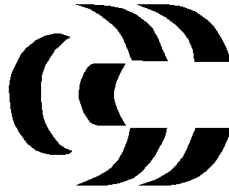


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## COMMERCE COMMISSION

### Decision No. 374

Determination pursuant to the Electricity Industry Reform Act 1998, in the matter of an application for exemption of involvements in electricity lines businesses and electricity supply businesses from the application of the Electricity Industry Reform Act 1998. The application is made by:

#### **BROADCAST COMMUNICATIONS LTD and TELEVISION NEW ZEALAND LTD**

- The Commission:** E C A Harrison
- Commission Staff:** D R Ainsworth
- Summary of Application** Broadcast Communications Ltd and Television New Zealand Ltd which are involved in electricity lines businesses and electricity supply businesses seek exemption from the application of the Electricity Industry Reform Act 1998 in order to remain involved in both kinds of business.
- Determination:** The Commission, in terms of section 81 of the Electricity Industry Reform Act 1998, exempts Broadcast Communications Ltd and Television New Zealand Ltd from the application of section 17 of the Electricity Industry Reform Act 1998 in relation to prohibited cross-involvements in electricity lines businesses and electricity supply businesses. The exemption is subject to the conditions stated in this Decision.
- Date of Determination:** 29 September 1999
- Date of Exemption:** The exemption takes effect from the date of the publication of a Notice of Exemption in the *New Zealand Gazette*

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## INTRODUCTION

- 1 On 23 August 1999 Broadcast Communications Ltd (BCL) applied to the Commerce Commission (the Commission) for exemption from the application of the Electricity Industry Reform Act 1998 (the EIR Act). The application was amended on 21 September 1999 to include an application for exemption by Television New Zealand Ltd (TVNZ), BCL's parent.
- 2 The application included a request for an interim exemption pending determination of the substantive application. Although the Commission has previously granted such temporary exemptions<sup>1</sup>, in this case where it is able to allocate resources to consider the application immediately, it does not intend to adopt such a course. The Commission believes the consideration of an interim exemption would merely delay a final decision with no apparent advantage to the applicants.
- 3 The Commission's powers to exempt 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 specified in section 81 of the EIR Act.

## BROADCAST COMMUNICATIONS LTD

- 4 BCL is a wholly owned subsidiary of TVNZ<sup>2</sup>. It is a provider of services to operators of broadcast and telecommunications networks. These services, which are provided at numerous sites<sup>3</sup> throughout New Zealand, include:
  - the transmission of television and radio broadcasting and telecommunications signals throughout New Zealand by microwave, fibre optic cable and satellite links; and
  - the provision of "co-siting" services to television and radio broadcasters and the operators of telecommunication networks<sup>4</sup> for a fee.
- 5 Co-siting means:
  - the ability for television and radio broadcasters and telecommunications companies to locate their transmitters, aerials, antennae and microwave disks on BCL towers or masts along with similar equipment owned by BCL;
  - the accommodation of associated transmission equipment owned by such people in enclosures or buildings at BCL sites along with BCL's own equipment;

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<sup>1</sup> Most commonly when there was a queue of applications for exemption awaiting investigation and consideration by the Commission. The queue arose from the substantial number of applications received by the Commission immediately prior to the 1 April 1999 deadline for corporate separation prescribed in section 24 of the EIR Act.

<sup>2</sup> BCL has no subsidiaries of its own.

<sup>3</sup> A BCL site typically comprises a tower or mast to which antennae, microwave receiving and transmitting disks, television and radio broadcasting transmitters are attached; a building or enclosure for the location of electronic and air conditioning equipment; a security fence and an access road. BCL's sites are both freehold and leasehold.

<sup>4</sup> BCL's 87 co-siting customers include Sky Network Television Ltd, TVNZ, TV3 Ltd, Telecom NZ Ltd, Vodafone NZ Ltd, Radio New Zealand, Radio Pacific Ltd, The Radio Network Ltd and the T. A. B.

- air conditioning of buildings; and
  - of particular relevance to this application, the supply of line function services, electricity and, in some cases, emergency electricity generation<sup>5</sup> to the co-siters.
- 6 In order to provide these services, BCL owns or leases 389 inter-linked<sup>6</sup> sites throughout New Zealand. The sites contain steel towers or masts of varying sizes and enclosures or buildings for the installation, of electronic, air conditioning and emergency electricity generation equipment. To obtain the most efficacious transmission and reception of microwave linking, broadcasting and telecommunication signals the sites are most commonly located on hill tops, often in remote locations.
- 7 BCL has three types of contract with its co-siting customers. These are:
- contracts under which BCL's customers must pay separate fees for co-siting services and for electricity. These are called exclusive contracts<sup>7</sup>;
  - contracts under which BCL's customers must pay only one co-siting fee which includes an unstated amount for electricity. These are called inclusive contracts; and
  - the Sky Network Television Ltd (Sky) Contract under which [ ] The Sky Contract also includes an unstated amount for electricity.
- 8 The term electricity in paragraph 7 includes a pro rata allocation of BCL's own line charges from the relevant local power company and of BCL's cost of electricity supply from its retailer.

### **BCL's Electricity Lines Business**

- 9 Electricity is supplied to BCL's sites by both overhead lines and underground cables which are connected to the electricity distribution networks (network) of the local power companies.
- 10 BCL's sites are usually the only electricity consumer in the immediate area and the electricity is distributed by a spur line or cable from the local power company's network, uniquely dedicated to the supply of BCL, often passing over steep and inaccessible terrain or through native bush. The maintenance of such lines is costly. As a consequence many of the power companies, to whose electricity distribution networks BCL sites is connected, have negotiated with BCL and have relinquished their former ownership of the spur lines to BCL. Of BCL's 389 sites, 221 have spur lines or cables owned by BCL. This number is increasing continually as BCL negotiates with the relevant power companies to formally transfer ownership of the lines and cables to it.

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<sup>5</sup> Of BCL's 389 sites, 54 of the largest or most strategically important are provided with emergency electricity generators.

<sup>6</sup> By microwave transmissions, fibre optic cable and satellite transmissions.

<sup>7</sup> Because electricity charges are excluded from the co-siting fee.

- 11 BCL also owns electricity lines within its sites. These lines distribute electricity around BCL's sites to both BCL and to co-siters' electrical equipment and, where installed, connect the emergency generator(s) and battery banks to the electrical equipment on the particular site. As a result, BCL owns electricity lines both on and off its sites throughout New Zealand. The total amount of electricity distributed by BCL is about [ ] gigawatt-hours per annum.
- 12 The electricity distributed by BCL is partly for its own consumption but mostly for the consumption of BCL's co-siting customers. Of the [ ] gigawatt-hours per annum distributed by BCL, [ ] gigawatt-hours are for BCL's consumption and [ ] gigawatt-hours are for TVNZ's consumption.

### **BCL's Electricity Supply Business**

#### *Electricity Generation*

- 13 BCL owns small diesel motor powered emergency electricity generators at 54 of its most strategically important sites. The total installed capacity of all BCL's emergency generators is 5.5 megawatts. The purpose of these generators is to provide backup electricity supplies to power the equipment at the sites to allow operation to continue in the event of the failure of the reticulated supply.
- 14 BCL has stated that the electrical connections of the emergency generators to the BCL internal networks at its sites is such that the generators can only supply electricity to the internal network and then only whilst the site is disconnected from the power company network. The emergency generators cannot supply electricity outside BCL's sites.

#### *Electricity Supply*

- 15 BCL purchases electricity for both its own and its co-siter's consumption by a national contract which it negotiates on an annual basis. The current annual contract with Meridian Energy Ltd began on 1 July 1999 and involves the nationwide supply of electricity to all BCL's sites. The contract was let as a result of an open tender. BCL has stated that there was keen competition for the contract by [ ] tenderers. BCL was able to make annual savings of about [ ] million on its annual electricity bill of [ ]].
- 16 BCL sells [ ] gigawatt-hours of electricity to the 87 companies which co-site their equipment on BCL sites of which [ ] gigawatt-hours is sold to its parent, TVNZ.

### **TVNZ**

- 17 TVNZ is a producer and broadcaster of television programmes via two national television channels. It has premises as follows:
- its Auckland Studios and head office;
  - Avalon Studios and office block in Lower Hutt;
  - its film archives and production studios in Lower Hutt; and
  - its Christchurch Studios.

- 18 TVNZ leases some of its accommodation to its subsidiary BCL and some to third parties. Under the leases the provision of electricity is TVNZ's responsibility.

### **TVNZ's Electricity Line Business**

- 19 Electricity is distributed within TVNZ's premises by line and cable to TVNZ, BCL and third party tenants. As a result, TVNZ owns electricity lines in New Zealand. The total amount of electricity distributed by TVNZ is about [ ] gigawatt-hours per annum.
- 20 The electricity distributed by TVNZ is mostly for the consumption of itself and BCL but also its lessees. Of the [ ] gigawatt-hours per annum distributed by TVNZ, [ ] gigawatt-hours are for the consumption of its third party lessees.

### **TVNZ's Electricity Supply Business**

#### *Electricity Generation*

- 21 TVNZ owns small diesel motor powered emergency electricity generators at its Auckland, Lower Hutt and Christchurch studios. The total installed capacity of TVNZ's emergency generators is 2.25 megawatts. The purpose of these generators is to provide backup electricity supplies to power the equipment at the studios to allow operation to continue in the event of the failure of the reticulated supply.
- 22 TVNZ has stated that the electrical connections of the emergency generators to the TVNZ internal networks at its studios is such that the generators can only supply electricity to the internal network and then only whilst the studio is disconnected from the local power company network. The emergency generators cannot supply electricity outside TVNZ's studios.

#### *Electricity Supply*

- 23 TVNZ purchases electricity for its Auckland and Lower Hutt premises by contract which it tenders on an annual basis. The current annual contract is with TrustPower Ltd. The Christchurch facility is supplied by Southpower Ltd.
- 24 TVNZ sells [ ] gigawatt-hours of electricity to the nine tenants which lease accommodation from it.

## **INVOLVEMENTS**

### **Electricity Lines Business**

- 25 BCL is the owner of electricity distribution networks distributing electricity both to and inside its sites. TVNZ is the owner of electricity distribution networks distributing electricity around its studios and other premises. In terms of section 4 of the EIR Act:
- BCL and TVNZ are businesses that convey electricity by line in New Zealand (s4(1)(a));
  - BCL and TVNZ own and operate, directly lines in New Zealand and other core assets of an electricity lines business (s4(1)(b)); and

- none of the exclusions from the definition of electricity lines business in section 4(2) apply to BCL or TVNZ.

26 BCL and TVNZ

- carry on electricity lines businesses alone and together as associates (s7(1)(a));
- exceed the 10% threshold in terms of control and equity return rights in those businesses (s7(1)(b)); and
- have material influence over those businesses (s7(1)(c)).

27 Therefore, BCL and TVNZ are involved in electricity lines businesses in terms of the EIR Act. BCL and TVNZ agree with this interpretation.

### Electricity Supply Business

28 BCL and TVNZ generate and sell electricity. In terms of the EIR Act:

- BCL and TVNZ sell electricity in New Zealand (s5(1)(a)(i));
- BCL and TVNZ generate electricity in New Zealand (s5(1)(a)(iii));
- BCL and TVNZ own and operate directly and indirectly generators in New Zealand (s5(1)(b));
- BCL and TVNZ own and operate directly and indirectly core assets of an electricity retail business which include the benefit of contracts to sell electricity (s5(1)(c)); and
- none of the exclusions from the definition of electricity supply business in section 5(2) or 5(3) apply to BCL. TVNZ, on its own, is excluded from the definition of electricity supply business by sections 5(2)(a) and section 5(3) because it sells and generates less than 2.5 gigawatt-hours of electricity per annum and its generating capacity is less than 5 megawatts.

29 BCL and TVNZ:

- carry on electricity supply businesses alone and together as associates (s7(1)(a));
- exceed the 10% threshold in terms of control and equity return rights in those businesses (s7(1)(b)); and
- have material influence over those businesses (s7(1)(c)).

30 Therefore, the Commission concludes that BCL and TVNZ are involved in an electricity supply business in terms of the EIR Act. Although TVNZ is not involved in an electricity supply business in its own right, because it is an associate of BCL, wholly owns BCL and has material influence over BCL, TVNZ satisfies the criteria in section 7 of the EIR Act for involvement in BCL's electricity supply business.

31 BCL does not agree that it is involved in an electricity supply business, arguing that

- in terms of section 5(1)(a)(i) it does not sell electricity in New Zealand. BCL argues that, while sale is not defined in the EIR Act, in the context of the purposes of the Act, it must be taken to mean selling for a profit. BCL states that as it merely passes on its own electricity purchase costs to its co-siting customers, it does not sell electricity at a profit and does not supply electricity in terms of the EIR Act. BCL also argues that, in terms of Decision 351A<sup>8</sup>, it is a mere agent acting on behalf of its co-siters in supplying electricity under the relevant contracts; and
- in terms of the provision of emergency generation BCL argues that it is excluded from the definition of an electricity supply business by section 5(2)(c). BCL states that its generators are unable to be connected to the national grid and its generation is solely for the consumption of a local community and the generator and the lines linking the generator to the main switchboard are not connected directly or indirectly to the national grid.

32 The Commission does not accept the BCL’s argument that “sale” of electricity must be at a profit noting that the Eighth Edition of the Concise Oxford Dictionary defines “sale” as:

the exchange of a commodity for money;

and “loss leader” as:

an item sold at a loss to attract customers.

33 The Commission further notes that a purpose of the EIR Act is to prohibit involvements which inhibit competition in the electricity industry<sup>9</sup>. In the Commission’s experience, one of the most common methods of inhibiting competition is by way of cross-subsidy from electricity lines businesses to electricity supply businesses leading to the sale of electricity at little or no profit<sup>10</sup>. The Commission considers that if the purposes of the EIR Act are to be achieved, the meaning of a business that “sells electricity”<sup>11</sup> in the EIR Act must be wide enough to include sale by a business at no profit, to allow the ownership separation provisions to act to prevent the potentially anti-competitive behaviour described. In this context, the Commission also notes that “business” is defined in section 3(1) of the EIR Act as:

any undertaking that is carried on whether for gain or reward or not.

34 In respect of the argument that BCL is a mere agent for the co-siters, the Commission notes the difference between this case and the Trans Tasman Properties Ltd (TTP) case. In the latter case TTP had no supply contract with an electricity retailer covering the purchase of electricity to supply its tenants nor did it have an electricity supply contract with its tenants. Instead, the electricity supply contract was between TTP’s tenants and an electricity retailer. In the present case, BCL does have an electricity purchase contract with an electricity retailer and does have a contract with its co-siting customers

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<sup>8</sup> Trans Tasman Properties Ltd.

<sup>9</sup> Section 2(2)(a)(i).

<sup>10</sup> But with increased line charges.

<sup>11</sup> In section 5(1)(a)(i).



which includes the supply of electricity. Therefore, the Commission does not accept BCL's argument that it is a mere agent for its customers in respect of electricity supply.

- 35 The Commission does not accept BCL's argument that its electricity generation activities are excluded from the definition of electricity supply business by section 5(2)(c). While, the Commission accepts that the lines linking BCL's generators are not connected directly or indirectly to the national grid<sup>12</sup>, others of BCL lines are connected indirectly to the national grid.<sup>13</sup> The Commission considers that, in order for section 5(2)(c) to apply, none of the lines owned by BCL should be connected directly or indirectly to the national grid.

## **PROHIBITED CROSS-INVOLVEMENT**

- 36 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.”

- 37 BCL and TVNZ are involved, and wish to remain involved, in both an electricity lines and an electricity supply business. BCL and TVNZ have, in terms of section 17 of the EIR Act, prohibited cross-involvements.

- 38 BCL and TVNZ have 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**

- 39 For the purpose of considering this application for exemption, the Commission, in terms of 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 E C A Harrison.

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

- 41 During their investigation into this application for exemption, Commission staff interviewed and obtained information from:

- BCL;
- TVNZ;
- Sky;
- TV3 Ltd; and

<sup>12</sup> Because the generators are designed to operate only when the particular site is disconnected from the national grid as the result of an emergency.

<sup>13</sup> That is the spur lines and cables external to BCL sites which are connected to the local power companies' networks (and thence indirectly to the national grid) and also BCL's lines internal to its sites, which are also connected indirectly to the national grid.

- Smart Power Ltd.

### Criteria Used by the Commission to Consider Exemption Applications

- 42 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.3.<sup>14</sup>
- 43 The Commission stated in Practice Note No.3 that:

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.

- 44 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,<sup>(15)</sup> expected

- 45 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.

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<sup>14</sup> Practice Note No.3, September 1998, Electricity Industry Reform Act 1998 Commission's Role and Processes.

<sup>15</sup> For example, of the types provided for in section 19 of the EIR 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)<sup>16</sup> 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.”

## **RELEVANT MARKETS**

46 The national retail electricity market is relevant to the application of the Commission's criteria to the facts of BCL and TVNZ's application for exemption.

## **BCL AND TVNZ'S ARGUMENTS IN FAVOUR OF EXEMPTION**

47 BCL and TVNZ have informed the Commission that:

- neither company charges the consumers to whom they distribute electricity for the use of the electricity lines they own - that is, neither for the spur lines and cables from the local power company networks supplying BCL's sites, nor for the networks inside BCL's sites and TVNZ's premises. They do pass on to co-siting and lessee customers, the customer's respective proportions of the local power companies' distribution charges made to BCL and TVNZ;
- neither company adds a margin to its own electricity purchase costs when it sets the electricity charges for BCL's 87 co-siting customers or lessees of TVNZ's premises. Each merely passes on to such consumers the charges made to it by its electricity retailer. Both BCL and TVNZ have stated that as a result of the large volumes of electricity purchased under their annual contracts, they are able to negotiate better prices for electricity supply than would individual consumers acting alone. BCL has further stated that its current contract with Meridian Energy Ltd has resulted in substantial saving in

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<sup>16</sup> Defined using the same process as used for market definitions in respect of Commerce Act matters.

electricity costs and that it will be passing those savings on to the consumers it supplies with electricity.

- 48 Given its large electricity consumption, BCL argues it is able to sell electricity to its co-siting customers at a lower price than they could otherwise obtain individually from electricity retailers. Smart Power Ltd, BCL's consultant which analysed the tenders BCL received for electricity supply, confirmed that six electricity retailers were involved in the tender round and the tenders received were priced competitively. Similar arguments apply in respect of TVNZ's electricity supply contract with TrustPower.
- 49 BCL argues that it has no incentive to add a margin to the price of either electricity distribution or supply because:
- electricity is a very small component of the total fee payable by co-siters; and
  - BCL's sites must remain competitive with the emerging technology of digital satellite broadcasting services and also with transmission masts and towers owned by BCL's competitors.
- 50 BCL also argues that because 43% of the electricity it purchases is used by itself and its parent, TVNZ, there is an incentive for BCL to ensure it purchases electricity at the lowest possible prices.
- 51 BCL and TVNZ have stated that nothing in their contracts with their co-siting and lessee customers prevents the consumers from obtaining their individual electricity supply from another retailer. In the case of BCL's inclusive and Sky contracts the electricity component of the total fee would need to be unbundled. However, BCL has stated that it is prepared to carry out such an exercise if it proves necessary. Further, BCL and TVNZ have each stated that in the situation of one of its co-siting or lessee customers obtaining electricity from another source it would not charge the other electricity retailer line charges for the use of BCL and TVNZ's lines.
- 52 BCL has stated that the emergency electricity generation which it provides to its most important sites is a fundamental part of the service which its co-siting customers require. The generation equipment is not installed to provide revenue through the sale of electricity, rather to allow its customers to continue broadcasting or transmitting during times of power failure. The generators are not able to be connected to either the national grid or the networks of the local power companies. TVNZ's emergency generators at its Auckland, Avalon and Christchurch Studios are installed to allow television broadcasting to continue in the event of power failure.

## **EXAMINATION OF BCL AND TVNZ'S POSITION IN TERMS OF THE COMMISSION'S CRITERIA**

### **Incentives Or Opportunities of BCL and TVNZ to Inhibit Competition in the Electricity Industry**

- 53 The focus of the following analysis is on that part of the national retail electricity market comprising the consumers supplied with electricity by BCL and TVNZ and

whether an exemption would provide BCL and TVNZ with incentives or opportunities to inhibit competitive electricity supply to them.

- 54 In the Commission's view the most potent mechanisms by which unseparated electricity lines and supply businesses might inhibit competitive electricity supply are:
- to charge for negotiation of access contracts and their administration;
  - to cross-subsidise electricity supply prices using revenue from electricity line charges; and
  - to delay access negotiations.
- 55 The Commission notes that neither BCL nor TVNZ charges for the use of its electricity lines. Therefore, the two companies have no opportunity to alter the balance of their pricing between distribution services and electricity supply. It is not possible for either BCL or TVNZ to use its ownership of electricity lines to cross-subsidise its electricity supply businesses, if it does not charge for the use of those lines.
- 56 BCL and TVNZ have agreed that if any of the consumers they supply with electricity wish to obtain electricity from another retailer, BCL and TVNZ will permit that without charging for the use of their electricity lines and without delay. BCL will also agree to the unbundling of the electricity component of its inclusive and Sky co-siting contracts.
- 57 Therefore, the Commission considers that BCL and TVNZ's incentives and opportunities to inhibit competitive electricity supply are no more than minimal. The Commission concludes that the granting of an exemption from the application of the EIR Act, and in particular the requirement to comply with the ownership separation provisions will not provide BCL or TVNZ with incentives or opportunities to inhibit competition in that part of the national electricity retail market which comprises the consumers BCL and TVNZ supply with electricity.

#### **Incentives or Opportunities of BCL and TVNZ to Cross-subsidise Generation Activities from Lines Businesses**

- 58 As discussed, it is the Commission's view that BCL is not excluded from the definition of an electricity supply business in respect of its electricity generation capacity by section 5(2)(c) of the EIR Act. As a result although in its own right it would be excluded, as BCL's parent, TVNZ is also not excluded.
- 59 However as neither BCL nor TVNZ charges for its electricity lines businesses it is not possible for either to cross-subsidise its emergency generation activities using revenue from its line business.
- 60 Therefore, the Commission does not consider that an exemption would provide BCL or TVNZ with incentives or opportunities to cross-subsidise generation activities from their lines businesses.

### **A Relationship Between an Electricity Lines and an Electricity Supply Business Not at Arms Length**

- 61 BCL and TVNZ propose to continue to own and operate both electricity lines businesses and electricity supply businesses. The two types of business 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 BCL and TVNZ's networks by electricity retailers who may wish to compete with BCL and TVNZ's electricity supply businesses. The relationship between the electricity lines and supply businesses of BCL and TVNZ will not be at arms length.
- 62 However, the Commission considers that the potential effects of the relationship not being at arms length can be tempered by the fact that BCL and TVNZ supply line function services at no charge. If that situation is safeguarded by conditions attached to any exemption granted to BCL and TVNZ, they are, in this respect, restricted in their 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 likely to suborn the purposes of the EIR Act.

### **THE COMMISSION'S DECISION**

- 63 The application of BCL and TVNZ passes the Commission's criteria for decision making in respect of applications for exemptions from the EIR Act.
- 64 In making its decision the Commission notes that the facts revealed in the application of BCL and TVNZ are particular to their situations. The Commission also notes that section 81(5) provides that the Commission may vary or revoke any exemption at any time.
- 65 Therefore, having considered the stated criteria, the Commission exempts BCL and TVNZ from the application of section 17 of the EIR Act, subject to the terms and conditions specified in the Notice of Exemption.

## NOTICE OF EXEMPTION

The Commerce Commission, pursuant to section 81 of the Electricity Industry Reform Act 1998, exempts Broadcast Communications Ltd and Television New Zealand Ltd from the application of section 17 of the Act in relation to a prohibited cross-involvement in an electricity lines business and an electricity supply business, as outlined in an application to the Commission by Broadcast Communications Ltd dated 23 August 1999..

The exemption is subject to the following terms and conditions:

- (a) That the price which Broadcast Communications Ltd and Television New Zealand Ltd charge for the electricity they sell to consumers at their sites and premises is equal to the price which the two companies themselves pay for the electricity they purchase, and that electricity is charged for by Broadcast Communications Ltd and Television New Zealand Ltd in a transparent manner.
- (b) That neither Broadcast Communications Ltd nor Television New Zealand Ltd shall charge any of the consumers they supply with electricity for the use of their electricity lines.
- (c) That should any consumer, to which Broadcast Communications Ltd or Television New Zealand Ltd supplies electricity, wish to obtain electricity supply from any other party:
  - Broadcast Communications Ltd or Television New Zealand Ltd shall grant reasonable access to its electricity lines without delay and without charge;
  - At sites where existing emergency electricity generators are installed, Broadcast Communications Ltd and Television New Zealand Ltd shall continue to supply emergency electricity generation equipment as a back up to the consumer's own electricity supply at no charge;
  - Broadcast Communications Ltd shall reduce the consumer's co-siting fee (whether payable under an exclusive, inclusive or an other type of contract) by an amount equal to Broadcast Communications Ltd's allowance, in the co-siting fee, for electricity supply and this shall be done in a transparent manner.
- (d) That Broadcast Communications Ltd and Television New Zealand Ltd shall promptly advise the Commission of any increased or new charge made by either company which relates in any way to the distribution or supply of electricity by them to consumers connected to their electricity lines.

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

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

Dated this                      day of September 1999

The Commission