



The Third Package Consultation Team
Department for Energy & Climate Change
4th Floor, Area C
3 Whitehall Place
LONDON
SW1A 2AW

Lloyds Court
78 Grey Street
Newcastle upon
Tyne
NE1 6AF

tel: [REDACTED]
email: [REDACTED]

29 October 2010

Dear Sir or Madam

Implementation of European Union Third Package: Consultation on Licence Modification Appeals

This response represents the views of CE Electric UK Funding Company (CE) and its wholly-owned electricity distribution licensees Northern Electric Distribution Limited (NEDL) and Yorkshire Electricity Distribution plc (YEDL).

CE is glad to have the opportunity to comment on DECC's consultation document on licence modification appeals. We have also contributed to, and fully support, the submission from the Energy Networks Association (ENA), made on behalf of the UK's energy network companies.

In this response we shall not repeat the points made in the ENA's submission but will concentrate on some of the principal points of concern that we would like DECC to address before any further statement is made about its intention to legislate, whether by regulations or by primary legislation.

Put briefly, we do not understand why DECC believes that the EU Third Package Electricity Directive 2009/72/EC and the Third Package Gas Directive 2009/73/EC (the EU Third Package) necessitate the kind of change that is being contemplated in the DECC consultation.

We had some opportunity to explore these issues at a meeting with ^{DECC officials} [REDACTED] held at the ENA on 22 October 2010. At that meeting the DECC representatives made it very clear that the changes were considered necessary solely to comply with EU law, rather than because they were desirable on their own merits as a matter of policy.

Our licences are fundamental to the operation of our businesses. The manner in which they can be changed is therefore of paramount importance to us: a change to a licence can be a matter of great significance to those who have committed considerable sums by investing in

CE ELECTRIC UK FUNDING COMPANY

Registered Office: Lloyds Court, 78 Grey Street, Newcastle upon Tyne, NE1 6AF

Registered in England and Wales. Registered Number: 3476201

If you would like an audio copy of this letter, a copy in large type, Braille or another language, please call 0800 652 6543

the companies that hold the licences. The biggest risk that an investor in a network company takes is regulatory risk. That risk is expressed principally, but not exclusively, in the risk that the licence (and particularly the price control conditions of the licence) may be changed in a manner that adversely affects the interests of the shareholder. A change to the mechanism by which such a change can be brought about, therefore, touches upon the fundamental property rights of the investor.

Where a government department proposes to make changes that might affect the fundamental property rights of those who have invested heavily in network assets and who are being called upon to continue to make significant investments in new assets in the future, we believe that the department should make its case very clearly and comprehensively before proceeding to make changes.

If we understand DECC correctly, the case for change is based entirely on a view of the requirements of the EU Third Package. We believe that the legal analysis that preceded this judgement should now be fully set out for everyone to comment upon. In our view, the DECC consultation on licence modification appeals asserts, rather than demonstrates, that there is an incompatibility between the existing licence modification arrangements and the requirements of the EU Third Package. The legal advice that we have received does not support such a contention. So far we have not been able to draw out from DECC the full legal argument that has led it to conclude that the ability of a licensee (or in the case of standard licence conditions) a number of licensees, to prevent a licence modification being made until it has been considered by the Competition Commission (CC) somehow contradicts the autonomy requirements of the EU directives.

Similarly, we have been unable to discover the legal case that has led DECC to conclude that the availability of judicial review is not sufficient to meet the 'appeal' requirements of the directives.

It occurs to us that there are two possible explanations for the position that appears to be being taken by DECC.

The first explanation is that, to the extent that there has been any legal analysis of the incompatibility of the present arrangements and the requirements of the EU directives, this has been fully revealed in the consultation. If that is indeed DECC's position then we find ourselves in profound disagreement with DECC. The legal case set out in the consultation is brief, flimsy, and, we are advised by external counsel, plain wrong.

The alternative explanation is that DECC's consultation proceeds from a much deeper legal analysis than is set out in the consultation. In that case, we respectfully ask for the opportunity to discuss *that* analysis with DECC before any further policy declarations are made.

So far the officials that we have spoken to have taken the position that they have received legal advice that the requirements of the directives with regard to autonomy and appeal rights conflict with the present arrangements. Although the officials present were quite willing to discuss the policy consequences of that advice, they were not equipped to discuss the

correctness of the advice from which the policy derived. This deficiency must now be rectified.

The foregoing may give the impression that we are implacably opposed to everything that is being contemplated in the consultation on licence modification appeals. That is far from being the case. However, we would like to participate in a better informed debate where the underlying case for change is not taken as a given. We hope that your processes and your timescales will not preclude that.

Yours sincerely,

[Redacted signature block]

[Redacted text block]

