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Steven Bailey
Inquiry Director
New Zealand Productivity Commission

Dear Steven

Submission on draft Regulatory Institutions and Practices report

The Electricity Networks Association (ENA) appreciates the opportunity to comment on the Productivity Commission's draft report of its Inquiry into improving the design and operation of regulatory regimes in New Zealand (Draft Report). We concur with the views expressed in the Draft Report about the importance of good regulatory design and practice for the welfare of New Zealanders. Continuous improvement will only be achieved with concerted and focused effort over the medium term.

Electricity network businesses are heavily regulated across numerous dimensions of their businesses, including regulation of technical matters, economic issues, consumer guarantees, employee health and safety, and public safety regimes, involving processes administered by many different regulators. The comments we make in this submission should be seen as applying generically, with a mind to what constitutes "best practice" regulation, which in itself is not a static concept.

The ENA considers that the Draft Report is comprehensive and develops a useful framework and set of recommendations to guide the review and ongoing improvement of existing regulatory bodies and the design and implementation of any new ones.

In our view, the single largest risk with this initiative is that the Productivity Commission's recommendations for achieving ongoing improvements across regulatory regimes is not progressed, and stalls. Successful implementation will require clear thinking, and persistence, at the political, policy and day-to-day management levels. To that end we recommend the Final Report extend the discussion to the implementation of its findings and provides greater direction on the key components of an effective implementation path and the attendant risks.

The ENA is encouraged by the breadth of the Draft Report in that it covers both the design of regulatory bodies (e.g. role clarity, level of independence and governance) and the way in which they operate (e.g. consultation and engagement). In our

experience both of these aspects are critical to effective regulation. We also agree with the suggested need to move away from the tendency to “set and forget” regulatory bodies and regulatory instruments. It is important that there are built-in opportunities to foster continuous improvement over time.

A good example is in the development of regulation under Part 4 of the Commerce Act. While this draws on regulatory frameworks elsewhere (e.g., five-yearly price path resets) it has many novel elements, customised to the New Zealand situation. The Commerce Commission and ENBs are positively engaging on the development of this regime (for example, following the first ever Customised Price Path Determination for Orion, the Commission has actively sought feedback on the process and Input Methodologies that governed it).

Over the medium term it will also be important to have a process that reviews regulatory regimes overall, to ensure that they are delivering the intended objectives, as there may be features and constraints in legislation that could be improved.

The ENA queries the finding in the Draft Report in relation to the relative strength and use of merits review relative to judicial review, as reflected in Finding 10.12:

The broad scope of judicial review in New Zealand means that the availability of merits review would not provide significantly stronger incentives on regulators to make correct decisions than is provided by access to judicial review alone.

The Draft Report discusses at length the pros and cons of various checks and balances on regulator decision making. This is a complex and important aspect of the design of an overall regulatory regime and the detail of the design is likely to matter. In the context of economic regulation of the electricity sector the recent introduction of merits review provisions has been an important step to provide investors in the sector greater confidence of reasonable outcomes by being able to appeal a decision on method, if need be, to an independent party. While such mechanisms have their limits, as discussed in the Draft Report, and are not a substitute for the ongoing review and improvement of the practice of regulation, they add an important dimension by reducing perceptions of investment risk and by encouraging regulators to step back and consider their decisions from an external review perspective. In addition, they create scope for regulated entities to obtain insights from an independent source. Recent experience of merits review proceedings also highlights the importance of clarity of legislative objectives and *ex post* review of the extent to which regimes are meeting their intended policy objectives.

The ENA considers there is scope to improve the design of merit review provisions and, to that end, we support the observations in Finding 10.16 on the desirability of Courts being able to question experts directly, and Finding 10.17 on the desirability of providing Courts some discretion over the admissibility of new evidence. We are mindful that merits review hearings of economic regulation and other highly technical issues place relatively unique demands on the judiciary. In recognition of this we support (as raised in Question 10.3) consideration of greater specialisation amongst the judiciary, or possibly the convening of a specialist body as discussed in the Draft

Report, in order that this function is resourced appropriately and is capable of providing timely responses.

We would be happy to discuss the points raised in this submission with you.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Alan', followed by a long, horizontal, slightly wavy line that extends to the right.

Alan Jenkins
Chief Executive