

## Request for draft document on Starting Price Adjustment Input Methodology

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| <b>Legislation:</b>      | Official Information Act 1982, s 9(2)(g)(i)                      |
| <b>Requester:</b>        | Electricity Networks Association                                 |
| <b>Agency:</b>           | Commerce Commission  |
| <b>Request for:</b>      | Draft Starting Price Adjustment Input Methodology (Draft SPA IM) |
| <b>Ombudsman:</b>        | Professor Ron Paterson   |
| <b>Reference number:</b> | 338921   |
| <b>Date:</b>             | 25 July 2013   |

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*Note: This is a publication version of the Ombudsman's final opinion.*

## Summary

For the reasons set out below, I am of the opinion that the Commerce Commission was entitled, under section 9(2)(g)(i) of the Official Information Act 1982 (OIA), to withhold a copy of a draft of a Starting Price Adjustment Input Methodology requested by the Electricity Networks Association Inc.

## My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information available when requested. The Commerce Commission is subject to the OIA. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.
2. On 17 May 2013, Ombudsman David McGee provided his provisional opinion on ENA's complaint. On Dr McGee's retirement from his position as Ombudsman on 31 May 2013, I assumed responsibility for this investigation. I have reviewed Dr McGee's provisional opinion and all the relevant material supplied during the course of this investigation. I have considered the further information provided by the Commission in response to the provisional opinion.

## Background

3. The complainant, the Electricity Networks Association (ENA), represents the interests of 24 companies that manage the local electricity networks throughout New Zealand.
4. The Commerce Commission determines maximum prices for "*regulated services*" under Part 4 of the Commerce Act 1986 (the 1986 Act) and the means of determining those prices. Electricity lines services and gas pipeline services are regulated services. The means of determining prices is by way of published "*input methodologies*" (IMs) which form part of the Commission's determinations. Section 52R of the 1986 Act states:

*"Purpose of input methodologies*

*The purpose of input methodologies is to promote certainty for suppliers and consumers in relation to the rules, requirements, and processes applying to the regulation, or proposed regulation, of goods or services under this Part."*

(The reference to "*this Part*" is a reference to Part 4 of the 1986 Act.)

5. Section 52T of the 1986 Act sets out the "*matters covered*" by IMs.

6. The 1986 Act requires the Commission to publish its determinations on prices for regulated services. IMs, together with the Commission's accompanying reasons for its decisions on prices, form a fundamental part of the Commission's determinations of maximum prices for regulated services. Section 52C of 1986 Act defines an IM as follows:

*"input methodology means a description of any methodology, process, rule, or matter that includes any of the matters listed in section 52T and that is published by the Commission under section 52W; and, in relation to particular goods or services, means any input methodology, or all input methodologies, that relate to the supply, or to suppliers, of those goods or services."*

7. The Commission determines the appropriate methodology for an IM. As a matter of practice, the Commission distributes to affected parties a draft of its proposed determinations for comment. Section 52V of the 1986 Act requires the Commission to publish a draft of a proposed IM; give interested persons a reasonable opportunity to comment on that draft; and to have regard to any views expressed by those affected parties.
  8. In many respects IMs provide the means of determining maximum prices and underpin the system of regulating the prices which suppliers of electricity lines services may charge for regulated services. For example, IMs may set out how those prices can increase without the Commission's approval, such as by reference to an increase in the Consumers Price Index. Under section 52P(7)(c) the Commission must make all ("*the whole*") of its determinations publicly available concerning regulated services, and section 52P(3)(c) requires the Commission to "*specify the input methodologies that apply*" to its determinations. Suppliers of regulated services have the right to appeal to the High Court against IMs which apply to them.
  9. An Order in Council for electricity and gas made under section 52N of the 1986 Act has the effect that prices for electricity and gas will be regulated for a period of five years. The current determination ends in 2015. At the time of the ENA's request for information in this case, the maximum permissible prices chargeable by most suppliers of electricity lines services were the same as those which were applicable under the previous regime (the now repealed Part 4A). The Commission had begun work to establish how prices were to be calculated (reset) at the commencement of the present regulatory period of five years. For this purpose it had prepared in draft what is referred to as a Starting Price Adjustment (SPA) IM. It intended in due course to publish this or a finally approved version of it for comment by affected parties.
  10. However, the Court of Appeal (on 1 June 2012) and ultimately the Supreme Court in *Vector Limited v Commerce Commission* [2012] NZSC 99, on 15 November 2012, determined that under the 1986 Act the Commission was not obliged to publish the draft SPA IM, as it was not an IM in terms of Part 4 of the 1986 Act and, in particular, section 52T.
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## Request for information

11. On 29 June 2012 (that is, after the Court of Appeal's judgment that the draft SPA IM did not need to be published under the 1986 Act), Mr Alan Jenkins, Chief Executive, ENA, made a request under the OIA to Mr John Hamill, the Commission's General Manager, Regulation Branch, for a copy of the draft SPA IM.

## Refusal of request

12. In a letter of 19 July 2012, Mr Hamill on the Commission's behalf refused to make available to the ENA the requested information, which the Commerce Commission interpreted "to be a request for both the Draft Determination and Reasons Paper" (the information at issue).
13. The Commission withheld the requested information under section 9(2)(g)(i) of the OIA. In his letter of 19 July 2012, Mr Hamill stated that:
  2. *"We have carefully considered your request. However, we consider there are good grounds to withhold the information under section 9(2)(g)(i) of the OIA. This is because we consider that disclosure would inhibit the free and frank expression of opinions between staff and Commissioners in the course of their duty, and could therefore adversely affect the conduct of public affairs.*
  3. *The most recent iteration of the DSPA IM [Draft Starting Price Adjustment Input Methodology] was part of a process of analysis that the Commission was following in working towards publishing a draft SPA IM for consultation. The various iterations of the DSPA IM provided to Commissioners sought to capture a range of concepts and opinions regarding the SPA IM to promote Internal discussion and debate, with a view to ensuring that any externally published Commission positions are as robust as possible. The Commission had not reached a final decision as to the content of the DSPA IM. The Commission ceased this process following the Court of Appeal decision in Commerce Commission v Vector Limited CA 702/2011, 1 June 2012. In order to ensure that staff and Commissioners are able to pursue robust debate and exploration of options in future, the Commission considers that it must withhold this information.*
  4. *We have not identified any countervailing public interest or other considerations favouring disclosure, especially as a draft document cannot necessarily be relied on as a guide to the approach the Commission may take in setting starting prices in future.*
  5. *You will be aware that we are considering the reset of the default price-path for electricity distribution businesses. Fully reasoned draft reset decisions, including on any starting price adjustment decisions, will be coming out in August."*

## Complaint

14. On 17 August 2012, Mr Jenkins made a complaint to the Ombudsman about the Commission's refusal to provide a copy of the draft SPA IM and Reasons Paper. In my consideration of the complaint I have not differentiated between these two documents.

## Investigation

15. On 31 August 2012, the Ombudsman, notified the Commission of the intention to investigate ENA's complaint. The Commission was asked to provide a report on its decision to withhold the information requested and a copy of the information at issue.
16. In a letter of 2 October 2012, the Commission's Chair, Dr Mark Berry, provided the Ombudsman with a report on the ENA's complaint, a copy of the draft SPA IM and copies of exchanges of emails between Commission staff concerning the draft SPA IM.
17. In his letter, Dr Berry stated that:
  3. *"As noted to ENA, we have primarily justified withholding this information under section 9(2)(g)(i) of the OIA. On reflection, we also consider that section 9(2)(e) of the OIA is relevant (and possibly section 6(e)(iv))."*

## Section 9(2)(g)(i)

18. In relevant respects, section 9(2)(g)(i) of the OIA provides good reason to withhold information if, and only if, the withholding of the information is necessary to –

*"Maintain the effective conduct of public affairs through the free and frank expressions of opinions by or between ... members of an organisation officers and employees of any ... organisation in the course of their duty".*
19. Section 9(2)(g)(i) is subject to the countervailing public interest test in section 9(1). Section 9(1) reads:

*"Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available."*

## ENA's view

20. In his letter of 17 August 2012, Mr Jenkins stated:

*"ENA does not agree with the Commission's claim that the requested information must be withheld. We cannot see how the requested information*

*affects the free and frank expression of opinions by and to the members of the Commission (either in the past or in the future). In particular, in ENA's view it is not credible that a draft SPA IM that had been developed for at least the previous 8 months, and was due to be published for consultation in three days hence, was at a stage of early development containing views potentially prejudicial to free and frank expression if released ...*

...

*... on 1 June 2012, the Court of Appeal released its judgment, reversing the High Court decision that the Commission was required under the Act to develop its starting price adjustment methodology as an IM. The Commission cancelled the release of the draft SPA IM and advised that it would not be proceeding with the consultation process.*

*The timing of the Court of Appeal decision was only three full working days prior to the planned release of the draft SPA IM. For this reason, we believe that the draft SPA IM must have been in an almost finalised state, and not in an early draft form as the Commission appears to suggest. Further, we emphasise that it was only by happenstance that the Court of Appeal decision was released three working days before the release of the draft SPA IM. If it had been released a few days later the draft SPA IM would have been in the public domain...*

*... we consider the reasons paper would have been well advanced and so accordingly should be released. In terms of the draft methodology, this is a factual document (albeit in draft form)."*

### **Commission's view**

21. In his letter of 2 October 2012, the Chair of the Commission submitted that the release of the information at issue would inhibit:

*"20. ... future free and frank expression of opinions within the Commission which will lead to less robust decisions and an inefficient decision making process."*

22. The Chair further submitted:

*"29. Release of the Draft Spa IM in its current form would have a chilling effect on Commission processes. I am concerned that the result of making incomplete drafts public is likely to be a less thorough and more defensive internal process, ultimately leading to weaker decisions that take longer to make.*

*30. To explain, our determinations are developed iteratively, with staff beginning work on the determination and reasons documents early in the process and then regularly exchanging drafts with Commissioners over many months. It is in these drafts that most staff and Commissioner thinking is tested and recorded, with comments being exchanged via email and weekly meetings.*

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31. *I accept that this is not the only way in which the Commission could make its decisions. However, over years of practice we have found that having staff work on the total package of release documents from early in the process is the most satisfactory and efficient way of making decisions in light of:*
- 31.1 *The complex balancing act that Commissioners are required to achieve between the competing regulatory objectives set out in s 52A of the Act;*
- 31.2 *The inter-play of the various aspects of the part 4 regime - for example, decisions in relation to starting prices cannot sensibly be made in complete isolation from decisions about rates of change, alternative rates of change and quality standards; and*
- 31.3 *Tight regulatory timeframes and numerous competing workstreams.*
32. *The Commission is happy to accept appropriate scrutiny of its decisions (as mandated by Parliament), but does not want its developing thinking played out in public. As set out below, we do not think that this would be in the public interest, and staff and Commissioners are naturally reluctant to expose their untested thoughts to open criticism.*
33. *If incomplete drafts were now to be made available through the OIA, the logical response would therefore be for the Commission to change how it deliberates on key decisions in order to avoid the disclosure. My immediate view of likely responses is:*
- 33.1 *Staff would be more likely to prepare separate memoranda with advice for the Commissioners at every iterative point in the process rather than incorporating that advice in the draft decision documents. In my view this is clearly inefficient – essentially creating documents for the sake of avoiding disclosure of other documents;*
- 33.2 *I would also expect all legal advice to be provided separately rather than as part of a package of advice, removing it from the very context that makes it most valuable to Commissioners;*
- 33.3 *The draft regulatory control documents would be developed much later in the process to protect against early forced release of the Commission's developing views. Indeed it is possible that Commissioners would no longer be comfortable asking staff to draft these documents for them at all;*
- 33.4 *Later drafting means that Commissioners would be unable to see how options and views could be implemented in the actual regulatory instrument until late in the process. As that is one of our key evaluative tools in deciding whether our regulatory decisions are fit for purpose, a move to later drafting runs an increased risk of substantial rework of decisions and real delays in regulatory processes. If we only identify*
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*implementation issues at the 11th hour when we look to translate advice and views into the actual regulatory instruments, it seems likely that we would have to go 'back to the drawing board' for that decision; and*

*33.5 Staff would most likely give 'controversial' advice orally, which means that views might not be adequately developed, articulated or recorded. This type of 'off the record' practice seems to me to be the inevitable response to a scenario where the Commission is no longer confident that its incomplete draft work product will be protected.*

*34. Each of the above scenarios I have described would in my view weaken the Commission's processes – thinking would be less well tested, and exchange of opinions would be less free and frank. Substantial inefficiency would also be introduced into the process. Ultimately the likely product would be that Commission decisions were less robust, yet took longer."*

## Section 9(1)

### ENA's view

23. In his letter of 17 August 2012, Mr Jenkins stated:

*"... Even if there were a sound basis (which we strongly disagree) we consider that there are overriding public interest considerations which would justify release. In particular, withholding a document that was due to be publicly released on the basis of the chance timing of the Court of Appeal judgment undermines confidence and trust in a public entity. The Commission has spent some months (and public money) working on the document and submitters had devoted considerable resource on the first round of submissions and expect transparency."*

### The Commission's view

24. In his letter of 2 October 2012, the Chair of the Commission stated:

*"36. As a general proposition, the Commission understands and supports the rationale of the OIA (i.e. that it is generally in the public interest to release official information.) However, in the case of incomplete drafts we are not convinced that this general presumption holds for two reasons.*

*37. Firstly, draft Part 4 determinations do require public consultation. We operate under an established statutory consultation regime where interested parties are able to comment on all material draft regulatory decisions.*

*38. Given this framework, there can be no realistic suggestion that the Commission is seeking to prevent scrutiny of its decisions – far from it. What we are seeking to do is to ensure that any documents that are in the public domain are fully reasoned and represent our best judgement.*



39. *Secondly, we are concerned that release of incomplete drafts that do not in fact reflect the Commission's settled position, could do more harm than good to interested parties and the Part 4 regime. This is because of the false signals these incomplete decisions potentially send to the market.*
40. *Commission regulatory decisions often set pricing or quality parameters that are fundamental to the amount of revenue that a regulated supplier can earn. They therefore have a substantial impact on any party that is connected to the supplier. This impact is particularly acute for suppliers that are listed on the NZX.*
41. *The Commission therefore seeks to release any draft and final determinations in a controlled manner, providing all information to parties outside of market hours and setting out what it has decided, what it has not decided and the reasons for its decisions. Parties then have a full picture in which to assess the impact of the decision.*
42. *That full picture simply cannot be created if incomplete Commission drafts are released under the OIA. At best parties will be left to speculate as to what parts of the incomplete draft will be confirmed; at worst the incomplete information will cause unintended mischief as (wrong) assumptions are made about what it means and company values adjust accordingly."*

## Analysis and findings

### Section 9(2)(g)(i)

25. The draft SPA IM was, by definition, still in draft form at the time of ENA's request. It contains in excess of 400 annotations. Those annotations appear to all be made by Commission staff members. Some of those annotations suggest improvements to the formatting of the document and note typographical errors. However, numerous annotations reflect the annotators' differences of opinions about whether the draft was appropriately or correctly expressed (for example, from a methodological point of view). On my reading of the draft, it appears doubtful that it was yet in a form which was suitable for presentation to Commissioners for their consideration.
26. As the Chair of the Commission noted:
  - "26. *To be clear, Commissioners are the final decision makers on all Commission determinations. Until Commissioners have approved the full document, it is not a Commission position. As at 31 May, I was not satisfied that all material decisions relating to the SPA IM had been made, that Commissioner decisions had been captured by staff in the documents, or that the IM itself and the reasons paper were consistent. Nor had any of the documents had final sign-off from our legal team, which Commissioners require before release.*

*Essentially these documents still reflected some staff opinions that had not been fully tested or agreed."*

27. In Part 2C of the Ombudsmen's Guidelines on official information, the following questions are posed:

*"Will release of the information:*

- Inhibit future free and frank expressions of opinion?*
- Mean that in the future opinions will be expressed in a different way, and will not be expressed in such a free and frank manner?*
- Mean that similar free and frank expressions of opinion are not recorded adequately in the future?"*

28. It is clear from the annotations made by Commission staff members on the draft SPA IM that they were freely and frankly expressing their opinions to each other on that draft. They were still in the process of refining that document. It is in the public interest that such refinement takes place. Such a process promotes better drafting of documents, and can reasonably be expected to lead to better decisions by the Commission on matters of very significant public interest.

29. As the Chair noted, with reference to the scenarios he referred to in para 33 of his letter:

*"34. Each of the above scenarios ... would ... weaken the Commission's processes - thinking would be less well tested, and exchange of opinions would be less free and frank ... ultimately the likely product would be that Commission decisions were less robust, yet took longer",*

if the information at issue was released.

30. In this regard, the Danks Committee in its report which led to the passing of the OIA observed:

*"If the attempt to open processes of Government inhibits the offering of blunt advice or effective consultation and arguments, the net result will be that the quality of the decisions will suffer, as will the quality of the record. The processes of Government could become less open and, perhaps, more arbitrary."*

31. I am satisfied that the release of the information at issue would have an inhibiting effect on the free and frank expression of opinions by and between members of the Commission staff in the course of their duties. I conclude that section 9(2)(g)(i) does apply.

## Section 9(1)

32. I accept that it is in the public interest that members of the ENA and the public are not only aware of the provisions of IMs which set prices for regulated services, but also have an

opportunity to comment on IMs before they are approved by the Commissioners and have the status of determinations. The Commission's decisions in respect of IMs impact on the amount paid by all consumers for regulated services.

33. The Commerce Act contains complex provisions that enable members of the ENA to challenge the Commission's determinations, including their determinations as to the appropriate methodology for determining prices that they are able charge consumers for regulated services. The Commerce Act subjects the Commission's draft Part 4 determinations to public consultation and, in keeping with the Commission's practice, interested parties (including ENA members) have the opportunity to comment on those draft determinations.
  34. However, it has been determined by the Courts that a SPA IM is not an IM under the 1986 Act and thus is not subject to the scrutiny of the 1986 Act's processes or to a right of appeal by suppliers or members of the public. Given that it is important that the Commission's processes are transparent, that is a factor which in terms of the countervailing public interest under section 9(1), favours the release of the draft SPA IM. The Commission's processes must not be hidden from public view and scrutiny without good reason.
  35. Against this background, the following matters tell against the release of the information at issue:
    - In this case, the draft SPA IM had not been approved by the Commissioners for release, and represented expressions of opinions by staff members (not the Commissioners' own opinion).
    - Commerce Commission staff should be able to exchange views among themselves on draft documents such as the information at issue and contribute without inhibition to the final document that emerges after Commission consideration.
    - The draft SPA IM in this case was still very much in a draft form and would have required considerable refinement before it was in a form suitable for approval by the Commissioners.
    - I accept the Chair's submission that release of the information at issue *"risks sending incorrect signals to suppliers, consumers and investors"*.
  36. I consider the specific matters identified in paragraph 35 outweigh the general public interest in transparency which attaches to the processes of any public agency.
  37. Accordingly, in my opinion the countervailing public interest under section 9(1) in disclosure does not outweigh the need to protect the interest defined in section 9(2)(g)(i).
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## Other withholding grounds relied on

38. As indicated above, the Commission in correspondence with the Ombudsman (though not initially to the ENA) also sought to justify the decision to withhold the draft SPA IM under section 6(e)(iv) and section 9(2)(e).
39. I do not intend to consider these provisions in any detail. In respect of section 9(2)(e) (mitigate loss) it is unnecessary to do so because I agree that the Commission had good reason in terms of section 9 to withhold the information in any case. The matter thus turns on whether there is a public interest in release sufficient to outweigh the presumptive ground to withhold.
40. Section 6(e)(iv) raises different issues. If it is established, no consideration of any public interest in release is undertaken; the provision is a full, “conclusive”, ground justifying withholding. This in itself gives pause for serious consideration before one would accede to an argument that it applies.
41. The subparagraph does relate to the control and adjustment of prices of goods and services so there is no doubt that the subject-matter is engaged in this case. But that subject-matter is only relevant to the release of information which would “*damage seriously the economy of New Zealand by disclosing prematurely decisions to change or continue government economic or financial policies*”.
42. My first reason for dismissing section 6(e)(iv) is that I have seen nothing that suggests that the information under consideration in this case would, if released prematurely, seriously harm the economy. I do not deprecate the information’s importance, but it is not of the order which section 6(e) appears to require.
43. But secondly, I would dismiss section 6(e)(iv) partly for the reasons I consider that section 9(2)(g)(i) applies – the information does not represent a “decision” whose “premature” release could lead to prejudice. On the contrary, it is not a decision and it is not intended to release it at all, much less prematurely. It is largely for this reason that it constitutes a free and frank expression of opinion.
44. Thus I do not consider that section 6(e)(iv) applies.

## Ombudsman’s provisional opinion

45. For the reasons set out above, Dr McGee formed the provisional opinion that section 9(2)(g)(i) of the OIA provided the Commission with good reason to refuse the request for the information at issue.
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## Comments on provisional opinion

46. In an email of 27 June 2013 Mr Jenkins of the ENA advised that it “[did] *not intend to proceed further with [its] complaint.*”
47. In a letter of 14 June 2013, the Chair stated that the Commission supported the provisional opinion. In his letter, he provided the following comments on the provisional opinion:
- “4. *We accept that the draft SPA IM itself has not been subject to scrutiny under the Part 4 of the Commerce Act 1986 (the Act). However, given the Supreme Court's judgment in November 2012 that the Commission was not required to produce a SPA IM, it is not clear to us that transparency in relation to that document is either relevant or envisaged by the Act.*
  5. *Further, the Commission's approach to resetting starting prices is subject to substantial scrutiny under the Act at each reset point. We therefore believe that any relevant objective of transparency is already being met.*
  6. *As an example, the Commission reset default price-quality path starting prices for electricity distribution businesses on 30 November 2012 – after the Court of Appeal's 1 June 2012 judgment that we were not required to determine a SPA IM.*
  7. *Looking solely at the period post that judgment, the Commission engaged in a substantial consultation, as required by section 53P(2) of the Act, with interested parties on its draft starting price reset decision – the proposed outcome, the approach taken, and the reasons for both. The total consultation period (submissions and cross-submissions) lasted almost 8 weeks. During that period we received a submission from ENA, and submissions and cross-submissions from a number of ENA members.*
  8. *So, while we acknowledge that a specific reset decision is not the same as the draft SPA IM, the Act does clearly ensure that interested parties are able to substantively comment on starting price decisions that affect them. In our view this reinforces [the] provisional opinion that there is no countervailing public interest that outweighs the reasons for withholding the draft SPA IM.”*
48. While I note the Chair's comments, I repeat the point made in paragraph 34 above: the fact that a SPA IM –
- “is not subject to the scrutiny of 1986 Act's processes ... is **a factor** that, in terms of the countervailing public interest under section 9(1), favours the release of the draft SPA IM.” (emphasis added)*
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## Opinion

49. In my opinion the Commission had, in terms of section 9(2)(g)(i) of the OIA, good reason to refuse the request for the information at issue.