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**APPLICATION FOR EXEMPTION
SECTION 81
ELECTRICITY INDUSTRY REFORM ACT 1998**

Date of Application:

4th July 2005

The Applicant:

Eastland Infrastructure Limited, on behalf of;
Eastland Network Ltd
P O Box 1048
Gisborne

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Application:

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 the application below.

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Executive Summary

Introduction

Eastland Infrastructure Limited (EIL) is the management company that manages Eastland Network Ltd (ENL). ENL is an “electricity lines business” as defined under the EIR Act and currently owns a 5MW_e hydro generation asset and 6 x 1.0MW_e and 1 x 0.6MW_e mobile diesel generator sets.

ENL wishes to construct and operate a 12MW_e wind farm at Mokairau, approximately 30km north-east of Gisborne. [

]

Issues with Current Regulation

ENL is restricted in its ability to own embedded generation and sell its output, in particular it is constrained by;

- The restriction on it being able to trade electricity hedges;
- The Ownership Separation and Corporate Separation Rules
- The Arms Length Rules

ENL believes that without these issues being addressed it will not be commercially viable for ENL to invest in some of the exciting new generation opportunities it has identified.

Exemption Sought

Exemption is sought in regard of to sections 5, and 25 of the EIR Act to allow ENL to operate the wind farm, in particular to be able to sell the electricity output from this wind farm and its other generation assets, direct to a small number of large end-consumers, who are connected to ENL’s network, to be able to deal in electricity hedges and to be exempt from the requirements of the Arms Length Rule.

ENL would be happy to continue to meet the requirements of the Corporate Separation rule, or other such requirements to provide separation of the electricity lines business from it’s generation business, should this be considered necessary by Commission. Provided these requirements did not overly burden the companies with overhead costs should this be deemed appropriate by the

Benefits of Embedded generation

ENL believes that providing the exemption requested will have a number of benefits to the company, to the region and to New Zealand. ENL investing in embedded generation will have the following benefits;

1. Provide a commercial return for ENL;
2. Avoid the need for transmission capacity upgrade, but still ensure that there is adequate electricity supply;
3. Provide potential local industry with certainty of competitive electricity price over the long-term;
4. Increase the probability of investment in new industry in the region; and
5. Augment the national generation portfolio and assist in meeting the national energy growth requirements.

Supporting Information

Overview of Eastland Network Limited

Eastland Network Limited is the electricity lines business (defined under section 4 of the EIR Act 1992) servicing the Gisborne and Wairoa Districts with line function services. It distributes approximately 306 GWh of electricity to approximately 26,000 consumers across two isolated distribution networks.

ENL is a limited liability company formed under the Energy Companies Act 1992.

Both EIL and ENL are 100% owned by the Eastland Community Trust. The Gisborne District Council is the capital beneficiary of the Trust. The income beneficiaries constitute all consumers connected to ENL's Gisborne distribution network and all rate payers on the Gisborne District Local Authority Electoral Roll (i.e. it excludes the consumers and community of Wairoa District Council). As a result of the EIR Act, ENL sold its interests in electricity supply to Contact Energy Limited. in November 1998.

ENL purchased both the line business and generation business assets from Wairoa Power in August 1999. ENL therefore has an interest in an "electricity supply business" as defined in section 5 of the EIR Act. These generation assets consist of the Waihi Hydro Scheme which has a "nameplate" capacity of 5MW_e. However, due to low inflows and reduced storage as a result of Cyclone Bola this generation facility does not generate the volumes that would be expected of a plant of its size.

ENL currently sells the energy output for its Waihi Scheme to TrustPower, the incumbent electricity retailer in Wairoa.

ENL currently sells the energy output for its Diesel Generators to Contact Energy, the incumbent electricity retailer in Gisborne.

In both these instances the amount paid for the generation output is considerably less than ENL's larger consumers are paying for the energy component of their electricity bill.

ENL has no direct involvement in the national electricity retail market.

Overview of ENL's Current Generation Assets and Opportunities

ENL currently owns a 5MW_e Hydro Electricity Generator at Waihi embedded into its Wairoa distribution network. This station generates electricity for sale to electricity retailers. Due to the dam's storage being reduced to approximately 3 days, as a result of Cyclone Bola, ENL's water management is focussed on the use of the scheme as a peaking plant applied to reduce transmission charges.

However, in terms of the Wairoa network it makes a significant contribution. The Wairoa network has a maximum demand of approximately 12.0MW and annual

consumption of approximately 53GWh. The Waihi Scheme therefore presents 41% of demand and with an annual generation output of approximately 11GWh, 20% of the energy supply in Wairoa.

In addition ENL owns 6.6MWe of containerised, mobile diesel generation sets, for the purpose of providing security, managing outages on ENL's distribution network and in a peak limiting role. Diesel generation can only economically be applied to peaks with short duration and then only to the top of the load peak where duration is short, limiting the running hours. This constraint prevents this generation being applied as generation purely for the purpose of electricity supply. This generation is also applied to deliver acceptable security standards at transmission level where existing Transpower assets are constrained.

ENL currently sells the energy generated during this time, plus that generated during network outages, plus that during times of emergency voltage support and that during periods requested by retailers as a result of high energy spot prices, to retailers at the market rates able to be negotiated. When the electricity retailers initiate electricity generation from ENL diesel generators they pay []cents/KWh, when ENL initiates generator operation ENL receives [] cents/KWh. The energy generated from these six generators operated in this way amounts to approximately 1.37GWh p.a. or less than 0.5% of the total energy distributed over its network (306GWh as detailed above).

The investment in generators has enabled ENL's existing network and transmission assets to be utilised more efficiently and has proved to be a lower cost alternative than ENL would otherwise face to upgrade its network, and Transpower's, in order to meet new capacity demands from local economic development. A factor ENL considers during all investment decision making.

Viability requires ENL to recover some of the cost of the generation by offering the energy for sale to retailers. However the majority of the recovery of costs has been derived from avoided new investment.

Retailers contract the use of the generators during periods of high spot price. While the diesel generators generate at costs exceeding 20c/kWh the spot price in Gisborne at times exceeds this level. This is characteristic of the constrained transmission system and the dominance of the Genesis owned generation in the region that is located behind the transmission constraint. The deployment of ENL's generation by retailers increases competition and reduces power supply costs to the region.

ENL is also well advanced in the design and planning of a 12MWe wind farm, at Mokairau, 30km North-East of Gisborne and progressing the investigations is a 45MWh/10MWe biomass fuelled combined heat and power plant and has completed some initial investigations on a gas fired 8MWh/5MWe cogeneration plant. ENL is far enough advanced with the technical and economic analysis of these projects, and in

particular the Mokairau wind farm, to have concluded that without the ability to; a) retail electricity directly to consumers and; b) to extract economies of scale by running them under it's existing management structure; it will not be economic to proceed with these projects.

Mokairau Wind Farm

Appendix A contains ENL's successful Tender submission to the Climate Change Office as a project to reduce emissions, and our subsequent Project Agreement with the Crown for this project. These documents provide information and background on the proposed Mokairau wind farm. It will be noted that these documents use 9MW_e as the output for the wind farm, whereas this exemption document discusses 12MW_e. This is because further technical work by ENL since the Project Agreement was executed, indicates a 12MW_e wind farm may now be possible, the constraint for the size is one of a technical nature with respect to system stability and distribution capacity of ENL's network.

ENL has continued to make progress on the Mokairau wind farm since the Project Agreement was executed. Consultation with affected parties has commenced, including several hui's with local iwi. ENL has executed a lease with the landowner at Mokairau station, for the installation and operation of the wind farm. ENL has also signed a memorandum of understanding with Hydro Tasmania. The MOU is structured such that ENL provides the land lease agreement, electrical substation and necessary network connections, operation of the wind farm and local knowledge with respect to logistics and construction and for Hydro Tasmania to provide what is likely to be a turnkey design, install and maintain for 5 years operation for the wind turbines themselves, via their relationship with Vestas. The MOU is constructed on a 50/50 cost and revenue share basis. This provides further evidence that ENL will not be motivated to use the wind farm to cross subsidise other activities or vice versa to affect markets. Its MOU partner would receive no benefit from this and resist any attempt to do so. Therefore the arrangement with Hydro Tasmania provides a check and balance on the affect on the local distribution market, for ENL ownership and operation of Mokairau Wind Farm.

Pricing Methodology

ENL's 2005/06 pricing methodology and actual line charges and terms and conditions are attached in Appendix B. ENL has a policy for distributed (embedded) generation connection to the ENL network consistent with that highlighted in the MED discussion paper. ENL currently would assess any distributed generation connection to it's network on a case by case basis, upon application, but has a policy of ensuring the option of distributed generation connection to the network is made known through detailing it in the line charges and providing for it in it's pricing methodology

document which is publicly disclosed. The ability for any entity to connect distributed/embedded generation to ENL's network provides further evidence that it is not affecting the local distribution market in connecting its own embedded generation wind farm to its network.

Regional/National Good

The Gisborne district currently has a transmission capacity constraint. The existing Transpower 110kV transmission line that runs from Tuai to Gisborne is nearing capacity. Indeed it is only via prudent demand side management of load, and generation by ENL as detailed above, that ENL is able to maintain maximum demand to a level within which the transmission line can supply with a reasonable degree of security.

Eastland has modelled forward to look at the likely load that could exist when forestry volumes reach their sustainable cut level. Current forestry volumes are around 700,000 tonnes per annum. This is forecast with a high degree of certainty to grow to in excess of 2,400,000 tonnes per annum. It is in the nation's and the region's best interest that as much as possible of this volume is processed, not exported in commodity log form, as this will contribute directly to regional growth.

This modelling has determined that it is not unreasonable to expect load to double over the next few years, from the current network maximum demand of around 50MW to 100MW. In addition this load will not be per annum straight line growth but will come on line in significant "chunks" as processing facilities are commissioned.

Investment in a new transmission line is a possibility, however given that Gisborne already has very high transmission costs and delivered electricity costs, this does not seem to be the most economically efficient option, as it would further increase transmission costs, raise the delivered cost of electricity and continue to make Gisborne dependent on external generation, which is already under pressure. It further appears that Transpower is somewhat distracted with the current issues involved in the 400kV core grid upgrade in the upper North Island and there is no guarantee they will be able to react in a manner timely enough to ensure that the transmission capacity is upgraded and that potential industrial investment is not scared off by the lack of an adequate electricity supply. Furthermore the issues Transpower are currently experiencing in the Waikato also provide a reminder of the issues that would need to be resolved for the East Coast in providing additional transmission capacity into Gisborne.

Investment in ENL embedded generation can potentially;

- Provide a commercial return for ENL;
- Avoid the need for transmission capacity upgrade, but still ensure that there is adequate electricity supply;
- Provide potential local/regional industry with certainty of competitive electricity price over the long-term;

- Increase the probability of investment in new industry; and
- Augment the national generation portfolio and assist in meeting the national energy growth requirements.

Motivation to Allow Lines Companies to Invest in Embedded Generation

Eastland believes it is vital to look at allowing, under current regulation, ways that Lines Companies can participate competitively in the energy generation market. The nation is currently faced with a shortage of future generation and transmission capacity and investment in localised "embedded generation" can help to counter this shortfall. Lines Companies are ideally suited to investing in embedded generation because;

- They know and understand the electricity sector;
- They have strong balance sheets; and
- They have, in general, local ownership and can tailor embedded generation solutions to suit the local environment.

There are currently 28 Lines Companies. If each was to install 5MW_e of embedded generation per annum, this would significantly meet the electricity growth needs of the nation moving forward.

Installing more transmission capacity is an alternative, but as detailed above not necessarily one that provides the most timely or best economic outcome, particularly in a region like the east coast. With embedded generation, Lines Companies are well placed to investigate transmission options (working alone or with Transpower) and decide on the lowest overall cost for their consumers.

To realise the vision of distributed generation, companies like ENL must change their role from distributing capacity along their lines, to one of managing bi-directional power flow in a network. The task is more difficult than their current mode of operation, but more economically efficient. ENL is requesting through this application capability to achieve these outcomes.

This request is consistent with the Government Policy objectives regarding the meeting of increased energy demand and regional economic development in a sustainable, economic and efficient manner. ENL has made submission on this very issue to the Ministry for Economic Development, in response to their discussion paper put out in March 2005, entitled Facilitating Investment in Generation by Lines Companies. This document is included in Appendix C.

Other Parties Not Interested in Embedded Generation

ENL also observes that there is little or no real interest, or if there is interest, little or no progress being made by other parties, in investing in embedded generation within the Gisborne region.

Impediments to Investment in Embedded Generation By ENL

Eastland is of a view that there are three parts of EIRA that currently impede the ENL Board from committing to investment in the Mokairau Wind Farm.

1. The inability for Lines Companies to **trade in financial instruments** (which, when read together with the Electricity Governance Rules, limits the ability of Lines Companies to enter continuous supply contracts with consumers);
2. The **ownership separation rule** and the **corporate separation rule**; and
3. The **arms length rules**.

Trading Financial Instruments

Section 5 (1) (a) (ii) of the EIRA defines (in part) an Electricity Supply Business as a business that;

Sells financial hedges for risks relating to the price of electricity in New Zealand

Therefore under current regulation if Eastland wanted to put hedges in place to cover periodic shortfall from the Mokairau wind farm it would be deemed to be an Electricity Supply Business. As Eastland is by definition an Electricity Lines Business it would be in breach of the regulations if it was to put a hedge in place.

If ENL was to sell its output from the wind farm plant to a large consumer connected to its network, it would need to be able to trade in electricity and hedges to cover the times when the wind was not blowing and there was no (or low) generation, in order that it could guarantee supply to the consumer.

ENL also notes that the amount it receives from retailers for the output from its diesel generators and hydro station are substantially lower than the large consumers connected to Eastland's network are paying. It is ENL's view that excessive margins are being made by retailers, allowing ENL to offer a cost effective electricity solution to large end-consumers in this market, would improve competition and lower the delivered energy cost (as seen by these large consumers).

It is further worth noting that the current amount paid to ENL for its (ENL initiated) generation output, is not sufficient to commit to investment in the wind farm. However, a supply contract with a consumer would provide a per unit price that would justify this investment.

As an example, ENL currently receives approximately [] cents per kWh for its generation output. Large consumers are paying over [] cents per kWh for their energy (excluding transmission and distribution line charges). ENL believes it needs to recover between [] cents and [] cents per kWh to justify its investment in the wind farm.

The ability for ENL to “hedge” generation output would mean we are able to offset the risk associated with variability of wind generation and offer consumers a supply contract.

Ownership Separation Rule

The EIRA essentially provides for Lines Companies (electricity lines businesses) to be separated from generators and retailers (electricity supply businesses) and limits cross ownership.

Section 17 of the EIRA provides the following;

17. Cross-ownership prohibition

- (1) No person involved in an electricity lines business may be involved in an electricity supply business.*
- (2) No person involved in an electricity supply business may be involved in an electricity lines business.*

Section 18 limits the amount of cross ownership as follows;

18. 20% aggregate cross-ownership prohibition

- (1) The purpose of this section is to prevent 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.*
- (2) A person who is involved in business A may not acquire an interest in business B if there are, or if the interest would, if acquired, result in there being, persons who are involved in any business A who—*
 - (a) Have more than 20% in aggregate of the control rights or equity return rights in business B; or*
 - (b) Have material influence over business B.*

The implications of this are that a Lines Company (an electricity lines business) can not have a controlling (or substantial) interest in an electricity supply business.

If ENL was deemed to be an electricity supply business then it would need to comply with the ownership separation rules above.

Of the generation activities that ENL is involved in, or proposes to be involved in, with the inclusion of Mokairau wind farm, only the selling of hedges would deem it to be an electricity supply business.

On the basis that the exemption to allow ENL to trade financial instruments is adopted then Eastland would not be deemed to be an electricity supply business for any of its existing generation portfolio or with the addition of Mokairau wind farm because;

- the Wind farm is fuelled by renewable energy sources and therefore is exempt from the ownership separation rule under section 46A.
- Waihi and the generator plant would be exempt under section 46C because the total quantum of non-renewable generation owned by Eastland is 11.6MW and therefore fall under the 50MW limit.

Eastland would therefore not be required to comply with the ownership separation rules.

Corporate Separation Rule

Under Section 24 however, ENL would still be required to comply with the corporate separation rule. This in itself is not difficult to comply with as the generation assets and business can be placed in a separate company that is owned by ENL or EIL.

The problem for Eastland is that the arms length rules would also be applicable.

Arms Length Rules

Section 25 requires a business with an exemption from the ownership separation rules to comply with the arms length rules.

Schedule 1 of the EIRA defines the requirements of the arms length rules.

ENL's understanding is that while it may not be required to comply with the ownership separation rule (because it would not be a deemed electricity supply business), it would need to comply with the corporate separation rule and the arms length rules.

The arms length rules would effectively mean that the separate company established to comply with the corporate separation rule would need to be managed by people who were not managers of ENL and governed by directors that are not directors of ENL.

ENL's view is that compliance with the arms length rules would force a level of incremental overhead costs into the wind farm project that would preclude the wind farm project being pursued as it would no longer be economic.

It should be considered that the size of ENL's embedded generation is relatively small (on a national scale), and the output would be dedicated to a small number of large consumers.

In order to make the economics work for the 12MW_e wind farm, ENL has budgeted 1 incremental management/technical resource to run this site plus a small allocation of overhead. The costs of establishing a full management team and board of directors that are separate, and therefore additional to what ENL currently has, would increase this cost by at least a factor of 5.

The limits within the EIR Act on the amount of generation that a Lines Company can own mean that in practice there will never be enough scale to justify the establishment of a separate structure that would comply with the arms length rules, unless it was a large renewables plant, in which case the existing network infrastructure would not be able to accommodate the generation export requirements

Exemptions Sought

In respect to Energy Hedges;

ENL seeks exemption from Section 5 (1) (a) (ii) of the EIR Act:

To allow ENL to trade in financial instruments (e.g. hedges) up to the nominal output of the final design of the Mokairau Wind Farm, assuming that it is available on a continuous basis.

In respect to the Arms Length Rules;

ENL seeks exemption from Section 25 (Arms Length Rule) of the EIR Act:

To allow ENL to sell the electricity output from the Mokairau wind Farm and its other embedded generators, direct to large end-consumers connected directly to ENL's network, whilst retaining a material ownership interest in the Mokairau wind farm and its electricity lines business.

Response to the Commission's three primary questions

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?*

From the Commission's Decision 332 (Alpine Energy Limited, 8 February 1999) and Decision 333 (Contact and Enerco New Zealand Limited, 10 December 1998) the relevant markets are:

- I. the national electricity generation market;
- II. the local electricity distribution market in the area covered approximately by the Gisborne and Wairoa District Councils;
- III. the national electricity retail market.

National Electricity Retail Market

ENL no longer has any direct involvement in the national electricity retail market. It is therefore unable to effect competition in this market. Nor would it receive any benefit from inhibiting competition (if it was able to do so). As stated in the Commission's Decision 332, competition in this market is increasing. This is a result of the Government's reforms of the electricity industry and the involvement of new players. ENL's ownership and use of a small amount (on a national or even regional scale) of generation would have minimal effect on this. Retailers are able to compete with each other throughout New Zealand (including the East Coast) unhindered by ENL's proposed generation.

ENL's interest therefore will not create material incentives or opportunities for ENL to inhibit competition in the national electricity retail market. The purposes of the EIR Act will not be defeated in this market.

National Electricity Generation Market

The potential output from the wind farm generation will be negligible in terms of the national electricity market. Producing approximately 37GWh annually, it represents 0.1% of the national electricity generation market. The output of the wind farm, would be dedicated to a small number of large end-consumers through long term hedge contracts.

As stated in Decision 332, competition in the national generation market is likely to increase.

ENL's ownership of additional wind generation does not create material incentives or opportunities for ENL to inhibit competition in the national electricity generation market. Competition in the national generation market will be unaffected by anything ENL might do in relation to its generation assets. Therefore, the purposes of the EIR Act will not be defeated in this market.

Local Distribution Market

As stated in Decision 332, the local distribution market is a natural monopoly where, by definition, competition is likely to be limited. Any new incentives or opportunities to inhibit competition are, therefore, likely to be related to those already present. The purposes of the EIR Act will not be defeated in this market.

It should also be noted that ENL is subject to the regulatory regime in Part 4A of the Commerce Act.

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?*

In Decision 332 the Commission identified the following incentives or opportunities to cross-subsidise generation and line activities:

- I. the incentive or opportunity to offer favourable connection terms;
- II. the incentive or opportunity to influence the sale of electricity at a non-market price;
- III. the incentive or opportunity to provide management or other services at below market price; and
- IV. the incentive or opportunity to protect the capital invested should the generation business face "hard times", by further capital injection on favourable terms.

The output from the proposed wind farm, would be dedicated to a small number of large end-consumers locally based through long term hedge contracts. The Electricity Sale and Purchase Agreement for this output is to be on normal commercial terms. The price for the electricity generated will be arrived at by negotiation based on the expected price path for the national electricity market and allowing for avoided transmission losses at the relevant GXP. It is to be set

for circa 10 years, with an indexation. There is therefore no material opportunity for ENL to influence the sale of electricity at a non-market price.

Furthermore ENL is subject to the regulatory framework under Part 4A of the Commerce Act.

In these circumstances there will not be any material incentives or opportunities for ENL to cross-subsidise generation for generation sale with the lines business. The purpose of the EIR Act will not be defeated.

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?*

The relationship between ENL's lines business and its generation interests is and would not be at arms length. However, ENL believe the arguments set out above demonstrate why ENL believe the EIR Act and Commerce Act would not be prejudiced by exemption from the arms length rule, because of the Electricity Sale and Purchase Agreement structure there will no scope for day to day negotiation with end-consumers on price and volume.

It should be further considered that ENL is looking at a 50:50 joint venture with a technology partner Hydro Tasmania for the wind-farm project and a separate entity will be established for this business.

Concerns about cross-subsidisation between the regulated network business and a separate generation business dissipate where a separate generation business exists and has two or more shareholders that are independent of each other, as any motivation for value shifting between entities disappears.

ENL also believe that an investment in the Mokairau wind farm is consistent with Government Policy in the following areas:

- the Government Policy Statement to ensure that electricity is produced and delivered to all classes of consumers in an efficient, fair, reliable, and environmentally sustainable manner and promote and facilitate the efficient use of electricity;
- the purposes of the EIR Act to help ensure that costs and prices in the electricity industry (in this case confined to Gisborne) are subject to sustained downward pressure; and
- recent amendments to the EIR Act reflecting the Governments view that there is an important role for lines businesses in generation.

DECLARATION

THIS APPLICATION is made by Eastland Network Ltd.

The company hereby confirms 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.

The company undertakes to advise the Commerce Commission immediately of any material change in circumstances relating to the application.

Date: _____

Signed by: **EASTLAND NETWORK LTD.**

Matt Todd
Chief Executive Officer

I am an officer of the company and am duly authorised to make this application.

Appendix A – Wind Farm documents

ENL Tender for Projects to Reduce Emissions
Mokairau Wind Farm

&

Project Agreement

Appendix B ENL 2005/06 Pricing Methodology

Appendix C ENL Submission to MED
Facilitating Investment in Generation by Lines Companies