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Dear Paul,

Changes to the Ring Fence Conditions in Network Operator Licences (Ref. 85/2012) (the "Consultation")

National Grid owns and operates the high voltage electricity transmission system in England and Wales and, as National Electricity Transmission System Operator (NETSO), operates the high voltage transmission system throughout Great Britain and offshore. National Grid also owns and operates the gas transmission system throughout Great Britain (NTS) and, through our gas distribution business, distributes gas to approximately 11 million offices, schools and homes in England.

National Grid would be subject to the proposed modifications to the "ring-fence" conditions in its electricity transmission licence in respect of its role as NETSO and in its two gas transporter licences in respect of the NTS and gas distribution networks it owns, if these changes are implemented as currently drafted. National Grid therefore welcomes the opportunity to respond to this consultation.

This response is in two parts:

- high level comments on the Consultation and proposed changes, including, in particular, why it would not be justified or beneficial to create additional licence requirements in relation to the appointment of independent directors on the boards on NWOs; and
- comments on the detailed drafting of the proposed changes to individual licence conditions, by way of scanned mark-ups of certain pages of the proposed revised conditions. These comments are based on the conditions that apply to National Grid's licensed companies[1], but are equally applicable to the other equivalent conditions.

This response is not confidential.

High Level Comments

Paragraph 1.2 of the Consultation sets out the main objectives of the ring fence with respect to network licensees as being:

[1] To the extent that these changes raise issues in relation to the changes effected by Special Condition C1 (Amendments to Standard Special Conditions relating to LNG) of the gas transporter licence in respect of National Grid Gas's business in respect of the national transmission system, we will be very happy to work with you to ensure that the changes fit together with the scheme of the rest of that licence.

- to prevent the onset of financial distress by imposing a range of regulatory requirements to back up the corporate governance arrangements put in place by the managers and owners of NWOs;

- to provide warning signals when symptoms of financial distress appear or potential threats are identified;

- to mitigate the severity and impact of financial distress factors should they arise and reduce any 'chain reaction' of adverse financial events; and

- *in extremis*, to facilitate price control reopener measures or the special administration process.

With the exception of the proposed new Board Composition condition, we consider the proposed changes, after the amendments in the latest draft licence conditions to reflect the comments that have been made in response to previous consultations, are generally consistent with these objectives and appear to enhance the internal consistency of the ringfence regime. Considering each of the proposed changes in turn:

- Availability of resources (new and revised certification requirements): the proposed new and revised certification requirements track other existing licence obligations and so the proposed changes appear to enhance the internal consistency of the ringfencing regime;

- Availability of resources (requirements to maintain an intervention plan): this proposed new requirement can be seen as good management practice and record keeping and has been drafted in such a way as to avoid unnecessary administrative burden on licensees. Ensuring that an Intervention Plan would be available in the event of Special Administration is consistent with the objectives of the ring fence;

- Credit rating of the licensee (specific reference to ratings of DBRS Ratings Ltd): this proposed change has no effect on licensees who are not rated by DBRS Ratings Ltd, but would ensure that where DBRS Ratings are available these are treated consistently with the ratings of the 3 main ratings agencies;

- Disposal of relevant assets (restrictions on granting security over receivables): this requirement is consistent with the aim of the ring fence conditions generally and with the existing protection of physical assets under the Indebtedness condition which ensure that they are available to the licensed business. As such, the proposed change is consistent with the objectives of the ring fence conditions overall;

- Ultimate Controller undertaking (new undertakings in standard form): it appears consistent with the objectives of the ring fence conditions for future Ultimate Controller undertakings to be in a standard form which has been drafted so as to be compatible with these objectives, whilst recognising that it would be disproportionate to require existing undertakings to be re-submitted in a standard form. It is made clear in the consultation at Paragraph 3.20 that there is no intent that existing undertakings need to be resubmitted, but this is not apparent in the proposed wording for the Draft Form of Ultimate Controller Undertaking at Appendix 9. We therefore suggest that the phrase "**HEREBY DIRECTS** that any undertakings procured to meet …." in Appendix 9 on page 127 are replaced by "**HEREBY DIRECTS** that any undertakings procured on or after 1st April 2013 to meet …..";

- Ultimate controller undertaking (annual reminder by licensees of these provisions to ultimate controllers): while this new requirement is unlikely to have any practical effect as ultimate controllers are already likely to be very mindful of their obligations under this condition, this modification is consistent with the objectives of the ring fence and will give rise to no material cost;

- Indebtedness (new cash-lock triggers, in the event of either (i) adverse availability of resources certificate or status, and (ii) breach of financing covenants): the requirements complement and reinforce the existing ring fence conditions. However, there is a risk of unintended and disproportionate effects unless the proposed drafting is tightened up by clarifying the meaning of "formal covenant pertaining to its financial affairs". This issue could be simply addressed by defining what this phrase means in the relevant licence condition[2];

- Board composition: the proposed modification is considered more fully in the following section, but, in short, it does not address the objectives that have been set out.

We note that, at Para 1.14 of the consultation, reference is made to the need for minor consequential adjustments to Special Condition C1 in the Gas Transporter Licence held by National Grid Gas plc in respect of the national transmission system. We would welcome the opportunity to review and comment on these required changes in advance of the formal licence modification proposals. As a general comment in relation to this, we consider that any references to LNG storage should not be included in standard special conditions applicable to all gas transporter licensees, but should rather be "pasted in" to those conditions by additional wording contained in Special Condition C1, as this is the approach taken in relation to other similar amendments.

Proposed New Licence Condition – Board Composition

We consider that any decision to implement the proposed new condition relating to board composition would be challengeable as "wrong" for the purposes of Section 11E(4) of the Electricity Act 1989[3], for the reasons we have previously given in our consultation responses dated 23 April 2010, 12 November 2010 and 30 June 2011, and as explained further below. There are multiple, separate and independent reasons why we consider that such a decision would be wrong: these are explained later in this response, after an initial discussion of the proposed licence condition.

Discussion

The Consultation sets out the justification for the Authority's decision to include this new licence condition in the proposed modifications at Paragraph 3.33 as being to ensure the objectives for the ring-fence set out in Paragraph 1.2 continue to be met in the light of the factors set out in Paragraph 1.3. Considering first the objectives of the ringfence conditions set out at Paragraph 1.2 and reproduced earlier in this response, none of these would be improved by a requirement to appoint sufficiently independent directors ("SIDs"). Taking these objectives in turn below:

- Objective 1: "*to prevent the onset of financial distress by imposing a range of regulatory requirements to back up the corporate governance arrangements put in place by the managers and owners of NWOs*": while the other ring fence conditions do impose such a range of regulatory requirements to back up corporate governance arrangements, this is not the case for the proposed Board Composition condition (particularly given that all directors, whether executive or non-executive, have the same duties as a matter of company law);

- Objective 2: "*to provide warning signals when symptoms of financial distress appear or potential threats are identified*": our previous response of 30 June 2011 explained in sections 3.3 and 3.4 why a requirement to appoint SIDs would be highly unlikely to provide any "early warning" benefit over and above the arrangements already in place, particularly for those NWOs which are subsidiaries of listed companies, and for those NWOs which issue listed debt. Such companies are already subject to very extensive ongoing disclosure rules and significant public and financial scrutiny by external interests. All licensees are already subject to extensive obligations to provide financial and performance information to Ofgem on a regular basis, which would enable to Ofgem to identify NWOs which may become susceptible

[2] In the relevant condition, the phrase "formal covenant pertaining to its financial affairs" should be made a defined term, with the meaning "formal covenant contained in any loan agreement, commercial paper, bond issue or committed facility"

[3] The same also applies in relation to the equivalent Section 23D(4) of the Gas Act 1986.

to financial distress or potential threats. Ofgem is also entitled to request further information at any time should concerns arise.

Moreover, the requirement under the "Availability of Resources" condition to notify Ofgem *immediately* of any adverse circumstances which would invalidate the most recent adequacy of resources certificate would be far more likely to provide early warning of potential financial distress than the appointment of SIDs. These points have not been addressed in the Consultation, nor in the earlier March 2011 consultation.

Finally, as to the suggestion that SIDs might resign in the event that an NWO was suffering financial distress, and so as a result Ofgem would learn of these difficulties, there is no evidence presented that SIDs would resign and walk away from their responsibilities in times of trouble, nor any reason to expect that they would wish to do so (in particular as resigning may not absolve them from any potential personal liability in relation to any insolvency);

- Objective 3: "*to mitigate the severity and impact of financial distress factors should they arise and reduce any 'chain reaction' of adverse financial events*": there is no reason why the severity of any financial distress, should it arise, would be mitigated by the appointment of SIDs, and no such reason has been set out in the Consultation. Numerous examples exist of large organisations which have a number of independent non-executive directors on their boards failing or suffering severe financial distress. Again, it is relevant that all directors, whether executive or non-executive, have the same company law fiduciary duties, which in times of impending financial failure are owed particularly to creditors, and Ofgem has previously acknowledged that there is "*no reason to believe that existing licensee directors do not perform their duties in accordance with the requirements of companies legislation*". As such, even by Ofgem's own reasoning, it is impossible to see how this proposal is justified or meets the claimed objective; and

- Objective 4: "*in extremis, to facilitate price control reopener measures or the special administration process*": a requirement to appoint SIDs would be irrelevant to this objective.

Considering the factors set out at Paragraph 1.3:

1. "*the financial and operating structures around network businesses and the associated risks have changed significantly since the 1990s*": fundamentally, given that, as shown above, none of the objectives of the ring fence are addressed by a requirement to appoint SIDs, changes in financial and operating structures would not justify imposing such a requirement. In any case, it is not clear why such changes would necessitate the appointment of SIDs at licensee level, given Ofgem's acknowledgements in the March 2011 consultation that:

    - these are risks that apply to "*corporate groups*" and which consequently need to be managed and resolved at group (rather than NWO) level;

    - "*the likelihood of an NWO experiencing financial distress because of problems at corporate group level is relatively small*";

    - "*primary responsibility for the financial well-being of each network operator lies with its managers and owners*";

    - it would not be "*commercially desirable*" to eliminate all risk that financial distress could affect a network operator; and

    - "*We [Ofgem] also accept that, in practical terms, NWOs are bound in, to a lesser or greater extent, to group business arrangements* ***and these relationships provide benefits for consumers and other stakeholders***".

2. "*the liquidity crisis of 2008 and ongoing economic concerns have highlighted additional issues which need to be addressed*": given that, as Ofgem previously acknowledged in the March 2011 consultation, all network operators survived the financial crisis of 2008 unscathed, notwithstanding that this was the worst financial crisis in 80 years, it is unclear why this crisis would justify a requirement to appoint SIDs. Moreover, as Ofgem previously recognised:

    - "*the likelihood of a NWO experiencing financial distress because of problems at corporate group level is relatively small*" (see Para 1.10 of the March 2011 consultation); and

    - the risks highlighted by this crisis are financial risks that apply to corporate groups (see Para 1.9 of the March 2011 consultation), which would consequently need to be managed and resolved at group level. In this regard, imposing a requirement to appoint SIDs at subsidiary level is not justified, particularly for those licensees where the parent company is listed on the London Stock Exchange and is subject to the UK Corporate Governance Code with all its associated requirements, including that a majority of the directors on its main Board are non-executive Directors, where those Directors' duties (as a matter of company law) extend to all group companies including the NWO(s).

In addition, Paragraph 3.30 refers back to Section 4 of the March 2011 consultation as setting out the reasons why Ofgem have proposed this new Board Composition licence condition. These were:

- SIDs should be able to make a positive contribution to good governance, particularly in promoting the importance of licence compliance (letter and spirit) which is central to the NWO's business (Para 4.5);

- where a group's businesses may be experiencing operational or financial stress other directors may feel a loyalty to the wider business and so take risks in relation to the NWO for the perceived benefit of the wider business, whereas SIDs would not (Para 4.6);

- SIDs would be able to provide an un-conflicted perspective on the NWO's interests, including in relation to licence compliance, in all circumstances (Para 4.20);

- in sufficiently serious situations, trading pressures could mean that group level owners might be less mindful of the terms of the ultimate controller undertakings than would normally be the case (Para 4.7);

- Ofgem might become aware of difficulties by being informed of the resignation of a SID (Para 4.8); and

- a conflicted director might act with the best of intentions in the face of a crisis situation but not consider that he or she is doing anything wrong with regard to particular licence compliance issues because of a lack of focus on specific obligations applicable to the NWO as a licence holder – whereas a SID is more likely to remain focussed on these requirements. (Para 4.25)

Our previous consultation responses have highlighted that all directors (whether executive or non-executive) have the same duties as a matter of company law. In addition, as Ofgem itself acknowledges, there is no suggestion that executive directors have in the past acted in contravention of their duties (and, indeed, Ofgem have been at pains to point out that they are not casting any aspersions on executive directors). Moreover, it flies in the face of all reason to suggest that SIDs would (whether *in extremis* or otherwise) be more likely to remain focussed on their duties and on licence compliance in particular than an executive director who is acting "*with the best of intentions*" when:

- such executive directors must be mindful of licence obligations in all they do on a daily basis;

- as acknowledged by the UK Corporate Governance Code, the detailed knowledge and experience of the company's day-to-day affairs that could reasonably be expected of a non-executive director will generally be less than for an executive director; and

- in times of financial stress, directors will be most aware that their fiduciary duty will be to the company's creditors as well as the company (rather than its shareholders) in the event of impending financial failure.

Error of fact

A decision to implement this modification on the part of the Authority would be based *in whole or in part on an error of fact*. It is a matter of fact that this proposed change has not been shown "*to be requisite or expedient having regard to the duties imposed by [sections 3A to 3C]* as required under Section 7(1) of the Electricity Act and the corresponding provisions of the Gas Act. This is clearly demonstrated by the discussion above. In this regard, this proposed modification does not further the principal objective of the Authority for the following reasons (both individually and collectively):

- it will have no practical effect, given that the duties of exec and non-exec directors are the same, and moreover as Ofgem's consultants (CEPA) noted in their report for Ofgem "*Under company law ….. directors have a duty to promote the success of a company for the benefit of its members. Where there are no independent shareholders, it is not clear that an independent director can interpret his or her duty in a different way from an executive director*."[4]

- it cannot have any effect, given that:

    - Ofgem's own consultants, CEPA, in their report for Ofgem, acknowledged that "*We [CEPA] have doubts that the additional non-executive board members are likely to have a significant impact*"[5]; and

    - Ofgem has itself recognised that independent directors in other contexts have not always been able to spot or prevent financial predicaments (Paragraph 2.24 in the March 2010 consultation); and

- it will have no beneficial effect on the operation of the ringfence where a licensee is a subsidiary of a publicly listed company, as such companies are subject to the UK Corporate Governance Code and so the board of the parent company has a majority of non-executive directors, whose obligations are fulfilled by reference to the way in which the listed company's board directs the business and operations of the subsidiaries[6].

As a consequence, for these reasons the proposed decision would be based, wholly or partly, on an error of fact.

Fails to Achieve the Stated Effect/Fails properly to have regard to the Principal Objective and Duties

The stated objectives of the proposed changes are set out in the Consultation at Paragraph 1.2 (and in the previous consultation of March 2011 at Paragraph 1.4). As highlighted by the bullet points listed above, and as explained in our previous consultation response of 30 June 2011, it has not been shown the proposed new Board Composition condition will further these objectives, particularly for those licensees which have an ultimate parent which is a public limited company subject to the UK

[4] "Assessment of Ofgem's Financial Ring Fence Conditions – A report for Ofgem", Cambridge Economic Policy Associates Ltd, October 2009, section 7.6

[5] Ibid

[6] As we have previously explained, the decisions and role of the non-executive directors at the listed company level extend to the business as a whole and take into account the status and performance of subsidiaries (including, where relevant, NWOs). There is, therefore, no need for each company within a group to be subject to the same requirements of the UK Corporate Governance Code in order for the Code to have relevance for that group.

Corporate Governance Code and the other obligations of a listed company. As such, a decision to implement this modification would be wrong for the purposes of Section 11E(4) of the Electricity Act 1989 (and the equivalent in Section 23D(4) of the Gas Act 1986) on ground (d), *as it fails to achieve the effect stated by the Authority*.

Similarly, the proposed change can be seen to *fail properly to have regard to the Authority's principal objective and duties* because it does not provide any guarantee of additional assurance over and above that which is presently provided. This is particularly the case for those licensees which have an ultimate parent which is a public limited company subject to the UK Corporate Governance Code and the other obligations of a listed company, as explained more fully in our previous consultation responses.

Furthermore, neither the Consultation nor the previous consultations in March 2011 and March 2010 have adequately demonstrated why alternatives and existing arrangements would not (or do not already) achieve the stated objectives. In particular, they have not demonstrated why, for those licensees which have an ultimate parent which is a public limited company subject to the UK Corporate Governance Code and the other obligations of a listed company, the requirements for a majority of independent non-executive directors on the main parent company board does not already ensure sufficient scrutiny of licensee arrangements, appropriate to these companies and at least equivalent to the scrutiny that SIDs would bring to other licensees. This is particularly the case given:

- the existing Ultimate Controller Undertaking licence condition, which is a legally enforceable deed from the ultimate controller to refrain from any action likely to cause a licensee to breach any of its obligations under the Act or its licence, and which include for example the "Availability of Resources" condition which requires the licensee to maintain access to sufficient resources, and "Credit Rating" Condition which requires the licensee to maintain an investment grade credit rating;

- Regulatory Accounts licence conditions (see for example SSpC A30 for gas transporters and Condition B1 of electricity transmission licences) require licensees to provide the Authority with corporate governance statements which enable Ofgem to review how the principles of good corporate governance are applied to licensees; and

- the Prohibition of Cross Subsidies Condition (e.g. SSpCA35 in gas and Condition B5 in electricity), which requires a licensee not to give any cross subsidy to, or receive any cross-subsidy from, any other business of the licensee **or of an affiliate or related undertaking of the licensee** and so explicitly prevents directors (who Ofgem claim may in some cases be conflicted) from taking decisions which would favour other parts of the group to the detriment of the licensee.

These considerations are not addressed in the new Consultation, whilst the previous March 2011 consultation offered only the following points:

- assertion of the identity of the NWO as a protected energy company notwithstanding its inter-relationships with other entities within a wider business; and

- an unconflicted voice of reason with respect to the interests of the licensed NWO business at time of operational or financial stress.

Our previous letter explained why no weight can be attached to these points, and as noted above Ofgem has not addressed these arguments in its new Consultation. The former is undermined by reasons contained in the discussion above as well as in our previous consultation responses, including:

- Ofgem's previous recognition of the small likelihood of an NWO experiencing financial distress because of problems at corporate group level and the fact that group business arrangements provide benefits for consumers and other stakeholders**;**

- the fact that the same duties apply to both executive and non-executive directors;

- the nature of directors' duties as noted by Ofgem's consultants, being "*Under company law ….. directors have a duty to promote the success of a company for the benefit of its members. Where there are no independent shareholders, it is not clear that an independent director can interpret his or her duty in a different way from an executive director*."

As to the latter, the point is again without foundation, for reasons set out in the discussion above.

Section 3A of the Electricity Act "*Principal objective and general duties*", Paragraph 5A(a), sets out the need, in carrying out its duties, for the Authority to have regard to the principle that regulatory activities should be "*transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed."*[7] The failure on the part of the Authority to address our previous comments and observations on the role of non-executive directors at group level in a listed PLC subject to the UK Corporate Governance Code means the proposed new licence condition is not "*proportionate*", and the failure to provide an exemption within the proposed new licence condition in these circumstances (as we have previously proposed) reinforces that it is not "*targeted only at cases in which action is needed*".

<u>The proposed decision is wrong in law</u>

The proposed decision ignores our previous observations (see for example Sections 3.1 and 3.2 in our consultation response of 30 June 2011) on the duties of directors under company law, and as a consequence is wrong in law:

- most fundamentally, it ignores that all directors, whether executive or non-executive, have the same duties in company law. Thus, for the appointment of SIDs to make any difference would require SIDs to pay more attention to these responsibilities than executive directors, but there is no evidence for this, and it has not been claimed by Ofgem, who have instead asserted that there is "*no reason to believe that existing licensee directors do not perform their duties in accordance with the requirements of companies legislation*";

- the Consultation again fails to recognise the requirement under sections 171-177 of the Companies Act 2006 for all directors to avoid conflicts of interest (although certain conflicts are permitted where approved and minuted);

- the proposal also ignores the point that the duties of directors under general law and the Companies Act 2006 provide reasonable and proportionate assurance of network and customer protection in the event of actual or potential financial distress. These duties oblige directors of a company, including an NWO, to promote the success of the company, and in so doing they must have regard to a number of factors including the long term consequences of any decision, the need to foster business relationships with suppliers and others, and the desirability of maintaining a reputation for high standards of business conduct. It is difficult to conceive of circumstances where the directors of a regulated utility would not pay due attention to these requirements, and as a result the interests of shareholders and others will best be served by ensuring ongoing licence compliance;

- it ignores the fact that, as explained again above, group director responsibilities clearly extend to the companies lower down in a corporate group. As a result, where parent companies are subject to the UK Corporate Governance Code there is no benefit from a requirement for SIDs at licensee level and moreover, as we have previously pointed out, such a requirement could be actually detrimental to good governance as the overlapping obligations of non-executive directors at different levels in the corporate structure would be unclear.

[7] The same requirement is also set out at Section 4AA of the Gas Act, Paragraph 5A(a)

In addition, the proposal appears to be based on a misunderstanding of company law, as previously explained in Section 3.2 of our June 2011 consultation response. At Para 4.22 of the March 2011 consultation, Ofgem stated that "*We [Ofgem] consider that if there is a conflict between the best interests of the company (in this case the NWO) and the best interests of its shareholder, we believe a director of the NWO has a duty to prefer the interests of the NWO.*" We consider that this statement is wrong because all directors have the same duty in the Companies Act to promote the success of the company for the benefit of its members (i.e. shareholders), and where a company has a single shareholder, for the benefit of that member[8].

Furthermore, where a NWO has a single shareholder, the wording of the new licence condition, which specifies that a SID must not "*hold a remit to represent the interests of any particular shareholder or group of shareholders …*" is incompatible with the Companies Act, as where there is a single member the Companies Act requires directors to promote the success of the company for the benefit of that member. In this connection, the observations of Ofgem's own consultants in this regard should also be taken into account: "*Under company law ….. directors have a duty to promote the success of a company for the benefit of its members. Where there are no independent shareholders, it is not clear that an independent director can interpret his or her duty in a different way from an executive director.*"[9] As a result, for this reason also the proposed decision is wrong in law.

Conclusions

With the exception of the proposed new Board Composition condition, we consider the proposed licence condition modifications are generally consistent with the stated objectives and appear to enhance the internal consistency of the ring fence regime. Whilst we consider that (i) the term "formal covenant pertaining to its financial affairs" used in the modifications in the Indebtedness condition needs to be suitably defined (as a defined term) in order to provide clarity and avoid unintended and disproportionate effects, and (ii) the new standard form of Ultimate Controller Undertaking should make clear that it will only be used for any new undertakings that are required after 1 April 2013 (as intended), we are otherwise supportive of these other proposed changes.

Subsection 5A(a) of Section 3A of the Electricity Act specifies that in carrying out its functions the Authority must have regard to "*the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*"[10]. From the paragraphs above, and from our previous consultation responses, it is clear that the proposed new Board Composition condition is not *"proportionate"* and not *"targeted only at a case in which action is needed"*. Moreover, the failure of the proposed condition to address the stated objectives, and the failure properly to address the responses to previous consultations undermine the *transparency* of the decision making process and regulatory principles behind it. As such, the proposed new Board Composition condition is not "*requisite or expedient having regard to the duties"* of the Authority under the Act, as required by Section 7(1)(a) of the Electricity Act and Section 7B(4)(a) of the Gas Act. Although some licensees with particular ownership structures (e.g. joint ownership by 2 or more infrastructure funds) may wish to appoint SIDs (and may have already done so), this does not imply that such a requirement should be imposed on all licensees, particularly those which are wholly-owned subsidiaries of UK listed companies subject to the UK Corporate Governance Code and the disclosure obligations of a listed company.

Ofgem have still not demonstrated that this new licence condition is justified or meets its stated objectives, particularly for those licensees who are subsidiaries of a listed company subject to the UK Corporate Governance Code and the disclosure obligations of a listed company. As such any

[8] As Ofgem's March 2011 consultation noted, section 172 of the Companies Act 2006 says that "*A director of a company must act in the way he considered, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in so doing must have regard (among other matters) to …. (f) the need to act fairly as between members of the company*." Clearly, where there is a single member, this requires directors to promote the success of the company for the benefit of that member, which is incompatible with the wording in Ofgem's proposed new licence condition.

[9] "Assessment of Ofgem's Financial Ring Fence Conditions – A report for Ofgem", Cambridge Economic Policy Associates Ltd, October 2009, section 7.6

[10] The same requirement is also set out at Section 4AA of the Gas Act, Paragraph 5A(a)

decision to implement such a requirement would, making reference to Section 11E(4) of the Electricity Act 1989 and the equivalent Section 23D(4) of the Gas Act 1986, be challengeable as “wrong” under the Acts.

Yours sincerely

[By e-mail]

Paul Whittaker
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