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JWT:BJM
Ref: WRC.Opns.Rating

30 May, 2002

The Secretary
Wellington Regional Council
P.O. Box 11646
WELLINGTON

Dear Ted

RATING OF UTILITIES' DISTRIBUTUTION NETWORKS

1. Thank you for your facsimile letter of 15 May 2002.

2. The two questions to be answered are:

   2.1. Does the Wellington Regional Council **(WRC)** have power to remit rates for utilities' distribution networks of:

      2.1.1. WRC's own bulk water network;

      2.1.2. Territorial authorities' **(TAs)** networks;

      2.1.3. LATES;

      2.1.4. "Franchised" operations; and

      2.1.5. Other corporate distribution networks (e.g. power, telecommunications, gas, postal)

   under both the current legislation (the Rating Powers Act 1988 **(RPA))** and the new legislation to take effect from the rating year commencing 1 July 2003 (the Local Government (Rating) Act 2002 **(LGRA))?**

   2.2. Can WRC make a zero or differential rate for all or any of the four rates it currently makes, namely general, rivers, transport, and stadium purposes?

3. The relevant provisions of the LGRA come into force on 1 July 2003. Until then, the provisions of the RPA continue to apply. Accordingly, for rating years prior to that commencing 1 July 2003 and concluding on 30 June 2004, the provisions which will be applicable are those contained in the RPA. Although the LGRA comes into force on 1 July 2003, to enable local authorities to continue to remit or postpone rates for the rating year commencing on that date, s. 139 of the LGRA states the provisions of the RPA will

continue to apply for that rating year. The reason is to enable local authorities to comply with the changed requirements for rates remission or postponement under the LGRA.

4. Whilst Utilities have always been liable for rates in respect of property which they owned or lease, their liability for rates in respect of their distribution networks where these are installed or pass through land which they neither own nor lease was reaffirmed in *Telecom Auckland Limited v Auckland City Council* [1971] 1 NZLR 426. Though the power of a local authority to rate for a distribution network has long been recognised, the matter seems to have taken greater prominence since a number of utility services formerly undertaken by the Crown or local authorities have been privatised.

5. Under s.3 of the RPA, all land is deemed to be rateable property unless otherwise provided in the Act or any other Act. Under s.2, land means *"all land, tenements and hereditaments, whether corporeal or incorporeal, and all chattels or other interests therein, and all trees growing or standing thereon".* The *Telecom* decision referred to above reaffirmed that the interest which a network utility operator has in the land on, under or through which the distribution network is installed is *"land"* within the meaning of the RPA. Section 7 of the LGRA provides that all land is rateable unless that Act or another Act states it is non-rateable. Under s.5 of that Act, *"land"* means *"all land, tenements and hereditaments, whether corporeal or incorporeal in New Zealand, and all chattels or other interests therein, and all trees growing or standing thereon".* There is therefore no material difference between the two sections and such networks will continue to be liable for rates.

6. The circumstances in which rates may be remitted under the RPA are set out in ss. 177 and 179.

6.1. Section 177 would not apply to network utility service operators as they would not be able to demonstrate payment of the rates would create *"extreme hardship"* to any person as required under that section.

6.2. Section 179 enables a local authority to remit rates, either wholly or in part, where the rates are in respect of any land described in Part I of the Second Schedule to the Act. Paragraph (a) .of Part I of the Second Schedule refers to land *"owned or occupied by or in trust for any local authority".*

6.3. This provision would permit the remission of rates where the network was owned and operated by a local authority.

6.4. If, however, the network was operated by some other person pursuant to any arrangement with the local authority which owned the network, then there would be no power to remit rates as, under s. 121 of the RPA, it is the occupier and not the owner who is primarily liable for the rate.

6.5. It would appear that it would be competent for WRC to remit a rate where the network utility service was operated by a LATE. Under s.594ZK of the Local Government Act 1974 **(LGA),** where any undertaking is transferred from a local authority to a LATE in which the local authority holds equity securities, any reference to the local authority in any Act is to be read and construed as a

reference to the LATE. On that basis, the High Court in *Watercare Services Limited v Auckland City Council* [2001] 2 NZLR 266 held that Watercare Services Limited was entitled to the benefit of the rating exemptions previously held by the Auckland Regional Council. The reasoning would be applicable to any LATE operating a network utility service within the Wellington region.

6.6. Although section 114 of the Wellington Regional Water Board Act 1972 provides that all rateable property of the Board (now WRC) is liable to be rated by a local authority having jurisdiction in that respect, it would still be competent for the local authority concerned to exercise its powers under section 179 of the RPA and remit rates for which WRC would be liable. That would permit WRC to remit rates payable in respect of its bulk water network.

6.7. Whether WRC, or any other local authority, should in fact exercise its discretion to remit the rates is another issue (which I discuss later).

7. The circumstances under which rates may be remitted under the LGRA differ from those under the RPA.

7.1. The First Schedule to the RPA sets out land which is not rateable under that Act. Part I sets out the categories of Crown land which is not rateable and Part II sets out land other than Crown land which is not rateable.

7.2. The Second Schedule to the RPA sets out land in respect of which rates may be postponed or remitted. Part I sets out the categories of land in respect of which a local authority may remit or postpone rates and Part II sets out those categories of land which are subject to a mandatory 50% rates remission.

7.3. The LGRA has altered this pattern.

7.4. The First Schedule to the LGRA sets out the categories of non-rateable land. Part 1 of the Schedule is land which is fully non-rateable. Essentially this part incorporates what was previously contained in the First Schedule to the RPA and also includes a number of categories of land which are to be found in Part I of the Second Schedule to the RPA. Part 2 of the First Schedule to the LGRA sets out those categories of land which are 50% non-rateable. Essentially this incorporates those categories of land which are contained in Part II of the Second Schedule to the RPA.

7.5. Sections 177 and 178 of the RPA (remission or postponement on the grounds of extreme hardship or hardship respectively) have no parallel in the LGRA.

7.6. The power to remit rates under the LGRA is found in s.85. A local authority may remit all or part of the rates only if it has adopted a remission policy under s. 122XA of the LGA and it is satisfied that the conditions and criteria in that policy are met (in the particular case).

7.7. Section 122XA of the LGA requires any remission policy to be prepared as part of the annual plan and adopted in accordance with the special consultative

procedure. If a new remission policy is not prepared and adopted, a summary of the remission policy to be applied by the local authority must be included in its annual plan. Any such policy must include a statement of the objectives sought to be achieved by remission of rates and the conditions and criteria to be met for rates to be remitted. Any such policy may be amended and revoked only in accordance with the special consultative procedure.

7.8. The LGA does not set out any specific matters and objectives to which the local authority must have regard in preparing and adopting a remission policy. However, s. 122XA(5) permits the local authority to consider the matters and objectives set out in s. 122XD. That section sets out factors which a local authority either must or may apply in adopting rates relief on Maori land. Because these factors relate specifically to Maori land, they cannot be general application though there are some matters which might be regarded as being of more general application (e.g. physical accessibility of the land, the level of community services provided to the land and its occupiers, and the importance of the land for community goals).

7.9. These provisions in the LGA would cease to have effect should the Local Government Bill **(LGB)** currently before the Select Committee be enacted. However, unless Clauses 89 and 90 (which contain the relevant provisions as to remission and postponement of rates) are substantially amended, there will be no material change to the position set out above.

7.10. In principle (and at first sight), it would appear to be possible therefore for a local authority to include in its policy relating to remission of rates a provision remitting rates in respect of utilities' service networks. I now propose to examine the propriety of such a policy.

8. When determining a policy for rates remission and postponement, WRC is exercising a statutory power of decision. As such, it is subject to judicial review in the High Court under s.4 of the Judicature Amendment Act 1972. Under that statutory provision, the Court may set aside any decision if the decision-maker takes into account irrelevant factors or fails to take into account any relevant factors or the decision is unreasonable in the sense that no reasonable decision-maker could have arrived at that decision. Accordingly, in determining its rates remission policy, WRC must have regard to the relevant factors in law and reach a decision which is reasonably open to it. Without traversing all the relevant factors, I now proceed to consider whether, in principle, a policy which provided for remission of rates for utilities' services networks would withstand challenge in the event of an application for judicial review.

8.1. The fundamental principle is that all land is rateable. That follows from s.3 of the RPA and s.7 of the LGRA. Therefore any policy providing for remission of rates must be a justifiable exception to the general rule that all rateable property is liable for payment of rates.

8.2. What circumstances might constitute a justifiable exception may relate to the ratepayer or to the property or to both. In the latter case, particularly, that could vary according to the nature of the rate i.e. whether it is a general rate or a special

rate (if under the RPA) or a targeted rate (if under the LGRA). Accordingly, while extreme hardship may be a factor of general application, the factors which may be applicable in other circumstances could vary according to the nature of the rate.

8.3. The identity of the ratepayer – i.e. whether the ratepayer is an individual, a local authority, a LATE, a body corporate, or otherwise – in itself, would appear to be irrelevant.

8.4. In view of the fact that electricity, gas, and telephone services are now supplied in a competitive (albeit imperfect) market, there appears to be no valid distinction to be made between a network utility service provider and any other commercial enterprise. Similar observations may be made in respect of postal services – there is limited competition in post but courier services are sufficiently analogous to be considered in somewhat the same market.

8.5. The position of water, waste water and sewage may be different. Although under the LGA, TAs are empowered, but not obliged, to provide these services, in fact these have been provided almost exclusively by TAs - even though some may have entered into contracts with private companies (in the sense of being non-public bodies) for the actual service delivery. Under part 7 of the LGB, TAs are required to make an assessment of water, waste water and sanitary services within their districts and, should the Bill become law, under clause 129, TAs must continue to provide any such services they are then providing and continue to maintain their capacity to do so. Having regard to this, it may be possible to distinguish the provision of such services from the provision of other utility services. Services for water, waste water and sewage provided by, or through, TAs are monopoly services available (with logistical limitations) to all ratepayers generally within the district and may be undertaken on a "without profit" basis. While an individual TA might contract a company to deliver some or all of these services to ratepayers, and while that company would do so "for profit" to itself, to the ratepayer the service would still be provided by the TA on a "without profit" to it basis. There would appear to be, therefore, no justification in distinguishing between such services according to who actually delivers them. Even if there were a direct contractual relationship between the ratepayer and the contracted service delivery company, it is difficult to see any justification for a policy which enabled utility service rates to be remitted where the TA itself delivered the service but not when the service was delivered by a contracted service delivery company.

8.6. Unless all territorial authorities delivered the services themselves, it would be difficult for WRC to justify any policy involving remission of rates for utility services where these were delivered by TAs. To do so would discriminate amongst ratepayers within the region for no reason other than the identity of the person providing the service – a matter which is quite irrelevant to any service being provided or any responsibility undertaken by WRC.

8.7. In the case of bulk water services, not all ratepayers within the region benefit from these services. By simply remitting rates in respect of the property held by WRC for bulk water purposes, those ratepayers who receive the benefits of such services would appear to be advantaged at the expense of those ratepayers who do not. Since the whole basis for WRC's charges under the Wellington Regional Water Board Act 1972 is the net recovery of costs incurred by WRC in providing the service, there would appear to be no basis for remitting rates otherwise payable in respect of these services.

8.8. All the provisions of Part VIIA of the LGA are clearly relevant in determining any rates remission or postponement policy. That would include particularly ss. 122F, 122G and 1220 of the LGA. Similar provisions are to be found in clauses 80 to 90 of the LGB.

8.9. What is required is a consideration of the services which WRC provides and the responsibilities which it is obliged to undertake. For example, the duties required of WRC under the Resource Management Act 1991 apply equally to network utility operators (and their networks) as they do to other ratepayers. There would appear to be no valid reason why such operators should be relieved of liability for rates in that respect. In considering such issues, a simple "user pays" approach cannot be justified.

8.10. A final question to be posed is what, if anything, is to be achieved by remitting rates for network utility services. Though there may well appear to be a superficial attraction in a policy which would see a local authority remit rates in respect of some (or all) of its own rateable property, there may be little net effect.

8.11. At this stage, I would recommend extreme caution in considering whether it is possible to formulate a coherent and justifiable policy which would entitle network utility service operators to have rates remitted in respect of their utility service networks.

9. I turn now to the question of differential rating for WRC's various rates.

9.1. Under the RPA, a local authority is empowered to make a rate on a differential basis only if it is empowered to do so by the section empowering that authority to make that particular rate. Section 80 of the RPA requires any local authority wishing to make a rate on a differential basis to do so by following the special order procedure. A territorial authority has power to do so in respect of its general rate (under s. 12(2)(c)) and any special rate (s/16(4)(b)) but a regional council may do so only in respect of any special rate (s.34(2)). When rating on a differential basis for catchment purposes, certain limitations apply.

9.2. This means that WRC cannot make a differential rate for its general rate, though the rate (at a uniform rate in the dollar) may vary within different parts of the region. It is not possible to make a rate for utilities' services networks which

differs from the rate payable in respect of other properties nor is it possible to have a zero rate. All properties within the region or the same part of the region (as the case may be) must be made and levied at the same uniform rate in the dollar.

9.3. WRC currently has the power to make a differential rate for rivers, transport and stadium purposes (and does so currently for the latter two).

9.4. The basis upon which a differential rate may be made under the RPA is set out in s.81(1) of the RPA. Any differential must relate to the specified criteria all of which relate to the characteristics or the use of the rateable property. There are two criteria which could be utilised were it desired to make a differential rate so as to distinguish utilities' distribution networks. These are *"the use or uses to which a property is put"* (s.81(1)(a)) and *"'such other distinctions in relation to the characteristics of a property as the local authority thinks fit"* (s.81(1)(f)).

9.5. The power to set a rate on a differential basis is conferred on local authorities by s. 13(2)(b) of the LGRA with respect to a general rate and by s. 16(4)(b) with respect to a targeted rate. The requirements for making a rate on a differential basis are set out in s. 14 of the LGRA and the basis upon which a differential rate may be made under the LGRA is set out in Schedule 2 of the RPA. Any differential must relate to one or more the specified criteria which relate to the characteristics or use of the rateable property, the services which are provided by or on behalf of the local authority to the property or the value of the property. There is one criterion which could be utilised were it desired to make a differential rate so as to distinguish utilities' distribution networks. That is *"the use or uses to which a property is put"* (Clause1 Schedule 2).

9.6. In making a differential rate, WRC would first have to determine whether it was appropriate to make a differential rate at all i.e. whether there was any reason to differentiate any properties by reference to any or all of the defined criteria having regard to the purpose of the rate.

9.7. Once a decision was reached in principle that there should be some differential, the next question to determine would be how the various differentials should be made having regard to all or any of the defined criteria. For example, the stadium purposes rate is currently fixed by differentials determined by a combination of the location and the use of the rateable property. With regard to utilities' services networks, the question to be considered would be whether these properties form a category which is sufficiently distinctive as to warrant being the subject of a separate differential.

9.8. In deterrnining the setting of differentials, many of the same considerations as I have traversed with regard to determining a rates remission and/or postponement policy would apply.

9.9. In having regard to the differentials, it is important to ensure that all circumstances are taken into account and the differential is not fixed simply by reference to any one factor (such as the services provided to the property). When considering such matters, it is all too easy to focus on particular benefits (or the absence of these) which are said to be derived by a particular property without considering the wider factors. Any community functions as an integrated whole. By focusing solely on the benefits said to accrue to any particular property or ratepayer, it is easy to lose sight of that all important factor.

9.10. For that reason, again I would urge caution in considering whether utilities' network services should be regarded as a separate category warranting a separate differential.

10. In summary the position is:

10.1. Until 1 July 2004, WRC has no power to remit rates for utility services other than those where a local authority or LATE is the ratepayer. WRC may, but is not obliged to remit rates for utilities' services networks where a local authority or LATE is the ratepayer.

10.2. Until 1 July 2003, WRC has no power to make a differential rate (including a zero rate) for its general rate.

10.3. WRC has the power to make a differential rate for any special rate and, after 1 July 2003, for the general rate provided it does so by reference to the statutory criteria applicable – s.8 l(2) of the RPA or Schedule 2 of the LGRA as the case may be – and any decision to make a rate on a differential basis is otherwise defensible.

10.4. A decision which would result in no rates being paid by utilities' services networks (whether by reason of a rates remission policy or by a zero rate under a differential rate) is almost certainly indefensible.

11. If you have any further queries, please do not hesitate to contact me.

Yours faithfully
OAKLEY MORAN

J.W. Tizard