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value for all customers*

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17 April 2007

Dear Simon,

RE: Efficient discharge of activities by the CUSC Amendment Panel

Thank you for your letter of 6 March 2007 to Steve Smith, also sent to Jim Campbell at the DTI, regarding CUSC Amendment Proposal 147 (CAP 147) raised by Wind Energy (Forse) Limited and considered by the CUSC Amendment Panel on 23 February 2007. This letter has also been considered by the DTI and can be taken to represent our joint view on the matter.

The letter states that in the (unanimous) view of the CUSC Panel given the intent of CAP 147 to give priority grid access to energy from renewable sources, it would not pass the current licence objectives as it would fail on the grounds of discrimination and inefficient operation and therefore would be rejected as a CUSC amendment. You also refer to the Renewables Directive (Directive 2001/77/EC) and seek our (and DTI's) view on the compliance with that Directive of NGET's current Transmission Licence.

Firstly, I can confirm that in both our and the DTI's view we do not consider that your transmission licence requires any amendment to be compliant with the Directive 2001/77/EC. **We therefore consider that this proposal can arguably be considered within the scope of the current CUSC (and therefore transmission licence) objectives and should therefore be permitted to proceed through the amendment process.**

I am able to share with you our thinking that has taken us to this place. It is however, obviously open for National Grid and/or the CUSC Panel to take its own legal advice on these matters. I should be clear that in setting out our thinking we are in no way fettering the discretion of the Authority on the merits of the proposal. We will take a decision on the merits of this amendment at a future suitable point in time taking into account the evidence of the proposer, interested parties and of course the CUSC Panel.

In your letter you raise the concern that the proposal would be inefficient and discriminatory. In relation to the question of whether the proposal would introduce

discrimination, as you will be aware, our consistent view has been (and remains) that the term requires (subject to what is said further below) not only that like situations be treated alike, but equally that non-equivalent situations may be required to be treated differently. This is typically referred to as “due discrimination”. It is also the case that no discrimination arises where like situations are treated differently provided that the difference in treatment can be objectively justified i.e. provided that the difference in treatment is pursuing a legitimate aim and is a proportionate means of achieving that aim. In reaching this interpretation we would rely not only on the normal meaning of the word and the intention of the provision in question, but also on the requirement not to “discriminate” in the relevant EC internal market directives and the meaning of that term as well elaborated by the jurisprudence of the European Court. It should be open to Wind Energy to argue either that certain forms of generation are not equivalent and so a difference in treatment need not necessarily be ruled out as “discriminatory”, or (even where certain forms of generation are equivalent) that a difference in treatment is objectively justified. These are factors that the CUSC Panel should consider in its deliberations of CAP 147. In making these considerations our legal advisors took into account the in *Foster v British Gas*¹ case².

Next, in relation to the question of economic and efficient operation, we consider it would be possible to make an argument that it is more economic and efficient for generators that do not emit carbon to have grid access than for carbon emitting generators to have access when you consider the environmental costs associated with higher carbon emissions. It is of course open to those carbon emitting generators to make an argument for no change on the basis that the EU ETS is designed to internalise the costs of carbon into their decision making. We believe that the CUSC process should facilitate this discussion and debate.

I would conclude by noting that in our own consideration of the proposal we will (as in our view you must) interpret the conditions in National Grid Electricity Transmission’s (NGET’s) licence, as well as our statutory duties, in line with directly effective provisions in EC legislation.

I hope that this response is helpful to you in your considerations. You will see that I have copied this response to Mike Davies of Wind Energy (Forse) Limited as the proposer of CAP 147. I would also be happy for this letter to be circulated to the rest of the CUSC Panel for their consideration. If you have any questions please do feel free to contact me or alternatively Jo Witters on 020 7901 7159.

¹ Case C-188/89 *Foster and Others v British Gas PLC* [1990] ECR I 3313

² the House of Lords found British Gas to be an emanation of the State such that private individuals were entitled to rely on directly effective provisions of Directives (in that case, a duty of non-discrimination) against British Gas. There is no reason to think that National Grid is in any different position to its predecessor. It would also in our view follow from the well-established duty to interpret domestic legal provisions consistently with EC law (the *Marleasing*² principle as this relates to Directives) that legislation and National Grid’s licence are required to be interpreted in a manner consistent with binding EC rules. This has particular relevance to the interpretation of the concept of “non-discrimination” as mentioned above. It may arguably also have relevance when it comes to the Renewables Directive and the interpretation of “efficient operation”; that is to say, while we are content that the licence does not require any amendment to implement the Directive, one may need to have regard to certain of its provisions (as with the other EC Directives) in considering the correct interpretation of certain provisions of the licence.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sonia Brown'.

Sonia Brown

Director, European Strategy and Sustainable Markets

CC Jim Campbell
Mike Davies

Department of Trade and Industry
Wind Energy (Forse) Limited