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Dear Marta,

**Statutory consultation on the proposed licence condition to prohibit potential abuse of transmission constraints by generators in the balancing mechanism**

We are pleased to respond to Ofgem's statutory consultation on the proposed licence condition to prohibit abuse of transmission constraints by generators in the BM.

In our response to Ofgem's June consultation we noted the success of TCLC since its introduction in 2012 in promoting cost reflective BM bid prices and appropriate production schedules by generators, thereby protecting consumers from unnecessary constraint costs; and we requested clarification of the potential overlap between TLCL and REMIT. We therefore support Ofgem's policy decision to maintain the existing TCLC Circumstance 2 as a licence obligation, whilst confirming that behaviour previously within Circumstance 1 will be enforced under Article 5 of REMIT (and presumably the successor arrangements to that REMIT provision following the UK's departure from the European Union).

We offer the following comments on the proposed new licence condition to implement this policy decision.

Sunset clause

Ofgem is proposing to extend Circumstance 2 of the TCLC as a permanent licence condition, ie with no sunset clause. Its rationale is that 'it is important that a replacement to Circumstance 2 of TCLC remains in place to ensure that bills are not higher than necessary'. The sunset clause was originally included on the basis that grid enhancements were likely to reduce the need for TCLC and that the Condition was likely to inhibit the competitive dynamic in discovering the best options for constraint management. The sunset clause reflected the fact that regulatory systems are subject to inertia, such that removal of regulations which have become unnecessary is generally lower priority than introducing new regulations. Therefore, rather than Ofgem committing to 'continuously review' whether there is a need for regulation, we think it would be better practice to introduce a new sunset clause in, say, 5 years' time. This would also be an opportunity to take stock of the level of competition and extent of grid enhancements as well as considering the interaction between TCLC and REMIT's successor arrangement.

## Unlicensed generators

In our response to the June Consultation, we encouraged Ofgem to consider the need for legislative changes to widen the scope of TCLC to include non-licensed generators. We welcome the fact that Ofgem's proposed approach to Circumstance 1 behaviour using REMIT will bring all market participants within its scope. However, it remains the case that Ofgem's approach Circumstance 2 behaviour using TCLC will only apply to those who hold a generation licence. We would therefore encourage Ofgem to keep under review the behaviour of un-licensed generators and if appropriate raise with BEIS the possibility of new legislative measures to address any problems identified.

## Overlap between REMIT and TCLC

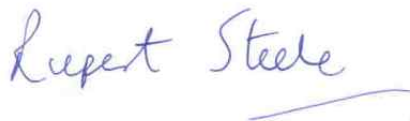
In our June response we acknowledged the overlap between TCLC and REMIT and commented on the need for better guidance as to the circumstances in which Ofgem would seek to use each regime as an enforcement tool. We welcome Ofgem's clarification (paragraph 3.21) that it sees TCLC and REMIT as complementary to each other. We also understand that Ofgem's goal is, as far as is practicable, to avoid duplication of the similar rules set out under REMIT and TCLC. Whilst we understand that Ofgem cannot guarantee on what basis it will act in every circumstance, we would welcome confirmation that as a general rule, it is Ofgem's intention to use the proposed condition as its main enforcement tool in respect of Circumstance 2 behaviour, unless special circumstances require it to look at other enforcement options (eg REMIT). We would also note that following Brexit, there may be an opportunity to define the interface between REMIT and TCLC more precisely.

## Appeals body

Although we supported the Energy Act 2010 provision of a TCLC appeal route to the CAT (given the similarities between TCLC and competition law, which also has an appeal route to CAT), we understand that Ofgem does not have powers to retain this appeal route for a new licence condition. However, we note in this context that Parliament intended that appeals of enforcement decisions to the High Court would involve assessing whether the penalty proposed is reasonable in all the circumstances (with the option of substituting a lower one), and that there would be an intensity of review going beyond judicial review standards<sup>1</sup>. Ofgem's proposals for TCLC may not therefore represent as significant a reduction in appeal rights as might at first appear.

I hope you find these comments useful. Should you wish to discuss any of these points further then please do not hesitate to contact me.

Yours sincerely,



**Rupert Steele**  
Director of Regulation

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<sup>1</sup> Lords Report stage of the Utilities Bill on 5 July 2000, statements by Lord McIntosh of Haringey, cols 1535-6 (<https://www.publications.parliament.uk/pa/ld199900/ldhansrd/vo000705/text/00705-17.htm>). This followed up on a similar exchange in Lords Committee on 21 June 2000, cols 295-304 (<https://www.publications.parliament.uk/pa/ld199900/ldhansrd/vo000621/text/00621-12.htm>). These statements were clearly intended to guide interpretation under *Pepper v Hart* principles.