

BEFORE THE BOARD OF INQUIRY

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of resource consent applications by Mighty River Power Limited to Palmerston North City Council, Tararua District Council and Horizons Regional Council for the Turitea Wind Farm Project

**MEMORANDUM OF COUNSEL FOR MIGHTY RIVER POWER LIMITED REGARDING
EVIDENCE EXCHANGED**



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MAY IT PLEASE THE BOARD:

1. INTRODUCTION

1.1 This Memorandum of Counsel responds to that filed by Counsel for Palmerston North City Council (*PNCC*) dated 10 June 2009 (*the Memorandum of Counsel for PNCC*). The Memorandum of Counsel for PNCC asks the Board to make a direction disallowing the statements of rebuttal evidence filed on behalf of Mighty River Power Limited (*Mighty River Power*) on 5 June 2009 from the following:

- (a) Mr Tony Parsons;
- (b) Mr Scott Vaughan;
- (c) Mr Andrew Watson;
- (d) Mr Gavin Alexander;
- (e) Mr Christopher Shaw;
- (f) Ms Deborah Burns;
- (g) Dr Peter Phillips;
- (h) Professor Ralph Sims;
- (i) Mr Paul Baker; and
- (j) Mr Brad Coombs.

1.2 In responding to the Memorandum of Counsel for PNCC, it is proposed to first provide the Board of Inquiry (*Board*) with the relevant background to and context to the exchange of evidence that has occurred. Specific points raised, and assertions made, in the Memorandum of Counsel for PNCC will then be addressed to the extent necessary.

2. BACKGROUND AND CONTEXT

2.1 It is submitted that each of the briefs opposed in the Memorandum of Counsel for PNCC were validly prepared and appropriately exchanged on behalf of Mighty River Power as rebuttal evidence, given that they either:

- (a) could only be exchanged as rebuttal evidence due to:

- (i) uncertainty as to the position PNCC would take with respect to its submission on the present applications; and
 - (ii) the absence of detail provided as to the identity and areas of specialisation of the experts that were to be called in support of PNCC's submission;
- (b) were considered necessary to assist the Board in light of developments with respect to the Board of Inquiry hearing of Contact Energy's applications for the Hauāuru mā raki wind farm that occurred after the filing of Mighty River Power's evidence in chief; or
- (c) respond to, and accordingly rebut, evidence filed on behalf of parties other than PNCC.

2.2 We accordingly address each of these matters further as follows.

Lack of certainty as to PNCC position/evidence to be called

2.3 Paragraphs 8 and 9 of the Memorandum of Counsel for PNCC state that the nature of the independent evidence to be called by PNCC was adequately outlined at both a public meeting held by PNCC on 12 February 2009, and a Council meeting (of which Mighty River Power was aware) on 18 February 2009. Neither Counsel nor Mighty River Power accept either of these claims. Before explaining the reasons for that position, it is important to first outline for the Board relevant background to, and aspects of, PNCC's submission on the applications of which the Board may otherwise be unaware.

PNCC's submission on the applications

2.4 As outlined in Mr C. Shaw's rebuttal evidence, PNCC issued a Request for Proposals for the development of a wind farm within the Turitea Reserve and on adjacent land, in March 2005. On 28 September 2005 Mighty River Power entered into an agreement with PNCC as its preferred development partner for the Turitea Wind Farm (*the Contract*). In accordance with the Contract, in 2006, PNCC proceeded with the necessary consultation and statutory processes to change the purpose of the Turitea Reserve to allow for electricity generation from renewable sources. In reliance on the Contract and PNCC's actions, and on the basis of its own analysis and assessments, Mighty River Power accordingly lodged the present resource consent applications in August 2008.

2.5 Following their call-in and public notification, PNCC lodged a submission in respect of the applications dated 20 February 2009, a copy of which is attached as **Appendix A** to Mr Henry's affidavit. In that submission, PNCC stated that it considered it essential for PNCC to be present at the hearing in order to "*provide the Court with a full independent line up of experts in relation to relevant effects*". It further sought:

"A decision which as a matter of overall judgement best accords with the overarching ethic of sustainable management guided and informed by:

- a. Part 2 RMA;*
- b. The operative and proposed RPS and regional plans;*
- c. The Palmerston North District Plan;*
- d. The Reserves Act;*
- e. The Turitea Reserve Management Plan.*

In support of that request PNCC will provide the Board of Inquiry with statements of evidence from a suite of independent experts in the same way it would have done had it been the consent authority...

Palmerston North City Council seeks a decision which best achieves the RMA's purpose of sustainable management having regard to expert evidence presented by PNCC and avoids any risk of adverse effects on water quality within the Reserve catchment." (original emphasis)

2.6 The final form of PNCC's submission was agreed to at an Extraordinary Council Meeting on 18 February 2009, being the meeting referred to at paragraph 9 of the Memorandum of Counsel for PNCC. A copy of the Order Paper for that meeting is attached as **Appendix B** to Mr Henry's affidavit. Included as Appendix 3 to that Order Paper is the "*recommended PNCC submission to Turitea Wind Farm Board of Inquiry*" (pages 31-47). Page 4 of that draft submission (page 35 of the Order Paper) states that "*PNCC request that the assessments be considered as part of the Board's [sic] decision. An indicative table of PNCC's experts is attached as Appendix 4.*" Significantly, no draft of that Appendix was included in the Order Paper, nor has it ever been made available to Mighty River Power (or, to Counsel's knowledge, any other party).

2.7 PNCC's final submission (as filed on 20 February 2009) did not include reference to Appendix 4, or indeed to any indicative table of experts. The sole indication of the evidence intended to be filed by PNCC was limited to a list provided in paragraph 4 of an "Attachment" to the submission, which stated that:

“A non-exhaustive list of topics which the expert evidence will address is as follows:

- (a) *landscape and visual effects;*
- (b) *noise effects;*
- (c) *ecological effects;*
- (d) *social/cultural impact analysis;*
- (e) *energy context;*
- (f) *water quality;*
- (g) *traffic efficiency and safety;*
- (h) *construction effects.”*

2.8 Mighty River Power considered that this list provided insufficient clarity as to the aspects of the applications that were to be addressed by PNCC’s submission, and of equal or greater importance, that the list failed to disclose the nature of the position PNCC intended to advance. Accordingly, on 11 March 2009 Counsel for Mighty River Power wrote to the Board raising concerns with the lack of information provided in PNCC’s submission, and noting that the submission included “*insufficient detail to inform Mighty River Power of the nature of the case to be met*”. A copy of that letter is attached as **Appendix C** to Mr Henry’s affidavit.

2.9 In that letter, Mighty River Power requested an additional week for the preparation of rebuttal evidence, rather than potentially causing a delay of the hearing by seeking further and better particulars (as it was entitled to). The additional rebuttal period was sought in order to have sufficient time to adequately respond to the issues raised in the various expert reports later filed in support of PNCC’s submission.

Public meeting called by PNCC on 12 February 2009

2.10 It is accepted that a public meeting regarding the applications was held by PNCC on 12 February 2009, and that this was attended by Mighty River Power representatives. The presentation posted on PNCC’s website following this meeting (attached as **Appendix E** to Mr Henry’s affidavit) indicated that the following experts would be engaged to undertake assessments with respect to PNCC’s submission on the applications:

- (a) Mr Jeff Baker – planner;
- (b) Mr Clive Anstey – landscape architect;

- (c) Mr James Baines – social impact assessment;
- (d) Ms Molly Melhuish – energy expert;
- (e) Mr Paul Blaschke – ecologist; and
- (f) Mr Nigel Lloyd – acoustic consultant.

2.11 However, as outlined in Mr Mark Henry's affidavit, the version of the presentation posted on the website was not the version actually presented in the meeting, and no hard copies of the original presentation were made available to attendees at the meeting. PNCC also did not expand or elaborate on the nature of the evidence that might be presented by the experts identified, either within the presentation or during the course of the meeting itself.

2.12 Evidence was subsequently exchanged on behalf of PNCC by the following additional five experts, not identified in that presentation:

- (a) Mr Jono Naylor – Mayor of PNCC;
- (b) Mr Chris Taylor – engineer (addressing water quality issues);
- (c) Mr John Male - hydrologist;
- (d) Mr Daniel Tate – traffic engineer; and
- (e) Mr John Van der Leden – civil engineer (addressing visual simulation and modelling issues).

2.13 It is therefore submitted that if the rebuttal evidence noted in the Memorandum of Counsel for PNCC is disallowed as Mr Maassen seeks (contrary to the correct legal position), the evidence of the experts on behalf of PNCC identified in paragraph 2.12 above should similarly be disallowed, on the same, albeit flawed, reasoning.

2.14 It is further submitted that, as outlined in Mr Henry's affidavit, the nature and purpose of the meeting in question was highly unusual in the context of a project such as the Turitea wind farm proposal, let alone one in which PNCC is contractually a development partner. As Mr Henry explains, the public meeting was essentially used for the purpose of educating the Palmerston North public on how to lodge a submission *in opposition* to the applications, and to encourage them to do so.

2.15 As a result, Mighty River Power developed significant concerns that the evidence PNCC could file in respect of the applications would not necessarily be as neutral as might have been expected given the vague and unhelpful wording of its submission. This was accordingly reflected in Mighty River Power's primary evidence to the extent it was considered appropriate and possible (on the basis of the information then available) at that time. In those circumstances, it is submitted that having regard to the nature of PNCC's submission, Mighty River Power could not, and could not have been expected to, anticipate the entirely adversarial and negative nature of the evidence circulated on PNCC's behalf on 22 May 2009. It was therefore not possible for Mighty River Power to appropriately and fully respond to the true extent of PNCC's case, prior to the filing of its rebuttal evidence.

Council meeting of 18 February 2009

2.16 It is also accepted that a Council meeting was held on 18 February 2009 regarding PNCC's submission on Mighty River Power's applications, and that this was attended by Mighty River Power representatives. Relevant background from this meeting has already been outlined above.

Rebuttal evidence necessary as a result of PNCC position

2.17 In light of the above, it is submitted that six of the briefs noted in the Memorandum of Counsel for PNCC were appropriately exchanged as rebuttal evidence in accordance with the Board's Directions: Preliminary and Hearing Procedures (*Directions*), as follows:

- (a) Mr C Shaw's evidence responds to, and rebuts, the evidence of Mr Naylor, Mr J Baker and Mr Taylor. Mighty River Power received no advice from PNCC that two of these three witnesses would be called, or as to the nature of the issues regarding interpretation of the Contract that they would raise.
- (b) Mr Watson's evidence primarily responds to, and rebuts, that of Mr Taylor. Again, Mighty River Power had no indication that Mr Taylor would be called as a witness, or as to the exact nature of the water quality and water treatment issues regarding the PNCC water supply that this would raise. To the contrary, Mighty River Power had received a copy of the report commissioned by PNCC from GHD entitled "Report for Proposed Mighty River Power Wind Farm: Turitea Water Quality Impact Assessment" dated February 2009 which did not identify any significant issues arising. Mighty River Power could therefore have

reasonably expected that any evidence by those experts would be similarly benign. A copy of the GHD report is appended to the evidence of Mr Taylor.

- (c) Both Dr Phillips and Ms Burns respond to, and rebut, the evidence presented by Mr Baines. It is accepted that Mighty River Power had notice that he was to present evidence on social/cultural impacts. However, Mighty River Power had no prior knowledge as to the nature of the purported Social Impact Assessment outlined in Mr Baines' evidence, or that his evidence would even extend beyond addressing the Public Perception Study undertaken by Research New Zealand as outlined in the evidence in chief of Mr Emanuel Kalafatelis. As Mr Kalafatelis is not appropriately qualified to comment on social impact assessments, it was necessary to engage Dr Phillips to prepare rebuttal evidence in this regard. PNCC was on notice from Mr Kalafatelis' evidence in chief that the Research New Zealand survey had been peer reviewed, and it was therefore appropriate and necessary for Ms Burns to be called to detail the nature of her review given the scope of matters raised by Mr Baines.
- (d) Mr P Baker and Professor Sims were both called primarily to respond to, and rebut, the evidence presented by Ms Melhuish. Mr P Baker also responds to the evidence of Mr Leyland (as addressed further below), and Professor Sims to the evidence of Mr J Baker. Again both Mr P Baker's and Professor Sims' rebuttal evidence was necessary (in the sense that it could only be given as rebuttal evidence) given the lack of detail in PNCC's submission regarding the generic "energy context" issues that Ms Melhuish was to address. Mighty River Power also cannot have been expected to anticipate the lack of proper consideration of climate change issues in both Ms Melhuish and Mr J Baker's evidence, which Professor Sims also responds to. As outlined in Mr Henry's affidavit, it is also factually incorrect for Mr J Baker to state (as he has done at paragraph 7 of his affidavit) that Ms Melhuish did not address climate change issues because she does not have, and has never claimed, any expertise in this area.

Developments with the Hauāuru mā raki wind farm hearing

- 2.18 Issues have recently been raised during the hearing for Contact Energy Limited's (*Contact*) Hauāuru mā raki wind farm as to the expertise of Mr Chris James, and the level of engineering design required in order to allow that Board to adequately

assess and determine the relevant applications. Mighty River Power accordingly exchanged additional rebuttal and peer review evidence from both Mr Parsons and Mr Vaughan, as it was considered this would appropriately inform and assist the Board to address those issues in the context of the Turitea project.

- 2.19 By way of background, the Hauāuru mā raki wind farm Board of Inquiry commenced proceedings on 27 April 2009. Mr James was scheduled to appear as an expert witness on behalf of Contact providing evidence as to the civil engineering aspects of the proposal. Mr James also exchanged evidence in chief on behalf of Mighty River Power in respect of the Turitea Wind Farm. During the afternoon of 1 May 2009 (the day after Mighty River Power was required to post its evidence in chief with respect to the present applications) Mr James was sworn in as a witness at the Hauāuru mā raki Board of Inquiry hearing.
- 2.20 During the questioning of Mr James at that hearing, and as recorded at page 464 of the transcript to those proceedings attached as **Appendix A**, his Honour Judge Smith challenged Mr James' capacity to appear as an expert witness. In particular, his Honour took issue with the fact that Mr James is not a formally qualified civil engineer, nor an accredited member of IPENZ.
- 2.21 Further, and as referred to in its decision dated 28 May 2009 adjourning the Hauāuru mā raki proceedings, concerns were raised by that Board as to the level of detailed design work that had been undertaken by relevant experts prior to the hearing commencing. In particular, the Board noted that in its opinion, Contact was "*essentially seeking a consent in principle*". Prior to the hearing, the evidence provided to the Board included only an indicative plan, within which the positions of turbines, roads, and all other works were essentially unknown, making an assessment of effects very difficult. The adjournment decision also noted that Contact's indicative design "*did not consider geology, stability, seismic conditions.*" The adjournment was sought in part to allow Contact to allay these concerns by undertaking a more thorough design process.
- 2.22 The issue of expert witnesses appearing despite not having formal qualifications has previously been considered by the Environment Court. In particular, in *Scurr v Queenstown Lakes District Council*¹ Judge McElrea stated that:

¹ C60/05.

“There is clear New Zealand authority that to qualify as an expert witness one need not necessarily have formal, professional qualifications”

2.23 In that decision, his Honour went on to affirm the test set out in *R v Halmond*² (incorrectly cited in *Scurr* as *R v Hallwood*, unreported, Court of Appeal, 22 February 1990, 305/80), stating that:

*“The judge or magistrate must determine whether the witness (a) has undergone such a course or special study and/or (b) is so experienced in a particular field as to render that person expert in a particular subject.”*³

2.24 In *Cash for Scrap Limited v Manukau City Council*⁴ the Environment Court affirmed *Scurr*, when stating (at paragraph 32): *“it is of course possible for someone to be qualified as an expert witness without formal qualifications and having instead extensive experience.”*

2.25 It is submitted that Mr James’ extensive background in civil design matters, and in particular the development of wind farm design, puts his experience outside that of the ‘common experience’. It is further submitted that, even in the absence of formal qualifications, Mr James is appropriately qualified as an expert in this particular area, and can accordingly provide evidence on matters of opinion, as well as fact. It is submitted that the level of design that had been undertaken in respect of the Turitea Wind Farm and circulated through the notification process and Mighty River Power’s evidence in chief is more than adequate and shows definite details such as the proposed turbine zones (within which turbines will be sited +/- 100 metres), the proposed road layout, soil disposal sites, substation locations, and culvert locations.

2.26 Nevertheless, in the circumstances, and mindful of its obligation to fully inform the Board and provide the ‘best evidence’, Mighty River Power considered it would assist the Board to have Mr James’ evidence, and the engineering work undertaken to date, peer reviewed by independent, qualified engineers. To this end, in mid May 2009, Mighty River Power engaged Mr Parsons, an independent engineer, and Mr Vaughan of Riley Consultants Limited, to undertake this work.

2.27 Mr Parsons was the original project manager for the Turitea Wind Farm, and is a highly experienced and qualified engineer. He also has knowledge of the initial

² CA305/89, 22 February 1990.

³ *Scurr v Queenstown Lakes District Council* C60/05, para 48.

⁴ A198/05, McElrea J, 6 December 2005.

engineering works and investigations undertaken for the Turitea project, as well as being familiar with the site itself.

- 2.28 Mr Vaughan was involved in TrustPower's 'Mahinerangi' Wind Farm hearing,⁵ which faced similar challenges to those which arose in the Hauāuru mā raki hearing regarding the necessary level of detailed engineering design work. In Mahinerangi, additional detailed design was undertaken during the hearing to provide the level of detail required by the Environment Court to inform its deliberations. It was therefore considered appropriate and of particular assistance for Mr Vaughan to be engaged to undertake peer review work for the Turitea project.
- 2.29 Given the timing of the developments during the Hauāuru mā raki wind farm hearing, it was not possible for Mr Parsons or Mr Vaughan to provide evidence in chief. Accordingly, and to be of most assistance to the Board, this evidence was supplied at the first possible opportunity, and made available to all submitters with Mighty River Power's other rebuttal evidence on 22 May 2009.

Response to other parties' evidence

- 2.30 Three of the rebuttal briefs addressed in the Memorandum of Counsel for PNCC validly and appropriately respond to evidence presented on behalf of parties other than PNCC. It is therefore unclear exactly why these have been raised for consideration in the Memorandum of Counsel for PNCC, or why it is considered they will cause substantial (or indeed any) prejudice to PNCC.
- 2.31 The relevant briefs are as follows:
- (a) Mr Coombs responds to issues regarding the outstanding natural landscape provisions of the Proposed One Plan (*POP*) raised in the evidence of Mr Phillip Hindrup on behalf of Horizons Regional Council (*Horizons*).
 - (b) Mr Alexander responds to geotechnical issues raised in the evidence of Dr Allan Palmer on behalf of the Tararua Aokautere Guardians (*TAG*) and Friends of Turitea Reserve (*FOTR*).
 - (c) Mr P Baker also responds to the electricity market issues raised in the evidence of Mr Leyland on behalf of TAG and FOTR.

⁵ *Trustpower v Clutha District Council* C85/2008

3. THE MEMORANDUM OF COUNSEL FOR PNCC

- 3.1 The following section addresses specific issues arising from the Memorandum of Counsel for PNCC to the extent that they warrant a substantive response. The paragraph numbers in the Memorandum of Counsel for PNCC are used here for ease of reference.
- 3.2 *Paragraph 2:* Each of the briefs referred to in this paragraph have already been addressed in detail above. In particular:
- (a) Mr Coombs' evidence responds to specific evidence from Mr Hindrup regarding the POP not able to be addressed by Mr Allan Wyatt or Mr Stephen Brown (Mighty River Power's other landscape witnesses). Both Dr Phillips and Ms Burns respond to specific aspects of Mr Baines' evidence not appropriate for rebuttal by Mr Kalafatelis. Ms Burns also outlines the peer review of the Public Perception Survey she has undertaken, in light of the matters raised in Mr Baines' evidence.
 - (b) Professor Sims specifically responds to the lack of climate change analysis provided by Mr J Baker and Ms Melhuish on the basis that their purported summary of the "energy context" and evaluation of 'positives and negatives' under section 5 RMA are both fundamentally flawed without it.
 - (c) The additional engineering and geotechnical evidence from Mr Parsons and Mr Vaughan was considered both appropriate and necessary in light of developments with the Hauāuru mā raki wind farm hearing that occurred subsequent to the filing of Mighty River Power's evidence in chief.
- 3.3 *Paragraph 4:* There is no requirement under the Directions or otherwise for Mighty River Power to inform PNCC, or any other submitter, of the rebuttal evidence it intended to call. All the rebuttal evidence is either appropriately confined to responding to issues raised in the evidence in chief of other parties, or (in the case of Mr Parsons and Mr Vaughan) was provided by way of additional assistance to the Board in the specific circumstances of this case. Other than the substance of Mr Watson's evidence (the finalisation of which was awaiting the receipt of information earlier requested from PNCC), all evidence was also exchanged in accordance with the Directions. It is therefore submitted that the exchange of this evidence cannot give rise to any prejudice, let alone "substantial" prejudice, to PNCC or any other submitter.

- 3.4 *Paragraphs 8 and 9:* The meetings referred to in these paragraphs have already been addressed in detail above.
- 3.5 *Paragraph 12:* The length of time Mighty River Power has had to understand the nature of the case against it, and the evidence it should call in response, has been set by the Directions. More pertinent, however, is the level of information it has been provided by submitters for consideration within these timeframes. Issues regarding the lack of detail provided in the PNCC submission have already been discussed above.
- 3.6 *Paragraph 18(c):* There is no requirement under the Directions or otherwise that rebuttal evidence can only be presented by “*experts for the applicant who provided statements of evidence in chief*”. The assertion in the Memorandum of Counsel for PNCC to the contrary is specious.
- 3.7 *Paragraph 20:* As already noted above, with the exception of the evidence of Mr Parsons and Mr Vaughan, the evidence opposed in the Memorandum of Counsel for PNCC is appropriately constrained to responding to issues raised in the evidence presented on behalf of various submitters. It is therefore appropriately classified as rebuttal evidence, not supplementary statements.
- 3.8 *Paragraph 21:* The “complications” identified in this paragraph do not arise in the present case, given that the briefs noted in the Memorandum of Counsel for PNCC have been validly and appropriately exchanged in accordance with the Directions. The evidence therefore falls to be dealt with as part of the “*familiar format*” of evidence exchange “*for people engaged in resource matters*”, as this is described at paragraph 18 of the Memorandum of Counsel for PNCC. Even if the briefs were “supplementary evidence” rather than rebuttal (which is not accepted), it is submitted that this would in no way prevent submitters from being able to advise whether it should be the subject of cross examination, or their experts from being able to participate in caucusing, as claimed in the Memorandum of Counsel for PNCC, without any supporting reason.
- 3.9 *Paragraph 22:* It is difficult to respond to this paragraph appropriately, as it is unclear exactly what point is being made here.
- 3.10 *Paragraph 24:* The necessity for exchanging rebuttal evidence from Mr Alexander (geotechnical) and Mr Watson (water quality), as well as the reason the substance of Mr Watson’s evidence was unable to be completed by 5 June, have been addressed

in detail above. It is unclear who the second Beca engineer is that is referred to in paragraph 24(b), as the only Beca expert giving rebuttal evidence aside from Mr Levy and Mr Watson is Mr Alexander, who has already been referred to in paragraph 25(a). The latest version of the conditions was circulated by Mighty River Power on 1 May 2009 as required by the Directions, and it is expected this will be subject to refinement right through to the close of the upcoming hearing. In Counsel's experience, this is completely usual (and entirely appropriate) for a project of this nature and scale.

3.11 *Paragraph 26:* The only evidence relevant to this issue is that on behalf of Mr Vaughan and Mr Parsons, as well as aspects of Ms Burn's evidence. Again, each of these briefs has already been addressed in detail above, as has the rationale for it being prepared and filed.

3.12 *Paragraph 27:* Relevant points in respect of the various claims made in this paragraph of the Memorandum of Counsel for PNCC are as follows:


- (a) Mr Maassen's claim that Mighty River Power is "*not undertaking caucusing as contemplated by the directions but is seeking caucusing with only some parties' experts at any one time as opposed to the collective experts in a particular discipline*" is not only spurious, but one he knows to be false.
- (b) As outlined in Mr Henry's affidavit, all experts engaged by Mighty River Power have been clearly advised of their caucusing obligations under the Directions and Consolidated Practice Note 2006 (*Practice Note*), and instructed to act accordingly. If caucusing has occurred with only some experts in a relevant discipline, this is solely due to availability issues within the timeframes set under the Directions, and not as a result of any deliberate strategy or decision on behalf of Mighty River Power or its experts, as Mr Maassen is implying. Further, the difficulty of securing dates on which all experts in the various disciplines are available has been clearly explained to Mr Maassen and his legal team. It is submitted that some caucusing, including caucusing in series, is better than no caucusing in the two week period allowed under the Directions for this process to occur and reports to be lodged with the Board.
- (c) Moreover, it is in fact Mr Maassen who has been **instructing** the various experts for PNCC not to engage in caucusing with Mighty River Power witnesses, as a result of the position he has taken regarding the rebuttal evidence noted in the Memorandum of Counsel for PNCC. Contrary to the

Directions and Practice Note, and as outlined in Mr Henry's affidavit, Mr Maassen has accordingly instructed experts not to engage with those experts whose evidence he is seeking to challenge by way of the Memorandum of Counsel for PNCC. As a result, it is submitted that Mr Maassen has expressly directed his experts to impose his own interpretation as to the correct procedure to be followed, before the Board even has a chance to consider this issue, let alone issue a decision on it. It is further submitted that it is entirely inappropriate for Mr Maassen to have effectively pre-determined and interposed himself as arbiter in this manner.

3.13 *Paragraph 28:* Mighty River Power is able to provide the Board with evidence as to the date of engagement of each of the relevant experts as necessary. Counsel and Mighty River Power also flatly reject the implication that any strategy deliberately aimed at undermining the Directions and/or prejudicing any submitter has been adopted.

4. CONCLUSION

4.1 For the reasons outlined in this memorandum, it is submitted that the directions sought at paragraph 29(c) of the Memorandum of Counsel for PNCC are without foundation, wholly inappropriate and unnecessary. Even so, Mighty River Power wishes to indicate that it would not be opposed to the Board issuing directions allowing submitters additional hearing preparation time (including in order to review the evidence noted in the Memorandum of Counsel for PNCC) should this be considered appropriate in the circumstances.



KR Price/HC Andrews/KM Bell
Counsel for Mighty River Power Limited

16 June 2009

Appendix A

DISCUSSION

5 <CHRISTOPHER DAVID JAMES, sworn [12.14 pm]

<EXAMINATION BY MR ROBINSON [12.14 pm]

10 MR ROBINSON: Mr James, can you confirm for the record that your full name is Christopher David James and you are the Lead Windfarm Civil Designer employed by Beca Carter Holdings and Ferner based in Wellington?

MR JAMES: That is correct.

15 MR ROBINSON: And that you have prepared a brief of evidence and of rebuttal evidence in this proceeding?

MR JAMES: I did.

20 HIS HONOUR: The problem, Mr Robinson, I think all of us assumed that he was a Civil Engineer, but when I look he has not got any qualifications.

25 MR JAMES: No, sir, I do not claim to be a Civil Engineer, not a Qualified Civil Engineer.

HIS HONOUR: So the question is, on what basis is he appearing before the Court as an expert witness, because he does not specify. Is he a registered engineers associate through IPENZ?

30 MR JAMES: No, I am not.

35 HIS HONOUR: So the first question I have is what expertise is he purporting to hold? The fact that he may be employed in a role does not give him expertise before the Court, so that is a question we have to address first.

MR ROBINSON: Indeed, sir.

40 HIS HONOUR: Unfortunately his qualifications and experience do not assist us because essentially it is just a generic statement of employment.

DISCUSSION RE QUALIFICATIONS

[12.20 pm]

45 HIS HONOUR: Why do we not take lunch and come back at 1.30 pm?