



COMMERCE COMMISSION

Decision No. 457

Determination under the Electricity Industry Reform Act 1998 (“the EIR Act”), in the matter of an application for exemption of involvements in both an electricity lines business and an electricity supply business from the application of the EIR Act. The application is made by:

URBUS PROPERTIES LIMITED

- The Commission:** PR Rebstock
D Curtin
- Commission Staff:** DH Shaharudin
- Summary of Application:** URBUS Properties Limited seek an exemption under section 81 of the EIR Act, from the application of section 17 of the EIR Act.
- Determination:** The Commission, pursuant to section 81 of the EIR Act, exempts URBUS Properties Limited from the application of section 17 of the EIR Act in relation to a prohibited cross-involvement in an electricity lines and an electricity supply business. The exemption is subject to the conditions stated in this decision.
- Date of Determination:** 13 March 2002
- Date of Exemption:** On publication of the Notice of Exemption in the *New Zealand Gazette*.

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INTRODUCTION

- 1 On 17 December 2001 the Commerce Commission (“the Commission”) received an application from URBUS Properties Limited for exemption from the application of section 17 of the EIR Act.
- 2 URBUS Properties Limited has sought an exemption from the application of section 17 of the EIR Act in respect of cross-involvements in electricity lines and electricity supply businesses. These cross-involvements arise as a result of the company’s ownership of electricity lines within commercial property together with the sale of electricity to tenants of that property. Section 17 prohibits any person involved in an electricity lines business from being involved in an electricity supply business and vice versa. Those businesses are defined in sections 4 and 5 of the EIR Act.
- 3 The Commission’s powers to exempt any businesses, involvements or interests from the application of the EIR Act, or persons from compliance with any provisions of any regulations made under the EIR Act are pursuant to section 81 of the EIR Act.

URBUS PROPERTIES LIMITED

- 4 URBUS Properties Limited (“URBUS”) is the applicant. It is based in Lower Hutt, Wellington. URBUS owns around 50 buildings throughout New Zealand, although mainly in the major centres.

URBUS’S ELECTRICITY LINES BUSINESSES

- 5 URBUS owns and operates electricity lines in New Zealand, those lines being the electrical reticulation within the company’s properties. URBUS conveys [] gigawatt-hours to tenants of its properties.

URBUS’S ELECTRICITY SUPPLY BUSINESSES

- 6 URBUS supplies energy to its property tenants. The breakdown is as follows:

Farmers Centre Complex	[] Gwh
BDO House	[] Gwh
Trafalgar Centre	[] Gwh
	<hr/>
	[] Gwh
Less:	
Common area usage	[] Gwh
Total ‘net’ consumption for threshold purposes	<hr/> [] Gwh <hr/>

INVOLVEMENTS

Electricity Lines Businesses

7 Section 4(1) of the EIR Act sets out the definition of an electricity lines business.

4(1) For the purposes of this Act, electricity lines business –

- (a) Means a business that conveys electricity by line in New Zealand; and
- (b) Includes the ownership or operation, directly or indirectly, of lines in New Zealand or any other core assets of an electricity lines business.

8 URBUS is an owner of electricity lines in New Zealand in that it:

- owns a business that conveys electricity by line in New Zealand (s4(1)(a)); and
- owns and operates, directly or indirectly, lines in New Zealand and other core assets of an electricity lines business (s4(1)(b)).

9 Section 4(2) of the EIR Act sets out exclusions from the definition of electricity lines business. Section 4(2)(a), as the only possibly relevant exclusion, provides that:

4(2) None of the following activities brings a person within subsection (1):

- (a) Conveying, together with its associates (if any), less than 2.5 GWh per annum:

URBUS conveys more than 2.5 Gwh per annum and therefore does not fall within the section 4(2)(a) exclusion from the definition of electricity line business.

10 URUBS is, therefore, an electricity lines business in terms of the EIR Act.

Electricity Supply Business

11 Section 5(1) of the EIR Act sets out the definition of electricity supply business.

5(1) For the purposes of this Act, electricity supply business-

- (a) Means a business that-
 - (i) sells electricity in New Zealand;
 - (ii) Sells financial hedges for risks relating to the price of electricity in New Zealand;
 - (iii) Generates electricity in New Zealand;
 - (iv) Trades in rights to sell or generate electricity in New Zealand; and
- (b) Includes the ownership or operation, directly or indirectly, of a generator in New Zealand or any other core generation assets:
- (c) Includes the ownership or operation, directly or indirectly, of any core assets of an electricity retail business, which include-
 - (i) The customer database relating to and used for the purposes of an electricity retail or electricity trading business; and
 - (ii) The benefit of a contract to sell electricity; and

- (iii) The benefit of an undertaking from any other electricity supply business not to compete with the business.

12 URBUS sells electricity in New Zealand (s5(1)(a)(i)). Section 5(2) of the EIR Act sets out the exclusions from the definition of electricity supply business. Section 5(2)(a), as the only possibly relevant exclusion, provides that:

5(2) None of the following activities brings a person within subsection (1):

- (a) Selling or generating less than 2.5 GWh per annum:

URBUS supplies more than 2.5 Gwh per annum and therefore does not fall within the section 5(2)(a) exclusion from the definition of electricity supply business.

13 Therefore, URBUS is an electricity supply business in terms of the EIR Act.

PROHIBITED CROSS-INVOLVEMENT

14 Section 17 of the EIR Act provides:

“(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.”

15 URBUS is involved, and wishes to remain involved, in both an electricity lines and an electricity supply business. URBUS has, in terms of section 17 of the EIR Act, a prohibited cross-involvement.

16 URBUS has, therefore, applied to the Commission for exemption from the application of the EIR Act and, in particular, from the requirement to comply with the ownership separation provisions of the EIR Act.

COMMISSION PROCEDURES

General

17 For the purpose of considering this application for exemption, the Commission, pursuant to section 58 of the EIR Act which applies section 105 of the Commerce Act 1986 to the EIR Act, has delegated its powers under section 81 of the EIR Act to P R Rebstock and D Curtin.

18 The Commission’s decision is based on an investigation conducted by its staff and their subsequent advice to the Commission.

Criteria Used by the Commission to Consider Exemption Applications

19 The EIR Act gives the Commission wide powers of enforcement, extension and exemption. To provide assistance to parties affected by the EIR Act, the Commission set out its role and processes in Practice Note No.3¹.

20 The Commission stated in Practice Note No.3 that:

¹ Practice Note No.3, September 1998, Electricity Industry Reform Act 1998 Commission’s Role and Processes.

“The EIR Act provides for the Commission to make exemptions in terms of section 81 of the Act. In considering applications for exemptions, the Commission will have specific regard to the particular purpose of Parts 1 to 5 of the EIR Act as defined in section 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 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) would not result in relationships between electricity lines businesses and electricity supply businesses which are not at arms length.

In determining exemptions, 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 that:

- (a) costs and prices in the electricity industry are subject to sustained downward pressure; and
- (b) the benefits of efficient electricity pricing flow through to all classes of consumers by –
- (c) effectively separating electricity distribution from generation and retail; and
- (d) promoting effective competition in electricity generation and retail.”

21 The Commission noted in Practice Note No.3 that:

“...the EIR Act provides for maximum cross-ownership limits and specific structural and behavioural requirements to ensure that the purposes of the Act are met. Strict compliance with these limits and requirements is, other than in exceptional circumstances,⁽²⁾ expected.”

22 The Commission stated in Practice Note No.3 that:

“On receipt of an application in the proscribed form, the Commission will determine whether granting an exemption would be contrary to any element of the particular purpose of Parts 1 to 5 of the EIR Act or the overall purpose of the Act.

The Commission’s tests would necessitate obtaining and evaluating objective answers to the following three questions in relation to the particular purpose of Parts 1 to 5 of the EIR Act:

- 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?
- 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?
- 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?

In relation to these questions, the Commission will consider factors such as:

- Relevant market(s)³ within the electricity industry;
- The nature of any incentives or opportunities created;
- The temporal nature of any incentives or opportunities created;
- The nature of any relationship which is not at arms length; and
- The temporal nature of any relationship which is not at arms length.”

² For example, of the types provided for in section 19 of the EIR Act.

³ Defined using the same process as used for market definitions in respect of Commerce Act matters.

EXAMINATION IN TERMS OF THE COMMISSION'S CRITERIA

Incentives or Opportunities to Inhibit Competition in the Electricity Industry

- 23 The Commission's focus under this heading is on that part of the national electricity retail market comprising the electricity consumers who are tenants of URBUS and whether an exemption would provide URBUS with incentives or opportunities to inhibit competitive electricity supply to them.
- 24 The Commission considers that URBUS could, in some circumstances, have the incentives and opportunities to inhibit competitive electricity supply to its tenants using the market power arising from its ownership of electricity lines.
- 25 However, the leasing of URBUS's properties occurs in a competitive property market. The Commission considers that such competition for tenants partially mitigates against any incentive or opportunity for URBUS to attempt to raise electricity prices by anti-competitive behaviour.
- 26 Further, if URBUS attempts to raise the price it charges for electricity to above competitive levels, there is the potential for its tenants to obtain electricity from other electricity retailers. The Commission will require as a condition to any exemption it grants that URBUS shall not charge for the use of its electricity lines and shall permit access to those electricity lines by other electricity retailers. These conditions will mitigate the opportunities for URBUS to act anti-competitively.
- 27 Therefore, given these factors, the Commission considers that URBUS's incentives and opportunities to inhibit competitive electricity supply to its lessees are no more than minimal and can be suitably dealt with by conditions attached to any exemption granted by the Commission.

Incentives or Opportunities to Cross-subsidise Generation Activities

- 28 URBUS is not involved in electricity generation activities. This criterion is not relevant.

A Relationship Not at Arms Length

- 29 URBUS intends to continue to own and operate both an electricity lines business and an electricity supply business. The two businesses will have common managers, premises and records. Managers will make decisions about both line and supply pricing and also about the terms for the granting of access to the company's lines by electricity retailers who wish to supply electricity their tenants. The relationship between the electricity lines and supply businesses will not be at arms length.
- 30 However the Commission considers that the potential effects of the relationship, not at arms length, can be tempered by the fact that URBUS does not charge for the line use (although it does charge for services relating to the provision of its lines). URBUS has undertaken that it will not introduce line charges for the use of its lines in the future. It is, in this respect, restricted in its ability to use the existence of a relationship not at arms length to defeat the purposes of the EIR Act. As a result, the Commission does not consider the potential effects of the relationship not being at arms length to be a material risk to the purposes of the EIR Act.

THE COMMISSION'S DECISION

- 31 Therefore, provided certain conditions are adhered to, the Commission considers that URBUS's application satisfies the Commission's criteria for the granting of exemptions from the EIR Act.
- 32 The Commission exempts URBUS from the application of section 17 of the EIR Act subject to the terms and conditions specified in the Notice of Exemption.
- 33 The Commission also notes that section 81(5) provides that the Commission may vary or revoke any exemption at any time.

NOTICE OF EXEMPTION

The Commission, pursuant to section 81 of the Electricity Industry Reform Act 1998, exempts URBUS Property Limited from the application of section 17 of that Act in relation to prohibited cross-involvements in an electricity lines business and an electricity supply business.

The exemption is subject to the following terms and conditions, that:

- (a) URBUS Property Limited shall not charge any tenant it supplies with electricity, for the use of or related to, any electricity lines business that URBUS Property Limited owns or operates;
- (b) URBUS Property Limited shall not prevent the access to its electricity lines, on reasonable terms and within a reasonable time, that any electricity supply business may require to supply electricity to any tenant connected to such lines;
- (c) URBUS Property Limited shall not enforce any clause in any lease or other agreement with its tenants that requires a tenant to be supplied with electricity by URBUS Property Limited, so that any tenant shall be free to choose that tenant's electricity supplier;
- (d) URBUS Property Limited will use its best endeavours to provide such reasonable information that any tenant taking a supply of electricity from URBUS Property Limited Newmarket may request to enable that tenant to assess competitive options available to it for the supply of electricity;
- (e) URBUS Property Limited do not generate electricity;
- (f) only administration costs directly relating to the provision of the lines service by URBUS may be passed on to tenants;
- (g) any administration costs must be clearly identified as such in tenants' invoices; and
- (h) URBUS provide to the Commission on 30 June each year, all information necessary to demonstrate, to the Commission's satisfaction, compliance by URBUS with (f) and (g) above.

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

The exemption takes effect from the date of publication of this Notice in the Gazette.

Dated this 13th day of March 2002

Paula Rebstock
Deputy Chair