

BEFORE THE BOARD OF INQUIRY

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of applications for resource
consent and notices of
requirement by
Transpower New Zealand
Limited for the North Island
Grid Upgrade Project

**MEMORANDUM OF COUNSEL FOR
TRANSPOWER NEW ZEALAND LIMITED PROVIDING FURTHER COMMENTS**

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MAY IT PLEASE THE BOARD

1. **THIS** Memorandum of Counsel sets out Transpower New Zealand Limited's (**Transpower**) response to matters raised in the 15 July 2009 letter which was sent on behalf of the Board of Inquiry. In that letter, the Board:
 - (a) sought a response from Transpower to matters raised in its comment on the Board's draft decision and report (**draft report**); and
 - (b) invited Transpower to respond to specific comments made by affected councils and two submitters.

2. **TRANSPOWER'S** response does not address the changes to the legal descriptions sought by Transpower in Appendix C to its comments. Transpower is currently obtaining copies of all relevant freehold registers/certificates of title and Parcel IDs which Transpower sought to update. A further memorandum and a statutory declaration will be lodged with the Board by 31 July 2009.

General response to comments of Councils and submitters regarding conditions

3. **THE** Board has asked Transpower to consider and respond to the requests for changes to conditions from the five district councils that took part in the hearing process. It has also asked Transpower to respond to specific matters raised by two other submitters. This response is dealt with separately below.

4. **TRANSPOWER** wishes to make some general comments about the changes requested by the Councils. It considers that the changes requested fall into three categories:
 - (a) Significant changes to conditions, which were not foreshadowed during the hearing, and which are not supported by evidence of a probative nature.
 - (b) Changes to conditions, which were raised previously, and which are being re-litigated by the Councils concerned.

- (c) Changes of a minor nature to conditions which correct typographical errors or clarify matters.
5. **OF** these three categories, Transpower considers that only changes of a minor nature which correct typographical errors or clarify matters should be made at this late stage of the process.
 6. **THE** majority of the changes to conditions requested by the Councils seek significant changes to conditions, which were not previously raised, and which are not supported by evidence. These changes to conditions were not placed before the Board at a time when the evidence of the relevant Council witness could be tested. As a result, Transpower considers that all changes which fall into this category should not be made at this stage.
 7. **THE** remaining category relates to changes to conditions that were raised previously, and which the submitter has chosen to re-litigate in comments on the Board's draft report. These changes are in some instances supported by evidence. Accordingly, there was the opportunity to test some of these changes during the hearing process, or at least comment on them in the final submissions for Transpower.
 8. **TRANSPOWER** considers that where there was the opportunity to test or comment on the changes now sought by the Councils, the Board could if it chose, make the changes requested. Such changes may however require the Board to revisit relevant evidence and/or its findings.
 9. **HOWEVER**, one of the Councils has chosen to request changes to conditions which were abandoned and therefore not pursued during the hearing. Evidence in support of those changes was deleted, and the opportunity to test those changes was removed. Transpower submits that any changes that fall into this category should not be made at this stage by the Board.
 10. **TRANSPOWER** also notes that the proposed designation conditions were progressively lodged with the Board, from 22 April 2008 through to 27 May 2008. The first Council case was presented on 7 July 2008, more than a calendar month after the full suite of proposed designation conditions had been lodged with the Board.

11. A specific response to each change sought is set out in **Appendix A**. Changes which are supported, or not opposed, by Transpower are as follows:
- (a) Franklin District Council, paragraphs 3, 4, 5, 9, 10 (but limiting the increase in timeframe to 20 working days), 12, and 15; and
 - (b) SWDC, paragraph 22(a).
12. **TRANSPower** does not support most of the changes that have been requested to be made to conditions. That is because most requests for change are not supported by evidence. However, that is not to say that Transpower is unwilling to further consider some of the issues raised. Transpower will continue to work through these issues with the Councils to see where further agreement on matters could be reached between the parties (in addition to the obligations in conditions).

Reference to new versions of documents

13. **TRANSPower** has been asked to explain what authority the Board has to consider, or refer to, documents that were not in existence at the time that the Board of Inquiry hearing was completed.
14. **TRANSPower** accepts that any documents that were not in existence at the time that the Board of Inquiry hearing was completed would fall into the category of new information that was not supported by evidence.

Noise standards

15. **MATAMATA-PIAKO** District Council sought that the references to the New Zealand Standards for noise in Appendix L, condition 14 (Nzs6801:1991 and Nzs6802:1991), be updated and replaced by references to Nzs6801:2008 and Nzs6802:2008.
16. **Nzs6801:2008** and **Nzs6802:2008** superseded the earlier versions of the noise standards on 6 June 2008. Matamata-Piako District Council presented its case on 17 and 18 July 2009. It did not seek leave to present evidence about the impact of the amended standards in terms of measuring noise.

17. **ALL** expert noise evidence lodged with the Board (Mr Warren, Mr Lloyd, Mr Hegley) referred to the earlier standards. Agreement was reached between the noise experts about appropriate noise conditions (Transcript, 9 September 2008, page 34).

18. **ACCORDINGLY**, it is considered that the change requested falls into the category of requested changes that are not addressed in evidence, and which were not previously raised by the submitter concerned.

19. **SECTION 23** of the Standards Act 1988 sets out which version of a standard applies. It states that:

"A New Zealand standard may (without prejudice to any other mode of citation) be cited in an Act, regulation or bylaw by the title and number given to it by the [Standards] Council, and any such citation shall (unless the context otherwise requires) be deemed to include and refer to the latest New Zealand standard with that citation (together with modifications to it) promulgated by the Council before the Act was passed or the regulation or bylaw made."

20. **THE** Environment Court has considered section 23 in the context of a resource consent in *Body Corporate 164980 v Auckland City Council* (A087/96). The Court noted that:

"Section 23 of that Act makes an exception "where the context otherwise requires". A reference in a district plan or resource consent condition would be a context which requires otherwise than treating it as a reference to a later version of the standard" (pages 11-12).

21. **IT** is considered that the evidence before the Board and the draft conditions provide the context for retaining the reference to the earlier noise standards.

Environment Waikato standard

22. **TRANSPower** and Environment Waikato requested that an updated technical report be referred to in condition 9 (Appendix U: Conditions for EW – Consents 116904, 116902 and 116905), in order to avoid confusion. The substance of the condition was not altered.

23. **TRANSPOWER** accepts that there is no specific evidence before the Board to support the above change.

Reference to Maungatautari

24. **THE** Board has requested clarification about the specific amendments that Transpower is requesting in relation to references in the draft report to Maungatautari. Transpower did not request specific changes to paragraphs 2395, 2444 and 2451 of the draft report, as they generally relate to the Board's ultimate judgements in relation to Maungatautari. It is difficult to suggest changes to these paragraphs, without impacting on these ultimate judgements. However, further comments about the reasons for Transpower's comments on the draft report are set out in this memorandum.
25. **AT** paragraphs 24-30 of its comments, Transpower raised the issue of there being some inconsistency within the references to Maungatautari in the draft report. Transpower raised the error at paragraph 2395 of the draft report, where the Board states its finding that the proposed line would not fully provide for the protection from inappropriate development of outstanding natural and physical landscapes "*passing through the edge of the Maungatautari ecological island*". The reasons why Transpower considered this paragraph to contain an error were set out in Transpower's comments.
26. **THE** evidence before the Board was that the proposed line would pass through the edge of the SLCA in relation to Maungatautari, rather than the Maungatautari ecological island. The Board also accepted Transpower's evidence that only the upper slopes of Maungatautari were an outstanding natural landscape. The upper slopes are within the fenced ecological island.
27. **THE** evidence before the Board in relation to the status of Maungatautari is summarised at paragraphs 1108 and 1109 of the decision:

"[1108] Applying the criteria described in the Wakatipu decision, Ms Buckland came to the opinion that Maungatautari is an outstanding natural feature and landscape. Mr Lister agreed, but did not include in that category the lower slopes, which do not share the same landscape qualities. Dr Steven also agreed about the upper, forested slopes. He

considered the natural quality of the lower farmed slopes to be in the moderate to moderate-low category.

[1109] The Board found persuasive the explanations given by Dr Steven and Mr Lister; and finds that the upper, forested slopes are an outstanding natural feature and landscape; and that the lower farmed slopes are not.

28. **TRANSPower** considers that paragraphs 1108 and 1109 of the draft report are accurate, and reflect the evidence before the Board. Transpower also supports the discussion about the application of section 6(b) to the facts at paragraph 1131 of the draft report. The Board stated:

[1131] The Board has also to recognise and provide for the protection of the outstanding natural landscape of Maungatautari from inappropriate development. That landscape would be protected from the potential adverse effects by being routed to avoid affecting the upper slopes that form the outstanding natural landscape. The landscape values of the lower slopes would be significantly downgraded, and the visual effects would be greater than desirable. Regard is to be had to those effects on the environment. But the direction to recognise and provide for protection of outstanding natural features and landscapes from inappropriate development does not apply in that respect."

29. **TRANSPower** suggests that as drafted, the references to Maungatautari at paragraphs 2395, 2444 and 2451 are not accurate, and are inconsistent with the Board's findings at paragraphs 1108, 1109 and 1131. Transpower requests changes to paragraphs 2395, 2444 and 2451 which remove this inconsistency.

30. **TRANSPower** suggests that minor changes are required to paragraphs 1071 and 1073, to clarify that it was only the lower slopes of Maungatautari that were disputed as being an outstanding natural landscape. These suggested changes, consistent with the paragraphs quoted above, are as follows (deletions shown by strikethrough, additions underlined):

"[1071] Transpower contended that in identifying Lake Karapiro, Maungatautari and the western bank of the Waikato River at Arapuni as SLCA's, the district plan lacks integrity and does not justify rejecting the

selected route; it disputed that Lake Karapiro, lower slopes of Maungatautari and the western bank of the Waikato River at Arapuni qualify as outstanding natural features or landscapes in terms of section 6...."

"[1073] The main issues for consideration are whether Lake Karapiro, the lower slopes of Maungatautari and the western bank of the Waikato River at Arapuni qualify as outstanding natural features or landscapes in terms of section 6 ..."

Mighty River Power

31. **THE** Board has asked for Transpower's response to Mighty River Power Limited's (MRP) comments relating to the commencement of its resource consents.
32. **TRANSPOWER** understands that the relevant MRP consents commenced on 12 April 2006. A copy of a letter from Environment Waikato confirming this date is attached.

P Phillips, C Richards and C Tylden

33. **THE** Board has asked Transpower to consider and provide a response to paragraphs 10, 11 and 14 of the comments on behalf of P Phillips, C Richards and C Tylden.
34. **AT** paragraph 10, the submitters raise concerns about Mr Patrick's evidence, including the distance of an access track. Mr Patrick's evidence, including the then proposed distance of an access track, was accurate at the date that he presented evidence. However, discussions have continued with these submitters subsequent to the presentation of Mr Patrick's evidence. A different, longer, access track from that in Mr Patrick's evidence was proposed by Mr Richards and has been given further consideration by Transpower.
35. **AT** paragraph 11, the submitters raise concerns that the line was not realigned to avoid their hayshed. This concern was not raised in the submitters written submission, or in any evidence by these submitters before the Board. As a result, Transpower did not have the opportunity to respond to this specific issue in

evidence. However, Mr Hall presented evidence in relation to the removal and relocation or rebuilding of farm buildings generally (see paragraphs 44-47).

36. **AT** paragraph 14, the submitters raise a concern about the scope of the designated works. They make particular reference to the removal of the ARI-PAK A line, and the fact that many access tracks and road entrances reside outside of the designated area. They seek that the draft conditions be reviewed to remove any doubt about the scope of the works.
37. **THE** removal of the ARI-PAK A line, and the access tracks to it, would be largely outside the scope of the designation, apart from those areas where the ARI-PAK A line (and associated works) overlap with the 400kV capable proposed line. Where the two overlap, the removal of the ARI-PAK A line would need to be carried out in accordance with the relevant designation conditions.
38. **HOWEVER**, where there is no overlap between the ARI-PAK A line and the proposed 400kV capable line, the designation conditions would not apply. For this reason, Transpower proposed a general advice note which relates to that part of the ARI-PAK A line which is outside of the scope of the designation. This advice note records that Transpower will *"use its best endeavours to establish and follow the procedures in the conditions in relation to cultural/spiritual matters, construction noise, the preparation of the construction management plan and pre-construction activities."*

DATED this 28th day of July 2009



D J S Laing / J G A Winchester / J P Mooar
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APPENDIX A: COMMENTS ON SPECIFIC CHANGES TO CONDITIONS SOUGHT BY THE COUNCILS

1. **THE** Board has asked Transpower to consider and provide a response to the following changes to conditions:
 - (a) Manukau City Council, annexure 1, paragraphs 1-32;
 - (b) Franklin District Council, paragraphs 2-16;
 - (c) Waikato District Council, attachment A or B;
 - (d) Matamata-Piako District Council, paragraphs 1 and 2;
 - (e) Waipa District Council, paragraphs 9, 10, 14 and 15; and
 - (f) South Waikato District Council, paragraphs 21-29.

Manukau City Council (MCC)

2. **MCC** requests a large number of changes to conditions which fall into the following categories:
 - (a) Significant changes to conditions that are unsupported by evidence, and which were not previously raised by the Council; or
 - (b) Significant changes to conditions that were previously raised, but which were not pursued by MCC, and which remain untested.

Paragraph 1: new conditions 1A-1D

3. **IT** is considered that these conditions fall into the category of conditions which were previously raised, but were not pursued and which remain untested. These conditions were set out in the original statement of evidence of Ms Waikaira (paragraph 33) and in the revised statement of evidence of Ms Waikaira (paragraph 33) lodged with the Board of Inquiry in accordance with the hearing procedures. However, the Council subsequently sought, and obtained, the leave

of the Board to lodge a second revised statement of evidence of Ms Waikaira (Transcript, 9 September 2008, pages 26-27). This second revised statement deleted paragraph 33.

4. **DURING** the presentation of MCC's case, the Board was advised by counsel for MCC that discussions were continuing with Transpower in the hope that agreement would be reached on conditions (Transcript, 9 September 2009, page 33).
5. **MCC** subsequently reached agreement about the conditions to be imposed. A Joint Memorandum dated 20 October 2008 was lodged with the Board. This Memorandum recorded that as agreement had been reached on conditions, it was no longer necessary to recall Ms Wikaira (paragraph 8).
6. **TRANSPOWER** considers that the agreement reached with MCC, which resulted in deletion of the conditions now being sought, has removed any ability for Transpower or the Board to test the conditions. Accordingly, Transpower opposes the imposition of these conditions.
7. **IRRESPECTIVE** of that, Transpower considers that the conditions sought by MCC are inappropriate. The management plan conditions have been drafted so that they are in the nature of certification conditions. They do not delegate an adjudicative role to a third party. The certification should be given by the Council officer with the relevant expertise. There should not be a second opportunity for the Council to consider a management plan, and request further changes, through the outline plan process. This approach would effectively give MCC two opportunities to consider the same document. It is considered that such an amendment is not justified, and could also impact on construction timetables.
8. **THE** certification of management plans, and the outline plan process are two distinct processes. One is governed by the designation conditions, and the other is a statutory process. Transpower considers that there is no need, or justification, for confusing the two processes.
9. **FOR** the reasons set out above, Transpower also does not support the following changes to conditions sought by MCC: