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Dear David

**Response to Third GB CUSC Consultation**

Thank you for the opportunity to comment on this the third GB CUSC consultation issued in December 2003.

British Energy continues to support the DTI/Ofgem BETTA project in principle. We have previously expressed our concerns regarding the way in which the planning and execution of BETTA and other associated market reforms are being taken forward, which makes it extremely difficult for market participants to fully understand and assess the overall impact and effects of the proposed reforms. As a consequence this increases market uncertainty and regulatory risk

This response is an appropriate opportunity to reiterate and expand on a number of those concerns particularly as the Ofgem programme timetable issued in November 2003 seeks to achieve 'designation' of key industry documents by the Secretary of State during July/August in order to maintain the April 2005 'go-live' date.

The 'go-live' date seems an increasingly challenging target, given the nature and extent of progress to date on BETTA issues and other market and government initiatives. For example, the current status of fundamental E&W charging reforms and their application across GB and the potential impact and interaction of government policy objectives for renewables are potentially incompatible. GB 'Charging' is in itself already proving to be an extremely contentious area for resolution.

We would continue to urge Ofgem/DTI to make greater use of other key industry stakeholders such as British Energy in the BETTA development phase to ensure timely progress continues to be made.

**Key Points:**

- **We remain concerned that a number of significant regulatory reforms (BETTA included) are making it extremely difficult for market participants to fully understand and assess the overall impact and effects of these proposed reforms. In light of this it is necessary to caveat this and other BETTA-related responses.**
- **We are mindful that while there is now increased legal certainty of BETTA implementation, new code modifications which propose significant reform to the E&W codes (CUSC/BSC and other key/core industry documents) in the interim period before 'designation' should be halted in order to reduce the threat to timely implementation.**



- **Whilst we note Ofgem's commitment to undertake 'GB' consultations on CUSC/BSC and other code modifications/amendments, the nature of the process(es) to be followed, given the governance restrictions, means that for all practical purposes a 'GB' review at this time cannot be as comprehensive as an E&W review.**
- **We note that the conclusions of the treatment of 'small generators' under BETTA remains an unresolved issue and has been specifically excluded from consideration within this consultation and associated draft legal text. We would urge Ofgem/DTI to bring forward its conclusions at the earliest opportunity.**
- **We note too that the issue of transmission charging, in the context of the Government's policy objectives for growth in renewables, as addressed by the August 2003 consultation remains outstanding.**
- **We remain of the opinion that the BETTA work programme should address the potential threats to timely implementation and include contingency provisions to allow for the introduction of a 'fit for purpose' GB-market should this prove necessary.**

#### Detailed Comments:

##### **GB system operator contracting with users**

We agree with the Ofgem/DTI view that the GB system operator should be responsible for contracting with users for connection to and use of the transmission system. We also agree that the standard form upon which the bilateral agreements should be based under BETTA should be set out as exhibits in both the CUSC and the SO-TO Code (STC).

Whilst we note that Ofgem/DTI do not intend to enshrine 'commercial continuity' as a principle under BETTA, there should nevertheless be no 'undue discrimination' as a consequence of BETTA for incumbents and practical and pragmatic considerations should ensure that the implementation of BETTA should not provide windfall winners or losers.

We note that to overcome the potential for discriminatory action by the GBSO that this is to be addressed within the transmission licences.

##### **GB system operator as the owner of the CUSC**

We agree with the Ofgem/DTI conclusion that the GB system operator should have the licence obligation to prepare and have in force a GB Connection and Use of System Code.

##### **Basis of the GB CUSC**

We agree with the proposal that, rather than introducing a new GB CUSC, the existing CUSC should be amended using powers provided in the E(TT) provisions of the Energy Bill.

Despite the process described and now enacted for a GB review of significant CUSC amendments we have above and elsewhere that whilst we commend Ofgem's commitment to undertake 'GB' consultations on CUSC/BSC and other code modifications/amendments in the period prior to 'designation', the nature of the process(es) to be followed, given the governance restrictions means that for all practical purposes a 'GB' review cannot be as comprehensive as an E&W review.



## **Governance**

We remain concerned that Ofgem/DTI consider that the Transmission Owners will not be a party to the GB CUSC Framework Agreement and will thus have no role in the amendment processes. This concern may be addressed and alleviated in the SO-TO Code (STC) but until the detail is available our concern remains.

We would reiterate that the implementation of BETTA provides an opportunity to bring the governance of the National Grid Charging Methodologies within the scope of the GB CUSC. Our concern remains that without reform, the governance of the transmission charging rules would reside within the GB SO licence. This approach is unacceptable as it lacks transparency and limits the ability of users to propose justifiable changes.

On a more general note, you will be aware of our position regarding governance of industry codes. All parties to the industry codes should have a right of appeal on the merits against any regulatory decision to an independent appeal body.

## **Election of Panel Members and structure of the Amendments Panel**

Whilst we note Ofgem/DTI's conclusion that there is no need to alter the role or constitution of the CUSC Amendment Panel, we agree that the wider scope of the GB CUSC may require consideration of a re-election process to be addressed in a subsequent transitional issues consultation.

## **Principles of Ownership**

We note the proposed amendments to a number of sections including the Interface Agreement (Exhibit O) to address Scottish law issues and reserve our position at this time pending further review.

## **Mandatory ancillary services**

At present we are content for the current section 4 of the England and Wales CUSC to form the basis of the GB version. However, further changes from this baseline may cause us to revise our opinion in particular when the 'small generators' position is clearer.

We note too that there is a lead-time issue in establishing mandatory (and commercial) services agreements prior to BETTA 'go live' with the GBSO. We trust this will be addressed as a 'transitional/implementation issue'.

## **Security cover**

Whilst we note commentary provided in the consultation document, British Energy considers the present CUSC security cover provisions to be excessively onerous and would wish to see these reviewed on a GB basis prior to implementation as part of the BETTA consultation process.

## **'Transfer Date' under the CUSC**

We note the intent for the GB CUSC to provide exemption to all users whose connections were commissioned before the 'Transfer Date' (midnight on 30<sup>th</sup> March 1990) to provide security cover for connection assets' 'Termination Amounts'



However, we also note that Scottish users will not be obliged to make 'technical facilities' available as a 'Transfer Date' provision, but that each case will be treated on its merits. We would welcome some clarity as to how this process will be performed.

### **Transitional Issues**

We are concerned that the likely scope of 'transitional issues' (including 'implementation') remain undefined. Whilst we note that general provision has been identified on the 6<sup>th</sup> November BETTA Programme Plan, we would like to be appraised of the extent of the issues being under consideration and their potential impact.

### **Nuclear site licences**

We advised in our response to the August 2003 consultation of the position in respect of our Nuclear Power Stations at Torness and Hunterston in Scotland the existence of a Nuclear Connection Agreement and a common Nuclear Use of System Agreement and that these bilateral agreements have a similar effect to the CUSC in England and Wales. There is also in place a Scottish Nuclear Site Licence Provisions Agreement (SNSLPA) which is very similar to the E&W NSLPA.

We note and endorse Ofgem/DTI's view that BETTA should not require any change to any Nuclear Site Licence and the intent to ensure the SNSLPA and NSLPA are provided for in the GB CUSC arrangements. We would note here too that we consider that the SO-TO Code will have a role to be defined in relation to ensuring any CUSC provisions are adequately 'backed-off' by the STC given the increasing likelihood that the TO's, who have an integral role in the NSLPA, will not be party to the CUSC.

### **Proposed Draft Text for the GB CUSC**

In relation to the draft legal text issued, we would highlight that the comments provided form part of a 'work in progress', in part because the documents reviewed are still developmental drafts, but also because we do not have full drafts of all the relevant associated documentation available to us at this stage. Therefore, as the BETTA Programme progresses, we are likely to have to revisit documents on which we previously commented (e.g. the STC) in light of what is contained in subsequent draft legal texts of other documents (e.g. the Transmission Licences and the CUSC). We note however that (para.4.189 refers) Ofgem/DTI have committed to a full legal review of all the draft codes will be undertaken later in the development cycle.

Our comments below largely replicate the comments issued to you earlier today by Denton Wilde Sapte on behalf of the BETTA Review Group (BRG), of which British Energy is a party.

#### *General*

We note that "NGC" is used throughout the draft CUSC. The use of "NGC" does not distinguish between NGC's system operation activities ("NGC SO") and its transmission ownership activities ("NGC TO"). As we understand it, Ofgem's rationale for using "NGC" reflects the fact that under the proposed arrangements for BETTA, NGC will have a single transmission licence through which both its system operation activities and its transmission ownership activities will be regulated as 'the GB CUSC obligations applying to NGC apply to NGC in its full capacity as both GB system operator and owner of transmission assets in England and Wales.' As Ofgem/DTI do not want TO's to be party to the CUSC, it is unclear how as advised in para 6.7 of the consultation, any of NGC's TO obligations can be enforced. Our view is that the references to "NGC" should be replaced with



references to "GB System Operator" or a similar term which demonstrates the capacity in which NGC is so acting.

As a consequence of this drafting, the new definition of "Relevant Transmission Licensee" which is specific to SPT and SHETL only, although consistent with the present drafting, will require amending.

I note too, that for example, new definitions of Transmission Reinforcement Works refers to a Construction Agreement which is no longer a defined term within this GB version (but is in existing E&W CUSC section 11) which I assume is in error.

#### Section 5 – Deenergisation :

The CUSC provides for de-energisation in respect of, among other things, generic events of default by the User (e.g. in the event of insolvency related orders being issued against the User); and site specific breaches by the User. Our view is that de-energisation, given its commercial significance, should be a last resort.

Pursuant to section 5.4.1, if a User breaches the CUSC/Bilateral Agreement in respect of a particular connection, and such breach causes or can reasonably be expected to cause a material adverse effect on the business or condition of NGC/other Users/GB Transmission System/any User Systems, then NGC can:

- (i) give the User notice of the breach and require the User to remedy such breach within 28 days or such longer period as agreed between the parties (see section 5.4.1(a)); or
- (ii) give the User notice that the breach is incapable of remedy and require the User (within 5 Business Days after receipt of such notice) to undertake to NGC that it would not repeat such breach (see section 5.4.1(b)).

Pursuant to section 5.4.3, if the User fails to comply with 4.4.3 (i) or (ii) above, NGC can de-energise a specific site on giving the User 48 hours notice of same. However, pursuant to section 5.4.4, if the breach continues to the extent that it places/seriously threatens to place NGC/Relevant Transmission Licensee in breach of its Transmission Licence, NGC will be entitled to de-energise the site after having given 12 hours notice of same. The drafting of/interplay between paragraphs 5.4.1, 5.4.3, and 5.4.4 is confusing and appears to be inconsistent. Sections 5.4.1 and 5.4.3 seem to give NGC a right to de-energise a site if the User fails to remedy a breach within 28 days, whilst under, section 5.4.4. NGC can de-energise a site if the User fails to remedy a breach after only 12 hours.

In addition, NGC will be entitled to de-energise Users' sites for any breach which places/seriously threatens to place NGC/Relevant Transmission Licensee in breach of its Transmission Licence (whether or not such breaches are really serious or not).

We consider that de-energisation should only be reserved for those breaches which places/seriously threatens to place NGC/Relevant Transmission Licensee in 'serious and material' breach (as opposed to some minor technical breach) of its Transmission Licence.

#### Exhibit O - Interface Agreement

The User will be connected to the GB Transmission System, and such connection will be governed by, among other things, the CUSC and the Bilateral Connection Agreement. Transmission Owners will need to install certain assets and facilities on the User's land so as to facilitate



such connection. The Interface Agreement is an agreement directly between the Transmission Owner and the User regarding arrangements in respect of such assets and the use of such assets and facilities. For example, the Draft Interface Agreement sets out details of those rights which the User grants to the Transmission owner to retain, replace, modify and alter Transmission Connection Assets on the User's land, and provisions relating to the relocation and removal of assets, security arrangements in respect of the assets etc.

We consider that whilst such interface agreements may be necessary in certain respects (e.g. in relation to those provisions which cover rights of access to Users' land); we believe that the majority of the provisions and obligations provided for in the Draft Interface Agreement would be better placed in the CUSC itself. For example, the Draft Interface Agreement provides that the User must notify the transmission owner if a connection agreement lapses so that the connection assets can be removed. However, if indeed a connection agreement (e.g. between NGC and a User) lapses, why would the User be concerned as to who provided the land to NGC for the connection assets? The Draft Interface Agreement also provides for transmission owners to move assets to a different place on site. However, if a transmission owner wants to move assets, and such relocation would ultimately and commercially affect the User's operations, then, our view is that the transmission owner should arrange such relocation through the system operator (who should in turn provide appropriate compensation to the User on the transmission owner's behalf).

If you wish to discuss any of the above issues please do not hesitate to contact me.

Yours sincerely

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