



COMMERCE COMMISSION

Decision No. 676

Determination pursuant to the Electricity Industry Reform Act 1998 (EIR Act) in the matter of an application for exemption of a cross-involvement in an electricity lines and electricity generation and retail from the application of the EIR Act. The application is made by:

JOAN WITHERS

- The Commission:** M N Berry
P J M Taylor
- Summary of Application:** Application by Joan Withers for exemption from section 17(2)(b) of the EIR Act in respect of certain prohibited cross-involvements between the sale of electricity by Mighty River Power Limited on Auckland International Airport's (AIAL's) network and AIAL's lines.
- Determination:** The Commission, pursuant to section 81 of the EIR Act, determines to grant an exemption from compliance with section 17 on the conditions specified in the Notice of Exemption.
- Date of Determination:** 31 July 2009
- Date of Exemption:** This exemption takes effect upon publication in the New Zealand *Gazette*.

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EXECUTIVE SUMMARY

Introduction

1. On 15 June 2009, the Commerce Commission (the Commission) registered an application (the Application) from Joan Withers (Ms Withers) for exemption from section 17(2)(b) of the Electricity Industry Reform Act 1998 (the EIR Act).
2. Ms Withers' involvements in electricity businesses arise from her interests in Auckland International Airport Limited (AIAL) (electricity lines) and Mighty River Power Limited (Mighty River Power) (electricity generation and retail).
3. Ms Withers is applying, under section 81 of the EIR Act, for exemption from the requirement to comply with section 17(2)(b) in respect of these possible cross involvements.

The Commission's Criteria

4. In considering an exemption from the EIR Act, the Commission has regard to the purposes of the Act and the extent to which granting the exemption would promote or inhibit these purposes.
5. To do this the Commission obtains and evaluates objective answers to the following questions in relation to the particular purpose of Parts 1 to 3 and 5 of the EIR Act:
 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?
 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 or retail activities from electricity lines activities?
 3. Where applicable, would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between a business that has involvement in electricity lines and a business that has involvement in electricity generation and retail, where those relationships may not otherwise be at arm's length?

Incentives or Opportunities to Inhibit Competition in the Electricity Industry

6. The Commission is of the view that, in respect of the national electricity generation and wholesale market, the relevant electricity retail market, and the local electricity distribution market corresponding to AIAL's network, the granting of an exemption in this case, subject to certain conditions, is unlikely to create incentives or opportunities to inhibit competition.

Incentives or Opportunities to Cross-subsidise Generation or Retail Activities

7. The Commission considers that, in this case, the granting of an exemption from section 17(2)(b) of the EIR Act, subject to certain conditions, is unlikely to create incentives or opportunities to cross subsidise between lines activities and generation or retail activities.

Requirement for Corporate Separation and Compliance with Arm's Length Rules

8. The Commission considers that, as the Applicant is not a connected electricity business, there is no requirement for corporate separation or compliance with the Arm's Length Rules.

Determination

9. The Commission determines to grant an exemption to Joan Withers from section 17(2)(b) of the EIR Act, in respect of the cross-involvements outlined in the Application, subject to the following terms and conditions:
 1. whilst Joan Withers is cross-involved with Mighty River Power Limited and Auckland International Airport Limited, she shall not participate in any discussions or decision making by Mighty River Power Limited and/or Auckland International Airport Limited regarding matters that relate to or could affect or favour the supply of electricity by Mighty River Power Limited (or disadvantage any other business selling electricity on Auckland International Airport Limited's network other than Mighty River Power Limited) on Auckland International Airport Limited's electricity distribution network or the provision of electricity lines services by Auckland International Airport Limited to Mighty River Power Limited, including:
 - a. the selection of, and any negotiation with, any electricity retailer for the supply, or intended supply, of electricity to Auckland International Airport Limited; and
 - b. the supply, or intended supply, of electricity by Mighty River Power Limited to any new, or existing, consumers on Auckland International Airport Limited's electricity distribution network;and shall not disclose the outcomes of any discussions or decision making by Auckland International Airport Limited to Mighty River Power Limited (and vice versa) on those matters;
 2. Ms Withers will confirm to the Commission, in writing, that the cross-involvement to which this exemption applies has ceased within one calendar month of the cross-involvement ceasing to exist;
 3. this exemption expires when the Commission publishes on its website Ms Withers' written confirmation that her cross-involvement has ceased, unless any variation or earlier revocation in terms of section 81(5) occurs before that event; and
 4. this exemption is specific to the cross-involvements created through Joan Withers' involvements in Auckland International Airport Limited and Mighty River Power Limited. It does not extend to any other interest or existing or future cross-involvement of Joan Withers.
10. The exemption takes effect from the date of its publication in the *New Zealand Gazette*.

INTRODUCTION

11. On 15 June 2009, the Commerce Commission (the Commission) registered an application (the Application) from Joan Withers (Ms Withers) for exemption from section 17(2)(b) of the Electricity Industry Reform Act 1998 (the EIR Act).
12. Ms Withers' involvements in electricity businesses arise from her interests in Auckland International Airport Limited (AIAL) (electricity lines) and Mighty River Power Limited (Mighty River Power) (electricity generation and retail).
13. Ms Withers is applying, under section 81 of the EIR Act, for exemption from the requirement to comply with section 17(2)(b) in respect of these possible cross involvements.

COMMISSION PROCEDURES

General

14. For the purposes of considering this application for exemption, the Commission, in terms of section 73 of the Crown Entities Act 2004, has delegated its powers under section 81 of the EIR Act to M N Berry and P J M Taylor, Commission members.

Criteria Used by the Commission to Consider Exemption Applications

15. The EIR Act was amended in October 2008 by the Electricity Industry Reform Amendment Act 2008.
16. The EIR Act gives the Commission wide powers of enforcement, extension and exemption.
17. The EIR Act provides for the Commission to make exemptions in terms of section 81 of the EIRA Act. In considering applications for exemptions, the Commission will have specific regard to the particular purpose of Parts 1 to 3 and 5 of the EIR Act as defined in sections 2(2) of the EIR Act. The Commission is likely to grant an exemption in respect of a business or involvement or interest only where doing so:
 - (a) would not result in certain involvements in electricity lines and electricity generation and retail that may create incentives or opportunities:
 - (i) to inhibit competition in the electricity industry; or
 - (ii) to cross-subsidise generation or retail activities from electricity lines activities; and
 - (b) where applicable, would not result in relationships between a business that has involvement in electricity lines and a business that has involvement in electricity generation or retail, where those relationships may not otherwise be at arm's length.

18. In determining exemption applications, the Commission will also have regard to the overall purpose of the EIR Act as set out in section 2(1) of the Act. That is, the purpose of the EIR Act is to reform the electricity industry to better ensure:
- (a) that costs and prices in the electricity industry are subject to sustained downward pressure; and
 - (b) that the benefits of efficient electricity pricing flow through to all classes of consumers; and
 - (c) new investment in generation from renewable energy sources
- by –
- (d) effectively separating electricity lines from generation and retail where those activities are co-located; and
 - (e) promoting effective competition in electricity generation and retail; and
 - (f) limiting barriers to new investment in generation from renewable energy sources.
19. On receipt of an application in the prescribed form, the Commission will determine whether granting an exemption would be contrary to any element of the particular purpose of Parts 1 to 3 and 5 of the EIR Act or the overall purpose of the EIRA Act.
20. The Commission's test necessitates obtaining and evaluating objective answers to the following questions in relation to the particular purpose of Parts 1 to 3 and 5 of the EIR Act:
- 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?
 - 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 or retail activities from electricity lines activities?
 - 3. Where applicable, would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between a business that has involvement in electricity lines and a business that has involvement in electricity generation and retail, where those relationships may not otherwise be at arm's length?
21. In relation to these questions, the Commission will consider such factors as:
- 1. The relevant market(s)¹ within the electricity industry;
 - 2. The nature of any incentives or opportunities created;
 - 3. The temporal nature of any incentives or opportunities created;
 - 4. The nature of any relationship that is not at arm's length; and
 - 5. The temporal nature of any relationship that is not at arm's length.

¹ Defined using the same market definition process as applied in Commerce Act matters. See also Commerce Commission, *Mergers and Acquisitions Guidelines*, 1 January 2004.

22. In the particular circumstances of this case, the Commission decided to invite submissions on the Application. The Commission received one submission on this Application, from Genesis Energy Limited. The submission was in support of a conditional exemption (as proposed in the Application) being granted to Ms Withers.

PARTIES

The Applicant

Joan Withers

23. Ms Withers is currently a director of AIAL. Mighty River Power wishes to appoint Ms Withers to its Board of Directors.

Other Parties

Auckland International Airport Limited (AIAL)

24. AIAL owns and operates the Auckland Airport. AIAL is a public company listed on NZX and Australian Stock Exchange (ASX). Its three largest shareholders are New Zealand Central Securities Depository Limited, Auckland City Council and Manukau City Investments Limited.
25. AIAL owns the electricity distribution network at the airport. The network operates at 11,000 and 400 volts and comprises transformers, switchgear and underground cables. The network connects to Vector Limited's citywide network at the perimeter of the airport. AIAL is a lines customer of Vector Limited.
26. AIAL distributes electricity to approximately 376 consumers at the Auckland International Airport. Of the approximately 90 gigawatt-hours (GWh) per annum distributed, 29 GWh is for AIAL's own use. AIAL levies a line charge for the provision of its line function services.
27. Electricity retailers TrustPower, Genesis Power Limited, Contact Energy Limited, Meridian Energy Limited and Mighty River Power each have access to AIAL's network in accordance with standardised Use of System Agreements (UoSA) in order that they may retail electricity to consumers connected to AIAL's network. AIAL is not itself a supplier of electricity either on its own network or any other. AIAL is supplied electricity by [].
28. Aside from Ms Withers, there are currently five other directors of AIAL, all of whom are independent of Mighty River Power.

Mighty River Power Limited (Mighty River Power)

29. Mighty River Power is an electricity generator and retailer. It owns eight hydro-electric power stations on the Waikato River, a gas co-generation plant at Southdown in Auckland and a thermal plant at Marsden Point, which has never been commissioned. In addition it owns geothermal power stations at Kawerau and Rotokawa, and jointly owns a geothermal power station at Mokai and biomass plants at Greenmount and Rosedale. A jointly owned geothermal power station at Rotokawa (Nga Awa Purua) is currently under construction.
30. Mercury Energy, Mighty River Power's electricity and gas retail division, competes in the national retail electricity market in various locations. Mercury Energy also supplies electricity to various consumers on the AIAL distribution

network, but does not supply electricity to AIAL itself. References in this Decision to Mighty River Power include Mercury Energy, where applicable.

31. There are currently nine existing directors of Mighty River Power, all of whom are independent of AIAL. Ms Withers appointment to the Board of Mighty River Power would replace one of those nine.

JOAN WITHERS' APPLICATION

32. Ms Withers has applied, under section 81 of the EIR Act, for exemption from the requirement to comply with section 17(2)(b) in respect of the possible cross-involvement between the sale of electricity by Mighty River Power on AIAL's network, and AIAL's lines.
33. The exemption is sought to enable Ms Withers to be appointed to the Board of Directors of Mighty River Power, without being in breach of the EIR Act.

APPLICATION OF THE EIR ACT

Requirements of the EIR Act

34. Section 17(2) of the EIR Act makes it a contravention of Part 2 of the Act for a person to breach the connected generation cap or connected customers selling cap.
35. The connected generation cap is not relevant to Ms Withers' application because Mighty River Power does not have any generation connected to AIAL's network.
36. The connected customers selling cap is set out in section 17C of the EIR Act. Section 17C provides that the cap is breached if a person is involved in selling more electricity to connected customers within a local network area than the person's qualifying generation within that local network area. The person's qualifying generation is the sum of the total annual nominal MWh capacity of the generation listed in section 17C(2) of the EIR Act.
37. The term "sell" is defined in section 3 of the EIR Act to mean "any arrangement under which any electricity is brought and sold, except financial hedge contracts".
38. The term "connected customer" is defined in section 3 of the EIR Act to mean a consumer to whom a person sells electricity, if:
 - (a) the electricity is conveyed to that customer on a line in which the person is involved; and
 - (b) the consumer and the line are within the same network area.
39. Under section 7 of the EIR Act, as relevant to this application, "involved" means that a person is involved:
 - (a) in a line if the person conveys electricity by the line, or owns or operates, directly or indirectly, the line or any other assets used in connection with the line, either alone or together with associates and either on its own or another's behalf;
 - (b) in selling electricity to a customer if the person sells to a customer either on its own or another's behalf;

- (c) in either of the things referred to in the above subparagraphs, if the person:
 - (i) carries on a business that does any of those things, either alone or together with its associates and either on its own or another's behalf; or
 - (ii) exceeds the 10% threshold in section 8 of the EIR Act in respect of a business that does any of those things; or
 - (iii) has material influence over a business that does any of those things.
- 40. Under section 11(1)(a) of the EIR Act, a person is deemed to have material influence over a business if they are a director or manager of a person that carries on that business.
- 41. Section 19 of the EIR Act describes the businesses and involvements to be disregarded under the EIR Act. In particular:
 - (a) section 19(1)(ge) of the EIR Act states that no account is to be taken of a person's business, or involvement or interest in a business, if that person is involved in selling no more than 5 GWh of electricity to connected customers within a local network area, in total, in a financial year; and
 - (b) section 19(1A)(c) of the EIR Act states that no account is to be taken of a person's involvement in a line that conveys less than 5 GWh per annum.

Applicant's involvements and possible involvements under the EIR Act

- 42. In respect of the connected customers selling cap, Mighty River Power sells electricity as defined under section 3 of the EIR Act. If appointed to the Board of Mighty River Power, Ms Withers would have material influence over Mighty River Power.
- 43. In accordance with section 7(1)(d)(iii) of the EIR Act this means that the Applicant would have material influence over a business that does any of the things in section 7(1)(a) to (c), and would therefore be "involved" in the sale of electricity by Mighty River Power.
- 44. This involvement would not be disregarded under section 19(1)(ge) of the EIR Act because Mighty River Power, the business that the Applicant is involved in, sells over 5 GWh of electricity to connected customers within the AIAL electricity network. This means Mighty River Power exceeds the 5 GWh per annum threshold at which no account is taken of a person's involvement in a business.
- 45. As noted above, AIAL owns and operates the lines and other assets comprising the electricity network at Auckland International Airport.
- 46. Ms Withers is currently a Director on the Board of AIAL and, therefore, has material influence over AIAL. In accordance with section 7(1)(d)(iii) of the EIR Act this means that the Applicant would have material influence over a business that does any of the things in section 7(1)(a) to (c), and would therefore be "involved" in AIAL's lines for the purposes of definition of "connected customers" in section 3 of the EIR Act.

47. This involvement is not disregarded under section 19(1A)(c) of the EIR Act because AIAL conveys approximately 90 GWh of electricity, which is more than the 5 GWh per annum threshold at which no account is taken of a person's involvement in a line.
48. Section 17D of the EIR Act states that the connected customers selling cap is breached by a person if the person is involved in selling more electricity to connected customers within a local network area, in total, in a financial year, than the equivalent of the person's qualifying generation within the local network area.
49. The Applicant does not, and is not likely to, have any qualifying generation within AIAL's local area network. Accordingly, if appointed to the Board of Mighty River Power, the Applicant would breach the connected customers selling cap. At that point section 17(2)(b) of the EIR Act would apply to the Applicant, in respect of her cross-involvement in AIAL's lines and Mighty River Power's selling of electricity. Consequently, the Applicant is seeking exemption from section 17(2)(b) of the EIR Act.

MS WITHERS' SUBMISSIONS IN SUPPORT OF HER APPLICATION

50. The Applicant submitted that the granting of an exemption would not create incentives or opportunities to inhibit competition in the electricity retail market because:
 - (a) Mighty River Power's generation assets are not directly connected to AIAL's distribution network, nor is it intended that they will be in the future; and
 - (b) any such incentives or opportunities can be effectively addressed by limitations on Ms Withers' participation in matters that relate directly to electricity supply or electricity lines services between AIAL and Mighty River Power. The Applicant considered effective limitations could be achieved through a combination of:
 - (i) the Mighty River Power Board Charter and Constitution which prohibits directors from voting on matters they have an interest in;
 - (ii) imposing a condition on the exemption to prohibit Mighty River Power from supplying electricity to any new customers on AIAL's network (except where a branch of a national chain);
 - (iii) imposing a condition on the exemption to prohibit Ms Withers from participating in discussions about the use of systems agreement between Mighty River Power and AIAL; and
 - (iv) imposing a condition on the exemption to prohibit Ms Withers from participating in any discussions or decision making by Mighty River Power regarding matters relating to the supply of electricity to Mighty River Power Airport Customers.
51. The Applicant submitted that the granting of an exemption would not create incentives or opportunities to cross-subsidise Mighty River Power's generation activities from its lines business because:

- (a) AIAL's equity securities are quoted on the New Zealand Exchange Limited (NZX). The NZX Listing Rules prohibit directors of such companies from voting or being included in a quorum where they are "interested" in a transaction. This would prevent Ms Withers in her capacity as a director of AIAL from voting or being included in a quorum in the event that Mighty River Power proposed to supply in future AIAL's own electricity requirements, or negotiate an amended use of systems agreement with AIAL; and
 - (b) any such incentives or opportunities can be effectively addressed by imposing conditions on the exemption, as outlined in paragraphs 50(b)(ii) to 50(b)(iv) above.
52. The Applicant submitted that the granting of an exemption would not create a relationship between AIAL and Mighty River Power which is not at arm's length because:
- (a) Ms Withers would be the only director in common between Mighty River Power and AIAL; and
 - (b) to the extent that a relationship exists between Mighty River Power and AIAL that is not at arm's length due to Ms Withers' presence as a director of Mighty River Power and AIAL, any potential effects of the relationship not being at arm's length can be avoided by imposing conditions on the exemption, as outlined in paragraphs 50(b)(ii) to 50(b)(iv) above.

EXAMINATION IN TERMS OF THE COMMISSION'S CRITERIA

Relevant Markets

53. The Commission is of the view that the relevant markets² in this instance are the national electricity generation and wholesale market³, the relevant electricity retail markets⁴ and the electricity distribution market that corresponds with AIAL's electricity distribution network⁵.

Question 1: Incentives or Opportunities to Inhibit Competition in the Electricity Industry

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?

² Other markets in the electricity industry, for example the electrical construction and maintenance market and the market for reticulation of new subdivisions, do not appear to be relevant to this application for exemption.

³ For a discussion of electricity generation market definition see Commerce Commission, *Decision 340: Transalta Corporation of Canada / Contact Energy*, 12 February 1999 and Commerce Commission, *Decision 491: Contact Energy Limited / Natural Gas Corporation Holdings Limited*, 04 February 2003.

⁴ For a discussion of relevant electricity retail markets definition see Commerce Commission, *Decision 517: Dr Keith Turner*, 17 March 2004 and Commerce Commission, *Decision 547: Mr Wayne Boyd*, 31 March 2005.

⁵ For discussion of electricity distribution market definition see Commerce Commission, *Decision 345: United Networks Limited / Transalta New Zealand Limited*, 11 March 1999 and Commerce Commission, *Decision 299: Holdco (Mercury Energy Ltd and Utilicorp) / Power New Zealand Ltd*, 27 June 1997.

National Electricity Generation and Wholesale Market

54. In respect of the possible cross-involvement between AIAL and Mighty River Power, Mighty River Power's generation assets are not directly connected to AIAL's distribution network, nor is it likely that they will be in the future. Mighty River Power's generation assets are hydro, gas co-generation, thermal and geothermal generators which are not directly connected to AIAL's distribution network. Therefore, the granting of an exemption would not, in respect of this possible cross-involvement, create incentives or opportunities to inhibit competition in the national electricity generation and wholesale market.

Electricity Retail Markets

55. In respect of the possible cross-involvement between AIAL and Mighty River Power, the focus of the Commission's enquiry is on AIAL's network, that is, on the retail electricity market comprising the 376 consumers connected to AIAL's distribution network at Auckland International Airport, and whether an exemption would provide either Mighty River Power or AIAL with incentives or opportunities to inhibit competition in that market.
56. Mighty River Power has an existing Use of Systems Agreement with AIAL, which enables Mighty River Power to sell electricity to AIAL's tenants. However, Mighty River Power does not currently sell electricity to AIAL itself and, accordingly, there is no current supply relationship between the businesses of Mighty River Power and AIAL.
57. Although Mighty River Power currently sells electricity to a number of AIAL tenants, several other retailers also sell electricity to AIAL's tenants. As other new retailers could also offer to sell electricity to AIAL's tenants in the future, Mighty River Power's opportunities to inhibit competition in the retail market are limited.
58. In addition, the ability of Ms Withers to act in a manner that could favour Mighty River Power, or influence the way that AIAL deals with Mighty River Power, is likely to be limited. This is because:
- (a) Ms Withers is only one of six directors on the AIAL Board, and will be only one of nine directors on the Mighty River Power Board; and
 - (b) Ms Withers will be unable to vote on any matter in which she is considered "interested", which would include matters relating to AIAL and Mighty River Power.
59. In the present circumstances, the Commission considers that the opportunities for competition to be affected in the retail market that would be created by the Applicant's cross involvement in AIAL and Mighty River Power could be effectively addressed by limiting the Applicant's participation in matters that relate to electricity supply or electricity lines services between those companies, or between one of those companies and another electricity business. Therefore, the Commission considers that any exemption granted should be subject to the condition that the Applicant be prohibited from participating in any discussions or decision making that relates to or could affect or favour the supply of electricity by Mighty River Power (or disadvantage any other electricity supply business other than Mighty River Power) on AIAL's electricity distribution network or the provision of electricity lines services by AIAL to Mighty River Power.

60. Ms Withers submitted that, in order to address any incentives or opportunities to inhibit competition which might be created by the potential cross-involvement, the Commission impose a condition on the exemption prohibiting Mighty River Power from supplying electricity to any new customers on AIAL's network (except where a branch of a national chain). However, the Commission is of the view that prohibiting Mighty River Power from supplying electricity to future consumers connected to AIAL's network would reduce the choice of electricity retailers available to those consumers, thereby inhibiting competition. Furthermore, the Commission is satisfied that the factors discussed above will be sufficient to address any concerns that competition might be affected by this particular potential cross-involvement.

Electricity Distribution Markets

61. The electricity distribution market that is relevant to the Application is the local electricity distribution market that corresponds with AIAL's electricity distribution network.
62. Local electricity distribution networks are characterised by being local natural monopolies. The granting of this exemption would not affect the level or existing competition or scope for potential competition within those markets.
63. Accordingly, the granting of an exemption would not, in respect of this market, create incentives or opportunities to inhibit competition.

Conclusion on Question 1

64. The Commission is of the view that, in respect of the national electricity generation and wholesale market, the relevant electricity retail market, and the local electricity distribution market corresponding to AIAL's network, the granting of an exemption in this case, subject to certain conditions, is unlikely to create incentives or opportunities to inhibit competition.

Question 2: Incentives or Opportunities to Cross-subsidise Generation or Retail Activities

Would the Commission, by granting an exemption in respect of a business or involvement or interest, create incentives or opportunities to cross-subsidise generation or retail activities from electricity lines activities?
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65. The Commission considers that a lines business which is also engaged in generation or retail has the opportunity to cross-subsidise its generation or retail business, should it choose to do so. Cross-subsidisation could take a number of forms. It may be that the lines business would meet costs which more properly lie with the generation or retail side of the business. It may be that common costs would all be attributed to the lines business. It may be that the lines business would provide capital to the generation or retail side of the business at less than its true cost. It may be that a generation or retail project would be funded in a way which weakens the financial stability of the lines business.
66. Any of the possibilities of cross-subsidisation could increase upward pressure, or dampen downwards pressure, on lines charges.
67. The Commission considers that the potential for cross-subsidisation of generation activities is of particular concern where a generator has the potential to connect generation to a local distribution network. However, no connection of Mighty River Power's generating assets to AIAL's distribution network is

proposed in this case and, therefore, there is no potential for cross-subsidisation of generation activities.

68. The Commission considers that the potential for cross-subsidisation of retail activities is of particular concern where a retailer has the potential to sell electricity to customers connected to a local distribution network. Mighty River Power currently sells electricity to customers connected to AIAL's network under an existing UoSA.
69. The Commission considers that, providing the Applicant does not participate in any future discussion or decision making that relates to or could affect or favour the supply of electricity by Mighty River Power (or disadvantage any other electricity supply business other than Mighty River Power) on AIAL's electricity distribution network or the provision of electricity lines services by AIAL to Mighty River Power, AIAL would have no incentives or opportunities to cross-subsidise Mighty River Power's generation or retail activities from its lines business.

Conclusion on Question 2

70. The Commission considers that, in this case, the granting of an exemption from section 17 of the EIR Act, subject to certain conditions, is unlikely to create incentives or opportunities to cross subsidise between lines activities and generation or retail activities.

Question 3: Requirement for Corporate Separation and Compliance with Arm's Length Rules

Where applicable, would the Commission permit, by granting an exemption in respect of a business or involvement or interest, a relationship between a business that has involvement in electricity lines and a business that has involvement in electricity generation or retail, where those relationships may not otherwise be at arm's length?

71. The EIR Act requires that, where a business is a "connected electricity business", it must comply with the Arm's Length Rules.
72. Section 17D states that a business is a connected electricity business if the business, or a person involved in the business, has an involvement in more than 10 MW of connected generation. Section 3 defines connected generation as meaning generation in which a person is involved that is connected to a line in which the person is involved, if the generation and the line are in the same network area.
73. In this case, Mighty River Power has no generation connected to AIAL's network and, therefore, the Applicant has no connected generation and is not a connected electricity business.
74. As the Applicant is not a connected electricity businesses, the Arm's Length Rules do not apply.

Conclusion on Question 3

75. The Commission considers that, as the Applicant is not a connected electricity businesses, there is no requirement for corporate separation or compliance with the Arm's Length Rules.

Conclusion in Respect of the Commission's Criteria

76. The Commission considers that, provided the Applicant does not participate in any discussions or decision making that relates to or could affect or favour the

- supply of electricity by Mighty River Power (or disadvantage any other business selling electricity on AIAL's network other than Mighty River Power) on AIAL's network or the provision of electricity lines services by AIAL to Mighty River Power, the granting of an exemption in this case would not create incentives or opportunities to inhibit competition in the electricity industry and would not result in any material increase in the opportunities or incentives to cross subsidise generation or retail activities from lines activities.
77. The Commission considers that, as the Applicant is not a connected electricity businesses, there is no requirement for corporate separation or compliance with the Arm's Length Rules.
 78. Accordingly, the Commission determines to grant an exemption to Ms Withers from section 17(2)(b) of the EIR Act, in respect of the cross-involvements outlined in the Application, subject to the following terms and conditions:
 1. while Ms Withers is cross-involved with Mighty River Power and Auckland International Airport Limited, Ms Withers shall not participate in any discussions or decision making by Mighty River Power Limited and/or Auckland International Airport Limited regarding matters that relate to or could affect or favour the supply of electricity by Mighty River Power Limited (or disadvantage any other business selling electricity on Auckland International Airport Limited's network other than Mighty River Power Limited) on Auckland International Airport Limited's electricity distribution network or the provision of electricity lines services by Auckland International Airport Limited to Mighty River Power, including:
 - a. the selection of, and any negotiation with, any electricity retailer for the supply, or intended supply, of electricity to Auckland International Airport Limited; and
 - b. the supply, or intended supply, of electricity by Mighty River Power Limited to any new, or existing, consumers on Auckland International Airport Limited's electricity distribution network; and shall not disclose the outcomes of any discussions or decision making by Auckland International Airport Limited to Mighty River Power Limited (and vice versa) on those matters;
 2. Ms Withers will confirm to the Commission, in writing, that the cross-involvement to which this exemption applies has ceased within one calendar month of the cross-involvement ceasing to exist;
 3. this exemption expires when the Commission publishes on its website Ms Withers' written confirmation that her cross-involvement has ceased, unless any variation or earlier revocation in terms of section 81(5) occurs before that event; and
 4. this exemption is specific to the cross-involvements created through Ms Withers' involvements in Auckland International Airport Limited and Mighty River Power Limited. It does not extend to any other interest or existing or future cross-involvement of Ms Withers.
 79. The exemption takes effect from the date of its publication in the *New Zealand Gazette*.

THE COMMISSION'S DETERMINATION

80. The Commission determines to grant an exemption from section 17 of the EIR Act, subject to the terms and conditions stated in the Notice of Exemption.

Dated this 31st day of July 2009

Dr. Mark Berry

Chair

NOTICE OF EXEMPTION

The Commerce Commission (Commission), pursuant to section 81 of the Electricity Industry Reform Act 1998 (the EIR Act), exempts Ms Withers from compliance with section 17(2)(b) of the EIR Act in respect of the cross-involvements (as that term is defined in the EIR Act) with Mighty River Power Limited and Auckland International Airport Limited as outlined in its application for exemption registered by the Commission on 15 June 2009.

The exemption is subject to the following terms and conditions:

1. whilst Ms Withers is cross-involved with Mighty River Power Limited and Auckland International Airport Limited, Ms Withers shall not participate in any discussions or decision making by Mighty River Power Limited and/or Auckland International Airport Limited regarding matters that relate to or could affect or favour the supply of electricity by Mighty River Power Limited (or disadvantage any other business selling electricity on Auckland International Airport Limited's network other than Mighty River Power Limited) on Auckland International Airport Limited's electricity distribution network or the provision of electricity lines services by Auckland International Airport Limited to Mighty River Power, including:
 - a. the selection of, and any negotiation with, any electricity retailer for the supply, or intended supply, of electricity to Auckland International Airport Limited; and
 - b. the supply, or intended supply, of electricity by Mighty Power Limited to any new, or existing, consumers on Auckland International Airport Limited's electricity distribution network;and shall not disclose the outcomes of any discussions or decision making by Auckland International Airport Limited to Mighty River Power Limited (and vice versa) on those matters;
2. Ms Withers will confirm to the Commission, in writing, that the cross-involvement to which this exemption applies has ceased within one calendar month of the cross-involvement ceasing to exist;
3. this exemption expires when the Commission publishes on its website Ms Withers' written confirmation that her cross-involvement has ceased, unless any variation or earlier revocation in terms of section 81(5) occurs before that event; and
4. this exemption is specific to the cross-involvements created through Ms Withers' involvements in Auckland International Airport Limited and Mighty River Power Limited. It does not extend to any other interest or existing or future cross-involvement of Ms Withers.

The exemption takes effect from the date of publication of this notice in the *New Zealand Gazette*.

The Commission may vary or revoke the exemption in accordance with section 81(5) of the EIR Act.

Dated this 31st day of July 2009

Dr. Mark Berry

Chair