IN THE MATTER OF the Resource Management Act 1991

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IN THE MATTER OF of the hearing of applications by Ashburton Community Water Trust to Canterbury Regional Council and Ashburton District Council for resource consents in respect of the Rakaia Terrace Hydro Scheme

LEGAL SUBMISSIONS ON BEHALF OF TRUSTPOWER LIMITED

1. INTRODUCTION

1.1 These submissions and the evidence to be presented are in support of TrustPower Limited's ('TrustPower') submission on the resource consent applications by the Ashburton Community Water Trust ('applicant' or 'ACWT') to establish and operate its Rakaia Terrace Hydro Scheme.

1.2 As an initial comment TrustPower has endeavoured to cooperate with the applicant as much as possible but found that it needed to push the discussions – this is surprising as it is ACWT's development. TrustPower also wishes to make very clear that it does not agree with comments in the applicant's case about the broader legal relationships between some of the entities and Mr Lees will comment on this.

1.3 TrustPower is also fairly disappointed with comments made on Monday about its existing assets. TrustPower is taking this proposal seriously as it is committed to the long-tem future of its Highbank Hydroelectric Power Scheme ('Highbank power scheme'). As with the Electricity Ashburton hydro generation scheme, TrustPower has actively worked with ACWT to agree conditions of consent and its level of comfort with this development has only been made possible with these conditions.

Overview of TrustPower

1.4 TrustPower is New Zealand's fifth largest electricity generator and third largest retailer. Originating from the Tauranga Electric Power Board established in 1924, TrustPower is a predominantly NZ owned listed company, employing about 400 people and serving about 220,000 customers.

1.5 It has considerable experience in managing small to medium generation, with 18 hydroelectric power schemes, many of which are for local supply. The company also has a very good environmental record across a large and diverse portfolio of schemes.

1.6 TrustPower is the owner and operator of the Highbank and Montalto power schemes which utilise water diverted from the Rangitata and Ashburton Rivers via the Rangitata Diversion Race.

Overview of TrustPower's case

1.7 The company does not oppose this type of scheme in principle however as the ACWT proposal will interact closely and directly with the Highbank power scheme, TrustPower has an obligation to ensure that its infrastructure is protected.

1.8 TrustPower has been proactive in its approach to engage with the applicant prior to this hearing. As a result, resource consent conditions are able to be proposed on an agreed basis and, if imposed by the Panel, will generally satisfy TrustPower's concerns with the applicant's proposal and ensure the continued safe and efficient functioning of the regionally significant physical resource represented by the Highbank power scheme. These conditions will be outlined in the evidence to follow.

1.9 The basis for TrustPower's attendance today is to inform and assist the Panel by explaining its operations at the Highbank power scheme and to address in some detail the particular aspects of the applicant's proposal that, without being subject to appropriate consent conditions, could result in significant adverse effects on TrustPower's existing operations.

1.10 TrustPower do not want to see the Panel rely on the parties dealing with the potential environmental effects through commercial agreements. In my submission, the consent conditions should be able to stand in isolation from any subsequent or underlying commercial agreements; only in this way can the consent authority properly fulfil its role – ie to be satisfied that all the adverse effects of the proposal will be adequately avoided, remedied or mitigated.

1.11 The Panel should be aware that TrustPower reached a satisfactory outcome in the resource consent process for the Electricity Ashburton scheme. As that scheme effectively repeats the Highbank Canal section (or first stage) of the ACWT proposal, the Electricity Ashburton consent conditions were used by the applicant and TrustPower as the basis for developing consent conditions for this project. The focus was then to ensure that further consent conditions were developed to address those additional issues which arise where the schemes' diverge - more particularly to respond to the additional flows in the Highbank tailrace and the diversion into the Terrace Canal section (or second stage) of the ACWT proposal.

1.12 Given the uncertainty that surrounds which existing entity (eg Electricity Ashburton, ACWT or Barhill Chertsey Irrigation Limited) or future entity will ultimately implement the various and overlapping consents that may authorise this development concept - it is important that the consent conditions imposed on any grant to ACWT are as consistent as possible with those applying to the Electricity Ashburton scheme.

1.13 While TrustPower accepts that the Electricity Ashburton consents may form part of the permitted baseline for assessing the effects of this proposal – it is important that the scope and extent of those consents be properly informed by the conditions that attach to them. That is, if the consents are to be relied on as part of the permitted baseline, then so should any conditions of the consents.

1.14 TrustPower's submissions and evidence are confined to the issues associated with its own Highbank power scheme. TrustPower makes no comment on the remaining aspects of the applicant's proposal which are subject to this Panel's due consideration. That does not mean, however,

that TrustPower endorses or supports those other aspects of the application.

1.15 The submissions to follow will address each of TrustPower's primary areas of concern in a little more detail highlighting particular legal aspects of relevance.

Evidence to be presented

1.16 The evidence to be presented on behalf TrustPower is as follows:

(a) **Ian Lees** (Production Manager, TrustPower) will provide an overview of the Highbank power scheme and the potential effects of this proposal on TrustPower's infrastructure. It would be fair to say that Mr Lees was rather disappointed about some of the comments made on Monday by the applicant, and he is concerned about ensuring that the Panel has the full story.

(b) **Richard Allibone** (Ecologist, Golders) will describe the current operation of the salmon barrier and provide an overview of the potential effects of the increased flow and the widening of the tailrace on the salmon barrier.

(c) **Matthew Bonis** (Consultant Planner, Planit) will review the planning aspects of the application and the s42A reports, and discuss the proposed conditions of consent which will satisfy TrustPower's key concerns.

2. TRUSTPOWER'S KEY CONCERNS

2.1 The company's key concerns fall into two main categories:

(a) The first category relates to **construction effects** and the need to protect TrustPower's infrastructure during the construction of the development. As is evident from the diagrams presented by the applicant, there will be significant excavations and earthworks very close to the Highbank infrastructure. Effects of concern to TrustPower include vibration and dust, the need for an alternative well to be provided, and also ensuring that any widening of the

tailrace and salmon barrier occurs outside of the times when the Highbank power scheme would be operating.

(b) The other category deals with **operational effects** of the proposal, and includes concerns such as the avoidance of further salmon entrainment and the need for the salmon barrier to be appropriately monitored and maintained, together with the requirement to maintain the tailrace and salmon bypass channel. In addition, to avoid compromising the operation of the Highbank power scheme, the discharge from the ACWT proposal into the Highbank tailrace needs to ensure that the water levels in the tailrace are kept within a specified band.

2.2 These potential adverse effects are explained further below.

Construction Effects

2.3 Mr Lees will discuss the company's very real concerns about the potential effects of dust on the electrical infrastructure at the power house, together with the potentially very expensive process for replacing any of the plant damaged by dust or vibration.

Vibration and settlement effects

2.4 TrustPower's submission is that the potential effects of vibration and settlement need careful consideration, given the sensitivity of the generation machinery and the proximity of significant earthmoving equipment. The conditions proposed can be summarised as follows:

(a) The consent holder would be required to commission an independent vibration report and deformation survey, designed to assess the potential risks of vibration and settlement and to provide recommendations on how that risk should be managed. This would be done in consultation with TrustPower but at the consent holder's cost.

(b) The report should specify certain limits which vibration levels should not exceed (and perhaps a "no go" area around the powerhouse for certain types of earthmoving and other

construction machinery), it should also identify what monitoring is required, and where those monitoring sensors should be located. The deformation survey should identify the existing levels, and include recommendations to avoid any deformation and any particular settlement limits which should be met.

(c) The report and survey would be prepared and submitted to the consent authorities for their approval, and the relevant recommendations then incorporated into a construction management plan. The construction management plan should include a condition requiring work to stop immediately in the event that the specified vibration levels or any settlement limits are exceeded.

Dust

2.5 TrustPower requests that the construction management plan also include a dust management plan, to be prepared in consultation with TrustPower. As a minimum, this plan would include a requirement to avoid as far as practicable any dust effects on the Highbank powerhouse, and a requirement to undertake a full clean of the exterior and of all electrical infrastructure affected by dust, together with an inspection of the infrastructure to ensure that there are no on-going effects caused by that dust.

Timing of works and other matters

2.6 TrustPower is also requesting as a consent condition that the Regional Council is to receive confirmation from TrustPower that it does not intend to operate the scheme for the specified period of the tailrace works. If the Highbank power scheme commenced operation part way through the construction then there would be obvious environmental effects arising (eg, including on water quality). To avoid losing power generation, and undermining the effectiveness of the power scheme, any construction works should as a minimum occur outside of TrustPower's generation periods.

2.7 The construction management plan could also usefully deal with other matters, such as continued access during the construction period, etc.

As will be explained, there is some degree of public usage of the area around the Highbank power scheme, and the construction management plan should be specifically required to ensure the public's safety during the construction period.

Operational effects and monitoring

2.8 As discussed further below, the Highbank power scheme is a regionally significant physical resource and must be sustainably managed. In my submission, that means that consents granted to this proposal should not substantially directly or indirectly interfere with TrustPower's operation.

Water levels in the tailrace

2.9 The primary operational concern held by TrustPower is to ensure that the water level in the tail race is kept within a range agreed with TrustPower. If the water level is too high or too low then there can be corresponding effects on TrustPower's generation equipment, as Mr Lees will explain.

2.10 TrustPower is requesting that a condition be imposed requiring that the consent holder cease discharging into the Highbank tailrace if the Highbank power scheme is operating and the water level exceeds a certain level, and that the consent holder increase the discharge rate if the water level in the tailrace drops below a certain level. The Electricity Ashburton scheme involves a weir to control the tailrace levels within an agreed range – however there are no details in the applicant's material about how they would also operate such a weir. Mr Bonis discusses the condition developed to address this matter.

Salmon barrier

2.11 Mr Allibone in his evidence addresses the effects the applicant's proposal will have on TrustPower's salmon barrier. TrustPower is concerned to ensure that a reasonable worst case flow scenario will not compromise the operation of the salmon barrier due to increases in the velocity of the outflow and greater loads on the barrier structure. Further, as Mr Allibone explains, the widening of the tailrace below the

fish screen could result in pools and hollows in the widened area in which salmon could strand. This needs to be addressed.

2.12 As described in Mr Lees' evidence, TrustPower has worked in close association with Canterbury Fish and Game to ensure that the salmon barrier operates effectively. TrustPower wants to ensure the salmon barrier continues to operate successfully and that the applicant's proposal does not undermine its effectiveness.

Well

2.13 While it is beyond the scope of these applications, the construction of this scheme would necessitate the relocation of an existing well serving the Highbank power scheme. TrustPower therefore requests that an advice note be included in any grant advising that construction works cannot commence on TrustPower's land until a replacement well has been provided and is operating. (If there are any new or replacement resource consents needed, then these should be obtained by the consent holder and transferred to TrustPower.) Mr Bonis addresses point further.

Other matters

2.14 TrustPower also requests that the Panel give appropriate consideration to ensuring the safety of public once the ACWT proposal is operating. TrustPower would not like to have to restrict public access to the area around its scheme, because of safety risks posed by this development. The proposed bridge across the canal beside the powerhouse needs to accommodate 30 tonne excavators sometimes used by TrustPower to maintain its infrastructure and this requirement is accepted by ACWT.

Non-derogation of grant

2.15 This development will interfere with TrustPower's existing operations. I have outlined above the main proposed conditions to address TrustPower's concerns, however to support the request for those conditions I wish to briefly discuss the non-derogation from grant principle (which I am sure the Panel is aware of) and provide a short summary of the Part 2 principles.

2.16 It is submitted that TrustPower's existing rights would be significantly eroded (to the point of derogation) if the applicant was also granted a resource consent without the appropriate conditions being imposed.

2.17 The High Court in *Southern Alps Air Limited v Queenstown Lakes District Council* 13 ELRNZ 221 held at paragraph 50 that a derogation from the grant would only occur when there is a "substantial interference" with the substance of the existing grant. Consideration must be given to the nature of the interference and whether it went to the substance of the grant, or merely to the convenience and enjoyment of its exercise:

> *In Mt Cook Turner J described derogation as occurring only where there was frustration of the previous grant. Subsequently, this description has been questioned: see the judgement of Elias J in Nordern v Blue Port Enterprises Lyd [1996] 3 NZLR 450 (HC) at 454-456, which discussion was approved by the Court of Appeal in Tram Lease Ltd v Croad at para [27]. These cases confirm that to amount to derogation from a grant, the relevant interference must be at least substantial. Mere interference with convenience or amenities does not suffice. It has also been said that the principle must be applied fairly, even strictly, but not narrowly.*

2.18 If the ACWT proposal is allowed to proceed without suitable consent conditions then the consent will substantially interfere with TrustPower's Highbank operation. The proposed effects concerned about in this case go well beyond mere inconvenience to TrustPower. They include preventing any exercise of TrustPower's consent during the tailrace works; the potential construction effects on the generation infrastructure; potential effects on the generation output enabled by the consents (if the tailrace water levels become high) and compliance with its own consent conditions (eg operation of the fish barrier). Any failure of the river protection works caused by the construction or operation of the ACWT canals could also seriously compromise (or perhaps even destroy) the existing power generation at Highbank.

3. PART 2 ASSESSMENT

3.1 As the Panel will be well aware, Part 2 of the Resource Management Act is the framework against which all the functions, powers, and duties under the RMA are to be exercised.

3.2 Of particular relevance in this instance are those aspects of sustainable management as defined in s5 of the RMA that refer to *managing* the use and development of resources *in a way or at a rate* that, while enabling development, will *avoid, remedy or mitigate adverse effects* of activities on the environment.

3.3 Power schemes are a significant physical resource, which contribute to the social and economic wellbeing of the Canterbury Region. The Highbank power scheme has been operating for over 60 years as part of a combined project to irrigate dry farmland and generate electricity.

3.4 The Environment Court has identified the critical role of electricity in providing for people's well-being:

> *"Electricity is a vital resource for New Zealand. There can be no sustainable management of natural and physical resources without energy, of which electricity is a major component."*[1]
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> *"From a national level, electricity is an essential commodity to New Zealand households (directly they spend in excess of $2 billion on it) and industry. It provides the basis for our economic prosperity and way of life. Unlike in some other countries, electricity cannot be imported, and for some purposes it has no practical alternatives."*[2]

3.5 While TrustPower accepts that the proposed ACWT scheme has generation potential (said to be some 22 MW maximum capacity) it is no more than the Highbank power scheme (approximately 28 MW maximum capacity).

3.6 From a legal perspective, Ms Appleyard's suggestion that "*Highbank is now dated in terms of its technology and its continued existence cannot be assumed*" [Second legal submissions for ACWT; para 64] is surprising. As the Panel will be aware it is required to take into account the Highbank power scheme as a regionally significant physical resource which is recognised in planning documents.

3.7 It will be obvious to the Panel that all of the applicant's comments about energy supplies (more particularly the New Zealand Energy Strategy and the proposed National Policy Statement on Renewable Energy) apply to

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1 *Genesis Power Limited v Franklin District Council* [2005] NZRMA 541 at [64].
2 *Rotokawa Joint Venture Ltd and Mighty River Power Ltd v Waikato Regional Council* (A41/07) at [422].

TrustPower's Highbank power scheme which has the obvious advantage of being constructed and operating.

3.8 TrustPower's submission is that the Highbank power scheme is an existing and long standing, and regionally significant, physical resource and its sustainable management must be ensured. If that requires additional constraints or costs being imposed on the ACWT proposal through resource consent conditions, then that is entirely appropriate.

4. CONCLUSION

4.1 These legal submissions have highlighted TrustPower's concerns with this type of scheme. For the reasons discussed above and from the evidence that follows it is clear that without the appropriate conditions the ACWT proposal will have an adverse effect on the operation of the Highbank power scheme.

4.2 To address the company's concerns, and to ensure the sustainable management of the Highbank power scheme, the company requests that the Panel impose the conditions agreed with the applicant as being appropriate (as summarised above and explained further in the evidence to follow).

4.3 Finally, TrustPower has gone to some effort in the preparation of the proposed conditions. If the Panel wishes to re-write or re-structure the consent conditions, TrustPower respectfully requests that it (along with other interested parties) be given an opportunity to comment on a draft version of those conditions prior to them being finalised. That will hopefully greatly reduce the need for any subsequent appeals on conditions (should the Panel be minded to grant the consents).

DATED this 18th day of September 2008

LCR Burkhardt
Counsel for TrustPower Limited