

# 2008 BCSECCOM 618

November 28, 2008

## Headnote

National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions – Securities Act* s. 88 - Cease to be a reporting issuer in BC - The issuer's securities are traded only on a market or exchange outside of Canada - Canadian residents own less than 2% of the issuer's securities and represent less than 2% of the issuer's total number of security holders; the issuer does not intend to do a public offering of its securities to Canadian residents; the issuer will not be a reporting issuer in a Canadian jurisdiction; the issuer is subject to the reporting requirements of the United States or of a designated foreign jurisdiction; and all shareholders receive the same disclosure

## Applicable British Columbia Provisions

*Securities Act*, R.S.B.C. 1996, c. 418, s. 88

In the Matter of  
The Securities Legislation of  
British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, Nova  
Scotia, Prince Edward Island and Newfoundland and Labrador  
(The Jurisdictions)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Endesa S.A.  
(the Filer)

## Decision

## Background

The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer for a decision pursuant to the securities legislation of the Jurisdictions (the Legislation) that the Filer is not a reporting issuer (the Requested Relief).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions:

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- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) the decision is the decision of the principal regulator and evidences the decision of the Decision Makers.

### **Interpretation**

Defined terms contained in National Instrument 14-101 - Definitions have the same meaning in this decision unless they are defined in this decision.

### **Representations**

This decision is based on the following facts as represented by the Filer:

1. The Filer is a corporation (*Sociedad anónima*) organized under the laws of Spain.
2. The Filer is registered in the Madrid Mercantile Register.
3. The Filer's registered office and main offices are located at calle Ribera del Loira nº 60, 28042 Madrid, Spain.
4. The shares of capital stock of the Filer (Shares) are listed and posted for trading on the Automated Quotation System of the Spanish stock exchanges and all of the Spanish stock exchanges (the Spanish Exchanges).
5. The Filer made a global public offering (the GPO) of Shares and American Depositary Receipts (the ADRs) on October 20, 1997 (collectively, Shares and ADRs are Filer Securities). Each ADR represents one Share.
6. The Filer Securities were offered by certain Canadian underwriters to investors in Canada (Canadian Offering).
7. The Filer is a "reporting issuer" or has equivalent status in each Jurisdiction and is not in default of any of the requirements of the Legislation of each Jurisdiction.
8. As of June 30, 2008, the Filer's issued and outstanding capital consists of 1,058,752,117 Shares.
9. As a consequence of the successful completion of the joint takeover bid made by Acciona S.A. and Enel Energy Europe S.r.L. in early October, 2007 for 100% of the Filer's Shares, the Filer's free float of Shares had decreased to less than 8%.

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10. On November 27, 2007, the Filer filed a Form 25 with the SEC, pursuant to which the last day of trading of the Filer's ADRs on the New York Stock Exchange was December 6, 2007. The deposit agreement relating to Endesa's ADRs terminated as of December 24, 2007.
11. On December 7, 2007, the Filer filed a Form 15F with the SEC to deregister and terminate its reporting obligations.
12. Due to the recent deregistration from the SEC, the Filer qualifies as a "designated foreign issuer" under National Instrument 71-102 – *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* (NI 71-102).
13. As of July 23, 2008, Broadridge Financial Solutions, Inc. reported that there were only two beneficial shareholders in Canada holding a total of 3,067 Shares.
14. As of July 16, 2008, after the tail period of the ADR program had expired, Citibank N.A. reported that there was one beneficial holder of ADRs in Canada holding 100 ADRs of Endesa. Since the deposit agreement for the ADRs has been terminated, holders of ADRs will only have the right to receive the Shares underlying the ADRs upon surrender of any ADR and payment of applicable fees to the ADR depositary. The only ADRs that are outstanding are those that have not been tendered for Shares by their holders. Consequently, the Filer has not conducted the same efforts (or expended the same time, money and resources) to determine the number of direct and indirect holders of ADRs worldwide as it did to determine the number of direct and indirect holders of Shares resident in Canada and their holdings as the ADR program has been terminated and the ADRs represent a negligible number of Shares.
15. The Filer has consulted with its bank, Banco Santander Central Hispano and Broadridge Financial Solutions, Inc whom in turn has consulted with various global custodians pursuant to which the Filer estimates the number of beneficial holders of Shares world wide is between 150,000 and 200,000.
16. Therefore, as of the dates listed in paragraphs 13 and 14 above:
  - (a) residents of Canada do not beneficially own directly or indirectly more than 2% of a class or series of the outstanding securities of the Filer; and

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- (b) residents of Canada do not represent in number more than 2% of the total number of owners directly or indirectly of a class or series of securities of the Filer.

The conclusion is reasonable for the following reasons:

- (c) there were 2 beneficial holders of Shares in all provinces and territories in Canada, holding, in aggregate, 3,067 Shares, representing approximately 0.0003% of all the issued and outstanding Shares;
  - (d) there was 1 beneficial holder of ADRs in all provinces and territories in Canada, holding 100 ADRs representing, in aggregate, 100 Shares, accounting for negligible percentage of all the issued and outstanding Shares;
  - (e) 3 beneficial securityholders represent 0.002% of the lower range of the estimated number of world wide holders of Shares.
- 17. The Filer currently has no plans to raise financing by way of a public offering of its securities in Canada.
  - 18. None of the Filer's securities are traded on a marketplace in Canada. The Filer does not currently intend to have its securities listed for trading on a marketplace in Canada.
  - 19. The Filer is subject to, and will continue to comply with all applicable requirements of applicable Spanish securities legislation and applicable rules of the Spanish Exchanges.
  - 20. The Filer has undertaken to continue to deliver, or make available, all disclosure documents required by Spanish securities legislation to be delivered, or made available, to holders of its securities in Spain to holders of its securities resident in each of the Jurisdictions in the manner and at the time required by Spanish securities legislation.
  - 21. The Filer will make disclosure documents available on its website in accordance with Spanish securities regulations. Most of the disclosure documents will also be made available on the website of the Spanish securities regulator.
  - 22. The type of disclosure material the Filer will make available will include information on share capital, issuance of debt or equity, dividends, tender offers, by-laws, material facts, relevant shareholders, information on

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shareholders meetings and proxies. Disclosure documents made available will include interim financial statements, auditors reports, audited financial statements, annual reports, by-laws of the Board of Directors, major shareholders' agreements and corporate governance reports.

23. The Filer has undertaken that holders of Shares will, including those resident in the Jurisdictions, have access to its continuous disclosure documents in English through the Filer's corporate website at [www.endesa.es](http://www.endesa.es).
24. On March 27, 2008 the Filer issued and filed a news release announcing that the Filer has submitted an application to the securities regulatory authorities of the Jurisdictions to cease to be a reporting issuer in the Jurisdictions.

### **Decision**

Each of the Decision Makers are satisfied that exemptive relief application meets the test set out in the Legislation for the Decision Maker to make the decision. The decision of the Decision Makers under the Legislation is that the Requested Relief is granted.

David L. Knight  
Commissioner  
Ontario Securities Commission

Suresh Thakrar  
Commissioner  
Ontario Securities Commission