptionally high calibre Board since the Authority's establishment. Without exception, the Board members involved in the TPM project have been thorough, diligent and forthright in discussions with the Authority's statutory objective at the fore of our work.

[103] Mr Hodder points to a series of circumstantial points about the consultation process, and the opinions of the two American professors and Dr Small:

(a) The Authority's erroneous approach to s 15 consistently led to (only) an asset-specific benefits-based approach to the TPM. It did not clearly define the problem or acknowledge its proposal did not solve some of the problems.

(b) No issues paper was ever withdrawn, industry and expert submissions and reports went without response or engagement.

(c) The views of Transpower and Manawa and other industry participants were consistently dismissed and the Authority failed to engage in active and transparent intellectual dialogue with them.

(d) The Authority ignored its own expert peer reviews of the 2019 CBA that are still relevant to the 2020 CBA. It relied on circular reasoning in insisting the CBA was sound.

(e) The Authority consulted on its problem definition well after it had consulted on the solution.

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91 Paterson Affidavit at [1.7].

(f) Conferences were highly managed by Authority staff.

(g) Workshops and oral hearings were extremely restricted and not receptive to views contrary to the Authority's thinking.

(h) The Authority travelled only to the United States rather than London.

(i) No expert advisory groups were appointed.

[104] In its submissions, the Authority makes a point-by-point rejection of each of these points. But none of them, either alone or in combination, amount to proof on the balance of probabilities that the Authority was biased or pre-determined its 2020 Decision.

[105] The views of Professors Rachlinski and Seidenfeld are interesting but not helpful in relation to either bias or pre-determination in law. Confirmation bias is a well-known phenomenon in the fields of psychology and behavioural economics. Despite its name, it is more related to pre-determination that other forms of bias. But positing the presence of confirmation bias in a decision-making process is not the same as determining a decision-maker is biased or has pre-determined their decision for the purposes of judicial review in New Zealand. That is consistent with Dr Every-Palmer's submission that Professor Rachlinkski's evidence is unsafe on the same grounds.

[106] These psychological experts' opinion evidence, based on part of the decision-making record, do not show there was either bias or pre-determination or unreasonableness by the Authority. The furthest they go is to make criticisms of the logic of the Authority's proposals and decision-making. And they suggest that the evidence supports the presence of confirmation bias amongst the members of the Authority in making the 2020 Decision. But Professor Cooper, for the Authority, points out that it is impossible to distinguish the marginal impact of confirmation bias on a regulator's policy choices.[92] I agree. The Authority's 2020 Decision is also consistent with the members of the Authority (who changed at various times) forming

[92] Affidavit of James Cooper, 7 June 2021, at [5.2] – [5.4].

a view that it continued to consider was the best regulatory solution, consistent with its statutory objective, to the issues it had identified.

[107] Conceivably, cognitive bias theory could be useful in helping to identify prophylactic techniques for a decision-maker to insulate themselves against accusations of legal bias. But they are not required by the legislation or by the law of judicial review. Professor Seidenfeld suggests that the threat of judicial review itself incentivises agencies against engaging in the pathologies that can lead to decision-making biases.[93] Here, the Authority was well aware of both the prospect of judicial review and Manawa's arguments about confirmation bias. Mr Farmer QC, for Manawa (then Trustpower), made reasonably full submissions on the issue in Manawa's unsuccessful judicial review of the Authority on the ground of inadequate consultation in 2016. Cull J explicitly noted that there would be further opportunities in the statutory process for such challenges, as there have been.[94]

Issue 3: Cost-benefit analysis

The use of cost-benefit analyses

[108] The Authority prepared several CBAs in relation to its Decision:

(a) In 2012, the Authority undertook a CBA for the changes it then proposed, resulting in an estimated benefit of around $173 million. This was the subject of criticism by those opposed to the proposal. The Authority subsequently produced a working paper on how it proposed to use CBAs.

(b) In 2016 the Authority commissioned from Oakley Greenwood a further CBA for its new proposals, resulting in an estimated benefit of $213 million. This was the subject of criticism by those opposed to the

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93 Mark Seidenfeld "Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rule-making" (2002) 87 Cornell Law Review 476 at 543–547. Judicial review is consistent with the three of five specific criteria Professor Seidenfeld suggests mechanisms to minimise confirmation bias must meet; see Reply Affidavit of Professor Mark Seidenfeld, 6 July 2021, at [3]

94 *Trustpower Ltd (formerly Bay Energy) v Electricity Authority* [2016] NZHC 2914, [2017] 2 NZLR 253 at [60] – [66], and [119] – [121].

proposal. In response to the criticism, the Authority first revised the CBA and then, in 2017, withdrew the CBA.

(c) In 2019, the Authority produced another CBA to support its 2019 Issues Paper, resulting in estimated net benefits of $2.7 billion. This was the subject of criticism by those opposed to the proposal. Transpower's expert review of the 2019 CBA by Axiom Economics concluded it was "irredeemably flawed" with errors which "serve to undermine completely the reliability" of the net benefit estimate. Manawa's expert review by HoustonKemp reached similar conclusions.

(d) In 2020, in response, the Authority revised its CBA, resulting in a downwards revision of its headline benefit figure to $1.3 billion. This is the figure it emphasised in the 2020 Decision that is under challenge.

Relevant law of cost-benefit analysis

[109] Under s 38 of the Act, the Authority is empowered to amend the Code, subject to s 39. Section 39 provides:

> **39 Consultation on proposed amendments**
>
> (1) Before amending the Code, the Authority must—
>
> (a) publicise a draft of the proposed amendment; and
>
> (b) prepare and publicise a regulatory statement; and
>
> (c) consult on the proposed amendment and the regulatory statement.
>
> (2) The regulatory statement required for a proposed amendment to the Code must include the following:
>
> (a) a statement of the objectives of the proposed amendment:
>
> (b) an evaluation of the costs and benefits of the proposed amendment:
>
> (c) an evaluation of alternative means of achieving the objectives of the proposed amendment.
>
> (3) Despite subsection (1), the Authority need not comply with subsection (1)(b) or (c) if it is satisfied on reasonable grounds that—

(a) the nature of the amendment is technical and non-controversial; or

(b) there is widespread support for the amendment among the people likely to be affected by it; or

(c) there has been adequate prior consultation (for instance, by or through an advisory group) so that all relevant views have been considered.

Submissions

[110] Mr Hodder, for Manawa, submits:

(a) The Authority is required by s 39(2)(b) to evaluate the costs and benefits of the proposed amendment and alternative means of achieving the objectives. This requires both quantitative and qualitative analysis and a sufficient and competent cost-benefit analysis (CBA).

(b) The Authority failed to meet those requirements. First, neither the 2019 CBA nor the 2020 CBA properly identified or evaluated all credible options for achieving the objectives of the TPM, or all the relevant costs and benefits of the proposed Guidelines. A CBA was not even used to identify the most beneficial option for reform. Second, the quantified benefits are from wealth transfers and their magnitude is simply implausible.

(c) Mr Hodder relies on expert economic evidence of Mr Young from HoustonKemp to submit that fundamental errors in the Authority's CBA entirely undermine its claims of $1.3 billion of net quantified benefits to consumers from the Guidelines over the next 30 years.

(d) The fundamental underlying problem with the benefit-based charge is that, on the evidence, it is impossible for Transpower to forecast private benefits for 25 to 30 years, which points in the direction of arbitrariness and undermines the case for change. There is no consensus in favour of the charge but there are cogent critiques by Transpower and Manawa.

(e) This means the Authority failed to take into account relevant considerations and wrongly took into account irrelevant considerations, failing to adhere to proper standards of regulatory decision-making. Mr Hodder goes so far as to submit that the role of a regulatory authority is not to upend the regulatory regime but to maintain it in the absence of clarity that it is broken or could be materially better, about which some degree of consensus and a good CBA could be expected. The Authority put the cart before the horse in terms of rigorous decision-making processes.

(f) In the absence of objective evidence-based decision-making, there is a serious risk of arbitrariness, unintended consequences and undermining the legitimacy of the statutory regime. Mr Hodder relies on an article by Professors Masur and Posner and case law in the United States to submit: there is no lack of institutional capacity in the courts to inquire into and determine whether an agency has utilised CBAs in a full and rigorous way because courts can apply simple logic and even simpler arithmetic;[95] and regulations imposing costs without justificatory benefits involve unlawful arbitrariness.[96]

[111] Mr Millard, for Nova, submits the requirement in s 39 for evaluations and a CBA implies that the Authority needs to undertake proper research into all important aspects of its proposed amendments. The policy behind the requirement is to bring rigour to a process which can create uncertainties, leading to investors requiring a higher rate of return. The Authority cannot make important assumptions without checking whether they are properly based. It must evaluate alternative methodologies. Mr Millard accepts that the impact of the totality of the new regime, and the breakdown of charges, was modelled. But he submits the residual charge is being imposed without any cost-benefit analysis, contrary to s 39(2)(b) of the Act. The failure to follow the procedure has led the Authority to make a decision on the residual charge that is unsupported by evidence, research or analysis, including a CBA.

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95 Jonathan S Masur and Eric A Posner "Cost-Benefit Analysis and the Judicial Role" (2018) 85 U Chi L Rev 935 at 949 and 960.

96 Cass R Sunstein "Cost-Benefit Analysis and Arbitrariness Review" (2017) 41 Harv Envtl L Rev 1.

[112] Mr Dunning, for Fonterra, also criticises the Authority for not further investigating or analysing the alternative approaches. He submits that the CBA only modelled the total proposal against the status quo and on the assumption the residual charge would be imposed on load. He relies on *Godfrey Hirst NZ Ltd v Commerce Commission* to submit that a regulatory body must attempt, so far as possible, to quantify rather than rely on purely intuitive judgment.[97] The residual charge could have been quantitatively assessed but was not. The Authority took a more intuitive approach than was appropriate to satisfy s 39(2). There has not been robust evidence and analysis of who will pay more under the residual charge, and of the relative costs and benefits. If a decision-maker is going to place great weight on efficiencies, they should perform a CBA and attempt to measure them quantitatively and assess them under various scenarios. Mr Dunning submits this is a simpler complaint than that by Manawa, because no CBA of the residual charge was performed at all. That is an insufficient basis for a decision that is inconsistent with the imposition of the benefit-based charge on generation.

[113] Mr Laurenson and Ms Stevens, for the Authority, submit it clearly considered all the alternatives identified by Manawa, which really takes issue with the weight and degree of analysis of each option. Quantitative analysis of all options is not required by legislation or case law and would be entirely impractical. There are no legal requirements as to what its quantitative CBA should have looked like. The question is whether the CBA is so flawed as to render the overall decision unreasonable. Manawa cannot show it is, given the wealth of expertise involved in its production, the robust process followed, the limitations of quantitative analysis, and the endorsement of the Authority's approach by an international expert on transmission CBAs, Mr Mann. The Authority did conduct a CBA, accounting for its approach to the residual charge to understand how a new TPM would affect the industry. It did not compare a net versus gross approach but modelled its proposal as it stood. That was more than it was required to do. It considered whether netting off or including embedded generation would better correlate with ability to pay. It was not required to model the effect on existing investments or conduct a case by case analysis.

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[97] *Godfrey Hirst NZ Ltd v Commerce Commission* [2016] NZCA 560, [2017] 2 NZLR 729 at [35]; citing *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429 (CA) at 447 (per Richardson J).

[114] Dr Every-Palmer, for Meridian, adopts the Authority's submissions. He also defends the expert evidence of Mr Mellsop, for Meridian, as reinforcing the conclusion that the Authority's CBA was reasonable.

Cost-Benefit Analysis

[115] Strictly speaking, s 39 of the Act does not apply to the Decision on the Guidelines but to a Code amendment. The Decision on the Guidelines is not itself a Code Amendment. But it leads to a Code amendment, so I deal with it on that basis, as did the Authority in its submissions.

[116] The text of s 39 requires that, in amending the Code, the Authority must prepare, publicise and consult on the proposed amendment and a regulatory statement. The regulatory statement must include "an evaluation of the costs and benefits of the proposed amendment" and "an evaluation of alternative means of achieving the objectives of the proposed amendment". But the Authority is not required to prepare, publicise and consult on the regulatory statement, or consult on the proposed amendment, if "there has been adequate prior consultation … so that all relevant views have been considered".

[117] The statutory text does not explicitly require quantitative analysis of costs and benefits or alternatives. That contrasts with other statutory provisions for economic regulation. For example, s 52I of the Commerce Act (as amended in 2008) imposes obligations on the Commerce Commission to conduct qualitative and quantitative analysis in conducting an inquiry into whether and how to regulate particular goods or services. It states, relevantly:

> (2) As part of an inquiry into particular goods or services, the Commission—
>
> …
>
> (b) must, when carrying out the analysis required by section 52G(1)(c), undertake a qualitative analysis of all material long-term efficiency and distributional considerations.
>
> (3) As part of that qualitative analysis, the Commission must, as far as practicable,—

(a) quantify material effects on allocative, productive, and dynamic efficiency; and

(b) quantify material distributional and welfare consequences on suppliers and consumers; and

(c) assess the direct and indirect costs and risks of any type of regulation considered, including administrative and compliance costs, transaction costs, and spill-over effects.

(4) As part of an inquiry, the Commission must, when considering which type of regulation might be imposed,—

(a) assess the benefits of imposing different types of regulation in meeting the purpose of this Part against the costs of imposing those types of regulation; and

(b) consider what would be the most cost-effective type or types of regulation in the circumstances.

[118] In *Telecom Corporation of New Zealand v Commerce Commission*, as one of five members of the Court of Appeal, Richardson J made an observation about a statutory requirement on the Commerce Commission to assess the likely public benefit and detriment from a business acquisition by Telecom:[98]

> The third [observation] is the desirability of quantifying benefits and detriments where and to the extent that it is feasible to do so. The commission encourages applicants to quantify anticipated public benefits. In this case certain major efficiency gains were quantified for Telecom at some $75 m. While both the commission and the Court did not accept elements in that quantification, both bodies considered that there would be significant efficiency gains if Telecom had management rights over both AMPS-A and AMPS-B. In those circumstances there is in my view a responsibility on a regulatory body to attempt so far as possible to quantify detriments and benefits rather than rely on a purely intuitive judgment to justify a conclusion that detriments in fact exceed quantified benefits.

[119] The implications of this were further considered by the Court of Appeal in *Godfrey Hirst NZ Ltd v Commerce Commission.*[99] The Court considered an argument that the Commerce Commission was bound to quantify the indirect benefit to the public and any corresponding detriments, before it could be satisfied that a business acquisition should be authorised. The statutory requirement was that the Commission

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98 *Telecom Corporation of New Zealand v Commerce Commission,* above n 97, at 447.

99 *Godfrey Hirst NZ Ltd v Commerce Commission,* above n 97, at [30] (footnotes omitted in subsequent quotation).

must be satisfied that the acquisition will result, or be likely to result, in such a benefit to the public that it should be permitted. The Court held:

> [35] The Commission correctly referred to judicial guidance. It highlighted in particular the view of Richardson J in *AMPS-A* CA that a regulatory body such as the Commission must "attempt so far as possible to quantify benefits and detriments [of the acquisition to the public] rather than rely on a purely intuitive judgment". This guidance may imply a dichotomy between strict objectivity and undisciplined subjectivity. It must not be allowed, however, to obscure the Commission's primary function of exercising a qualitative judgment in reaching its final determination. The Commission is a specialist body whose members are appointed for their particular expertise across a range of disciplines and who are expected to exercise their collective knowledge, skill and experience in making what is essentially an evaluative judgment on any application.
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> [36] Mr Dixon's submissions assume that the mathematical quantification of efficiencies will determine the Commission's assessment under s 67(3)(b). However, the statutory framework and legislative history shows that the Commission's determination must have regard to efficiencies when weighed together with long-term benefits to consumers, the promotion of competition, and any economic and non-economic public benefits at stake in the relevant market. Where possible these elements should be quantified; but the Commission and the courts cannot be compelled to perform a quantitative analysis of qualitative variables. This Court's observation in *New Zealand Bus Ltd v Commerce Commission* is apposite. When applying the prohibition under s 47(1) against business acquisitions that would have the effect of substantially lessening competition, the Court stated:
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> > It is true that some data will be weighed or considered in deciding whether the law is violated and some will not. Yet all the suggestions about more systematic ways to inform that judgment are merely techniques, or hand tools. In short, this Court should not allow a kind of false scientism to overtake what is in the end a fundamental judgment which is required by the Act itself.
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> [37] Axiomatically, the Commission is better equipped than the courts to apply "more systematic ways" to inform its evaluative judgment. But the dangers of "false scientism" survive. The Commission cannot be expected to render all relevant factors in quantitative terms. Nor should its qualitative judgment be reserved as a mere backstop. In this respect, we disagree with the framework outlined and applied in the High Court in Hirst's 2011 appeal. We endorse the Court's summary of the Commission's "standard practice" relating to quantifiable factors:
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> > [53] … Consistent with economic theory, detriments (welfare losses) are quantified (as far as practicable) under three categories of efficiency losses: allocative, productive and dynamic. Efficiency benefits (welfare gains), recognised pursuant to s 3A, are also quantified. Other benefits claimed by a party seeking an authorisation are quantified if possible. The Commission then forms its view on the range, magnitude and likelihood of all the claimed benefits (those quantified and any that are not quantifiable).

> [38] However, in the light of the statutory scheme, we are satisfied that a quantitative analysis of this nature cannot dominate the Commission's approach. In cases where the Commission is able to undertake parallel assessments of a qualitative and quantitative nature, each must be informed by and ultimately integrated within the Commission's determination by exercising its institutional expertise. Qualitative factors can be given independent and, where appropriate, decisive weight; it follows that non-quantifiable factors need not assume a merely supplementary function in a largely arithmetical exercise, as supposed in contemporary practice. Richardson J's concern to avoid "[p]ure speculation … and simple intuition" remains valid. This appeal demonstrates, however, the dangers arising from a narrow focus on quantified efficiencies — it invites technical dissection of discrete components of determinations which are beyond reproach when viewed as a whole.
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> …
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> [41] … The statute does not allow for imposition of an artificial construct or gloss on what is a deliberately broad and evaluative test. The Commission is to have particular regard to any efficiencies which will result from the transaction within a wider quantitative and qualitative assessment. There is no warrant for imposing a rigid condition on its powers to determine whether an acquisition is in the public benefit by requiring the Commission to undertake an economically impossible and ultimately meaningless analysis.

[120] That analysis effectively applies here. I accept that a CBA can be a useful tool of economic and financial analysis of different policy options. The Treasury's 78-page *Guide to Social Cost Benefit Analysis*, to which Mr Hodder referred, makes that clear.[100] A CBA can bring quantitative discipline to policy choices and require assumptions to be made explicit. But a CBA is also only as good as the assumptions by which the quantification is undertaken. It is inherently difficult to quantify some sorts of intangible benefits. The Treasury's *Guide* makes such limitations clear too.[101] Quantification of costs and benefits can be a useful element of good regulatory practice. But there is more to good regulatory practice than quantification.

[121] The sort of "false scientism" identified by the Court of Appeal is always a risk of quantification. Quantification, and its underlying assumptions, can always be critiqued, as the process here shows. That just illustrates that a CBA is a tool, to be employed along with other tools and techniques of regulatory economic policy analysis. The Authority's 2020 Decision involved its members using the expertise for which they were appointed to exercise a qualitative evaluative judgment. It considered

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100 The New Zealand Treasury *Guide to Social Cost Benefit Analysis* (July 2015).
101 At [182].

a quantitative CBA of the proposed reform issued with the 2019 Issues Paper. It considered trenchant critiques of that CBA and produced a revised CBA to accompany its Decision. But, as the Court of Appeal said in *Godfrey Hirst*, a quantitative analysis cannot dominate the Authority's approach.

[122] Most importantly, the Act does not explicitly require quantification at all, let alone quantification to a particular standard. Neither does it require a separate quantification of each element of the Guidelines, such as the residual charge. Indeed, as a residual charge there is a rationale for analysing it as part of the overall proposal. This is the fundamental problem with these challenges: the Act does not require what the challengers say is required. Section 39 emphasises the importance of consultation over a regulatory statement involving an evaluation of costs and benefits. Under s 39(3)(c), if the Authority is satisfied on reasonable grounds that all relevant views have been considered in adequate prior consultation, no preparation and publication of a regulatory statement involving evaluation of costs and benefits is even required.

[123] I accept the implied compliment to the New Zealand Courts in Mr Hodder's submission that (even, I infer) judges can apply simple logic and even simpler arithmetic. I have sympathy for the views of Professors Posner and Masur that United States judges have been correct to require agencies to justify regulations by reference to valid CBAs. Economics is, after all, applied common sense. But there must be a legal basis for judges to consider the merits of economic arguments. I am a qualified economist who was employed as an Economic and Financial Analyst in my early career. It is tempting to enter into the economic debates engaged in by the parties. But that is not my role as a judge. Given the text, context and purpose of the Act, it is not the Court's role to imply into the legislation requirements as to the nature or standard of cost-benefit analysis that the Authority must engage in. Parliament could so provide. But it has not.

[124] The Act delegates the 2020 Decision on this aspect of regulation of the electricity industry, along with other aspects, to the Authority which is established as an expert body, advised by expert staff and consultants. It requires the Authority to consult, as does the common law of judicial review. But the Authority's exhaustive consultation process is not challenged. Given that, judicial interference in the

requirements on its economic analysis on the basis of illegality against the Act would simply represent an additional compliance cost, and source of uncertainty, to the regulatory process. Or, as Kós J said in *Chorus Ltd v Commerce Commission*:[102]

> Economic regulation, on the other hand, is notoriously difficult to prescribe, given the extraordinary variety of business practices, markets and circumstances that fall to be addressed. The reality of economic regulation is that statutes present a chart of medium scale at best. The exact route to be taken is left to the judgment of the navigator, the decision-maker. Usually, as here, an expert tribunal for that very reason. In such cases, the decision-maker may have an "area of judgment".

[125] That is consistent with the statute here. Although the statutory context is not propitious for judicial standard-setting for economic regulation, the ultimate baseline judicial requirement of such decisions is that they may not be unreasonable. As explained above, the three scenarios identified in *Hu* are where the decision is not supported by any evidence, or the evidence is inconsistent with the decision, or the only reasonable conclusion contradicts the decision. But the criticisms raised here do not rise to that level. I respond to the most salient specific points.

[126] Mr Young provides an expert critique of the Authority's CBA. Against that, Mr Mann of FTI Consulting and Mr de Raad an economic consultant to the Authority gives expert evidence for the Authority and Mr Mellsop of NERA gives expert evidence for Meridian that dispute Mr Young's evidence and support the Authority's CBA. The following gives a flavour of key issues:

(a) Mr Young criticises the Authority's choice of modelling methodology and the sensitivity of its results to assumptions. Mr de Raad defends it, saying the Authority considered it important to use a methodology that captured changes in demand arising endogenously from the proposal. Mr Mann considers that doing so was sensible, the results realistic and the sensitivity assessment appropriate.

(b) Mr Young considers the Authority's CBA includes an estimated change in consumer surplus from lower average electricity prices, caused by removal of the RCPD charge, that involves a wealth transfer from

[102] *Chorus Ltd v Commerce Commission* [2014] NZHC 690 at [15] (footnotes omitted).

suppliers to consumers, rather than a net benefit, which should be excluded from a CBA. The Authority's assumption that lower wholesale prices would reflect lower wholesale costs is implausible. The Authority's modelling of there being higher consumption at peak times could give rise to higher costs not lower costs. Mr de Raad explains the approach of the Authority to discount for the wealth transfer factor and other assumptions and calculations made in the CBA accompanying the 2020 Decision, in response to the same criticisms of the 2019 CBA. Mr Mann considers Mr Young's criticisms are based on a misunderstanding of the impact on the wholesale electricity market of a new TPM based on the Guidelines. He demonstrates that removal of the RCPD leads to a lower price to consumers but an increased price to suppliers, which increases supply. Mr Mellsop's opinion is that the increase in consumer surplus is a mixture of efficiency gains and wealth transfers and that Mr Young considerably overstates the extent of any wealth transfer.

(c) Mr Young considers there was a failure to evaluate the proposals against a range of meaningful alternative options, with some alternatives being eliminated on the basis of a qualitative assessment only. Ms Stevens, for the Authority, submits that the decision-making record shows that it gave extensive consideration to alternatives and it was not required to give conduct any quantitative CBA for all options, especially given the quality and extent of its qualitative analysis.[103]

(d) Mr Young considers generators and distributors costs, in providing capacity to meet estimated increases in peak demand, are incorrectly excluded. He considers Transpower's transmission costs are underestimated because they are based on historical data. Mr de Raad explains historical transmission cost data was used to formulate a relationship between demand and transport costs and then estimate

[103] The Authority's submissions replicate and amend, in nine pages, Table 4 of Manawa's submissions explaining what alternatives were considered by the Authority. See Electricity Authority's Submissions, at 134–142.

forward. He explains how the Authority considered increased generation investment costs would be captured, which Mr Mann considers reasonable. Mr Mann rebuts Mr Young's other criticisms. Mr Mellsop considers these costs are immaterial, the distribution costs were considered (though not quantitatively) and the transmission costs were appropriately modelled.

(e) Mr Young considers assumptions in the Authority's 2019 CBA, that the proposal would deliver more efficient outcomes valued at $145 million, are not supported by any reliable evidence. Mr Mann explains why he considers Mr Young's criticisms are misconceived. Mr Mellsop considers there are investment efficiencies in that the benefit-based charge will improve locational decisions, transmission investments will be subject to greater scrutiny and there will be greater certainty for investors. He conducts two "plausibility tests" of the benefits of more efficient grid use.

[127] A number of Mr Young's criticisms have force. So do the responses. Good points are made on both sides. This amounts to a contest between experts. The merits of the criticisms of the CBA are not so one-sided as to impugn the 2020 Decision. And the CBA was only one tool supporting an evaluative judgment by the Authority. It was subject to, and known by the Authority to be subject to, limitations and aggressive debate between experts after consultation.[104] None of the challenges to the CBA persuade me the Decision is close to unreasonable. Manawa has not been able to demonstrate, on the balance of probabilities, that the Authority's decision is not supported by any evidence, or the evidence is inconsistent with the decision, or the only reasonable conclusion contradicts the decision.

Issue 4: Other challenges to the residual charge

[128] In addition to the challenges to the residual charge amongst the above issues, Nova and Fonterra challenge the residual charge on other grounds. Fonterra is most

[104] Stockman Affidavit at [7.14] and [9.29]; Dawson Affidavit at [3.6]–[3.10]; Paterson Affidavit at [10.5].

concerned with the imposition of the residual charge on load customers (such as itself). Nova is concerned with the charge being based on grossed-up Anytime Maximum Demand (AMD), which includes electricity loads supplied by co-generation (such as it supplies), behind the point of connection with the national grid. The Authority makes the point that Nova and Fonterra challenge the residual charge for not reflecting the benefit the participants receive from the grid while Manawa submits that a charge that does reflect benefits is unreasonable and unlawful. Meridian submits that the challengers seek to draw the Court into the economic substance of the Authority's decision.

The residual charge

[129] The residual charge will be the most significant charge in the early years of the regime. It is expected to collect 70 per cent of the total interconnection charges initially, declining to 20 per cent by 2047.[105] This reflects that the fact the benefit-based charge, which will largely apply to new investments, and connection charges will ramp up over time. However, cls 54 and 62 of the Guidelines require Transpower to extend the benefit-based charge to additional existing investments, reducing the initial residual charge, if it considers that would better meet the Authority's statutory objective. Clause 2 of the Guidelines also allows Transpower to propose a TPM that differs in the details but not the intent of Guidelines regarding the residual charge.

[130] The residual charge recovers Transpower's overheads or unallocated fixed costs – a vexed issue in the economic regulation of natural monopolies – and the sunk costs of existing investments. It is set on the basis of each transmission customer's historical average AMD at each of its grid exit points. It is calculated on historic use of electricity (from the grid and not from the grid). It is adjusted over time, with a lag, based on the customer's gross annual energy usage. The overall aim is to avoid distorting market behaviour, including in the way the RCPD based on load could be avoided by regulatory arbitrage.

[131] As context for the residual charge, it is worth noting:

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[105] 2020 Decision at [10.10].

(a) There is a transitional price cap on transmission charges for each existing load customer's benefit-based and residual charges, which occasioned some argument. Its intention is to reduce price shocks for customers. There was argument at the hearing as to whether the cap necessarily applies to Nova. The Authority submits it does and Nova submits it does not. Perhaps later in the process, given a change in incentives, those positions will reverse themselves. In any case, I do not need to pre-judge the resolution of this issue to decide the case.

(b) The prudent discount policy (PDP) for customers is available where they can show it would be feasible and beneficial for them to bypass the grid inefficiently, because that would cause others to pay more. Alternatively, it is available when the customer's transmission charges exceed the "efficient standalone cost" of the transmission services received. The details of the PDP are left for the TPM.

[132] The Authority consulted on residual charge issues in its 2012 Issues Paper, 2015 Options Working Paper and 2016 Second Issues Paper. In its 2019 Issues Paper, the Authority stated, relevantly:

> Our current preferred option is that the residual should be allocated based on a gross load approach, as gross demand is a better proxy for customers' size (and so their willingness and ability to pay) than net demand. As is discussed in appendix D: decision making framework, allocation of common costs based on this is consistent with what would occur in a workably competitive market. If the operation of distributed generation reduced the residual charge, the allocation would no longer be based on customer size or ability-to-pay. It would also risk creating an artificial incentive for investment in distributed generation over time, in advance of the residual allocator being updated (particularly if updating occurred frequently).

[133] In its 2020 Decision, the Authority stated:[106]

> 10.15 We received submissions both for and against the proposal that the residual charge should apply to load customers only. Some generation customers supported the Authority's position that load customers should pay the residual charge. Some load customers argued the residual charge should be allocated to generation as well as load customers. For example, Vector (citing Compass Lexecon and Professor Bunn) argues that requiring generators to pay the residual charge would not raise energy prices:

[106] 2020 Decision document (footnotes omitted).

> 'Compass Lexecon's 2015 expert report for Vector explains clearly why this view is incorrect. Specifically, the residual charge would be a fixed cost for generators that would not be affected by dispatching decisions, which in a competitive market are determined by marginal costs. It is therefore not the case that generators would be able to simply pass through fixed transmission charges to load customers, at least in the short-run.'

10.16 Professor Bunn submitted that fixed costs would not be simply passed through:

> '…as the transmission charges would be fixed, not short-run marginal, costs, one would not expect those to go through a simple pass through into the energy market. Rather, they would be part of all the annual fixed costs that have to be covered by wholesale market profit contributions…'

10.17 We agree with these statements by Compass Lexecon and Professor Bunn. In a competitive market, if generators paid residual charges they would not take the residual charge into account in short-run dispatching decisions; rather, they would be part of annual fixed costs that have to be covered by wholesale market profit contributions. However, it is not our contention that there would be a simple pass-through into the energy market via generators increasing their wholesale market offers. Rather, we expect investors in new generation would respond to the requirement to cover a larger annual fixed cost by not entering or by delaying their entry until energy prices were expected to cover the additional cost of the residual charge.

10.18 Rio Tinto accepted that new generation should not pay the residual charge — for the reasons set out in the preceding paragraph. However, Rio Tinto argued that the residual charge for existing transmission infrastructure should be paid by existing generators (as well as load customers). As new generators would be exempt from the charge, they would then not factor the charge into their entry considerations, so in that case any residual charge on generators would not result in higher energy prices.

10.19 We understand this line of argument. However, we consider that making the distinction between future and existing generation as suggested by Rio Tinto would be problematic. Allocating a residual charge to existing generation only would, in effect, subsidise new generation, so would distort competition in the generation market (e.g. it would cause existing generation to be less profitable and therefore risk premature exit). It would most likely be seen as regulatory opportunism, heightening uncertainty and so indirectly increasing energy prices.

10.20 Having considered the matters raised in submissions, the Authority remains of the view that it would be consistent with its statutory objective for the residual charge to apply to load customers, but not to generation customers (except to the extent they have load).

[134] The Authority also stated, relevantly:[107]

[107] At [10.34](b).

(a) the benefit-based charge reflects the benefit a customer gains from an investment. If a load customer has generation behind its point of connection, it is likely to receive a lower benefit from new grid investment and this is reflected in a net measure

(b) the residual charge is not intended to reflect a customer's benefit from or burden on the transmission network. Rather, it is to recover remaining revenues in the least distorting manner. In the long-term, it will recover unallocated overheads and costs, for example, Transpower's Human Resources system costs: these costs are not related to grid use and not related to the benefits customers receive from particular grid investments. Residual charges are allocated on a proxy for customers' size and so their ability to pay (much like the way the tax system works). This is not reduced by the presence of generation behind the point of connection.

(c) allocation of the residual charge based on net demand would risk creating an artificial incentive for investment in distributed generation, in advance of the residual allocator being updated (and the shorter the lag with which updating occurs, the worse this inefficient incentive would be). This risk does not present itself in relation to the (largely fixed) benefit-based charge – parties face the cost and benefits of either the grid investment or of their decisions to avoid or minimise grid investment.

[135] The Authority went on to state:[108]

> 10.36 The Authority acknowledges that distributed generation has many benefits for consumers and plays a crucial role in energy markets, including as an alternative to transmission. Distributed generation can be rewarded in various ways (for example, through prices realised in the energy market or from entering a grid support contract with Transpower). In our view, however, it is generally appropriate for generation behind the customer's point of connection to reduce a load customer's liability for the benefit-based charge for future investments, but not for the residual charge (for the reasons explained above). We would observe that over time, we expect the share of total grid costs recovered through the benefit-based charge to materially increase as the share of the residual charge reduces.
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> 10.37 … The Authority's view is that gross AMD is a proxy for customers' size and ability to pay. It is a better measure of size and ability to pay than net demand. In principle, the fact that some customers manage their use of the grid using embedded co-generation should not have the effect of reducing their allocation of the residual charge.
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> …
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> [10.46] We acknowledge the residual charge is not based on the drivers of grid investment. This is intentional. …

[108] At [10.37].

Relevant considerations, irrelevant considerations and unreasonableness

[136] The core of Nova's and Fonterra's challenges revolve around the overlapping grounds of failing to consider relevant considerations, considering relevant considerations and unreasonableness.

[137] Mr Dunning, for Fonterra, submits that despite the Authority's justification for imposing the residual charge on load customers, it is difficult to imagine how the alternative it rejects could result in a greater financial burden on them. Beyond Issues 1 and 3 regarding the statutory objective and CBA, dealt with above, he submits in particular that the Authority:

(a) failed to take into account relevant considerations regarding:

(i) the relative impacts between different types of consumers, including having regard to relative elasticities of demand;

(ii) the relative merits of alternative proposals such as allocating costs to generation and the benefits of encouraging embedded generation;

(b) took into account irrelevant considerations of:

(i) who is most able to pay and least able to avoid paying, referring to tax policy;

(ii) the efficiencies associated with passing costs borne by generation on to load; and

(c) failed to act reasonably as a result of these errors.

[138] Mr Millard, for Nova, submits:

(a) Basing the residual charge on the ability to pay is to give weight to an irrelevant consideration. AMD may not reflect size, which is assumed

to reflect ability to pay. Westpower would suffer the fourth largest increase in charges but Westland is hardly a place with great ability to pay. The assertion that grossing-up better reflects size and ability to pay is wrong. Co-generation is located near the load it services and usually in rural areas, neither of which has anything to do with ability to pay. Ability to pay must be related to the size of the customer base and the affluence of those customers, neither of which have anything to do with embedded generation. The evidence shows the reverse.

(b) The decision regarding the residual charge is unreasonable. Grossing up for load that does not use or impose cost on the grid contradicts the Authority's own statements and reasoning. The Authority considered that allocation of the residual charge based on net demand would risk creating an artificial incentive for investment in distributed generation. That does not apply to existing investment decisions made under a different charging regime and is, in any case, baseless.

[139] Mr Laurenson, for the Authority, submits the residual charge recovers the costs of services provided as explicitly allowed under pt 4 of the Commerce Act. The Authority was entitled to take inspiration from tax policy in identifying an approach to recovering certain overhead and sunk costs in the least distortionary way. The Authority considered the matters the parties say are relevant and the alleged irrelevancies reflect disagreement on the substantive decision. The Authority's approach to the residual charge was fully reasoned and considered, often supported by other submitters, and was reasonable. The change for Westpower, which supported a gross approach, is relatively small once distortionary payments are accounted for. Imposing the charge on load avoided harm to wholesale electricity market competition from delaying entry of new generation and avoiding distorting consumption decisions. Including load supplied by co-generation avoided distortion from parties changing connection arrangements to avoid charges.

[140] Dr Every-Palmer, for Meridian, supports the Authority's submissions. He submits that Fonterra's argument fails to respond to the Authority's concern that imposing the residual charge on generation would create a new distortion by delaying

entry to the generation market and thereby result in higher electricity prices. He submits that Fonterra's preferred Ramsey-pricing approach actually supports imposing the residual charge on load only, the opposite of what Fonterra advocates. He also submits the different purposes of the benefit-based and residual charges explain the differences between them in signalling, and not signalling, prices.

[141] I hold that none of these challenges to the residual charge succeed. The Authority did take into account the considerations Mr Dunning submits are relevant, as the extracts quoted above demonstrate. The Authority considered the position of load with attached co-generation.[109] It invited and considered alternative proposals, including, as identified above, in relation to allocating costs to generation. It explicitly commented on the value of co-generation, which includes embedded generation.

[142] The legislative and factual context suggests that the considerations Mr Dunning or Mr Millard submits are irrelevant are relevant to the Authority's Decision. Allocating costs according to customers' ability to pay, in order to avoid market distortions, is not irrelevant or unreasonable, given the Authority's statutory objective. The Authority's reference to tax policy was by way of pursuing the objective of avoiding distortionary effects of regulation. Neither is it irrelevant to have regard to the efficiencies of passing through costs borne by generation to load customers. The Authority's analysis, quoted above, is explicit that it did not contend there to be a simple pass-through; it takes into account the effect on wholesale prices and on the incentives on investors in new generation. There is nothing in the legislation that prohibits the residual charge being imposed on load or that requires it to be imposed on generation.

[143] The Authority has reasons for its Decision, which it has explained as noted above. It sought to recover overhead and sunk costs while avoiding market distortions. It considered that tying the residual charge to use of electricity, on a gross load approach, would prevent customers from avoiding charges by locating themselves behind the point of connection to the grid. It would avoid transmission pricing favouring co-generation over other forms of electricity supply. Meridian's

[109] 2020 Decision document at [10.37].

submissions were instructive as to the extent of the economic distortions in the current pricing regime. The price cap and PDP are relevant context for the residual charge in the proposed regime. Overall, the reform tries to avoid behavioural distortions and to avoid over-weighting the costs of the benefit-based charge.

[144] The Authority consulted extensively on the issues. It considered the issues raised by submitters, including from Fonterra and Nova. There are reasonable arguments against the residual charge aspect of the Decision. The Authority itself acknowledges the issue is difficult. But there are also reasonable arguments supporting the Authority's position. Nova and Fonterra have not demonstrated unreasonableness as a ground of judicial review in terms of *Hu* or any other authority. They simply disagree with the decision and seek to draw the Court into the economic merits of the Decision. It is the Authority's role, not the Court's, to make judgments on the merits of the competing policy arguments, as emphasised in the quotation from *Unison Networks Ltd v Commerce Commission* earlier in this judgment.

An unlawful tax

[145] Mr Millard submits the residual charge is not related to benefits or costs and is an unlawful tax. He submits a tax cannot be imposed except by clear and express words contained in a statute. Clauses 12.77 and 12.78 of the Code regarding cost recovery do not apply. The power to collect levies in s 128 of the Act has not been invoked. So the Authority cannot impose levies to recover actual costs.

[146] There is, as the Authority's 2012 Issues Paper noted, an analogy between a postage stamp charge and a tax.[110] But the residual charge is not a tax, as Mr Laurenson and Dr Every-Palmer submit. Subject to the regulatory regime in the Act and the Commerce Act, Transpower is expected and empowered to recover its costs. As cl 12.78 of the Code provides, the purpose of the TPM is to ensure that the full economic costs of Transpower's services are allocated. The industry participants who are connected to the national grid are charged for access to the grid. Whether they choose to use it is beside the point. Their alternative is to disconnect from the grid. The residual charge is an element of the charge for connecting to the grid.

[110] 2019 Issues Paper at D.79 – D.84.

Material error of fact

[147] The advice to the Authority was that:[111]

> (a) we have now estimated the difference in charges between the net and gross load approaches, and we see no evidence to support the view that it would be material enough to alter a decision to exit one way or the other (particularly in the early years while the price cap is in effect)

[148] Mr Millard submits that is a material error of fact because it underestimates the impact on Nova by some four times. Mr Laurenson acknowledges the figures presented for Nova did not account for its connected load so the Authority's data was incomplete. He submits that would not have changed the Authority's decision because it does not mean the proposal does not accord with s 15. The impact on a small number of customers does not outweigh the benefit of avoiding the distortionary impact on incentives to take inefficient decisions from a net approach.

[149] The Authority subsequently received submissions from other parties about such adjustments, though not Nova, which it accounted for in the 2020 Decision Paper.[112] So Nova had an opportunity to correct the error it says is material. But, in any case, as the label "indicative charges" suggests, the Authority's analysis did not purport to be definitive. And there is no evidence a correction would have changed the decision. I do not accept this was a material error.

Relief

[150] The challengers sought various forms of relief. But Transpower submitted there would be significant consequences for Transpower and other industry participants if the Guidelines were set aside in a way that requires all subsequent work on the methodology to be set aside. Both the Authority and Transpower submitted that, if the application for judicial review succeeds, the appropriate relief would be affected by the ground on which the challenge succeeds and the gravity of the error. At the hearing, all parties agreed that any exercise of the Court's discretion on relief

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111 Tim Sparks *TPM: net versus gross load approach for allocation of residual and benefit-based charges* (Electricity Authority, 6 May 2019) at [7.12].

112 Stockman Affidavit at [12.49].

should be the subject of further concise submissions. Given the conclusions I have come to, no such further submissions are required.

Result

[151] The application for judicial review is dismissed.

[152] I see no reason why costs should not follow the event but, if there is disagreement on costs, the parties may file submissions within 15 working days.

Palmer J