

Northern Ireland Electricity Limited

**Consultation on
Acquisition of NIE, NIE Powerteam and allied
businesses by ESBNI Ltd**

NIE's Response

6 May 2011



Introduction

NIE is pleased to respond to the SEM Committee's consultation and would comment as follows on the proposed licence changes.

Condition 3: Availability of Resources and Undertaking of Ultimate Controller/Compliance Plan

The Consultation Paper proposes, in paragraph a, that NIE's annual certification of availability of resources should include an annex "detailing the information used in coming to the conclusion [that the Licensee has a reasonable expectation that it has the financial facilities and resources to carry on the business over the next 12 months]".

It is NIE's preference that the current regulatory provisions on certification of availability of resources should remain unchanged. These provisions align with the current GB industry standard (SLC 30 of the Standard Electricity Distribution Licence) and we consider that the standard regulatory framework should not need to be augmented with special provisions that are exclusive to NIE.

Where, in any event, the Utility Regulator requires any further information pursuant to the submission of a certificate by NIE, any material information concerned will be provided by NIE in accordance with Condition 8 of its licence.

It should be noted that both NIE's directors and its external auditors certify its availability of resources on an annual basis and, in doing so, subject the assumptions and information underlying certification to close scrutiny.

In paragraph b, it is proposed that the Compliance Plan should "specifically address how this condition is fulfilled each year". We would agree in principle that the annual Compliance Report could include an explanation of how NIE secured sufficient resources in the year under report to enable it to comply with its obligations under the Compliance Plan. However, this should be a matter of agreement rather than licence modification and should not require NIE to disclose confidential financial or commercial information.

In paragraph c, it is proposed that a new licence condition be introduced on procurement, mirroring the obligation in the corresponding ESN licence. It is argued that this will give "more focus and prominence to this issue and to underscore the pre-existing obligations already incumbent on NIE". Whilst we believe that these pre-existing obligations fully cover the requirement on NIE to procure assets and services from the most economic sources, we have no strong objection to this proposal.

In paragraph e, the consultation paper proposes that the definition of "resources" in Condition B7 of the equivalent NGC licence should be incorporated into NIE's licence. In Condition B7, "resources" are defined as "including (without limitation) management and financial resources, personnel, fixed and moveable assets, rights, licences, consents and facilities". We have no objections to this proposal.

Condition 3A: Board Independence

The SEM Committee will be aware that the constitution of the NIE Board and the appointment of individual directors are matters reserved to ESB. NIE understands that ESB is considering the SEM Committee's proposal that an independent executive director be appointed and will reply separately to the Committee.

In accordance with Condition 3A of NIE's licence, the current Board structure comprises a majority of independent non-executive directors. This in itself is a very progressive measure which, together with the relevant requirements of Condition 12 of NIE's licence, ensures the independence of NIE's Board. We are not aware of any relevant precedent for the appointment of an independent executive director and do not consider that any such condition is needed, or could be regarded as proportionate, in the case of NIE. Additionally, in regard to future appointments, this condition would be likely to restrict significantly ESB's choice of candidates with the required expertise.

Condition 4: Restrictions on Dividends / Licence tidy up

In NIE's view, some consolidation of existing licence conditions is desirable and we agree that the declarations to be made by NIE's directors could be incorporated within a single licence condition. The "tidy-up" exercise also needs to deal with errata in the current licence document previously notified to the Utility Regulator by NIE.

Condition 10: Restriction on Use of Certain Information

The SEM Committee's proposal is that "the only types of information that could be made available between NIE and ESB would be types pre agreed with the Utility Regulator" and that "These types of information could be set out in the Compliance Plan". The former Compliance Plan, approved by the Utility Regulator, adopted the approach of prohibiting disclosure of certain information, e.g. commercial information relating to customers, suppliers and generators, to Viridian personnel engaged in the operation of an Associated Business. The same approach should be followed in the new Compliance Plan. The alternative approach of prescribing in detail the information that may be disclosed to an Associated Business would be unduly restrictive and unworkable in practice since it would not be reasonably possible to set out a complete exhaustive list.

Condition 12: Independence of the Transmission and Distribution Business

Paragraph b proposes that the nature of the corporate governance undertaking should remain the same but, since corporate structures may alter, who gives the undertaking should be subject to agreement between NIE and the Utility Regulator from time to time. NIE concurs with this proposal.

Paragraph c refers to the need to review the Compliance Plan to reflect the new ownership structure. Whilst initial discussions have taken place between NIE and the Utility Regulator, these need to be resumed at an early date following this consultation with the objective of having an agreed Compliance Plan in place by the end of June.

Paragraph d refers to the need to review the licence definition of “Associated Business”. NIE’s main concern in this respect is to ensure that co-operation and the flow of information between NIE and ESB Networks on matters of mutual interest is not restricted to the detriment of these businesses and electricity customers in general. The review of this licence definition should also ensure that ESB’s provision of common services to NIE is not impeded. It is important to note that these principles will need to be reflected in the new Compliance Plan.

We attach a suggested amended definition of Associated Business to ensure that it does not include ESB (exercising its corporate governance role) or ESB Networks. This is a key point for NIE and NIE would welcome the opportunity to further discuss the proposed drafting or any alternative proposals to address this issue with the SEM Committee.

Finally, two ESB employees have been seconded to senior management positions in NIE (the relevant documentation was forwarded to the Utility Regulator on 1 March 2011). Condition 12.3 (c) of NIE’s licence requires that decisions relating to the T&D network are taken by NIE’s directors and employees. Since such secondments were not envisaged when this licence condition was introduced, it is not currently provided for in Condition 12.3(c), unless the secondee is a director of NIE (which is the case in relation to one of secondments referred to above). NIE would therefore wish to discuss with the Utility Regulator and agree an appropriate modification to the wording of Condition 12.3(c) to facilitate this requirement.

Licence Condition 12.15 - Proposed Amended Definitions

“Associated Business” means any business of the Licensee (or of any affiliate or related undertaking of the Licensee) other than a relevant holding company, the Transmission and Distribution Business, the Land Bank Business, ESB Networks, and Powerteam”

“relevant holding company” means the ultimate holding company of the Licensee acting through a part of its business which does not itself generate or supply electricity on the Island of Ireland.

“ESB Networks” means ESB Networks Limited and the business unit of ESB known as ESB Networks which holds the Transmission System Owner licence and/or the Distribution System Owner Licence granted by the Commission for Energy Regulation as amended from time to time.”