

CONSULTATION PROTOCOL

Introduction

1. The Government Policy Statement on Electricity Governance requires the Commission to prepare a consultation protocol. This protocol supersedes the Transmission Consultation Process (prepared by M-co for the Commission, June 2004) relating to how the Commission will consult.
2. This guide sets out how the Commission intends to determine the level of consultation it may undertake when it carries out a consultation.
3. It is not intended to provide a template for every consultation, but rather to explain, in a general way, when an obligation to consult arises, the content of the consultation requirement, the options available to the Commission when it undertakes a consultation, and the matters to which the Commission will have regard when determining how it will consult.

Sources of consultation requirement

4. Various specific consultation requirements are imposed on the Commission by:
 - the Electricity Act 1992;
 - the Electricity Governance Regulations 2003;
 - the Electricity Governance Rules; and
 - the Government Policy Statement on Electricity Governance (issued in October 2006).
5. The level of consultation required under these instruments differs depending on the source of the consultation requirement.
6. In addition, the Commission may be required to consult in order to satisfy general administrative law requirements where none of the specific provisions requiring consultation apply, but the Commission is considering exercising a statutory power of decision (a decision that is reviewable by the High Court).
7. Even when there is no obligation to do so, the Commission may consult on a matter when it is interested in the views of industry participants and relevant stakeholders in order to make the best possible decision.

Content of consultation requirement

8. When establishing a consultation process and setting the nature of the consultation, the Commission will consider whether:
 - *a specific method or process for the consultation has been set by the Act, regulations, the Rules, or the Government Policy Statement:* If so then the Commission will comply with those requirements and may, if the Commission considers it should do so, treat those requirements as a minimum and do other things as well; or

- *no specific method or process has been set by law (whether in relation to an obligation to consult that arises as a matter of law, or in relation to consultation that the Commission chooses to carry out even though it is not required to do so):* In this situation, the Commission will determine what is appropriate in the circumstances.
9. However, in either situation, when the Commission carries out a consultation, it will design its process to comply at minimum with basic standards for consultation established by case law.
10. This means that the Commission will always seek to arrange each consultation undertaken so that it complies with the principles specified by the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671. The Commission interprets those principles as being as follows:
- there are no universal requirements as to the form of consultation: any type of interaction (whether oral or written) that allows adequate expression and consideration of views will be sufficient;
 - consultation must be allowed sufficient time, and genuine effort must be made;
 - consultation involves the statement of a proposal not yet finally decided on, listening to what others have to say, considering their responses, and then deciding what to do;
 - for consultation to be meaningful, the decision-maker must make available sufficient information to enable parties who are consulted to be adequately informed to make “intelligent and useful” responses; and
 - the word “consultation” does not require agreement (although it does require more than mere telling, or presenting). The Commission recognises that this principle is particularly relevant in relation to its functions. In relation to many of the issues that the Commission is required to deal with, industry stakeholders have widely divergent views and the issues have gone unresolved for many years. The Commission recognises that it is charged with breaking such deadlocks by making decisions in relation to those matters;
 - “consultation” cannot be equated with “negotiation”. Negotiation implies a process that has as its objective arriving at agreement (although in consultation the tendency is at least to seek consensus);
 - the decision-maker must approach the matter with an open mind: the decision-maker must be prepared to change or even start the process afresh.

Examples of consultation processes

11. The following describes a number of possible consultation processes that the Commission may consider adopting when it carries out a consultation. These processes are only a sample of the broad spectrum of possible consultation processes that the Commission could choose to adopt in relation to a particular matter.
12. The decision by the Commission on which process it will actually adopt in a particular situation will be informed by a number of factors, which are discussed in the next section.

Level of consultation required in circumstances	Process
Low	<ul style="list-style-type: none"> • Telephone call with manager at relevant organisations (for example, regulatory managers), to discuss issues.
	<ul style="list-style-type: none"> • Email to relevant industry/stakeholder requesting written views.
Moderate	<ul style="list-style-type: none"> • Preparing consultation document, providing it to relevant direct stakeholders, and posting on website; • Allowing a set timeframe for submissions.
	<ul style="list-style-type: none"> • Preparing consultation document, providing it to relevant parties, and posting on website; • Seeking submissions from the public as well as industry stakeholders; • Allowing a set timeframe for submissions; • Meeting with parties making submissions prior to making a decision.
Extensive	<ul style="list-style-type: none"> • Preparing consultation document, providing it to relevant parties, and posting on website; • Requesting submissions from the public; • Allowing a set timeframe for submissions; • Holding public meetings prior to making a decision; • Issuing a preliminary view on the issues; • Requesting further submissions; • Making a final decision, and publishing reasons for that decision.

How will the Commission decide the type of consultation it will undertake?

13. The Commission will take into account the following factors to assist in determining what the appropriate consultation process is in any particular case:

- Whether, if the obligation to consult arises under statute, a process has been established in the statute that requires the Commission to follow a specific process;
- The importance of the subject-matter of the consultation;
- The timeframe available: when does the relevant decision have to be made?

- The range of parties who might be affected by the decision, and their understanding of the issue(s);
- How similar issues have been consulted on in the past.

14. The above list is not exhaustive, and the factors are not listed in any particular order of priority.

Confidential Information

15. During consultation interested parties may wish to provide the Commission with confidential information and request that the Commission does not publish the information, due to commercial sensitivity or other valid reasons.
16. Whilst the Commission may agree to keep such information confidential (subject to the Commission's overriding obligations under the Official Information Act and other legislation), the reliance that the Commission will place on that information may be diminished, particularly when the Commission is not in a position to verify or test the information or where other affected parties are not in a position to challenge or otherwise comment on the information.

General comments

17. The Commission takes its consultation obligations seriously and for this reason is concerned to ensure that it follows an appropriate process for each consultation.
18. However, it is important to keep in mind that determining the level of consultation that should be carried out is an issue that needs to be addressed having regard to the particular consultation and related factors. It is not appropriate to have a "one size fits all" approach to consultation.

