

## Public Version

14 June 2007

The Registrar  
Commerce Commission  
PO Box 2351  
**WELLINGTON**

Pursuant to section 81(1) of the Electricity Industry Reform Act 1998, application is hereby made to the Commerce Commission for exemptions from the application of the Electricity Industry Reform Act 1998, as described in the application.

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### PERSON MAKING THE APPLICATION

#### 1. The Applicant

- 1.1 This application is made by Infratil Limited (“Infratil”) and Lloyd Morrison (together “the Applicants”). The address details for Infratil are:

Infratil Limited  
PO Box 320  
97 The Terrace  
Wellington  
New Zealand

Attention: Paul Ridley-Smith

Telephone: (04) 473 2399

Facsimile: (04) 473 2388

Email: [Paul.Ridley-Smith@HRLMorrison.com](mailto:Paul.Ridley-Smith@HRLMorrison.com)

Mr Morrison’s address details are the same.

- 1.2 This is a combined application from Infratil and Mr Morrison, for both of whom exemptions are sought. The reason for this is that Infratil and Mr Morrison’s involvement in Wellington International Airport (“WIAL”) and TrustPower Limited (“TrustPower”) (the cross-involved companies for the purposes of the Electricity Industry Reform Act 1998 (“the EIR Act”)) are very similar.
- 1.3 As discussed in section 4 of this application, Mr Morrison is a director of both companies. Mr Morrison’s appointment to the Boards of WIAL and TrustPower were both made by Infratil as controlling shareholder in both WIAL and TrustPower. His involvement can therefore be seen to follow from Infratil’s involvement in both businesses. His role as a director of both companies could also be seen as a way of Infratil exercising control over both companies.
- 1.4 Also, as discussed in section 4 of this application, both Mr Morrison and Infratil exert “*material influence*” (as defined in section 11 of the EIR Act) over both

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companies. In Infratil's case, this "*material influence*" follows from Mr Morrison's and others' appointments as directors of WIAL and TrustPower. We therefore consider that the nature of the involvements of Infratil and WIAL in "*electricity lines businesses*" and "*electricity supply businesses*", for which exemptions are sought, are very similar and appropriate to be dealt with a single application.

- 1.5 We also note that section 19(1)(h) of the EIR Act provides that no account is to be taken of a person's business, or involvement or interest in a business if the business involvement or interest is exempted by the Commission under section 19(1)(h) of the EIR Act. This section could be read as providing that where a person has an involvement in business, if that business is exempted, from the person's involvement is to be disregarded. This is statutory recognition that some interests are so closely linked that they should be considered the same. While the current situation does not come within section 19(1)(h), as Mr Morrison's involvement in WIAL and TrustPower does not arise from his involvement as defined in the Acts in Infratil, we submit that it is similar, in that his appointment as a director of both companies arises as a result of Infratil's interest in both companies. We therefore consider that it is appropriate for the applications to be considered together.
- 1.6 The need for the exemptions also arises solely as a consequence of WIAL's desire to remain, for obvious airport management related reasons, as a lines business (albeit marginally) over the threshold in section 4(2) of the EIR Act. As such, Infratil notes that this application is closely interrelated with the exemption application filed by WIAL on 22 December 2006 ("the WIAL application").

1.7 [

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### **The Applicants' Contact**

- 1.8 Correspondence and enquiries should in the first instance be addressed to the Applicants' solicitors:

Buddle Findlay  
Law Offices  
State Insurance Tower  
BNZ Centre  
1 Willis Street  
PO Box 2694  
DX SP20201  
Wellington

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nick.crang@buddlefindlay.com

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### CONFIDENTIALITY

#### 2. Requests for confidentiality

- 2.1 The Applicants do not request a confidentiality order for the fact of the application.
- 2.2 Confidentiality for specific information is requested as follows:
- 2.2.1 The Applicants seek confidentiality for specific information in this application included in square brackets and highlighted. A copy of this application with the confidential information deleted is provided to assist the Commission.
- 2.2.2 In accordance with section 58 of the EIR Act, the Applicants request that the Commission make a confidentiality order under section 100 of the Commerce Act 1986 in respect of this information, and that, on the expiry of any confidentiality order that the Commission makes, the information continues to be withheld under section 9 of the Official Information Act 1982.
- 2.2.3 The Applicants also request that they be notified of any request made under the Official Information Act 1982 for the information, and be given the opportunity to be consulted as to whether the information remains commercially sensitive at the time that the request is made.
- 2.3 These requests for confidentiality are made for two reasons:
- 2.3.1 because the information is commercially sensitive and disclosure would be likely to unreasonably prejudice the commercial position of Infratil; and
- 2.3.2 some of the information relates to [

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## **BUSINESS ACTIVITIES OF THE APPLICANT**

### **3. Infratil Limited**

- 3.1 Infratil Limited is a specialist investor in infrastructure and utility assets. The company is listed on the NZX and owns airports in New Zealand and Europe as well as energy and other investments in New Zealand and Australia. Infratil is the major shareholder in both Wellington International Airport Limited (“WIAL”) and TrustPower Limited (“TrustPower”), as described below.
- 3.2 As at the date of its last annual report (for the year ending 31 March 2006), Infratil’s substantial security holders were Utilico Investment Trust Plc (19.46%) and the HRL Morrison Family Trust (7.74%). As part of the TrustPower transaction outlined below, Infratil bought back and on-sold Alliant Energy New Zealand Limited’s 5.02% shareholding in Infratil.
- 3.3 Lloyd Morrison is an Infratil-appointed director of both WIAL and TrustPower.

## **BUSINESS ACTIVITIES OF OTHER RELEVANT PARTIES**

### **4. Wellington International Airport Limited**

- 4.1 WIAL owns and operates Wellington International Airport. WIAL is 66% owned by Infratil Limited, through New Zealand Airports Limited, and 34% owned by Wellington City Council. WIAL’s business activities, and the nature of its involvement in an electricity supply business and an electricity lines business, are set out in section 3 of the WIAL application.
- 4.2 [
- ]

### **5. TrustPower Limited**

- 5.1 TrustPower Limited operates in the electricity generation and retail sectors in New Zealand. It is currently the fourth largest electricity supply business in New Zealand. TrustPower owns 34 hydro power stations and the Tararua Wind Farm. All TrustPower’s generation is based on renewable resources. TrustPower retails approximately 4,700GWh of electricity per annum to around 220,000 customers. TrustPower’s primary retail bases are outside the main metropolitan areas of Auckland, Wellington and Christchurch, although they have some customers in the Wellington region.
- 5.2 TrustPower is listed on the NZX. There are currently three large shareholders in TrustPower. The largest shareholder is Infratil Limited, which currently owns

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approximately 50.5% of the shares in TrustPower, having bought Alliant Energy New Zealand Limited's 28.53% stake in a transaction that settled on 29 December 2006, and then on-sold sufficient shares to the Tauranga Energy Consumer Trust to bring its shareholding up to 33% and sold the remainder on the open market. As noted above, the Tauranga Energy Consumer Trust currently owns approximately 33% of the shares.

### INVOLVEMENTS PURSUANT TO THE EIR ACT

#### 6. Requirements of the EIR Act

6.1 The relevant requirements of the EIR Act are set out in section 7 of the WIAL application.

#### 7. Electricity Lines Business

##### *Position of WIAL*

7.1 As noted in section 8 of the WIAL application, WIAL operates an "*electricity lines business*".

7.2 As also noted in that section, TrustPower does not hold any interests that could cause it to be classed as an "*electricity lines business*".

#### 8. Electricity Supply Business

8.1 As noted in section 9 of the WIAL application both WIAL and TrustPower operate "*electricity supply businesses*".

#### 9. Conclusion on EIR Act

9.1 Infratil and Mr Morrison are both involved in an electricity lines business and an electricity supply business.

9.2 In Infratil's case, this is because:

9.2.1 It holds more than 10% of the control rights (i.e. voting rights) in TrustPower Limited. This takes it over the 10% threshold specified in section 8 of the EIR Act. In accordance with section 7 of the EIR Act, this means that it is involved in the electricity supply business operated by TrustPower Limited;

9.2.2 It owns more than 10% of the control rights in WIAL. For the same reasons, this means it is involved in the electricity lines business operated by WIAL;

9.2.3 It has powers of appointment over directors of both WIAL and TrustPower, including Mr Morrison, and those directors are accustomed to act in accordance with the wishes of Infratil in respect of the carrying on or management of the business of WIAL and TrustPower. Infratil therefore

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has “*material influence*” over both WIAL and TrustPower in terms of section 11 of the EIR Act.

9.3 In Mr Morrison’s case, this is because:

9.3.1 He is a director of TrustPower appointed by Infratil. This means that he is a “*manager*” in TrustPower and, in accordance with section 11(1)(a) of the EIR Act, is deemed to have material influence over the electricity supply business operated by TrustPower. This means that he is “*involved*” in that business under section 7 of the EIR Act.

9.3.2 He is a director in WIAL appointed by Infratil, and, for the same reasons that apply in respect of his directorship of TrustPower, is deemed to be involved in the electricity lines business carried on by WIAL.

9.4 Section 17 of the EIR Act therefore applies to both Infratil and Mr Morrison.

9.5 As discussed above, WIAL is involved in both an electricity lines business and an electricity supply business, but this cross-involvement is not the subject of this application. Rather, exemptions in this regard were sought in the WIAL application.

## DETAILS OF EXEMPTIONS SOUGHT

### 10. Exemptions Sought

10.1 The following exemptions are sought:

10.1.1 temporary exemptions from section 17 of the EIR Act for Infratil and Mr Morrison, to be granted as soon as possible to cover the period up until the Commission makes a decision on the exemptions sought in this application and the WIAL application or shortly thereafter; and

10.1.2 permanent exemptions from section 17 of the EIR Act for Infratil and Mr Morrison, commencing from the expiry of the exemptions sought in paragraph 10.1.1 above.

10.2 The circumstances of its application, and the exemptions sought, differ from previous exemption applications considered by the Commission. However, there are some parallels with the exemptions sought, and granted by the Commission, in relation to:

10.2.1 Various decisions in relation to directors of Auckland International Airport Limited (Decisions No. 384, 517 and 547); and

10.2.2 Vector Limited (Decision No. 541).

## GROUNDS FOR THE APPLICATION

### 11. The applicants' arguments for the application

11.1 In summary, the arguments in favour of the application are:

- 11.1.1 Taking into account the conditions proposed below, and the three primary questions the Commission considers in determining applications for exemptions under section 81, the material risk to the purposes of the EIR Act in granting the exemptions is minimal; and
- 11.1.2 It is an imperative for the proper operation of Wellington International Airport, and to enable emergency generation to be made available for essential services, that WIAL retain ownership and control of its electricity lines. The risks and costs of WIAL losing control of these lines are also out of all proportion to any detriment arising from WIAL's ongoing ownership and control of those lines, and the resulting cross-involvement of Infratil and Mr Morrison in both an electricity supply business (TrustPower) and an electricity lines business (WIAL).

11.2 These matters are discussed further below.

### 12. Relevant Markets

12.1 Consistent with Decision No. 348, the national electricity retail market is relevant to this application.

### 13. The Commission's three primary questions

13.1 The Commission has specified three primary questions that it will examine in considering applications for exemptions under section 81 of the EIR Act.

#### *Incentives or opportunities to inhibit competition in the electricity industry*

##### *Impact of the temporary exemptions*

13.2 The Applicants consider that the temporary exemptions they seek will not have a significant impact on this question. They consider that the effects arising from any incentives or opportunities to inhibit competition over the period of the temporary exemptions are minimal.

##### *Impact of the permanent exemptions*

13.3 In respect of the permanent exemptions, the Applicants note that, as set out in the WIAL application, [

]. The Applicants

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also note that there is no current supply relationship between the businesses of WIAL and TrustPower, other than [

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13.4 Accordingly, the extent to which there could be incentives or opportunity to inhibit completion in the electricity industry, if the exemptions are granted, is limited. In addition, Infratil proposes a number of conditions to address any remaining concerns.

13.5 [

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13.6 [

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13.7 [

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13.8 [

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13.9 In addition to these points, the Applicants do not consider that the size of WIAL's lines business is so significant as to give TrustPower any incentive or opportunity to inhibit competition in electricity generation or retail [

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13.10 Further, the Applicants propose as a condition of the exemptions that WIAL be required to provide for access to its network and tenants for all electricity retailers, other than TrustPower [

]. This will ensure that there is competition in the retail electricity market on WIAL's network.

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13.11 Accordingly, the Applicants do not consider that there would be significant incentives or opportunities for either WIAL or TrustPower to inhibit competition in the electricity industry if the exemptions were granted.

### ***Incentives or opportunities to cross-subsidise generation activities***

#### *Impact of the temporary exemptions*

13.12 The Applicants consider that the temporary exemptions it seeks will not have a significant impact on this question. They consider that the effects arising from any incentives or opportunities from Infratil's stakeholding in both companies, and Mr Morrison's directorships, to cross-subsidise the generation activities of Trustpower (although the extent to which these exist are limited as discussed below) over the period of the temporary exemptions are minimal.

#### *Impact of the permanent exemptions*

13.13 In respect of the permanent exemptions, the Applicants note that the closest generation owned by TrustPower to Wellington International Airport is the Tararua Wind Farm and some hydro generation in Marlborough. These generation assets are significantly geographically separated from WIAL's electricity network so that the potential for cross-subsidisation of generation activities is limited.

13.14 As the Commission noted in Decision No. 541 in relation to the generation assets of NGC and Vector's lines business, the potential for cross-subsidisation is of particular concern where a generator has the potential to connect generation to a local distribution network.

13.15 In addition, the Applicants consider that WIAL's network is sufficiently small that it does not create significant incentive or opportunity for cross-subsidisation of TrustPower's generation activities.

13.16 Further, the conditions proposed below, particularly the limitations on the charges that WIAL could impose on its tenants for line services and for selling electricity to [ ] retail customers, limit the potential for cross-subsidisation. This arises particularly because the charges will be set to be competitive with the market charges or prices for those services.

13.17 The Applicants note that the electricity lines business of WIAL and the electricity supply businesses of TrustPower will be operated in separate businesses. This greatly limits the opportunities for cross-subsidy. Furthermore, although Infratil is the majority owner of WIAL, the Wellington City Council takes a close interest in the operation of the business, and appoints a director to WIAL's board. It would be in the Council's interest to strongly oppose any attempt to cross-subsidise. Similarly, in respect of TrustPower, while Infratil is the major shareholder, there are other significant shareholders particularly the Tauranga Energy Consumer Trust, who would closely monitor Infratil's actions in relation to TrustPower. Infratil has only two nominee directors on the TrustPower Board out of the six current Board

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members, which are anticipated to reduce to five. There is an independent Chairman.

13.18 Accordingly, the Applicants consider that the opportunities and incentives to cross-subsidise TrustPower's generation activities from Infratil's and Mr Morrison's involvement in WIAL's electricity lines business are minimal and do not present a material risk to the purposes of the EIR Act.

### ***A relationship not at arms' length***

#### *Impact of the temporary exemptions*

13.19 The temporary exemptions will permit Mr Morrison to continue as a director of, and Infratil to continue be involved in, both WIAL and TrustPower. The Applicants consider that the effect of these involvements over the period of the temporary exemptions is minimal.

#### *Impact of the permanent exemptions*

13.20 The Applicants note that the Commission observed in Decision No. 541 that in most circumstances where an exemption was required from the ownership separation provisions of the EIR Act, a relationship will be created that will ultimately not be at arms length. In each case, the Commission assesses the practical effect of the non-arms length relationship in order to decide whether that relationship is likely to lead to a result that would be contrary to the purposes of the EIR Act.

13.21 In respect of the permanent exemptions, the Applicants note that the electricity lines business and the electricity supply business will be operated in separate companies. Although this is not "*arms length*" as defined in the EIR Act (particularly because Mr Morrison will be a director of both companies) taking into account the points made above in relation to the first two questions, there is little practical effect in terms of the conduct which the EIR Act was designed to prevent.

13.22 Further, Mr Morrison's presence as a director of both WIAL and TrustPower has a limited ability to create a relationship between the two companies that is not at arms' length.

13.23 This is because both WIAL and TrustPower have provisions in their constitutions that prevent interested directors from voting on a matter related to an interested transaction except in limited circumstances. In relation to Mr Morrison, these provisions would apply to a transaction involving both WIAL and TrustPower.

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13.24 Clauses 44.1 and 44.2 of WIAL's constitution state:

- 44.1 *A director of the company who is interested in a transaction entered into, or to be entered into, by the Company may not (subject to clauses 44.1.1 and 44.2) vote on a matter relating to the transaction, but may –*
- 44.1.1 *vote on any matter to which either of clauses 57 or 58 apply;*
  - 44.1.2 *attend a meeting of directors at which a matter relating to the transaction arises, and be included among the directors present at the meeting for the purposes of a quorum;*
  - 44.1.3 *sign a document relating to the transaction of behalf of the Company; and*
  - 44.1.4 *do anything else as a director in relation to the transaction,*
- as if he or she were not interested in the transaction.*
- 44.2 *The shareholders may by ordinary resolution suspend or relax the prohibition on interested directors voting to any extent in respect of any particular transaction*

13.25 Clauses 57 and 58 relate to indemnity and insurance for directors and employees. In relation to the ability under 44.2 for shareholders to relax the interested director provisions, Infratil proposes that the Commission place a condition on the exemptions that Infratil not vote its shareholding in WIAL so as to pass an ordinary resolution having the effect of suspending or relaxing the prohibition in clause 44.1 in respect of electricity.

13.26 Clauses 12.15.3 and 12.15.4 of TrustPower's constitution state:

- 12.15.3 **No voting by interested Director** – *A Director shall not vote in respect of any matter in which that Director is interested, nor shall the Director be counted in the quorum in any meeting to consider the matter, except that a Director may vote in respect of, and be counted in the quorum for the purposes of, a matter in which he or she is interested if that matter is one in respect of which, pursuant to an express provision of the Act, Directors are required to sign a certificate or one which relates to the grant of an indemnity pursuant to section 162 of the [Companies] Act.*

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12.15.4 **Exceptions** – *Nothing in Clause 12.15.2 applies in relation to the matters referred to in section 143.*

13.27 Section 143 of the Companies Act refers to directors' remuneration and indemnities for employees and directors. Note that these provisions also largely incorporate into TrustPower's constitution the NZX Listing Rules requirements in relation to interested directors. Furthermore, clause 2.1(c) of TrustPower's constitution provides that if there is any inconsistency between the NZX Listing Rules and a provision of the constitution, the Listing Rules will prevail. TrustPower, while listed, is therefore effectively unable to remove the interested director provisions from its constitution.

13.28 In Decision No. 547, the Commission accepted that similar provisions in the NZX Listing Rules prevented Mr Boyd from voting on matters in relation to which he had declared a conflict of interest, but considered there could be the opportunity for competition to be inhibited by means of the formal voting process. Nevertheless, the Commission seems to accept that these kind of voting restrictions are relevant.

### **14. Risks and costs of WIAL losing control of lines out of proportion to any detriment arising from WIAL's ongoing ownership**

14.1 If the permanent exemptions are not granted, the Applicants consider that they would have only two options for addressing their cross-involvements:

14.1.1 Infratil selling its shares in either TrustPower or WIAL (and, as a consequence, Mr Morrison ceasing to be a director); or

14.1.2 arranging for some of WIAL's tenants to be directly connected to Vector's network. If these tenants were of sufficient size, this would take WIAL below the 2.5GWh per annum threshold in section 4(2)(a) of the EIR Act, meaning that it was no longer an electricity lines business, and therefore that Infratil and Mr Morrison would no longer be cross-involved with both an electricity supply business and an electricity lines business.

14.2 However, the Applicants consider that the costs of either of these options are disproportionate to the detriment arising, in terms of the purposes of the EIR Act, from either Infratil and Mr Morrison's continuing involvement in WIAL and TrustPower, or WIAL's ongoing ownership of its lines.

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- 14.3 In relation to the sale option, Infratil notes that WIAL and TrustPower are two of its key investments, forming a significant part of its portfolio. Selling its shareholding in either or both of these companies would therefore have a significant financial impact on Infratil and its shareholders.
- 14.4 In relation to the option of selling part of WIAL's lines business, the Applicants note that, if WIAL loses control of the lines within its main terminal building ("MTB"):
- 14.4.1 It would be very difficult and complex for supply to be taken directly from Vector for some tenants. Separate lines would need to be constructed from Vector's transformers to particular tenants within the MTB.
- 14.4.2 Allowing a separate entity to own electricity lines within the MTB would make management of the building infrastructure complex and difficult in the future. An owner's effective management of a building relies upon being able to manage and control all the infrastructure within the building. This is particularly important for WIAL, where the needs of the airport and its users can change over time in order to meet the primary aviation needs of the airport's users.
- 14.4.3 All of the other major airports in New Zealand own the lines within their terminal buildings.
- 14.4.4 If a tenant's site was directly connected to Vector's network, that site would not be able to use WIAL's emergency generation plant, access to which it is provided through WIAL's essential circuit lines. For some tenants (e.g. the airlines) access to the emergency generators is extremely important.

### 15. Proposed conditions

- 15.1 The Applicants propose the following conditions for the temporary exemptions sought in paragraph 11.1.1 above:
- 15.1.1 the exemptions sought in paragraph 11.1.1 continue to the date on which the permanent exemption sought in paragraph 11.1.2 commences;
- 15.1.2 the Applicants will procure, to the fullest extent possible, that WIAL not enter into an arrangement with TrustPower permitting TrustPower to supply electricity to WIAL or any of its tenants [
- ]
- 15.2 The Applicants propose the following conditions for the permanent exemptions sought in paragraph 11.1.2:
- 15.2.1 [

]

15.2.2 the Applicants will procure, to the fullest extent possible, that WIAL's charges to its tenants be as follows:

15.2.2.1 [

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15.2.2.2 [

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15.2.3 [

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15.2.4 the Applicants will procure, to the fullest extent possible, that WIAL not enter into an arrangement with TrustPower permitting TrustPower to supply electricity to WIAL or any of its tenants [

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15.2.4.1 [

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15.2.4.2 [

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15.2.5 [

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15.2.6 that Infracore not vote its shares in WIAL so as to pass an ordinary resolution under clause 44.2 of WIAL's Constitution that would have the effect of suspending or relaxing the prohibition on interested directors voting set out in clause 44.1 of WIAL's Constitution in respect of electricity matters.

**CONCLUSION**

**16. Fees**

16.1 We **enclose** a cheque for \$11,250.00 for the prescribed adjudication fee. Please advise us of the actual cost of processing the application and the amount of any possible refund as soon as practicable.

**17. Declaration**

17.1 A declaration in the prescribed form by Infratil Limited and Lloyd Morrison, as applicants, is **attached** to this application.

**18. Further Information**

18.1 We would be pleased to discuss any issue in this application on which the Commission might require further clarification. As noted above, any such queries should in the first instance be directed to the applicant's solicitors.

**DECLARATION**

This application is made by Infratil Limited and Lloyd Morrison. Infratil Limited and Lloyd Morrison confirm that:

- all information requested by the Commerce Commission has been supplied;
- all information known to the applicant which is relevant to the consideration and determination of this application has been supplied to the Commerce Commission; and
- all information supplied by the applicant to the Commerce Commission is correct as at the date of this application.

Infratil Limited and Lloyd Morrison undertake to advise the Commission immediately of any material change in the circumstances relating to this application.

DATED this      day of June 2007

Signed by: Infratil Limited

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Name: Paul Ridley-Smith

I am duly authorised to make this application.

DATED this      day of June 2007

Signed by: Lloyd Morrison

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