
Application for an Exemption pursuant to
Section 81 of the Electricity Industry Reform
Act 1998

Date of Application: March 2005

INTRODUCTION

Application

- 1 Pursuant to section 81 of the Electricity Industry Reform Act 1998 (*EIR Act*), application is hereby made to the Commerce Commission for exemption from the application of the EIR Act, as described in this application.

Applicant

- 2 Details of the Applicant and the Applicant's contact are set out below:

- Applicant:
- James Mathew Peters (*Jamie Peters*); and
 - any Company in which Jamie Peters directly or indirectly has an "involvement" (as defined in the EIR Act) in an electricity lines business or electricity supply business by virtue of the acquisition of the Properties or any other properties (the *Peters Group*).

Telephone: (09) 379 9521
Facsimile: (09) 379 9526

Attention: Sean Garelli

Applicant's Contact: Chapman Tripp Sheffield Young
Level 35
ANZ Tower
23-29 Albert Street
Auckland

Telephone: (09) 357 9000
Facsimile: (09) 357 9099

Attention: Mark Nicholson/Jackie Floyd

Background

- 3 The Applicant is involved in the acquisition and development of properties.

Finance Centre

- 4 FIDK Trustco Limited, a company wholly owned by Jamie Peters has entered an agreement to purchase the following properties comprising part

of the block known as the Finance Centre situated on the corner of Albert Street and Victoria Street, Auckland:

4.1 Lot 2: Brookfields House;

4.2 Lot 3: Simpson Grierson House;

4.3 Lot 5: comprising Durham House, John Scott House, car parks, and the podium,

(together the *Properties*).

5 Settlement of the sale and purchase of the Properties is scheduled for 1 April 2005. [

].

6 The Properties are currently owned by NZGP (Northern Region) Limited, a company forming part of the Trans Tasman Property group. In decision 351A, the Commission granted Trans Tasman Property Limited an exemption from the application of section 17 of the EIR Act in respect of the Properties.

7 The Properties principally comprise commercial office units, car parking and retail which are leased to third party tenants.

8 FIDK Trustco Limited will take over the current lease agreements with tenants and Starline Utilities Limited, a company wholly owned by Jamie Peters, proposes to supply electricity to the tenants. To the best of the Applicant's knowledge, the supply of electricity to tenants is not a requirement of the leases it will take over.

9 Starline Utilities Limited will also supply electricity to be utilised in providing common building services to tenants, including air conditioning systems, building elevators and light to shared lobby areas. This will be charged to tenants by way of operating expenses. The Applicant is not seeking an exemption in respect of electricity that is consumed in providing common services and charged to tenants by way of operating expenses, on the basis that the Commission has previously determined that this does not constitute an electricity supply business for the purposes of the EIR Act (refer Decisions 351A, 514, 536).

10 Electricity supplied to the tenants is conveyed by means of the existing embedded electrical wiring systems within the Properties. A charge is not levied on the tenants for the use of the embedded wiring systems.

Other Interests

- 11 The Applicant also has the following interests:
- 11.1 Union Nelson (Freehold) JP Trustco Limited, a company wholly owned by Jamie Peters, holds a []% interest in the property at 27 Union and 145 and 147 Nelson Street, which is subject to a ground lease. Under the ground lease, the landlord has a right (at its option) to supply electricity to the tenant. Union Nelson (Freehold) JP Trustco Limited is not currently exercising its rights under this lease.
- 11.2 East On Quay Developments Limited, a company wholly owned by Jamie Peters, has been granted encumbrances over properties identified in certificates of title 178535 and 179537 under which it has a right (at its option) to supply electricity to any tenant, the owner or the licensee of the owner. The encumbrances have not yet been registered and EOQ is not currently exercising its rights under either encumbrance. The encumbrances have been granted in the context of a sale of the properties by EOQ and while EOQ is endeavouring to amend the encumbrances to remove its option to supply electricity, it may not be in a position to do so before it needs to register the encumbrances.
- 12 The Applicant does not currently own or operate any electrical distribution systems, and does not intend to own or operate any electrical distribution system outside the electrical distribution systems in the Properties and any properties it owns in the future. If the Applicant sells any properties in the future it may retain ownership of the electrical distribution systems in those properties.

INVOLVEMENTS PURSUANT TO THE EIR ACT**Electricity Lines Business**

- 13 Following settlement of the sale and purchase of the Properties, FIDK Trustco Limited will be an electricity lines business pursuant to section 4 of the EIR Act because it will:
- 13.1 convey electricity by line in New Zealand (being the embedded electrical wiring systems at the Properties) (section 4(1)(a));
- 13.2 own and operate lines and other core assets of an electricity lines business in New Zealand (being the embedded electrical wiring systems at the Properties) (section 4(1)(b)); and
- 13.3 not be exempted from being an electricity lines business under any of the exemptions set out in section 4(2) of the EIR Act.

- 14 Following settlement of the sale and purchase of the Properties, FIDK Trustco Limited will be "involved" in an electricity lines business pursuant to section 7 of the EIR Act because it will:
- 14.1 carry on that business (section 7(1)(a));
 - 14.2 exceed the 10% threshold (as defined in section 8 of the EIR Act) in respect of that business (section 7(1)(b));
 - 14.3 have material influence over the business (section 7(1)(c)); and
 - 14.4 own and operate the core assets comprising the business (section 7(3)).
- 14.5 Following settlement of the sale and purchase of the Properties, Jamie Peters will also be involved in the electricity lines business because as the sole shareholder of FIDK Trustco Limited, he exceeds the 10% threshold (as defined in section 8 of the EIR Act) in terms of control and equity return rights and has a material influence over FIDK Trustco Limited (section 7(1)(b) and (c)).

Electricity Supply Business

- 15 Following settlement of the sale and purchase of the Properties, Starline Utilities Limited will be an electricity supply business pursuant to section 5 of the EIR Act because it will:
- 15.1 sell electricity in New Zealand (section 5(1)(a)(i)); and
 - 15.2 own, directly, a customer data base relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i));
 - 15.3 own, directly, the benefit of a contract to sell electricity (section 5(1)(c)(i));
 - 15.4 will not be exempted from being an electricity supply business under any of the exemptions set out in section 5(2) of the EIR Act.
- 16 Following settlement of the sale and purchase of the Properties, Starline Utilities Limited will be "involved" in an electricity supply business pursuant to section 7 of the EIR Act because it will:
- 16.1 carry on that business (section 7(1)(a));
 - 16.2 exceed the 10% threshold (as defined in section 8 of the EIR Act) in respect of that business (section 7(1)(b));

16.3 have material influence over the business (section 7(1)(c)).

- 17 Following settlement of the sale and purchase of the Properties, Jamie Peters will also be involved in the electricity supply business because, as the sole shareholder of Starline Utilities Limited, he exceeds the 10% threshold (as defined in section 8 of the EIR Act) in terms of control and equity return rights and has a material influence over Starline Utilities Limited (section 7(1)(b) and (c)).

Scope of Exemption Application

- 18 The Applicant seeks a permanent exemption from the application of section 17 of the EIR Act in relation to the cross-involvement in an electricity lines business and an electricity supply business that would be brought about by an acquisition by FIDK Trustco Limited of the Properties.
- 19 The Applicant also seeks a permanent exemption from the application of sections 18 and 30 of the EIR Act, as the Applicant's business involves the acquisition and development of properties, which may from time to time involve other parties who have other interests in electricity lines or supply businesses.
- 20 Until the Commission determines that a permanent exemption is appropriate, the Applicant seeks a short term exemption under section 81 of the EIR Act from the application of section 17 of the EIR Act.

GROUNDS FOR APPLICATION

Section 17

- 21 The Applicant considers that an exemption is appropriate in these circumstances because the cross-involvement that would result from the acquisition described above will not, for the reasons outlined below, offend against the stated purpose and underlying policy of the EIR Act.
- 22 In considering applications for an exemption pursuant to section 81 of the EIR Act, the Commission has stated in the EIR Act Practice Note that it will consider three questions, each of which is addressed separately below.

Question 1: Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to inhibit competition in the electricity industry?

- 23 Consistent with exemptions the Commission has previously granted in similar circumstances, the Applicant considers the relevant market is the national electricity retail market (refer Decisions 315A, 457, 458, 514, 536).

- 24 In addition, the Applicant acknowledges that exemptions referred to above have been granted by the Commission on certain conditions. The Applicant accepts that if the Commission considers it appropriate to grant the exemption requested in this application, it should be on similar conditions, namely:
- 24.1 That neither the Applicant nor any of its related entities introduce a charge to any person for the use of, or related to, an electricity lines business in relation to the supply of electricity to the tenants of the Properties;
 - 24.2 That the Applicant or its related entities not prevent access, on reasonable terms and on a timely basis, to any embedded electrical wiring systems they own in relation to the Properties by any electricity supply business wanting to supply electricity to the tenants of the Properties;
 - 24.3 That the Applicant or its related entities provide all tenants of the Properties to whom they supply electricity with relevant electricity consumption and billing information on a timely basis, to enable the tenants to assess competitive options for the supply of their electricity;
 - 24.4 That the Applicant does not at any time enforce any lease, clause or encumbrance which allows the Applicant the option of supplying electricity so that the tenant, or third party subject to the encumbrance, is free to choose its electricity supplier (but the Applicant is entitled to offer to supply electricity to that tenant or third party);
 - 24.5 That the Applicant:
 - (a) notifies, within three months, the tenant and any third party subject to an encumbrance that the Applicant will not enforce the lease, clause or encumbrance;
 - (b) notifies any new tenant, after the date of this exemption who has a lease clause which allows the Applicant the option of supplying electricity that the Applicant will not enforce that clause, or the Applicant provides in the lease that the tenant can choose its own electricity supplier (but the Applicant is entitled to offer to supply electricity to that tenant or third party).
 - 24.6 That if the Applicant or its related entities enters into any new, or materially changes its current, contracts, arrangements, or

understandings with the tenants of the Properties or their assigns in relation to the conveyance or supply of electricity, the Applicant notifies the Commerce Commission.

- 25 The conditions outlined above will ensure that the Commission will not create any incentives or opportunities to inhibit competition in the national electricity retail market by granting an exemption. There will continue to be competition between electricity suppliers, because tenants are free to choose who they purchase electricity from. Given the current competition for commercial properties, there will be no incentive or opportunity to increase its tenants' electricity prices. Rather there will be incentives to keep the prices as low as possible to encourage tenants to remain in the Properties.

Question 2: Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to cross-subsidise generation activities from electricity lines businesses?

- 26 The Applicant is not involved in any generation activities. Therefore, granting an exemption would not create any incentives or opportunities to cross-subsidise generation activities from the electricity lines business.

Question 3: Would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between an electricity lines business and an electricity supply business which is not at arms length?

- 27 The Applicant acknowledges that if an exemption is granted, the relationship between the electricity lines business and the electricity supply business will not be at arms length. However, the Applicant considers that compliance with the arms length rules in Schedule 1 of the EIR Act is not necessary if the Commission grants the exemption on the terms mentioned above for the following reasons:

27.1 the conditions of the exemption will prevent any anti-competitive consequences from a relationship which is not at arms length from arising;

27.2 there will be a strong incentive on the Applicant as owner of the Properties to minimise its costs to tenants.

Sections 18 and 30

- 28 Section 18 of the EIR Act prohibits more than 20% in aggregate of the control rights or equity return rights in, or material influence over, an

electricity lines business or an electricity supply business being held by persons who are involved in the other type of business.

29 Section 30 of the EIR Act prohibits a person with a cross-involvement from acquiring an involvement, or increasing the level of any of that person's involvements, in an electricity business.

30 Each time the Applicant acquires a new property it:

30.1 will increase its involvement in an electricity lines business (if the property includes the electricity distribution system);

30.2 may increase its involvement in an electricity supply business if any entity in the Peters Group supplies electricity to the tenants of the new property.

31 In addition, if Jamie Peters or any entity in the Peters Group acquires the new property in conjunction with any other person who has an involvement in an electricity lines or supply business, then the 20% aggregate cross-ownership prohibition in section 18 of the EIR Act may be breached.

32 Given the compliance costs and potential delays, the Applicant seeks an exemption in respect of any future property acquisition, investment and management activities the Applicant might undertake and for the exemption to apply to any entities related to the Applicant that are "involved".

33 The Applicant accepts that if the Commission considers it appropriate to grant the exemption requested in this application, it should be on the conditions that:

33.1 the terms and conditions set out in paragraphs 24.1 to 24.6 above in relation to the exemption given to the cross-involvement applies;

33.2 the Applicant inform the Commission of the details of any future property acquisition or development activity within 20 working days (as that term is defined in the Commerce Act 1986) from the day following the day it undertakes the activity that is likely to breach the EIR Act and for which the Applicant is likely to rely on this exemption.

CONFIDENTIALITY

34 Confidentiality is sought for the information that has been deleted in the "Public Copy" of this application until the applicant confirms in writing to the

Commission that the particular information is no longer confidential. The confidential information is contained in paragraphs 5 and 11.1.

35 As provided in section 58 of the EIR Act, confidentiality is sought pursuant to section 100 of the Commerce Act 1986 and pursuant to section 9(2)(b) of the Official Information Act 1982 on the grounds that:

35.1 the information is commercially sensitive and contains valuable information which is confidential to the Applicant; and

35.2 disclosure of it is likely to give an unfair advantage to competitors and unreasonably prejudice the Applicant's commercial position.

36 The Applicant also requests that it be notified of any request made to the Commission under the Official Information Act for the confidential information, and that the Commission seek the Applicant's views as to whether the information remains confidential and commercially sensitive at the time those requests are being considered.

ADJUDICATION FEE

37 Enclosed is the adjudication fee of \$11,250 (inclusive of GST) payable to the Commerce Commission. In accordance with regulation 3 of the Electricity Industry Reform Act (Fees) Regulations 1998, a refund is requested of any proportion of this fee where the actual cost of processing this application is less than \$11,250.

DECLARATION

38 Attached to this application is a completed declaration form.

FURTHER INFORMATION

39 If the Commission requires any further information in relation to this application for exemption, please contact the Applicant's Contact, as set out on the front page of this application.

DECLARATION

THIS APPLICATION is made by James Mathew Peters

I hereby confirm that:

- all information requested by the Commerce Commission has been supplied;
- all information known to the Applicant which is relevant to the consideration of this application has been supplied to the Commerce Commission; and
- all information supplied by the Applicant to the Commerce Commission is correct as at the date of this application.

I undertake to advise the Commerce Commission immediately of any material change in circumstances relating to the application.

Date:

Signed by:

James Mathew Peters