

**APPLICATION BY MR SAMFORD LEE MAIER (JUNIOR)**

**FOR EXEMPTION**

**UNDER SECTION 81(1) OF THE**

**ELECTRICITY INDUSTRY REFORM ACT 1998**

**26 August 2002**

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**Exemption Application Under Section 81(1) of the  
Electricity Industry Reform Act 1998**

**Date of Application:**

1. This application is dated 26 August 2002.

**Application:**

2. Pursuant to section 81(1) of the EIR Act, application is hereby made to the Commerce Commission for a permanent exemption from the application of section 17 of the EIR Act, as described in the application.
3. This application:
  - (a) sets out the nature of Mr Maier's role with Mighty River Power Limited ("Mighty River Power") and New Plymouth Equity Advisers Limited ("NPEAL");
  - (b) explains the relationship of the EIR Act to each of Mr Maier's roles; and
  - (c) identifies the extent of the exemption sought.

**Applicant:**

4. This application is made by Mr Samford ('Sandy') Lee Maier (Junior).
5. This application has been prepared and filed by:

Mighty River Power Limited  
Level 9  
KPMG Legal Building  
22 Fanshawe Street  
AUCKLAND

Attention: Richard Taylor  
Phone: 09 308 8227  
Fax: 09 308 8209  
E-mail: Richard.Taylor@mightyriver.co.nz

and

Simpson Grierson  
Simpson Grierson Building  
44-52 The Terrace  
Box 2402  
WELLINGTON

Attention: Elisabeth Welson/Adam Wood  
Phone: 04 924 3400/04 924 3502  
Fax: 04 472 6986  
E-mail: elisabeth.welson@simpsongrierson.com  
adam.wood@simpsongrierson.com

## Confidentiality

6. Confidentiality is sought for the information marked in this application as confidential. This is due to the commercial sensitivity of this information, which if released could unreasonably prejudice Mighty River Power, NPEAL or Powerco vis à vis their business competitors. Confidentiality is sought for 20 working days after the determination of this application (pursuant to section 100 of the Commerce Act 1986). For the same reasons, Mr Maier would also like the Commission to note that the information should be confidential thereafter on the basis of section 9(2)(b) of the Official Information Act 1992.

## Mr Maier's Role with Mighty River Power

7. Mr Maier was appointed a director of Mighty River Power by the Minister of State-Owned Enterprises, with effect from 19 April 2002.
8. Mighty River Power is an electricity generator and retailer. It is a State-Owned Enterprise. Its core electricity generation assets include a chain of nine hydro stations on the Waikato River which provide on average approximately 13% of New Zealand's electricity needs and are capable of generating up to 25% of peak national demand. Mighty River Power sells electricity to approximately 250,000 customers through its retail businesses Mercury Energy and First Electric.
9. Mighty River Power falls within the definition of an electricity supply business under the EIR Act because it:
  - (a) sells electricity in New Zealand (section 5(1)(a)(i));
  - (b) owns or operates, directly or indirectly, a generator in New Zealand or any other core generation assets (section 5(1)(b));
  - (c) owns or operates, directly or indirectly, core assets of an electricity retail business which include:
    - (i) a customer database relating to and used for the purposes of an electricity retail business (section 5(1)(c)(i)); and
    - (ii) the benefit of a contract to sell electricity (section 5(1)(c)(ii)); and

- (d) is not exempted by section 5(2)(a), because it sells or generates more than 2.5GWh per annum; and
- (e) is not otherwise exempted by section 5(2).

### Mr Maier's Role with NPEAL

- 10. Mr Maier is, and has been, a director of NPEAL since 1 December 2000.
- 11. NPEAL is a wholly-owned subsidiary of New Plymouth District Council ("NPDC").
- 12. NPEAL is a Local Authority Trading Enterprise under the provisions of the Local Government Act. It provides commercial and professional advice to NPDC regarding its various investments, including but not limited to NPDC's investments in Powerco Limited ("Powerco"), Apex Consultants Limited, Hobson Investments Limited, forestry and airport investments. NPDC holds a 47.7% shareholding in Powerco.
- 13. Powerco is an electricity lines business. Its electricity distribution networks provide line function services to electricity consumers in Taranaki, in the Wanganui, Manawatu, Wairarapa, the Hutt Valley and Porirua. Powerco is listed on the New Zealand Stock Exchange ("NZSE"). Its shareholders are as follows:
  - (a) New Plymouth District Council 47.7%
  - (b) Taranaki Electricity Trust 16.8%
  - (c) Powerco Community Trust 3.7%
  - (d) Powerco has approximately 17,000 smaller shareholders spread throughout New Zealand.
- 14. Powerco operates a network with approximately 157,000 electricity connections and distributes approximately 2087 GWh of electricity per annum over that network.
- 15. Powerco falls within the definition of an electricity lines business under the EIR Act because it:
  - (a) conveys electricity by line in New Zealand (section 4(1)(a)); and
  - (b) owns or operates, directly or indirectly, those lines in New Zealand or any other core assets of an electricity lines business (section 4(1)(b));
  - (c) is not exempted by section 4(2)(a), because it conveys more than 2.5GWh per annum; and
  - (d) is not otherwise exempted by section 4(2).
- 16. [*Confidential*]
- 17. [*Confidential*]
- 18. Mr Maier does not personally hold any control rights or equity return rights in Powerco. Similarly, NPEAL does not hold any Powerco shares.

## Cross-involvement prohibited

### Section 17

19. Section 17 of the EIR Act provides that:
- (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.*

### Involvements

#### Mighty River Power

20. Mr Maier is involved in an electricity supply business as he is a "manager" of Mighty River Power by virtue of his role as a director of that company (section 11(1)).

#### NPDC / Powerco

21. NPDC is involved in an electricity lines business by virtue of its ownership of 47.7% of the control rights and equity return rights in Powerco (sections 7(b), 8(a) and 8(b)).
22. Mr Maier submits that he is not involved in Powerco by reason of his directorship of NPEAL for the following reasons:
- (a) he does not have a material influence over Powerco (section 11); and
  - (b) there is no "aggregation" under sections 8(c) and (d) of the EIR Act. Mr Maier submits that an "aggregation" would require him to personally hold at least some of the control rights or equity return rights in Powerco, which he does not do.
23. Mr Maier submits that he does not have a material influence over Powerco by virtue of the following facts:
- (a) Mr Maier is one of three directors on the NPEAL board. The other directors are John Gordon Armstrong (Chairman) and George William Green. John Heywood Ross Eagles acts as legal adviser to NPEAL and is an alternate director for all three directors.
  - (b) The directors of NPEAL were appointed by NPDC after conducting interviews and taking advice from NPDC's advisers. The appointments were made by NPDC through its Energy Sub-Committee ("Sub-Committee") acting under delegated authority from NPDC.
  - (c) NPDC had operated a Municipal Electricity Department since before 1900. That investment was corporatised into Taranaki Energy Limited when the Energy Companies Act 1992 reorganised the electricity and gas industries in New Zealand. Through various takeovers and amalgamations this shareholding is now held by the NPDC as a 47.7% interest in Powerco.

- (d) Prior to the formation of NPEAL and prior to the amalgamation of the original Powerco Limited and CentralPower Limited NPDC held its shares in Powerco through a company called Pukeariki Holdings Limited ("PHL"). This company was a joint venture between Infratil who owned just over 10% of PHL and the NPDC who owned the balance. The directors of PHL were John Gray (ex Chief Executive of the Christchurch City Council), John Gordon Armstrong, and Lloyd Morrison (Infratil's investment manager at that time). John Eagles was the alternate director for John Armstrong and John Gray. Accordingly, both John Armstrong and John Eagles have been involved in NPDC's investment in Powerco for a longer period than Mr Maier and have a greater knowledge of Powerco and its history than Mr Maier.
  - (e) NPEAL acts as an adviser to the Sub-Committee in relation to NPDC's investments, including but not limited to its investments in Powerco, Apex Consultants Limited, Hobson Investments Limited, forestry and airport investments. While Powerco represents NPDC's largest shareholding, the other investments are of significant strategic importance to NPDC.
  - (f) The Sub-Committee is made up of four members, being the mayor, the deputy mayor and two councillors. The Sub-Committee acts as a committee of NPDC with delegated authority to act on certain recommendations from NPEAL in relation to the Powerco shares.
  - (g) [*Confidential*]
  - (h) [*Confidential*]
  - (i) Each NPEAL board meeting is attended by the NPEAL directors, its legal adviser John Eagles, and PriceWaterhouseCoopers. Each director and adviser plays an equal role in the formulation of advice to NPDC, with most issues being decided by consensus. No one director or adviser is more dominant than the others.
  - (j) NPEAL provides advice to the Sub-Committee in writing and meets with the Sub-Committee on a regular basis. On occasions the Chairman reports directly to the Sub-Committee and answers any questions the Sub-Committee may have in respect of the advice given.
  - (k) NPDC does not as a matter of course follow the recommendations of NPEAL.
24. On this basis Mr Maier submits that he does not have a "material influence" over Powerco within the ordinary meaning of those words and that he does not fall within paragraphs (a) to (f) of section 11 of the EIR Act.
25. If, contrary to Mr Maier's submission, the Commission considers that Mr Maier is involved in Powerco by virtue of his directorship of NPEAL this will result in a cross-involvement which is prohibited under section 17 of the EIR Act. This application has been prepared on the basis that the exemption will apply to Mr Maier's directorship of NPEAL if the Commission determines that Mr Maier is involved in Powerco.

## Scope of the Application for Exemption

### *Permanent Exemption*

26. Mr Maier seeks a permanent exemption under section 81(1) of the EIR Act from the application of section 17 of the EIR Act.
27. In considering applications for an exemption under section 81(1) of the EIR Act, the Commission has stated that it will consider the following three questions:
- (a) 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?
  - (b) 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?
  - (c) 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?
28. In response to the Commission's questions Mr Maier's submissions are set out below.

### *Relevant Market*

29. Mr Maier submits that the relevant market for the purposes of his application for exemption is the market in which Powerco and Mighty River Power have a common presence (i.e., those parts of the national electricity retail market comprising the customers connected to the Powerco distribution network).

**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?***

30. If, contrary to Mr Maier's submission, the Commission considers that he is involved in Powerco by virtue of his directorship of NPEAL, Mr Maier submits that the granting of an exemption would not create incentives or opportunities to inhibit competition in the electricity industry for the following reasons:
- (a) The nature of Mr Maier's 'involvement' with Powerco (i.e., by virtue of his directorship of an advisory company belonging to Powerco's major shareholder) does not result in Mr Maier having any material influence over the business of Powerco.
  - (b) The existing business relationship between Mighty River Power and Powerco is limited. The electricity supplied by Mighty River Power to customers within the Powerco distribution network is approximately [Confidential] percent of the total electricity supplied to customers within that network. Mighty River Power supplies electricity to approximately only [Confidential] customers within the Powerco distribution network.

- (c) Mr Maier is prevented by the constitution for Mighty River Power from voting on any matters relating to transactions where a conflict of interest exists. A copy of the constitution for Mighty River Power is attached at Schedule 2.
  - (d) Mr Maier has considerable experience as a company director in New Zealand and in the electricity sector. A copy of his curriculum vitae is attached at Schedule 3. It can be reasonably inferred that it is precisely because he has this experience that he was appointed as a Mighty River Power director by the Minister of State-Owned Enterprises.
  - (e) The two companies entered into a Use of System Agreement on 22 May 2000 under which access to Powerco's network is provided to Mighty River Power. That agreement is in substantially the same form as other Use of System Agreements to which Mighty River Power is a party. A copy of the agreement is attached at Schedule 4.
  - (f) The parties have entered into the Use of System Agreement on an arm's length basis.
  - (g) There is no cross-ownership between Powerco and Mighty River Power at shareholder level. Mighty River Power is a State-Owned Enterprise while Powerco is a publicly owned company which is listed on the NZSE.
  - (h) [*Confidential*]
  - (i) [*Confidential*]
31. Mr Maier submits that as a result of the above matters, the granting of an exemption would not create incentives or opportunities for Mr Maier to inhibit competition in the electricity industry.
32. If contrary to Mr Maier's views the Commission considers that any incentives or opportunities to inhibit competition would be created by granting an exemption, Mr Maier submits that they would be negated by the imposition of the following terms ("the conditions"):
- "For so long as Mr Maier remains a director of New Plymouth Equity Advisers Limited and Mighty River Power Limited:
- (i) he will not vote on any matter which relates to any transaction, agreement, arrangement, or understanding between, or to be entered into between, Powerco Limited and Mighty River Power Limited; and
  - (ii) he will not when exercising powers or performing duties in connection with either New Plymouth Equity Advisers Limited or Mighty River Power Limited, act in a manner which would prefer the interests of Powerco Limited over Mighty River Power Limited, or vice versa."

**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?***

33. If the Commission considers that Mr Maier is involved in Powerco by virtue of his directorship of NPEAL, Powerco's electricity lines business could only be used to subsidise Mighty River Power's generation activities if the Use of System Agreement between those companies was amended so that Powerco did not receive a commercial return.
34. Mr Maier submits that if the Commission grants the exemption on the conditions set out in paragraph 32 above, no opportunities to cross-subsidise Mighty River Power's business will arise. Mr Maier will be prevented from voting on any matter which relates to the existing (or any future) Use of System Agreement between Mighty River Power and Powerco.

**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?***

35. If the Commission considers that Mr Maier is involved in Powerco by virtue of his directorship of NPEAL and grants an exemption, Mr Maier accepts that he will have an involvement in both Powerco and Mighty River Power. Consequently, if it were not for the conditions in paragraph 32 above the relationship between Powerco's electricity lines business and Mighty River Power's electricity supply business will not be at arm's length.
36. However, Mr Maier submits that any potential anti-competitive consequences which arise from the absence of an arm's length relationship between the respective companies will be negated by the conditions set out in paragraph 32 above. Accordingly, Mr Maier submits that the granting of an exemption would not be contrary to the purposes of the EIR Act.

**Conclusion**

37. The underlying purpose of the cross involvement provisions of the EIR Act is:
- (a) to prohibit certain involvements in electricity lines businesses and electricity supply businesses which may create incentives or opportunities:
    - (i) to inhibit competition in the electricity industry; or
    - (ii) to cross-subsidise generation activities from electricity lines businesses; and
  - (b) to restrict relationships between electricity lines businesses and electricity supply businesses which may otherwise not be at arms length.
38. Mr Maier considers that his involvement in each company creates no incentives or opportunities to inhibit competition in the electricity industry or to cross-subsidise

generation activities from electricity lines businesses and will not result in relationships between electricity lines businesses and electricity supply businesses which are not at arm's length. If contrary to his submission the Commission considers that such incentives or relationships do exist, Mr Maier submits that the imposition of the conditions in paragraph 32 above would ensure that the purpose of the EIR Act is met.

39. At present the electricity industry faces real challenges in obtaining directors and managers with sufficient expertise to efficiently manage electricity businesses in New Zealand. Accordingly, if the Commission is satisfied that Mr Maier's involvement in each company is not contrary to the purpose of the EIR Act, Mr Maier submits that an exemption should be granted to enable him to continue to provide each company with the benefit of his advice and experience.

### Attachments

40. We attach copies of:
- (a) [*Confidential*]
  - (b) the constitution for Mighty River Power (Schedule 2);
  - (c) Mr Maier's curriculum vitae (Schedule 3);
  - (d) the Use of System Agreement entered into between Mighty River Power and Powerco on 22 May 2000 (Schedule 4);
  - (e) [*Confidential*]; and
  - (f) letters from the Chairpersons of Mighty River Power and NPEAL supporting the application for exemption (Schedule 6).

### Further Information

41. If the Commission requires any further information in relation to this application for exemption please contact Simpson Grierson, Mighty River Power Limited, or the applicant.

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Simpson Grierson

**SCHEDULE 1**

**[*Confidential*]**

**SCHEDULE 2**  
**Mighty River Power Constitution**

**SCHEDULE 3**  
**Mr Maier's Curriculum Vitae**

**SCHEDULE 4**  
**Use of System Agreement between Mighty River Power and Powerco**

*[Confidential]*

**SCHEDULE 5**

*[Confidential.]*

**SCHEDULE 6**  
**Letters from the Chairpersons of Mighty River Power and NPEAL Supporting the**  
**Exemption Application**

## DECLARATION

This application is made by **SAMFORD LEE MAIER (JUNIOR)**

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.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 2002

Signed by **SAMFORD LEE MAIER (JUNIOR)**

\_\_\_\_\_  
Applicant