



**ELECTRICITY INDUSTRY ACT 2000  
APPLICATION FOR A RETAIL LICENCE**

**CONTACT AVALANCHE LIMITED  
(ARBN 107 479 372)**

**NOTICE OF DECISION**

**24 FEBRUARY 2004**

## SUMMARY

1. Pursuant to provisions of section 19 of the *Electricity Industry Act 2000* (**EI Act**) the Essential Services Commission (**the Commission**) has granted Contact Avalanche Limited (**Contact Avalanche**) ARBN 107 479 372 a licence to sell electricity in Victoria.

## BACKGROUND

### Requirement to obtain a licence

2. Section 16 of the EI Act provides that a person must not engage in the sale of electricity unless the person is -
  - the holder of a licence authorising that activity; or
  - exempted from the requirement to obtain a licence in respect of that activity.

### Entitlement to apply for a licence

3. Section 18 of the EI Act provides that a person may apply to the Commission for a licence authorising one or more of the following activities:
  - (a) to generate electricity for supply or sale;
  - (b) to transmit electricity;
  - (c) to distribute or supply electricity;
  - (d) to sell electricity.

### The applicant

4. The applicant, Contact Avalanche, is a company incorporated in New Zealand and was registered under the provisions of the *Corporations Act 2001* (Cwlth) as a foreign owned company effective from 16 January 2004. The applicant is a 100 percent owned subsidiary of Contact Energy Limited (**Contact Energy**), a public and listed corporation on the New Zealand Stock Exchange. Contact Energy was established in 1996 commensurate with the country's policy of disaggregation of the former Electricity Commission of New Zealand and operated as a State owned enterprise until it was fully privatised by the New Zealand Government in 1999.
5. Contact Energy as the parent company has a range of interests in all parts of the energy sector in New Zealand and Australia.
6. Information provided by the applicant demonstrates that it has the relevant key staff to conduct a large retail operation in Victoria. The parent company, Contact Energy, will transfer key operational staff from New Zealand to Victoria in order to establish and manage the operations. These persons will assume the positions of General Manager, Marketing Sales Manager and Services Manager. These personnel have considerable experience and knowledge of electricity retail operations in New Zealand that will be applied to the Victorian market.

7. Contact Avalanche proposes to recruit from within Victoria other key personnel including the Corporate Services Manager and ultimately the equivalent of 182 full - time equivalent positions in legal, information technology and support, human resources, finance, field and telephone sales, metering, call centre operations, credit support and service delivery.

### **The application**

8. By letter dated 23 December 2003, the applicant submitted an application to the Commission for a licence to sell electricity in Victoria and also provided the Commission with attachments, some of which were marked 'commercial and in confidence'. The attachments to the application contained amongst other things, commentary relevant to the objectives of the *Essential Services Commission Act 2001* (ESC) and EI Act, details of the applicant's background, corporate and operational structures, the experience and expertise in the energy sector, operating capability and skills (including energy trading arrangements) and profiles of directors and key personnel. In particular, as prescribed at section 19(2) of the EI Act, the applicant also set out in detail its financial viability and technical capacity.

### **Advertising the application**

9. Section 19(6) of the EI Act provides that the Commission must publish a notice in a daily newspaper generally circulating in Victoria specifying that the application has been lodged and inviting interested persons to make submissions to the Commission in respect of the application within a period and in a manner specified in the notice.
10. A notice was placed in *The Age* newspaper on Wednesday 7 January 2004. The advertisement invited interested persons to make submissions to the Commission in respect of the application received from Contact Avalanche by the close of business on Friday, 6 February 2004. The Commission received no inquiries or submissions.

### **Express invitations to submit**

11. By letter dated 7 January 2004, the Commission wrote to each licensee inviting them to make a submission in respect of the application. Invitations were also sent to various interested parties and stakeholders including the members of the Commission's Customer Consultative Committee.
12. The Commission did not receive any submissions from licensees or interested parties in respect of the application.

### **Provisions relating to the Commission's decision**

13. Section 19(1) of the EI Act provides that, subject to sub-sections (2) and (3), the Commission may grant or refuse the application for any reason it considers appropriate, having regard to the objectives of the Commission under the EI Act and under the ESC Act.

14. As previously noted, Section 19(2) of the EI Act provides that the Commission must not grant an application for a retail licence unless the Commission is satisfied that -
  - (a) subject to sub-section (3), in the case of an application for a licence to sell electricity, the applicant is financially viable; and
  - (b) subject to sub-section (4), the applicant has the technical capacity to comply with the conditions of the licence.

## **CONSIDERATION OF THE APPLICATION**

### **General approach**

15. A decision to grant a retail licence to a new market entrant has the potential to promote competition in the generation, supply and in particular, the sale of electricity and, therefore, to also promote efficiency and economy in those activities. Accordingly, consistent with its objectives under the provisions of both the EI Act and the ESC Act, the Commission has granted a licence to Contact Avalanche.

## **ISSUES**

### **Technical capacity**

16. The degree of technical capacity required to satisfy the Commission in terms of section 19(2)(b) of the EI Act varies according to the nature of the licence to be issued. It is the applicant's intention to commence its licensed activities within 12-months from the granting of a retail licence, and therefore under the provisions of section 19(2)(b) of the EI Act the Commission must be satisfied with the applicant's technical capacity to comply with the conditions of licence.
17. Contact Avalanche provided particulars in its application of its technical capacity to comply with the conditions of the licence. The applicant's key personnel have been in the energy sector in the fully contestable market of New Zealand for a number of years in various capacities and positions where the parent company, Contact Energy is a primary participant and will leverage its knowledge and experience from the New Zealand market. Contact Energy also engaged the services of a full time resident Australian consultant to investigate and research the Australian markets over a period of time and this has resulted in detailed study of the Victorian electricity sector. On the basis of this comprehensive research, and supported by its legal advisers, the parent resolved to enter the Victorian electricity market as a retailer.

The Commission has applied its standard assessment of technical capacity to the applicant. The Commission is satisfied that Contact Energy has the technical capacity to comply with the proposed licence conditions.

## **Financial viability**

18. The applicant must demonstrate its financial viability under the provisions of section 19(3) of the EI Act. The applicant has advised the Commission of its inquiries and intention to apply for registration as a customer with the National Marketing Management Company (NEMMCO) and that it will comply with the prudential requirements imposed by NEMMCO. Furthermore, the applicant, Contact Avalanche, has confirmed that –
- based on independent legal advice, it proposes to lodge an application to Part 7 of the *Corporations Act 2001* for an Australian Financial Services Licence when it proposes to enter into a hedging arrangement. This is anticipated to be in the immediate future. This licence test imposes a number of comprehensive prudential tests to determine an entity's financial viability.
  - it has registered with NEMMCO as an 'Intending Participant' and registration as a full participant will be completed upon the Commission granting a retail licence. Contact Avalanche has indicated that it has satisfied the prudential requirements of NEMMCO.
  - the prudential requirements have been satisfied in order to accommodate a "Use of System Agreement" with licensed electricity distributors and these arrangements will be finalised upon the Commission granting a retail licence.

Notwithstanding the above, the Commission has applied its standard assessment of financial viability to the applicant. The financial viability tests includes amongst other things the applicant's financial position, management knowledge and experience and the level of understanding and the application of risk management, including but not limited to corporate governance principles, financial controls and reporting and compliance practices.

The Commission has concluded that the applicant has satisfied the financial test and Contact Avalanche can be considered to be financially viable.

## **Compliance with Codes and Rules**

19. The provisions of Victorian electricity retail licences require the licensee to comply with all applicable provisions of, amongst other things, the Electricity Distribution Code, the Electricity System Code, the Electricity Customer Metering Code, the Electricity Customer Transfer Code, the Electricity Retail Code and any other relevant code developed dealing with retailers' market conduct.
20. The licence being granted to the applicant contains the licence conditions obliging it to comply with, amongst other things, the full retail competition regulatory framework.

## **Prohibited Interests and the Requirement for Incorporation in Australia**

21. Edison Mission Energy (EME) owns approximately 51 percent of Contact Energy, the parent company of the applicant. EME owns a 60 percent share in an unincorporated joint venture that operates the gas – fired 300 MW Valley Power peaking plant in the La Trobe Valley, Contact Energy owns the 40 percent balance of this same plant, and EME owns outright the 1000 MW Loy Yang B Power Station, also in the La Trobe Valley. Under the provisions of section 32 of the EI Act, there are three limitations to the granting of applications for the issue, transfer or variation of a licence. The relevant provision for the purposes of the application is:

section 32(3) provides that the Commission must not grant an application for the issue, transfer or variation of a licence if the applicant or transferee proposes to use property and rights acquired from a licensee within the meaning of part 3 of the EI Act for the purpose of running a business under the licence and the applicant or transferee would have held a prohibited interest if they had acquired the shares in the corporation and the property and rights acquired constituted the sole undertaking of that corporation.

22. Contact Avalanche has satisfied the Commission that section 32(3) does not apply to the application for a retail licence because neither Contact Energy (the parent) nor Contact Avalanche (the applicant) will be acquiring the sole undertaking of a currently licensed generator, transmitter or distributor of electricity.
23. Contact Avalanche has also made representations that there are no prohibited interest issues as provided at section 68 of the EI Act. The Commission is satisfied that section 68 does not apply as it relates to this application for a retail electricity licence.
24. Contact Avalanche is not incorporated in Australia contrary to the application guidance notes for applicants. It registered as foreign owned corporation with ASIC and incorporated in New Zealand. There is no express requirement under the EI Act that a company applying for a licence must be incorporated in Australia. The National Electricity Code (NEC) provides that market participants must be registered and operate from a permanent place of establishment in Australia. Contact Avalanche has satisfied this requirement. This therefore ensures that the Commission has jurisdiction over the applicant, Contact Avalanche.

## DECISION

25. The Commission is satisfied that Contact Avalanche-
- has the technical capacity to comply with the conditions of the licence to be granted;
  - has satisfied the financial viability requirements of the EI Act; and
  - the granting of a licence is not inconsistent with the EI Act.
26. Having regard to the objectives specified in section 8 of the *Electricity Industry Act 2000* and section 10 of the *Essential Services Commission Act 2001*, the Commission has granted an electricity retail licence to Contact Avalanche Limited (ARBN 107 479 372).