EN

Case No COMP/M.5224 -
EDF / BRITISH
ENERGY

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(2) NON-OPPOSITION
Date: 22/12/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.12.2008
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus […]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION IN CONJUNCTION WITH ARTICLE 6(2)

To the notifying party

Dear Sir/Madam,

Subject: Case No COMP/M.5224 – EdF/ British Energy
Notification of 3 November 2008 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 3 November 2008 the Commission received a notification of a proposed concentration within the meaning of Article 4 of the Merger Regulation by which EdF S.A ("EdF") through a 100% owned subsidiary, Lake Acquisitions Ltd ("Lake") proposes to acquire sole control of British Energy ("BE") by way of a public offer to purchase the entire issued share capital, including shares which the UK state is entitled to subscribe, and will subscribe, prior to implementation of the offer.

2. In a transaction that is legally separate from the notified concentration, EdF has concluded a non-legally binding Memorandum of Understanding with Centrica, one of the other large energy companies in the UK, to sell on 25% of BE, should its bid be successful. Centrica launched a rights issue on 31 October to raise the funds to pay for its part of BE. This potential transaction has not been notified to the European Commission and as such has not been taken into account in this decision.

I. The Parties and the Operation

3. **Electricité de France (EdF)** is a company incorporated under the laws of France. Previously wholly owned and now majority owned[2] by the French state, since 2005 it has been listed on the Euronext market in Paris. Active globally, EdF and its

[1] OJ L 24, 29.1.2004 p. 1.

[2] The French State holds 84.8% of the issued ordinary shares of EdF.

subsidiaries ("EdF Group") are active in the generation and wholesale trading of electricity and in the transmission, distribution and retail supply of electricity to all groups of customers. It is also active in the provision of other electricity-related services in France and other countries.[3]

4. **BE** is a public company limited by shares, incorporated under the laws of Scotland and listed on the London Stock Exchange. Active only within Great Britain, it operates on the UK markets for both generation and wholesale trading of electricity and retail supply of electricity to industrial and commercial customers. BE is 35.6% owned by the UK Government and, following substantial State aid in 2004, it is subject to commitments until 2010.[4] In relation to the 2004 State Aid decision, the Commission has not identified any State Aid problem with respect to the sale process itself. It has neither identified risks that the 2004 decision may be circumvented or no longer complied with.

5. The proposed transaction concerns the acquisition of sole control of BE by EdF. EdF have made a public offer, via Lake, to purchase the entire issued share capital of BE. As a consequence, the transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

II. COMMUNITY DIMENSION

6. The transaction has a Community dimension within the meaning of Article 1 (2) of the merger Regulation. The parties' combined aggregate worldwide turnover is more than EUR 5,000 million and the aggregate Community wide turnover of each party exceeds EUR 250 million[5]. Whereas BE achieves more than two-thirds of its Community-wide turnover within the UK, EdF does not achieve more than two-thirds of its Community wide turnover within that state and as such the two thirds rule is not applicable.

III. COMPETITIVE ASSESSMENT

7. The proposed transaction as originally notified raises serious doubts as to its compatibility with the common market as regards i) the wholesale electricity market (specifically the potential for the new entity to both withdraw capacity in order to benefit from raised prices and change commercial strategy as regards Industrial and Commercial Customers for the combined entity, leading to a reduction in liquidity),

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3 EdF Group is active in the design, building and provision of technical consultancy services relating to the construction, operation and maintenance of electrical plants and power networks. It also provides waste recycling and street lighting services. It has operations in France, Germany, GB, Italy, Hungary, Poland, Slovakia, Spain, Austria, Netherlands, Czech Republic, Switzerland, US, Brazil, South Africa, Ivory Coast, China, Vietnam, Ukraine, Russia, Japan, Mali, Thailand, United Arab Emirates and Laos.

4 Commission Decision of 22 September 2004 on the State Aid which the United Kingdom is planning to implement for BE plc (OJ L142 of 6.6.2005, p.26)

5 EdF's worldwide turnover is EUR […] million in 2007 (Community wide EUR […]), BE's worldwide turnover is EUR 3,980 to end March 2008 (Community wide EUR […]).

ii) the high concentration in the ownership of sites most likely to be suitable for a first wave of new nuclear build and iii) the potential for the combined entity's holding of three National Grid connection agreements in relation to Hinkley Point, which it may not use fully, to act as a barrier to entry for other competitors in the relevant region..

8. In the course of the proceedings, the notifying party submitted undertakings designed to eliminate the serious doubts identified by the Commission, in accordance with Article 6(2) of the Merger Regulation. In light of these modifications, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market or with the proper functioning of the EEA Agreement.

Relevant Markets

i) Horizontal Relationships

9. Each relevant market is treated separately in this decision. The markets concerned by the transaction in which there is a horizontal overlap between the parties are i) the market for generation and wholesale supply of electricity, for which issues in relation to withholding and liquidity have been identified and for which the parties have offered appropriate remedies, ii) the market for the retail supply of electricity to industrial and commercial customers on half hourly rates, iii) the market for carbon trading, iv) the markets for procurement of nuclear fuel and iv) the market for financial electricity trading and v) the market for sites for nuclear new build.

A. WHOLESALE ELECTRICITY MARKETS

1. Product market definition

10. Both EdF and BE are active in the wholesale electricity markets in Great Britain. The parties agree with the Commission's prior decisional practice according to which there is a single product market for both electricity generation and wholesale supply.[6]

11. The generation of electricity involves the production of electricity at power stations as well as all electricity physically imported through interconnectors.[7] Demand comes mainly from electricity suppliers, large industrial and commercial customers who are able to buy directly on these markets, and traders.

12. The wholesale electricity market allows the buying and selling of electricity by various counterparties (generators, suppliers and brokers/financial institutions) using a range of various products and time horizons. It allows counterparties, in line with

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6 Case M.3268 – *Sydkraft/Graninge*

7 Case M.3440 *ENI/EDP/GDP*

BETTA[8] conditions, to balance their supply and demand, to hedge their risks or to take a position on future prices.

13. Products traded include baseload or peakload for durations ranging from day-ahead up to three years ahead. It is possible to distinguish four main trading routes, differentiated mainly by their time horizon and size/volume of trade.

13.1. Non standard, non brokered trades: (also known as structured "over the counter" Trades or Power Purchase Agreements) which are longer term contracts for significant amounts of electricity between a generator and a purchaser, usually a supplier.

13.2. Over the Counter ("OTC") brokered trades: bilateral contracts of up to three years under relatively standard terms, usually initiated on a brokers screen but also by telephone. Within brokered trades, various products exist. These include i) baseload, ii) peakload, iii) weekday, iv) weekend and v) seasons.

13.3. GB Power Exchange (APX[9]): screen based short term market consisting of "Prompt" (products of 4 weeks to 4 hours before delivery) and "Spot" trades (products for 4 hours to half an hour before delivery).

13.4. Balancing Mechanism: which provides a means for National Grid to ensure that supply and demand are balanced by buying or selling additional energy close to real time. It operates one hour ahead of gate closure for a given half hour period with National Grid acting as the sole counterparty for all transactions.

14. The supply side of the market for wholesale electricity in Great Britain is made up of a number of different players and comprises various sources of production; i.e. from large scale nuclear and fossil generation to small scale distributed generation. Technologies used include nuclear ([10-20]% of total capacity in 2007), coal ([30-40]%), combined heat & power ("CHP" [0-5]%), open cycle gas turbine ("OCGT" [5-10]%), combined cycle gas turbine (CCGT) plant ("CCGT" [30-40]%), renewables ([5-10]%) or other, (such as pumped storage [0-5]%).

15. In line with the Commission's decision in Iberdrola/Scottish Power[10] no distinction is made between the different sources of electric energy[11] within the wholesale electricity market.

16. That being said the Commission has investigated whether the various sub-segments of the wholesale market (non-standard non-brokered, OTC brokered, Power Exchange and Balancing Mechanism) could comprise separate markets. In addition,

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8 British Electricity Trading and Transmission Arrangements.

9 The GB Power Exchange, is a screen based short term market where participants trade (prompt or Spot) a series of standardised blocks of electricity

10 Case M.4517 *Iberdrola/Scottish Power*

11 Gas fired, coal fired, nuclear, hydroelectric power stations, wind farms or others.

within the OTC brokered segment the Commission has investigated, whether the various products traded (such as baseload and peakload) are in fact separate markets, given that they consist to a large extent of different sources on the market,[12] with different cost structures and are therefore priced differently.

17. The results of the market investigation do not support the definition of narrower product markets but rather favours the definition of one wholesale electricity market comprised of different segments.

18. Most of the respondents consider that the different channels through which electricity is sold should be considered as part of the same relevant product market. Some respondents have indicated that in particular the BM cannot be considered as a market as it is rather a "mechanism" managed by the system operator to balance the system. Given the small volumes traded in the BM (around 10 TWh compared to around 925 TWh of the OTC and APX channels) the inclusion or not of the BM in the wholesale market does not change the substantial assessment of this case. With respect to the various products sold (weekday, weekend, base-load, peak hours, etc), the majority of the respondents also tend to consider that splitting these products in separate markets is not appropriate, given that the different products simply represent different groupings of the same basic trading units which are half-hourly quantities.

19. There are also a number of ancillary services purchased by the National Grid to manage electricity supply and demand in the network. For the purposes of this decision it is further left open whether ancillary services are part of the same market or whether they constitute separate product markets in themselves. Excluding ancillary services form the wholesale market does not lead to a different assessment form the one presented hereafter. Ancillary Services will not be discussed further in the text of this decision because even considering narrowest markets, the transaction does not give rise to competition serious doubts in this respect.

Therefore, for the purposes of this decision the wholesale market is considered as a single relevant product market.

2. Geographic market definition

20. The Commission considers that the relevant geographic market comprises the whole of Great Britain.[13] This area is regulated by BETTA and therefore subject to the same conditions of competition. The vast majority of respondents to the market investigation agreed with this definition.

21. In addition, although in the light of Council Directives 2003/54/EC and 2003/55/EC, it has to be considered whether bigger markets may be emerging leading to wider definitions for the relevant geographic market, with respect to the UK the Commission

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[12] For example baseload consists to a large extent of nuclear power, whereas peak load is sourced from more flexible plant such as gas or coal.

[13] Great Britain comprises England, Wales and Scotland but excludes Northern Ireland.

has previously found the geographic market to be Great Britain[14] There are no indications that this assessment is no longer valid.

22. Therefore, for the purposes of this decision, the relevant geographic market is Great Britain.

3. Competitive Assessment

a) Market Shares

23. The parties´ activities overlap horizontally in *the wholesale electricity markets*. On the British market, the transaction will lead to a combined market share of [20-30]% by capacity or [20-30]% by output with an increment of [5-10]% or [5-10]% respectively. The parties' most important competitors are E.ON ([10-20]% by capacity, [10-20]% by output), SSE ([10-20]% by capacity, [10-20]% by output), RWE ([10-20]% capacity, [5-10]% output), Iberdrola/Scottish Power ([5-10]% capacity, [5-10]% output), International Power ([5-10]% capacity, [5-10]% output), Drax ([5-10]% capacity, [5-10]% output) and Centrica ([0-5]% capacity, [0-5]% output). In addition some other smaller competitors exist.

24. The market investigation has confirmed that whilst the parties' combined market shares are not extremely high, there are aspects of concern particular to the electricity market under investigation. In particular, in relation to the wholesale electricity market, these are 1) the possibility for the combined entity to withdraw capacity in order to benefit from raised prices and 2) the potential for the combined entity to reduce liquidity in the wholesale market.

<u>a.1) Withholding in the wholesale market</u>

25. The proposed operation would bring under common control BE's mostly baseload and predominantly nuclear capacity with EdF's flexible capacity (coal and gas). This leads to the potential concern that the merged entity would have an incentive to withdraw flexible capacity in order to increase the market price that it receives on its infra-marginal units. This is because, post-merger, the combined entity would benefit from price increases on a larger production base and have more opportunities to withdraw flexible capacity.

<u>The Parties' view</u>

26. The parties argue that the merged entity would lack the ability to significantly increase electricity prices by withdrawing electricity from the market. In particular, the parties argue that "*EdF's analysis of the merit order curve suggests that it is relatively flat during most states of demand which reduces the combined entity's ability to raise prices significantly through a capacity withdrawal strategy*."[15] In

14 Case M.4517 – Iberdrola/ScottishPower.

15 Cf. Form CO.

addition, the parties argue that the Great Britain ("GB") market structure, which is prominently characterised by bilateral and forward trading (and a correspondingly small spot market), would prevent the merged entity from engaging in a successful withdrawal strategy. In particular, the parties argue that "*Long term trading strategies focused on manipulating long term contract prices would be speculative, impractical and unlikely to succeed; they would furthermore require that for several years the merged entity incur the costs of capacity withdrawal without any corresponding benefits*."[16]

27. The parties further argue the combined entity would not have an incentive to withdraw capacity in order to increase prices. In support of their claim, the parties have submitted a model based on the assumption that prices are set on the basis of the marginal cost of the operators on the merit curve ("stack model" of the GB electricity market). The parties infer from their model that the merged entity would not have an incentive to withdraw capacity in order to increase prices. In a second updated model,[17] they estimate that an "optimized"[18] withdrawal strategy over 12-hour peak/off-peak periods would generally result in an average price increase around […]% (over all hours) and a profit impact of less than GBP […] million per year.[19]

28. The parties also submit that the above figures would need to be corrected for any start-up costs and ramp-up/-down constraints as well. Furthermore, they argue that the overall incentive would be further limited because already contracted fixed-price long-term electricity sales by BE would not benefit from the increased price. Consequently they argue that withholding would not be profitable because the merged entity would buy back volumes at the higher price. In this respect, the parties specifically make the point that a capacity withdrawal strategy would forfeit some of the key rationales of the transaction to the extent that it drives the combined entity into a net short hedging position.

Assessment

29. The proposed operation would bring together BE's mostly baseload production with EdF's flexible production, which raises the potential concern that the combined entity would, as a result of the merger, withdraw production to increase prices that it gets on its plants that are producing. The market investigation carried out by the Commission indicated that the proposed transaction, as initially notified, raised serious doubts with

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16 *Idem.*

17 [Technical details about the models submitted by the parties]

18 The optimization entails taking the highest profit withdrawal scenario of […] possible combinations of unit withdrawals for each 12-hour (or 1-hour) segment

19 The parties also submitted a version of their model using the volatility of gas prices […]. However, this version of the model does not optimize withdrawal strategies, and is otherwise subject to the same criticism as the updated model without a correction for gas volatility (in particular, with respect to future capacity expansions).

respect to this concern[20], which the parties' arguments did not permit to alleviate, for the reasons detailed below.

30. First, the arguments made by the parties concerning the alleged lack of ability to affect prices by withdrawing production cannot be accepted. Indeed, regarding the shape of the supply curve, the results of the model discussed in paragraphs 30 to 35 indicate that the parties can significantly affect prices by withdrawing capacity because of the specific position of certain plants of the combined entity on that curve. In addition, the argument that the merged entity would have to incur losses during several years to affect long-term prices is simply incorrect. Indeed, the merged entity's long-term incentive to withdraw does not depend on whether it withdraws in the short term. This is because buyers know that if they do not fix the price of future electricity, it may be affected by withholding independently of whether the merged entity withholds in the short term. Furthermore, the fact, as explained by EdF throughout the procedure, that its practice is to forward hedge […], using the most traded and liquid season-ahead forward products, does not eliminate EdF's ability or incentive to withdraw capacity. Given that most of its sales are done [] ahead, and that the price of such products is influenced by the spot price, EdF has the ability to either explicitly undertake the withdrawal or to price its ability to do so into its forward contract sales towards third parties. Also the trading unit of the combined entity can manage its supply obligations in advance (ie source enough electricity in advance so that it meets these supply obligations) while keeping some margin of manoeuvre with the units which can be sold on shorter terms and thus use them for a short term withdrawal of capacity.

31. Second, neither model submitted by the parties supports the conclusion that the merged entity lacks the ability and incentive to increase prices by withdrawing production. Indeed, even though they may appear relatively low, the numbers provided by the parties are not negligible when the impact on consumers is considered. For example, a […]% increase of the price of electricity for all hours would lead to a loss of surplus for consumers of […] of pounds sterling per year.

32. But more importantly, the results of the model are very sensitive to assumptions concerning demand, capacity and other variables. In fact, the parties' assumptions are debatable, in particular as capacity data in the second model used by EdF may be overly optimistic.[21] Using the more conservative assumption of the first model submitted by EdF, even accounting for start-up costs as submitted by EdF,[22] the

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20 One respondent also specifically raised the point that the combined entity is likely to engage in a withdrawal strategy during the period 2013-2017 (for which there is no model) when many of the LCPD opt-out plants the competitors have will go off-line while EdF/BE has opted-in all of its applicable fossil-fuelled plants.

21 Following comments by the Commission on the lack of optimization of the initial model, the parties also modified their assumptions for many other variables, and in particular regarding capacities […]. Although the new numbers are sourced from National Grid, they may appear rather optimistic, in particular for future renewable and CCGT technology […]. The current first phase investigation however does not allow to conclude on which of the capacity assumptions is more appropriate. In any event, given that both are indeed forecasts based on certain assumptions it is important to gauge the sensitivity of the capacity and demand variables of the model and make the assessment based on that.

22 [Description of how start-up costs were considered by the Commission]

Commission finds that with a simple optimization process,[23] the proposed operation leads to significantly higher price increases as well as sufficient incentives to possibly consider and carry out a strategy of profitable withholding.

Table 1. Price increase and incremental profit under the parties' initial assumption (2010; median cost factor scenario)[24]

	Average price increase	Additional profit for merged entity
12-hour withdrawal	[0-5]% ([0-5]% in peak hours)	GBP […]M
12-hour withdrawal (including start-up costs)	[0-5] % ([0-5]% in peak hours)	GBP […]M

Source: Commission's calculations.

33. The Commission also carried out a sensitivity analysis on some of the key model assumptions and found that the parties' conclusion is not robust;, significantly higher price increases are obtained under a number of plausible assumptions. For instance, if the additional incremental cost for opted-out coal plants[25] is considered to be higher than the one proposed by the parties and equal to GBP […] per MWh as proposed by some market participants, price increases become even higher. The GBP […] cost increment is based on data showing that the marginal costs of LCPD[26] opt-in and opt-out plants have diverged significantly and to a much larger degree than the GBP […] since January 2008. Higher price increases are also found when a sensitivity analysis is carried out with respect to demand. This is a particularly relevant cause of concern since, as in the Electricity Study of the Commission Energy Sector Inquiry there were indications that UK demand data on the transmission system operator (TSO) level

23 The Commission considered the first 13 strategies included in the parties' updated model, which is likely to be conservative as it ignores other potentially profitable strategies.

24 While the Commission accepts EdF's arguments that a 1-hour withdrawal strategy is not practicable, it is of the view that calculating with a constant 12-hour strategy may be very conservative given that minimum up and down times of the power plants are usually (in particular gas-fired power plants) shorter than the 12-hour period used.

25 The Large Combustion Plants Directive (LCPD) restricts the running hours for opted-out coal plant to 20,000 between 2008 and 2015 (8 years) before they must be retired. In order to take this constraint into account in the model, the parties assume an incremental marginal cost of GBP […] for the relevant plants.

26 […] submission of 14 November 2008, page 19

may be underestimated.[27] The table below reports the results of this sensitivity analysis.

Table 2. Sensitivity analysis with respect to some of the parties' initial assumptions (2010; median cost factor scenario)

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*Incremental LCPD cost (*GBP […]*)*		
	Average price increase	Additional profit for merged entity
12-hour withdrawal	[0-5]% ([5-10]% in peak hours)	GBP […]M
12-hour withdrawal (including start-up costs)	[0-5] % ([0-5]% in peak hours)	GBP […]M
Demand +5%		
	Average price increase	Additional profit for merged entity
12-hour withdrawal	[0-5]% ([0-5]% in peak hours)	GBP […]M
12-hour withdrawal (including start-up costs)	[0-5]% ([0-5]% in peak hours)	GBP […]M
*Incremental LCPD cost (*GBP […]*) & Demand +5%*		
	Average price increase	Additional profit for merged entity
12-hour withdrawal	[0-5]% ([5-10]% in peak hours)	GBP […]M
12-hour withdrawal (including start-up costs)	[0-5]% ([5-10]% in peak hours)	GBP […]M

Source: Commission's calculations.

27 Cf. Electricity Study, page 646, http://ec.europa.eu/competition/sectors/energy/inquiry/electricity_final_part3.pdf

34. In addition, the parties' argument according to which this model only relates to the merged entity's incentive to withdraw production - and not its ability - is incorrect. Indeed, under the model's assumptions, the merged entity has both the ability and the incentive to withdraw production. This appears clearly from the calculated price increases and additional profits associated with a withdrawal strategy and from the explanations given previously on the management of the trading portfolio of the combined entity.

35. It is also important to note that considering fixed 12-hour periods is understating the potential impact of the merger given that actual withdrawal strategies are likely to be more flexible and take place at differing time intervals. In addition, the start-up cost would not be incurred for withdrawals during consecutive 12-hour periods. Moreover, the model ignores the possibility of partial withholding where the associated costs are lower in that no start-up is needed, there are no minimum up and minimum down constraints, and any possible ramp-up or ramp-down times and cost are lower.

36. Finally, the parties also affirm that because of BE's long-term contracts, the merged entity would lack the incentive to engage in a withdrawal strategy as it would not benefit from the increased prices on its pre-contracted volumes. However, this argument does not eliminate the Commission's serious doubts for the following reasons. Such an argument would not be valid for existing long-term contracts whenever their price is indexed on prices of the wholesale market. Such contracts are in fact exposed to price movements in the wholesale markets and can therefore not be disregarded as a source of raising the incentive for a withdrawal strategy. Furthermore, the remaining long-term contracts of BE the prices of which are fixed for the entire duration of the contract will expire in the coming years and will thus be less and less relevant factors limiting the incentive to withdraw.

Conclusion

37. In view of the empirical evidence described above, it is concluded that the proposed transaction as initially notified raises serious concerns related to its possible effect on wholesale electricity prices. This finding is consistent with the concerns expressed during the market investigation, according to which the merged entity would enjoy increased market power and would have an incentive to withdraw some of its flexible production in order to increase prices.[28] On the basis of these considerations the Commission had serious doubts as to the compatibility of the transaction, as initially notified, with the common market.

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28 Note that this finding is consistent both with the absence and presence of pivotality in a significant number of hours. Although the analysis carried by the parties suggests that the merged entity would be in a pivotal position only in a relatively low number of hours, this view is not shared by several other market respondents. Further analysis needs to be undertaken on this issue given the sensitivity of these models to capacity/availability assumptions.

a.2) Impact on liquidity: effects in the wholesale and supply markets

38. The second way in which the proposed concentration may harm the electricity wholesale markets in Great Britain ("GB") is by reducing the levels of liquidity. These concerns were already voiced by many market participants and other third parties, such as UK's energy regulator (Office for Gas and Electricity Markets, "Ofgem"), prior to the formal notification of the proposed transaction, and the market investigation carried out by the Commission has confirmed such concerns.

39. In general terms, a market can be defined as liquid if producers are able to sell sufficient quantities of a given product to purchasers, and purchasers can purchase sufficient quantities from sellers. There are also various ways in which liquidity can be measured depending on the trades and the size of the market considered. Given the lack of transparency with respect to the Structured/PPA agreements[29] , the parties have proposed to measure it on the basis of the ratio of the volumes traded in the OTC and through the Power Exchange compared to the overall demand in the UK. On the basis of this definition, the GB liquidity ratio in 2007 would be of around 2.65, being the OTC trades 927 TWh and the GB demand of 350 TWh[30].

40. A concentration that increases the level of vertical integration of the merged entity can potentially lead to a decrease of the merged entity's need to trade with other counterparties in the wholesale markets since part of its power needs might, post-merger, be covered by the merged entity's own power generation. If this happens, it is possible that liquidity in the wholesale markets is reduced. The market investigation is not conclusive as to whether, in general, there is a direct link between an increase of vertical integration and a decrease in liquidity. However, the market investigation has expressed serious concerns that this particular transaction may in fact have such negative effects on liquidity.

EdF's view

41. Electricity companies have different "hedging" strategies to cover their position either as sellers (mainly generators) or as purchasers of electricity (mainly suppliers who, in turn, sell the electricity to final customers). In the case of a generator, the hedging strategy basically consists in (i) deciding how much of its future generation has to be sold in advance (today), and (ii) how it wants to sell such electricity: through OTC, through long term supply agreements (structured or PPA agreements) or, if the generator is integrated downstream, through its supply arm. In the case of a supplier, the hedging strategy basically consists in (i) deciding how much of its future needs to supply its customer base has to be bought in advance (today), and (ii) how it wants to buy it: from the wholesale market, through long term supply agreements

29 See definition of these agreements in paragraph 13.

30 Source: Form CO page 209. The OTC trades include all trades except structured/PPA trades, short term market and trades in the Balancing Mechanism trades, for which the parties state that it is difficult to find a reliable estimate. This figure differs slightly from the ratio given in page 195 of the Form CO (2.75) calculated on the basis of pure OTC and Power Exchange trades.

with generators or other third parties (i.e. financial institutions who, in turn, have secured these volumes from generators) or, if the supplier is integrated upstream, from its generation arm.

42. EdF's current hedging strategy for its generation business []. With respect to its supply business, however, EdF's current hedging strategies for its "nHH" customers (comprising customers that have non-half hourly rates, mainly household customers but also some industrial and commercial customers) and for its "HH" customers (comprising the industrial and commercial customers that have half hourly rates, hereinafter referred to as "I&C HH" customers) are different.

43. For its nHH customers, EdF's strategy consist []. In addition, EdF tries to source the electricity for its nHH customers from its own generation. Given that EdF generation amounts to around 27 TWh and that its nHH customers' demand is of around […] TWh, generation and demand are pretty well balanced and only a net position of around […] TWh in excess is left. However, […]EdF has to recur to the wholesale market either to sell the electricity it has in excess or to buy the electricity that cannot be hedged internally.

44. With respect to its I&C HH customers, EdF has a different approach and follows what it calls a "back-to-back" strategy. This strategy consists in the following: once a new customer has signed a contract, EdF purchases from the wholesale market all the electricity needed to supply this customer during the whole contract.

45. Given that the demand of EdF's I&C HH customers amounts to around […], it is not surprising that EdF has to rely on the wholesale market to procure the electricity for its I&C HH customers, as it cannot do it internally.

46. EdF explains its strategy to supply its nHH customers internally on the following aspects:

- They represent a very high number of small consumption customers with contract terms allowing them to switch supplier at any point in time without notice;
- They are not committed to pay for a fixed volume and only pay for the output which they consume;
- Their consumption can vary significantly depending on weather conditions;
- Their meters do not differentiate consumption between different time periods.

47. These features impose a number of constraints on EdF, mainly that it is not economical to effect frequent changes in tariffs given the highly fragmented customer base, the aggregated demand (although the number of customers is pretty stable) varies unpredictably due to changes in the weather and other market conditions and sophisticated tariff structures indexed to wholesale electricity prices cannot be developed.

48. Given that it is more difficult to dynamically align the procurement costs with the sales prices to nHH customers, it is less risky to supply these customers internally than from the wholesale market, which can have high levels of volatility. In addition, as the consumption volumes for these customers are very difficult to forecast accurately, there is a lower risk of incurring imbalance costs if they are supplied

internally with EdF's flexible generation (for example, in case of an expected imbalance, it is easier to change in-house production to get balanced than selling back or buying additional volumes from the market).

49. With respect to its I&C HH customers, EdF explains its strategy on the following aspects:

- They are relatively low in number compared to nHH customers,
- Their annual demand is significantly higher,
- The contracts are set for a fixed time period (average length of […])
- They are knowledgeable about the electricity wholesale market and prices and have sophisticated procurement systems,
- Their demand profile 'shape' is different from nHH customers, (i.e. it does not have the same seasonal or weather effects)

50. EdF therefore states that, in comparison to nHH customers, these characteristics allow it to propose tailored pricing proposal to largest customers, to easily match the load shape of these customers through standard wholesale market products and reduce the risk of imbalance costs. All these factors allow EdF to establish a sourcing strategy for I&C HH customers from the wholesale market. Finally, EdF mentions three additional reasons justifying this strategy: (i) since I&C HH customers are priced by reference to wholesale market prices, it is appropriate for risk management to adopt a procurement strategy that also relies on the wholesale market, enabling it to secure profit margins at the time of the contract signature for the life of the contracts, (ii) this strategy supports EdF desire to have two fully separated businesses (retail supply to I&C customers and generation), run and managed independently, and (iii) this strategy ensures that its optimisation of generation is fully driven by wholesale market and plant-specific criteria rather than being dictated by the rhythm and timing of the I&C HH negotiation rounds, which take place at the months of April and October[31].

51. On the basis of the above considerations, EdF has clearly stated that it will continue to hedge its generation in accordance with its current strategy and that it sees no reason to change its current strategy as regards sourcing the electricity for its I&C HH customers back-to-back from the wholesale market[32].

52. EdF also states that, if it were to change such hedging strategies, this would negatively affects its business since the margin of its generation business would be impaired in order to service I&C HH customers, there would be dilution of responsibilities between the generation and the I&C HH supply business and there

[31] These months reflect the renewal cycle of the Large I&C customer contracts as they coincide with periods in which these customers were liberalised. EdF argues that these months may be at a time when the prevailing forward wholesale market price is at a relatively low level, thereby depriving EdF of the opportunity of choosing to buy or sell electricity at other times of the year when it could obtain better value for its output.

[32] […]

would be a loss of focus in relation to marketing or sales activity on wholesale markets or product innovation. These negative effects would not be outweighed by potential benefits such as the reduction of the transaction costs due to the internalisation and a small reduction in EdF Value at Risk ("VaR")[33] due to the removal of the risk associated with the procurement of the I&C HH customers from the wholesale market.

53. EdF submits that, on the basis of the above considerations and the special situation of BE, in fact liquidity is likely to increase post merger. Currently BE has a low credit rating which limits significantly its ability to trade in the wholesale market[34]. Given that post merger the credit rating of the combined entity will be much better, the combined entity will be in a position to trade in the wholesale market part of BE's output currently traded bilaterally through structured deals with third parties. In addition, there is potential for a progressive extension of EdF's current strategy for I&C HH customers to BE customers.

Results of the market investigation

Negative effects of low liquidity

54. In a first step, the Commission has investigated whether or not a reduction of liquidity is likely to have negative effects in the electricity markets (generation/wholesale and supply of electricity to final consumers). The market investigation has confirmed the likelihood of such negative effects.

55. Low levels of liquidity reduce the ability of generators to sell electricity in the wholesale market efficiently. In this particular case, non-integrated (independent) generators have voiced strong concerns that the merged entity may lead to the elimination of EdF as an important purchaser in the wholesale market, reducing their customer base substantially. In addition, the internalisation of BE generation would equally give rise to a reduction of the electricity offer in the wholesale market, with purchasers having less choice to carry out their purchases. The reduction in choice makes it more difficult to efficiently hedge the positions of the different counterparties, both generators and suppliers, possibly leading to higher costs.

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33 VaR is an economic measure used by EdF to control the risk in its trading strategy.

34 According to the explanations provided by the parties, "*In the BETTA wholesale market credit support is normally required by counter-parties purchasing power to ensure that, should the contracts terminate early for whatever reason, they can recover any costs they may incur in replacing the terminated transactions in the open market or to meet liabilities relating to delivered but not yet paid for electricity. This credit support can be provided by Parent Company Guarantees ("PCGs"), letters of credit or, if the contracting party does not have an investment grade credit rating, cash as collateral. With no investment grade credit rating, BE's strategy of extending its fixed price contract portfolio to provide future income certainty is significantly affected by the need to provide this collateral as cash. BE T&S therefore actively manages its use of collateral by selling more electricity through collateral efficient routes to market, including direct sales through BEDL, which requires minimal collateral, and also through the use of contracts with low collateral structures, mainly with banks. The latter reduce the requirement for collateral in return for discounts from the prevailing wholesale price in the relevant periods covered by the contracts*". Source: Form CO, page 81.

56. Moreover, low liquidity is likely to give rise to increased levels of volatility in wholesale prices: i.e. significant variations and unpredictability of prices. The vast majority of the respondents have confirmed this fact and that the lack of reliable price "signals" from the wholesale market significantly reduces the ability of independent generators or suppliers to get the necessary financing for new projects and future expansions. The result is that barriers to entry increase for independent counterparties since the lack of reliable wholesale prices makes it very difficult to predict what the future earnings of the new businesses/expansions will be.

57. Many respondents have also indicated that the level of liquidity may decrease more and more in a sort of "vicious circle" by which low liquidity leads to further vertical integration (structural or contractual) and eroded incentives of other traders (such as financial institutions which also contribute to maintain high levels of liquidity) to stay in the wholesale markets, which leads in turn to lower liquidity, weaker price signals and less competition.

Ability and incentives to internalise generation output, leading to a likely decrease of liquidity in the wholesale markets

<u>Ability</u>

58. The Commission has also investigated whether the merged entity may have the ability and the incentives to internalise its generation output, which may lead to a reduction in the levels of liquidity. The majority of the respondents to the market investigation have raised concerns with respect to this likely reduction of liquidity in the wholesale electricity market post transaction given that, post merger, EdF will be able and willing to use BE generation for its own supply business instead of selling it to other counterparties.

59. BE has a long generation position, meaning that its production of electricity is higher than the electricity supplied to its final customers (exclusively I&C HH customers). The part of its generation output not sold to its I&C HH customers is sold either directly into the wholesale market or through "structured" long term contracts to other counterparties such as other generators or financial institutions. EdF has a short generation position: it produces less electricity than the requirements of its supply business, meaning that it has to procure a large part of its electricity needs from the wholesale market. Most of the respondents consider highly likely that, post transaction, the merged entity will have the ability to net-off these long and short positions: i.e. EdF would internalise its generation output, procuring electricity from BE generation, and therefore both the sales of BE and the purchases of EdF would be withdrawn from the wholesale market, hence reducing liquidity.

60. The generation and supply data provided by the parties confirm the fears voiced in the market investigation. In 2007, BE generation output was around 60 TWh out of which around 32 TWh were sold through long-term agreements/structured trades, the rest (around 27 TWh) being sold directly to its I&C customers. BE also has some trading activities in the wholesale markets amounting to around […] TWh. These are however purchases and sales mostly aimed at balancing its position at each moment on time or to cover unexpected outages/reductions in output of its generation portfolio.

61. EdF generates around 27 TWh and its supply can be split into nHH customers (around […] TWh), that it serves directly from its own generation, whilst it needs to cover its remaining sales of […] TWh to I&C HH customers through purchases from the wholesale market. Therefore, even if part of BE current generation is locked by long-term supply agreements/structured deals, as these contracts lapse EdF would have the ability to use part of BE's generation output to cover part of the demand of its I&C HH customers. In the medium term, BE's long-term agreements will all lapse and by […], if no new agreements are entered into, EdF would have access to all BE generation output.

62. The table below shows how the net position of the merged entity will evolve over the next years and compares it with EdF's expected I&C HH customers demand, which allows to verify to what extent the merged entity will be able to internalise its generation output. The net position is calculated on the basis of:

(i) the expected generation output of the combined entity, taking into account the current scheduled closures of BE's nuclear plants, EdF' new CCGT plant (West Burton B, […]) and assuming that BE's coal-fired plant at Eggborough remains with EdF[35].

(ii) the expected demand of EdF's nHH business, BE's I&C HH customers and BE's contracts.

Combined Entity Generation/Supply Balance	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**	**2017**
	TWh	**TWh**	**TWh**	**TWh**	**TWh**	**TWh**	**TWh**	**TWh**	**TWh**	**TWh**	**TWh**
EdF generation output (including PPA)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
BE generation output	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Combined Entity Generation Output	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
EdF nHH demand	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
BE I&C HH Demand	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
BE contracts	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Combined Entity Demand	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net Position (excl. EdF I&C demand)	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
EdF I&C demand	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Combined Entity Net Position	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

63. The above figures indicate that, despite the fact that the merged entity is not likely to be able to procure all its I&C HH customers ("EdF I&C HH demand") internally, there is scope for internalisation with respect to large amounts of generation output during the period 2011 to 2016. This is the case even if, in order to exclusively take account of the effect of the merger, the current […] TWh that EdF is not internalising are deducted from the "Net Position".

35 The Commission makes this assumption as there are still uncertainties as to whether or not certain banks that have a call option over this plant will exercise it.

64. In addition to the physical balance shown above, there is scope for further reduction of liquidity due to the combination of the trading activities of the parties. Prior to the concentration, BE and EdF trading activities to balance their positions through the OTC, APX or BM (i.e. fine tuning to match expected demand, buys or sells to hedge unexpected changes in output levels such as outages, etc) are carried out independently. Post merger, it is reasonable to expect that trades previously carried out between BE and EdF will not be in the wholesale market anymore as they would be netted off internally. An assessment of the trading activities between the parties shows that in 2007 there were around […] TWh[36] traded (purchased and sold) between the parties. Although it has been argued by the parties that this amount of trades is below what it would have normally been expected if the match between EdF and BE trades would have been the same as the average match in the marketplace, it has to be pointed out that this is not a negligible amount of trades (compared to EdF' trades of around […] TWh and to BE's trades of around […] TWh). In addition, it is also reasonable to expect that many trades occurred between EdF or BE and other parties are may be netted-off internally post merger due to the consolidation of their trading books.

65. Furthermore, in 2008 EdF has centralised almost all its trading activities in EdF Trading ("EdFT"). This implies that the trading orders of both the generation business and of the supply business (purchases to hedge the I&C demand) will be managed in the same trading book, increasing significantly the likelihood of internal netting-off of matching buy/sell positions.

66. It therefore can be concluded that the merged entity will have the ability to internalise at least large part of its generation output between 2011 and 2016 and to further reduce liquidity due to the consolidation of the trading book.

Incentives

67. A majority of respondents also consider that the merged entity would have the incentives to internalise BE generation. By internalising its production, the merged entity would be in a position to harm independent generators (generators of electricity with no supply business) who would see their customer base reduced significantly[37]. In addition, the merged entity may hinder the ability of its competitors downstream to find suitable products in the wholesale market to supply their customer base. In the medium to long term, this would translate into less competition both at wholesale and supply levels.

68. Some respondents have also mentioned that internalisation secures a route to market generation output and increases the certainty on future earnings as electricity procurement costs are also more certain. Moreover, it has been claimed by some respondents that flexible plants are better suited than base load plants to supply nHH customers (which is in fact reflected by EdF current strategy described above)

[36] Parties' information on their trading activities. Annex 19 of the Form CO and submissions of 18 November 2008 (BE) and 1 December 2008 (EdF).

[37] EdF currently has to source around […] TWh for its large I&C customers from the wholesale market which represents around [5-10]% of GB demand.

whereas baseload production corresponds more to the flat shape consumption of large HH customers. Accordingly, the merged entity could have an incentive to internalise BE generation to serve the portfolio of HH customers of EdF.

69. The Commission considers that most of the arguments put forward by the parties to justify different hedging strategies for nHH and for I&C HH customers explain why, if only one of the two groups of customers has to be supplied internally, nHH customers are better suited than I&C customers, but not why I&C HH customers *per se* are not commercially appropriate to be supplied internally.

70. EdF has argued (see section on 'EdF's view' above) that given that prices of I&C HH customers are normally referenced to the wholesale prices, there is an incentive to procure the electricity for these customers from the wholesale market as this secures a given margin during the duration of the contract. However, even if many I&C HH customers have flexible price mechanisms which allow customers to dynamically fix the price depending on how wholesale market prices evolve, there is a significant number of customers which have fixed prices, less exposed to variations in the wholesale prices and for which internal supply as opposed to back-to-back purchases from the wholesale market does not appear to be an obstacle: once the price is fixed, a certain margin can also be secured as generation costs (mainly fuel costs) are also hedged. For example, for EdF customers with annual consumption above […] GWh, around […]% (in volume) have fixed price mechanisms[38]. In addition, the fact that BE itself is supplying all its I&C HH customer base (both with flexible and fixed pricing mechanisms) internally and that this strategy, even if somehow dictated by BE's credit limitations to trade, has not prevented BE from being a strong and successful supplier to I&C HH customers, does not support the parties claim that, post merger, the less risky commercial strategy with respect to I&C HH customers is to procure all the electricity back to back from the wholesale market.

71. Again, other arguments such as the low number of customers in comparison to nHH customers or the fact that their annual demand is significantly higher do not permit the Commission conclude that it makes economically more sense to supply I&C customers back-to-back from the wholesale market if there is scope for internalisation. The fact that currently EdF is […] GWh long and that it does not internalise this volume to supply its I&C customers does not weaken this conclusion. This is because, given that the demand of EdF's I&C HH customers is around […] GWh, it appears reasonable to apply a single business model to all I&C HH customers rather than internalising a minority of them and not the rest. In addition, it has to take into account that, given that the hedging strategies of EdF […] it is normal that there is an imbalance to be put into the marketplace anyway.

72. The Commission recognises that the fact that contracts are for fixed periods of time may be important in deciding whether to hedge I&C HH customers from the wholesale market or internally. As the parties have pointed out to the Commission, the fact that, once these contracts lapse, there is no certainty that the customer will continue with the same supplier can increase the associated risk to hedging part of the generation output forward with this customer. The Commission considers however

[38] EdF submission of 21 October 2008, answer to Q.7.

that this would be particularly relevant only if the aggregated demand of I&C HH customers were to be much more difficult to be reasonably predicted as compared to the demand of nHH customers. An analysis of EdF and BE demand[39] in the graph below shows that this is not the case:

[…]

73. The graph shows that until 2003 the aggregated demand of HH customers has changed due to some gradual acquisition of consumers of BE and the takeover by EdF of a competitor at the end of 2003. The demand of nHH customers of EdF remained stable. Since the beginning of 2004, both the demand of nHH customers and the aggregated demand of HH customers have remained stable.

74. Furthermore, the risk of vertical integration and reduction in liquidity due to the new incentives of the undertakings vertically integrating has been recognised by most of the respondents and even by BE. A clear example of this recognition is BE's submission to Ofgem in the framework of its five year corporate strategy 2006-2011 of 30 September 2005, in which it stated that "…*Evidence suggests that the trend of VI* [vertical integration] *is having a distorting effect on competition in both generation and supply markets. / ..the internal contracting by VI players is inhibiting the ability of the wholesale market to function properly. This is evidenced by continued liquidity problems and the absence of effective paper derivative markets and limited pure trader activity.*"

75. On the basis of the foregoing, the Commission concludes that, post merger, the merged entity is likely to have incentives to supply its I&C HH customers internally, hence increasing significantly the risk of a reduction of liquidity in the wholesale market.

Estimate of the reduction of liquidity

76. The Commission has also attempted to estimate by how much liquidity may be reduced as a result of the merger. This is however a difficult exercise since a lot of factors play a role in the purchasing/selling decisions of the market participants (such as future hedging strategies that the merged entity would be likely to adopt in the future, availability of the power plants, type of products traded, volumes committed through long-term contracts, etc).

77. The estimates provided to the Commission by market participants indicate that potentially EdF may be able to internalise up to around […] TWh (compared to a total GB demand of around 350 TWh), which are EdF's current supplies to I&C HH customers, most of the times simply on the basis of the physical balance between BE long and EdF short positions. Other estimates are based on the pure netting off of the current trading activities of BE and EdF, leading even to a higher decreases in liquidity. However, these estimates do not take into account factors such as BE structured deals committed for the next years and that therefore cannot be internalised, changes in the expected output of the combined entity over the next

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[39] Source: Datamonitor, provided by the parties.

years and the limitations on the ability to internalise all the volumes theoretically available for internalisation derived from the hedging strategies that the merged entity can put in place after the merger.

78. The Commission has therefore asked the parties to provide an estimate of how liquidity may be affected if EdF were to internalise its generation output to supply its I&C HH customers, instead of purchasing the electricity from the wholesale market.

79. EdF has provided two estimates of how liquidity could be affected. The first one, consists in a model to simulate the impact on liquidity in case of internalisation of its generation output post merger. In doing so, EdF has assumed that its hedging strategy for its I&C HH customers […] should reflect how EdF is currently purchasing the volumes required for these customers in the wholesale market. EdF has suggested that this strategy would require EdF to hedge […]. The Commission has also made the simulation of an alternative scenario assuming a strategy with a degree of internalisation higher than the one proposed by the parties consisting in applying to I&C HH customers the strategy currently followed for nHH customers. The table below shows the results of the simulation and the impact that internalisation would have had on liquidity for the year 2007:

	2007 (TWh)
Wholesale market	926
EdF + BE trades pre-transaction	[…]
Merged entity's trades post-transaction with internalisation ([…])	[…]
Difference as a result of internalisation	[…]
Change in the wholesale market %	[…]
Merged entity's trades post-transaction with internalisation ([…])	[…]
Difference as a result of internalisation	[…]
Change in the wholesale market %	[…]

80. The above results are however conservative, as they do not take account the possible netting-off of buys and sells due to the combination of BE and EdF trading books. In particular, the parties have considered in their assumption that most of the around […] TWh currently traded by BE will continue to be traded after the merger (see paragraph 64).

81. EdF also provided an alternative estimate based on a methodology which seeks to calculate the level of trades (purchases and sales) performed by a player on the wholesale market compared to the actual physical generation output from its power plants and the actual delivery of electricity to its customers. This ratio gives an indication as to the extent to which the power generated or sold give rise to a trading activity on the wholesale market. On the basis of this methodology[40], EdF's estimate

40 Form CO, section 6.34.4, page 208.

is that in 2007 liquidity may have been reduced in a worst case scenario by around […] TWh, or [5-10]% of the OTC market. This effect can however be even more significant taking account of the fact that part of BE's current structured deals are with financial institutions who are likely to be, in turn, trading at least part of these purchases. Therefore, the internalisation of these volumes would likely lead to a reduction of trades higher than the physical volumes internalised. This effect would also be larger because the assessment of the parties is not taking into account the fact that the volumes of generation of BE that the merged entity would not internalise would be traded several times in the market.

Conclusion

82. On the basis of the above considerations, the Commission considers that the merged entity will have post transaction the ability and is also likely to have the incentive to internalise power generation output that absent the merger would have been traded in the wholesale market, leading to a decrease of liquidity. Given the negative effects that a reduction of the level of liquidity is likely to have on competition, the Commission has serious doubts as to the compatibility of the transaction, as initially notified, with the common market.

a.3) Impact on transparency

83. A specific effect of the merger, reported by some market players, is that BE currently, as a nuclear-only supplier and quoted on the UK stock markets, has been obliged to publicly report planned outages of its power plants, thereby creating transparency for other players. There is a fear that EdF would not be under any such obligation, which could indeed create an additional competitive advantage for the merged entity over its competitors, including as regards its ability to successfully implement the above described types of behaviour.

84. However, the Commission has ascertained that the disclosure regime applicable to the CVRs / Notes will require the disclosure to the market of factual information on output and availability of the existing BE nuclear fleet that is substantially consistent with the factual information on output and availability that BE is currently required to disclose pursuant to its obligations as a listed company. Accordingly, key information concerning the availability and output of the existing BE nuclear fleet will continue to be required to be made available, which will facilitate market transparency.

B) RETAIL SUPPLY OF ELECTRICITY TO INDUSTRIAL AND COMMERCIAL CUSTOMERS

1. Product market definition

85. In the past, the Commission has identified separate product markets for large and small customers. In ENI/EDP/GDP[41], for Spain and Portugal, the Commission distinguished between i) large industrial customers which are connected to high and medium voltage and ii) smaller industrial, commercial and domestic customers which are connected to the low voltage grid.

86. For Great Britain, the Commission has previously distinguished between i) customers with a maximum demand of 100 kW and above and ii) customers with a maximum demand below 100kW. Following liberalisation, in EdF/Seeboard[42], although the market definition was left open, the market investigation indicated that the retail electricity market could be sub-divided between three categories, i) domestic customers, ii) smaller industrial and commercial customers (SMEs) which do *not* use "half hourly rates" (ie, do not have their electricity consumption automatically measured every half an hour) and iii) large industrial and commercial ("I&C") customers which *do* use half hourly rates.

87. The parties submit, contrary to the possible segmentation mentioned in EdF/Seeboard that the relevant product market is *the broader market for supply of electricity to all industrial and commercial ("I&C") customers*, encompassing supply to both half hourly (HH) and non-half hourly (nHH) rates. The market investigation however clearly supports the subdivision of the retail electricity market as between (i) domestic and commercial ("I&C") and, (ii) within I&C, between I&C customers on half hourly rates ("I&C HH") and those on non half hourly rates ("I&C nHH).[43]

2. Geographic market definition

88. As proposed by the parties, the market investigation supports the definition of the relevant geographic market to be Great Britain (England, Scotland and Wales, excluding Northern Ireland) as this area is regulated by BETTA and therefore similar conditions of competition apply.[44] The vast majority of respondents to the market investigation have agreed with this definition. Therefore the Commission considers the relevant geographic market to be Great Britain.

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[41] Case M.3440 *ENI/EDP/GDP*

[42] Case M.2890

[43] Market division also supported by the market investigation in case M.2890- EdF/Seeboard.

[44] This is in line with M.4517 –Iberdrola/Scottish Power. Two competitors have highlighted the interconnector with France (2 GW capacity) and have suggested the Commission examine the merger in the context of a developing EU energy market. One customer has suggested that the market is regional on the basis that that certain suppliers only supply in certain regions which leads to those regions having a small number of very dominant suppliers. According to one competitor it is the case for historical reasons, linked to companies taking over distribution networks, that certain suppliers have higher market shares in some regions than others. A few competitors raised the issue of physical transmission constraints arising between Scotland and the rest of Britain. However, only one submits that this should result in Scotland being treated as a separate geographic market.

3. Competitive Assessment

89. Whereas EdF is active in the retail supply of electricity to all categories of customers including domestic households, BE is active in the supply of electricity to I&C customers only. As such, the only overlap between the parties is in relation to the supply of electricity to I&C customers.

90. Within the category of I&C customers, each party is active in the markets for both non-half hourly and half hourly rates.

91. As regards I&C nHH customers, the parties have a combined share of [10-20]% by volume with a very minor increment of [0-5]% attributable to BE. The transaction will not lead to competition problems in this market, given the relatively low combined market shares and the minor increment resulting from the transaction. The market investigation did not identify any serious doubts for this market.

92. As regards I&C HH customers, the transaction will lead to a combined market share of [30-40]% by volume, with an increment of [10-20]%. The parties' most important competitors in this regard are RWE ([10-20]%), SSE ([10-20]%), E.ON ([10-20]%), Gdf ([5-10]%), Iberdrola ([0-5]%), and Centrica ([0-5]%). In addition some other smaller competitors exist with a combined market share of around [5-10]%. The post-merger HHI would therefore be […]with a delta of […].[45]

93. As a result of the proposed transaction the combined entity will therefore become the undisputed market leader in the GB market for retail supply to I&C HH customers, which are the large business customers.

94. Within this market, it has been submitted that the parties compete on different segments of the customer market. In particular it is submitted that whilst EdF focuses on the multi-site customers consuming lower volumes, BE focuses on very large high volume consuming single site customers. In this respect, the parties submit that they are not close competitors by reference to both the average consumption per site and to the respective number of customers versus total volume. In fact, when comparing BE's and EdF' number of customers and the their corresponding demand, the result is that BE supplies a volume of around […] TWh to around […] customers - average demand of […] GWh per customer and […] GWh per site – while EdF supplies around […] TWh to about […] customers - average demand of […] GWh per customer and […] GWh per site.

95. Ofgem has also highlighted the possibility of segmenting the I&C customer base into further sub-segments. In line with data gathered by Datamonitor, these sub-segments have differing customer characteristics based on expenditure, consumption and number of sites within a portfolio. According to this data, the transaction would lead to the parties having a dominant position in the "Super Major" sub-segment of the

[45] This clearly exceeds the relevant thresholds considered as indicative of competition concerns by the Commission in the Guidelines on the assessment of horizontal mergers (HHI above 2000 with a corresponding delta of 150 or more).

market, with overlaps also in the "Large-Sites Group" and "Intensive".[46] However these are considered to be sub-segments of the I&C markets, rather than product markets in themselves.

96. In this regard, many of the respondents to the market investigation specified that they consider that there are sub-segments within the I&C markets, related in particular to volume consumption and number of sites. Some customers indicated that there is a correlation between this and the level of flexibility in the products offered by suppliers. However, for the most part such respondents consider these to be sub-segments of the HH/ non HH product markets rather than product markets in themselves.

97. The market investigation clearly supports the contention that within the I&C HH market, the parties are focused on the different segments mentioned in paragraph 94 above. This means that although both companies are active in the same market, they focus to a large extent on different types of customer, and are therefore unlikely to exert a particularly strong competitive constraint on each other.

98. In terms of the substitutability of the products offered by the parties, in general terms, customers consider that in comparison to EdF, BE has a smaller and simpler range of products that are easier to manage. EdF has a broader range of products with more features and therefore considered by some to be less easy to manage. As such, the products are not considered close substitutes. On the other hand, replies to the market investigation have indicated that the products offered by EdF are similar to those offered by the other integrated competitors on the market. In line with paragraph 28 of the Commission Guidelines on the Assessment of Horizontal Mergers, the merged entity's incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merged entity than when they offer less close substitutes.

99. In response to the market investigation, certain customers voiced concerns about the possibility of the transaction leading to the withdrawal of a certain product currently offered only by BE and not offered by EdF or other vertically integrated suppliers on the market. In particular BE offers a product which allows a customer to fix price as a percentage of estimated consumption in a given period. By comparison, the most comparable flexible product offered by EdF allows a customer to fix price for a given block of electricity (5 to 10 MWh) combined with a sell back option.

100. Whereas it may be preferable for certain customers that the combined entity to continue to offer the BE product in question, EdF has offered an objective reason as to why it would not be possible to do this. In particular as EdF maintains that it will extend its policy of sourcing electricity for I&C HH customers back to back from the wholesale market rather than internally, as currently done by BE, it must first buy the electricity in blocks available on the wholesale market before it can provide this to customers. As its business model is to source for this category of customer on a “back

46 [50-60]% (+[0-5] BE) by site, [50-60]% by volume for "Super Major", [20-30] % (+[0-5]) by site, [20-30]% (+[10-20] BE) by volume for "Large Sites" and [10-20]% (+[0-5]) by site, or [20-30]% by volume (+[5-10] EdF) for "Intensive". These three segments taken together rare considered to correspond to the HH I&C market.

to back" basis, it maintains that it would be difficult to offer electricity on a non-block contracting basis as a standard product. However, EdF does not exclude doing so on non-standard terms in specific cases. Furthermore, it has submitted certain evidence that BE has already capped the volume a customer could fix in any given period to 20 MWh.

Conclusion

101. Whereas the combined entity will with a combined market share of [30-40]% be the undisputed market leader in the supply of electricity to I&C HH customers, the Commission considers that EdF and BE are not particularly close competitors and that the remaining competitors active in the market, particularly E.ON, RWE and SSE are sufficient to ensure that competition will be maintained in the market. For these reasons, the Commission does not consider the transaction to give rise to serious doubts on the GB HH I&C market.

OTHER MARKETS

C) IMPACT ON AVAILABILITY OF SITES FOR NEW NUCLEAR BUILD

102. Post merger there will be a high concentration in the ownership of sites most likely to be suitable for a first wave of new nuclear build given that the merged entity will hold, or will have some influence on the development, of seven out of nine (or seven out of ten) such sites.[47]

103. The Commission has also looked at the question of whether the merger can have any negative effects on the nuclear reactor technology market. The market investigation has not brought up any evidence which suggests that EdF,or any other third party which may be interested in investing in new nuclear build in the UK, would be foreclosed in their choice of nuclear reactor technology as a result of the merger.

1. Product market definition

104. The UK Government has adopted policies on energy and climate change which include its support for nuclear new build as part of the electricity mix for the UK[48]. Whilst for the wholesale electricity market no distinction is made between the different sources of electric energy,[49] the Commission considers that in light of the

[47] In the Form CO the notifying party lists ten sites in England and Wales which in its view are the most likely candidates for a first wave of new nuclear build ("NNB"). These sites comprise land close to the existing nuclear reactors. [Information submitted to the Commission which indicated that the number of sites could in fact be nine instead of ten]

[48] The UK Government January 2008 White Paper on Nuclear Power states that new nuclear stations should have a role to play in the country's future energy mix alongside other low carbon sources. The Government, in that paper also concludes that new nuclear power stations could make a material contribution to tackling climate change.

[49] Gas fired, coal fired, nuclear, hydroelectric power stations, wind farms or others.

particularities associated with the procedure for designating specific sites as suitable for the construction of nuclear new build[50] and of the special characteristics of such sites[51], there is a separate product market akin to a real estate market for sites considered suitable for building new nuclear power stations. This market can include only a limited number of sites. As the UK Government noted in its 2008 White Paper[52], nuclear new build is expected to be on areas in the vicinity of existing nuclear facilities rather than on non-nuclear sites. In the consultation process leading to that White Paper, industry has indicated that these are the most viable sites for early nuclear development[53] because of such factors as the availability of land, the distance from large population centres and support of local communities[54].

105. A majority of respondents to the market investigation agree that there is a separate product market for sites most likely to be used for new nuclear new build given the specificities of such power plants. In addition the market investigation supports the view that the most commercially attractive sites for a first wave of new nuclear build are those which are already used for nuclear generation.

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50 The UK Government has adopted a Strategic Siting Assessment (SSA) procedure with a view to establishing a list of suitable sites to be included in a National Policy Statement (NPS). The SSA will assess which nominated sites are strategically suitable. The Government is currently conducting a consultation on the criteria that should be used to assess the suitability of sites. Following confirmation of the criteria in 2009, sites which pass the assessment will be listed in the NPS which is expected to be published in early 2010. Sites listed in the NPS will then have to receive planning consent before the building of a reactor. Parties will be able to make planning applications after the NPS is published. The Government expects that planning applications will be approved by the relevant regulatory authorities only for sites approved through the SSA and listed in the NPS.

51 See the Jackson Report, report conducted by Jackson Consulting for HM Government to assess the siting of new nuclear power stations. That report stresses that the process of site selection involves striking a reasonable and appropriate balance between several competing factors. According to this report, these factors might include enabling criteria (e.g availability of land for nuclear station development, cost effective access to the grid and availability of cooling water supplies), avoidance criteria (e.g coastal erosion and flooding vulnerability, proximity to population centres and to environments protected from development) and exclusion criteria (e.g close proximity to airports, residential and industrial premises).

52 Meeting the Energy Challenge: A White Paper on Nuclear Power, January 2008 CM 7296, see pages 127-129

53 The present analysis focuses on a first wave of nuclear plants to be built and put in operation in the next ten to fifteen years. There may be further development afterwards but this has not been considered relevant for the present analysis.

54 See also the Jackson Report at page 27 which states that although in principle, new greenfield sites' could be chosen to locate a nuclear power station, any new capacity should almost certainly be developed first at one of the existing nuclear sites that are likely to become available for reuse.

2. Geographic market definition

106. Given that nuclear power plants are to supply electricity into electricity wholesale markets, the geographic scope of the real estate market for the build of new nuclear power stations cannot be larger than national. First wave new nuclear build within the UK will be confined to sites deemed suitable under the terms of the Strategic Siting Assessment ("SSA") and thereafter listed in the National Policy Statement ("NPS"). This assessment is theoretically national. However, currently, the Scottish authorities are not in favour of new nuclear build in Scotland and can legally prevent the building of such plants on their territory. For the purposes of this decision it can be left open however whether the market should be defined as including only those potential sites in England and Wales or whether it would be broader further to the issuance of the NPS given that the transaction, as modified by the commitments entered into by EdF, will not raise serious doubts as to its compatibility with the common market under any alternative.

3. Competitive Assessment

107. In 2008, the UK Government issued a White Paper in which it openly supports the construction of new nuclear power capacity and in this regard it launched a facilitative programme which includes a SSA which will assess which sites are suitable for a first wave of new nuclear power stations leading to a NPS by early 2010. The NPS will list those sites deemed suitable. Accordingly, interested third parties will be able to apply for planning permission for new nuclear build at the potential sites from 2010 onwards.

108. The market investigation carried out by the Commission identified nine to ten sites which are most likely to be part of the NPS and thus be suitable for a first wave of new nuclear build in the foreseeable future[55]. Out of these potential sites for a first wave of new nuclear build, currently five[56] belong to BE while three sites (Oldbury, Sellafield[57] and Wylfa) belong to the Nuclear Decommissioning Authority ('NDA')[58] and land at one site (Bradwell) belongs partly to the NDA and partly to BE[59]. It should also be noted that EdF has for some time now purchased land next to NDA's land at Wylfa and land next to BE's Hinkley site. According to the Government and

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55 Although it is not theoretically excluded that additional "Greenfield" sites may eventually be developed, the market investigation carried out by the Commission confirmed that they are not likely sites for a first wave of nuclear power plants and are therefore not relevant for the purpose of this analysis.

56 Hinkley, Sizewell, Heysham, Hartlepool and Dungeness.. Land next to BE's Hinkley site is owned by EdF.

57 As indicated by the UK government, Sellafield is complex site with many problematic issues and thus it would take longer to bring to the market. However, as noted by EdF, although the NDA has not yet made any public announcement regarding when it will be auctioned, the NDA has indicated that it will nominate this site for consideration in the SSA process.

58 The NDA is a non-departmental public body, established under the Energy Act 2004 and it is responsible for the decommissioning and clean-up of the UK's civil public sector nuclear sites.

59 At Bradwell, some of the potential new build land is owned by the NDA and some land by BE. A rational development of that site for new nuclear build is expected to include both the NDA and the BE land. The NDA is expected to auction its land at Bradwell in the next months.

to the views of competitors part of the land owned by EdF at Wylfa is essential for the most rational and economical development of the NDA owned Wylfa site.

109. The transaction would give rise to dominance by the combined entity over the market for sites most likely to be used for a first wave of new nuclear new build.

110. The vast majority of respondents to the market investigation have voiced concerns in relation to the potential dominance of the merged entity in the market for new build nuclear sites. These concerns related in particular to the potential competitive effects of this dominance in sites on the related market for generation and wholesale supply of electricity given the comparative competitive advantages associated with the holding of, and/or with dominating, nuclear generation in the GB market. In accordance with the results of the market investigation, the advantages for a generator which has nuclear generation as part of its portfolio can include inter alia the relatively lower carbon dioxide emission costs and comparatively lower exposure to fuel prices, as well as the fact that a generator dominant in the production of electricity from nuclear can be subjected to lower competitive constraints during low demand hours. It was also noted that dominance in nuclear sites most likely to be used for a first wave new build can potentially raise further competitive concerns if there is an increase in the proportion of nuclear generated electricity in the GB market in the medium to long term, in particular considering the UK and EU policies for lower carbon emissions.

111. EdF submits that there should not be competitive concerns post merger with regards to ownership of sites. First, EdF states that the overlap in sites ownership is not a substantial one given that EdF only owns land adjacent to two of the existing nuclear power stations. Second, EdF argues that it has entered into a Sites undertaking with the British Government and a Simultaneous Marketing Agreement (SMA) with the NDA which can make available to competitors of the merged entity a number of potentially suitable new build sites.

112. The Sites undertaking is an agreement between EdF and the UK Government, which is conditional on the offer of EdF for BE being accepted by shareholders and authorised by competent authorities. This sites undertaking requires EdF, in certain circumstances, to dispose of specified areas of land adjacent to or near existing nuclear sites, including land currently owned by BE. Moreover, EdF has entered into a SMA with the NDA, which is also conditional upon the offer for BE being accepted by shareholders and authorised by competent authorities. Under this agreement, the NDA will offer through a competitive auction its lands at Bradwell, Oldbury and Wylfa and at the same time EdF will offer its lands at Wylfa. The content of these agreements is summarised in the table below.

Sites which can be made available to 3rd parties for a first wave of nuclear new build (divested from BE/EdF or auctioned by theNDA)	**Owner (s)**	**Key Conditions associated with the divestitures/auctions following the Sites Undertaking and the Simultaneous Marketing Agreement**
Wylfa	NDA-	NDA and EdF part to be auctioned together - EdF is prohibited from bidding for more Wylfa land. Wylfa I lot will include EdF

	EdF	and NDA land, while Wylfa II lot will only include land owned by EdF. EdF will complete sale of its land at Wylfa only if NPS list included possibility for two EPRs at each of Hinkley and Sizewell and one at Bradwell.
Bradwell	NDA- **BE**	NDA land will be auctioned but **EdF can** bid for it. EdF will have to sell BE's land at Bradwell and any land it acquires in the auction of the NDA Bradwell land, only if the SSA/NPS are in place for Sizewell and Hinkley and planning permission is in place for 2x EPRs at Sizewell
Heysham or Dungeness	**BE**	EdF will have to divest (by sale) one of these two only if planning permission for 2 x EPRs[60] at each of Sizewell and Hinkley is granted.
Oldbury	NDA	To be auctioned by the NDA , but EdF cannot bid for it (at a later stage Sellafield NDA site can also be auctioned but this would take time as it is a complex site)

113. In essence, EdF argues that the Sites undertaking and the Simultaneous Marketing Agreement, will facilitate new nuclear build competition by freeing up potentially suitable land. As a result of the Sites Undertaking, and along with the SMA, a number of suitable sites can be made available to competitors, if the merger proceeds. These sites could include, subject to certain conditions contained in these agreements being satisfied, the land of EdF at Wylfa (Lots I & II), BE's land at Bradwell, any land acquired by the merged entity at the NDA auction at Bradwell and one of BE's Heysham or Dungeness sites. In addition further to the SMA, the NDA would auction its land at Wylfa , Bradwell and Oldbury. Moreover, it is argued by EdF that this scenario is preferable to the counterfactual situation, whereby BEwould probably attempt to develop its sites piecemeal through joint ventures.

114. On the other hand, as noted by third parties in response to the market investigation, as a result of the merger and the conditions contained in the SMA and in the Sites undertaking for the release of sites by EdF, new entrants can be put to a time disadvantage and can face higher risks.

115. In terms of the counterfactual (absent the merger), considering the high number of sites in the hands of BE and given the fact that BE lacked the resources to develop at least a majority of these sites on its own, it is likely that BE would have opted for a joint venture approach. This is confirmed by a number of market participants who were already in talks with BE for that purpose. Moreover BE would have had a strong incentive to sell land both with a view to raising capital and in order to ensure shareholders' better returns.

60 European Pressurized water Reactor, the new-generation Areva design nuclear power plant model that is also under construction in Flammanville, France and Olkiluoto, Finland

116. As a consequence the market for sites for new nuclear build would be significantly altered by the merger in so far as it removes many possibilities for competitors of the merged entity to acquire such sites.

117. First, it is worth noting that the Sites undertaking could potentially delay the development of the Bradwell and Dungeness/Heysham sites compared to a joint venture scenario as the release of land by EdF is contingent on EdF obtaining the necessary consents and planning permission on other developments. This could clearly have the effect of preventing or delaying entry by other parties by the period it takes to obtain planning permissions and consents in place.

118. Second, the merged entity will have the ability to control the timetable for release as there is no obligation that it applies immediately for planning consents for two reactors at each of Sizewell and Hinkley or that it should take a proactive approach with a view to pursuing and completing these processes in parallel[61].

119. Third, as proven by the response to the market investigation, the inherent uncertainty about the scope and timing of release (and which sites would in fact be finally released) are likely to act as disincentives on competitors investing in the considerable up-front planning work involved. This uncertainty may also deter them from bidding for NDA sites while uncertainty remains around the adjacent BE sites.

120. Fourth, third parties have alleged that it is unreasonable to allow EdF to bid for the NDA Bradwell site which will be auctioned by the NDA when in fact the aim of the Sites undertaking is to reduce the concentration of sites in the hands of the merged entity rather than to increase it.

121. Finally, it should be borne in mind that the parties to the concentration (EdF-BE) were in fact in a very good position to compete with each other in new nuclear build in the UK in the absence of the merger. EdF has already acquired land potentially suitable for nuclear generation in the UK at Wylfa and at Hinkley, it already holds connection agreements which could support a nuclear reactor at each of these two sites and clearly is an experienced nuclear operator.

Conclusion

122. On the basis of the above considerations, the Commission has serious doubts as to the compatibility of the transaction, as initially notified, with the common market.

D) Competitive assessment on Connections

123. A related concern expressed by third parties in the course of the market investigation related to the number of connection agreements held by both EdF and BE respectively, at specific locations, which could potentially foreclose the opportunity of competitors to connect new power plants (nuclear or otherwise) to the grid. It was specifically claimed by third parties that the combined entity would hold a large

61 [Details on EdF's strategy to apply for planning permissions]

portfolio of connection agreements for getting access to the transmission network which may hinder other generators ability to develop new power generation plants in Great Britain. With respect to the merger specific elements regarding connection agreements, the Commission has identified an overlap between EdF and BE at Hinkley allowing the merged entity to hold connections for three nuclear reactors at that location, when in fact the intention of the merged entity is to only develop two nuclear reactors at that location.

124. This overlap at Hinkley can indeed raise serious doubts to the compatibility of the transaction, as initially notified.

125. It has further been claimed by third parties that certain connections held by EdF and/or BE could be speculative grid connections in the sense that EdF cannot reasonably be expected to build a power plant at all locations where it holds a Grid connection and/or that the agreed dates of connection are too optimistic. EdF has emphatically denied these allegations and stated that these connection requests are not speculative as they are all linked to land currently owned by EdF or BEand associated with credible generation projects. Moreover, following enquiries with the relevant regulatory authorities, the Commission takes the view that there are regulatory measures in place which can address this issue in the scenario that an operator does not connect or is not expected to connect within the agreed date. In any case, the Commission takes the view that this is not a merger specific issue.

Conclusion

126. On the basis of the above considerations, the Commission has serious doubts as to the compatibility of the transaction, as initially notified, with the common market.

D. PROCUREMENT OF NUCLEAR FUEL

1. Product market definition

127. As both parties have nuclear generation facilities within the EEA[62] and the procurement of nuclear fuel takes place on either worldwide or EEA markets, there is an overlap between the parties in this area with respect to their purchases of nuclear fuel products and services.

128. As described by the parties, the procurement of nuclear fuel is comprised of four stages; i) procurement of uranium, ii) conversion services, iii) enrichment services and finally iv)fuel assembly services[63]. Whereas for AGR nuclear generators BE

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62 BE is active only in the UK. EdF has no nuclear generation facilities in the UK, but has 58 nuclear facilities in France.

63 Fuel assemblies are used as the delivery device for the integration of nuclear fuel into the core of the nuclear reactor. They are composed of a metallic structure and a certain number of fuel rods that contain the fuel pellets. In Case M.1940 Framatome/Siemens/Cogema/JV, the Commission found that there is a separate market for the supply of Fuel Assembly fabrication for "western type design PWRs.

purchases these services as a single package, for PWR technology both parties purchase these services separately. For the purposes of this decision, each of these processes is treated as a separate market.

2. Geographic market definition

129. As regards Fuel Assemblies, the parties submit that because of the difficulty in transporting them that there are three geographic segments to this market; America, Europe and Asia. In the 2000 Framatome case[64] a market investigation found indications that the relevant market was not wider than the EEA, in particular that prices differ between world regions on average between 25-35%. This was partially confirmed by an investigation in the Toshiba/Westinghouse case[65], where competitors highlighted the existence of significant barriers to import into Europe and relatively high custom duties on fuel assemblies.

130. As regards the markets for procurement of uranium,[66] conversion and enrichment services it has been submitted that these are worldwide.[67] As regards conversion and enrichment services, the response of market participants has been mixed however.

131. For the purposes of this case, the market for the procurement of uranium is considered to be worldwide and the market for procurement of PWR fuel assemblies to be EEA wide. The definition of the relevant geographic markets for the procurement of conversion and enrichment services can be left open as on any definition considered the transaction does not give rise to any serious doubts.

3. Competitive Assessment

132. The parties´ activities overlap horizontally in the markets for procurement of uranium, conversion and enrichment services. The combination of EdF and BEfor each of these markets on a worldwide basis accounts for less than 15%, with an increment of about [0-5]% and as such would not raise serious doubts.

133. If the relevant markets are EEA wide as previous market investigations have suggested[68], the market shares would be higher however. On an EEA wide basis - for procurement of conversion services the parties would have a combined share of the relevant procurement market of [30-40]%, with a minor increment however ([0-5]%). As regards procurement of enrichment services, the parties would have a combined share of about [40-50]%, with a small increment of [0-5]%. In this respect it has been submitted that the parties could not easily consolidate their procurement post

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64 See footnote 29

65 Case M.4153 – *Toshiba/Westinghouse*

66 Uranium is sourced from undertakings who mine it from various regions throughout the world.

67 In 2007 39% of EU demand for enrichment services was sourced from outside the EU.

68 In Case M.3099 – Areva/Urenco/ETC JV, there were indications that the geographic market for the *supply* of enriched uranium was the EC.

transaction due to their respective procurement processes/schedules for renewing purchase contracts.

134. In relation to the procurement of Western Style PWR fuel assemblies, the transaction would lead to a combined European market share of approximately [60-70]%, with a minor increment of [0-5]% attributed to the fact that BE owns only one PWR station.[69]

135. BE currently procures its fuel assemblies for its PWR from Areva[70], EdF procures from both Areva and Westinghouse-Toshiba. These suppliers currently have a duopoly on the relevant market. Mitsubishi is considered to be a potential new entrant, although it currently has no qualified and licensed product in Europe. It is considered that a new entrant to the market would need between 3 to 5 years to undergo the necessary testing procedures and to obtain the required authorisations by the relevant bodies before being in a position to offer its product to customers.[71]The limited number of suppliers in the markets for nuclear fuel suggests that these suppliers pose a countervailing market power, something which the market investigation did not dispute.

Conclusion

136. It is therefore considered that in view of the small increment in the combined parties' procurement which results from this concentration and the suggested countervailing power of the limited number of suppliers, there are no serious doubts in the nuclear fuel markets.

F) CARBON TRADING

1. Product market definition

137. The parties submit that the relevant market for CO2 allowances includes both EU allowances ("EUA's") issued for trade under the EU Emission Trading Scheme ("EU ETS")[72] and Certified Emission Reductions ("CERs")[73] issued under the global mechanisms set up by the Kyoto Protocol. In October of this year the EU Carbon Registry is connecting to the UN's international transaction log. This will allow the free exchange of CERs within the EU and according to the parties spur further swap trade from EUAs to CERs.

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69 Both parties are active in the procurement of PWR fuel assemblies, given that EdF operates 58 PWR reactors in France and BE operates one PWR reactor (Sizewell B) in the UK.

70 Whereas it procures its fuel assemblies for its AGRs from Westinghouse.

71 Case M.4153 - *Toshiba/Westinghouse*

72 EUAs are allocated on the level of the EU member states to individual undertakings and can be traded amongst each other under the terms of the EU ETS.

73 CERs are project based carbon credits which may be considered in terms of contracts.

138. According to information submitted in a previous case, whereas CERs are substitutable with EUAs from a compliance perspective, the principle of supplementarity[74] means that the use of CERs is limited to between 8% to 12% of the total amount of EUAs allocated to a party.

139. In any case, the issue whether CERs should be included with EUAs in the relevant product market, which is EU wide in scope, may be left open.

2. Geographic market definition

140. The parties agree with prior Commission practice that the relevant geographic market is the EU carbon emissions trading market, which has been established under the EU ETS.

3. Competitive Assessment

141. The parties would have approximately [10-20]% between them on the market for EUAs and as such it is technically affected. However, the increment added by BE's trades in carbon is small. On an EU wide carbon trading market encompassing both EUAs and CERs, the parties would have less than [10-20]% combined.

Conclusion

142. It is considered that the concentration does not raise serious doubts for this product market.

ii) Vertical relationships

143. With respect to vertical relationships, potentially affected markets concern: the generation and wholesale market, retail supply of electricity to I&C (nHH and HH) customers and EdF's regulated distribution networks in London, South East and Eastern regions.

G) GENERATION AND WHOLESALE/RETAIL SUPPLY OF ELECTRICITY/DISTRIBUTION NETWORKS

144. The combined entity would be vertically integrated as between the generation and wholesale supply of electricity (combined share of [20-30]% by capacity or [20-30]% by output,), the retail supply to all classes of end user ([20-30]% by demand volume)([30-40]% I&C HH customers) and the distribution of electricity in London, the South East and Eastern regions (100%).

145. As such, the question arises of potential input or customer foreclosure through the transaction's strengthening of the combined group's vertical integration.

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74 The supplementarity principle is found in three articles of the Kyoto Protocol, articles 6 and 17 with regard to trading and article 12 in relation to the clean development mechanism.

146. The only relevant markets with a combined market share in excess of 30% are those for the retail supply of electricity to I&C HH customers ([30-40]%) and the distribution networks in London, the South East and Eastern regions (100%).

147. The market investigation has indicated that certain customers are concerned that the combined entity could foreclose upstream competitors in the market for generation and wholesale of electricity from access to downstream suppliers actively purchasing in the wholesale market. This is related to concerns about the potential for a reduction in liquidity on the wholesale market, which has been addressed above.

148. As regards the retail supply of electricity to I&C HH customers, the merged entity would not have a sufficient basis to be able to foreclose access to customers for upstream competitors in generation and supply. On the downstream customer market, the merged entity would continue to compete with several large integrated players with healthy market shares, i.e.; RWE ([10-20]%), SSE ([10-20]%), E.ON ([10-20]%), Gdf ([5-10]%), Iberdrola ([0-5]%), and Centrica ([0-5]%). In addition, the increment to the I&C HH market share brought by the addition of BE is already supplied directly by internal BE generation. As such, access to customers in this market will not change as a result of the merger.

149. Downstream from the market for generation and wholesale of electricity and upstream of retail supply of electricity to is the separate market for distribution of electricity. Whilst BE is not active in distribution, EdF owns and operates three distribution networks in Britain, namely those in London, the South East and Eastern regions. These are natural monopolies in the areas they cover. However they are regulated under licence conditions monitored by OFGEM, which provide for third party access rights for all licensed suppliers under fair and equitable conditions in accordance with regulatory price control. They are also obliged to offer connection on fair terms to anyone seeking connection to the distribution system.

150. There are no further vertical relations between the parties where either or both parties would have a market share in excess of 25%.

Conclusion

151. It is considered that the concentration does not raise serious doubts in relation to the above vertical relations.

VI. Remedies

A. Procedure

152. In order to address the serious doubts as to the compatibility of the transaction, as initially notified, with the common market, identified by the Commission, EdF submitted on 3 December 2008 a remedy package consisting in a) the unconditional divestment of the Eggborough Power Plant and an auction of baseload electricity, b) the unconditional divestment of a site at either Heysham or Dungeness and c) the termination of one of the combined entity's grid connections at Hinkley Point. The Commission carried out an extensive market test among the parties' competitors and customers to assess the effectiveness of the remedy package to remove the competition concerns identified. With a view to incorporating comments and suggestions expressed by market players as regards the first remedy package, EdF submitted on 18 December 2008 a revised remedy package comprising i) the divestment of both the Eggborough and Sutton Bridge power plants, the latter subject initially to a […] year tolling agreement with a third party, ii) a commitment to trade [25-35] TWh externally over the course of 4 years as either structured trades or on the OTC market,[75] iii) the unconditional divestment of either Heysham or Dungeness, as the purchaser chooses and iv) the termination of one of three National Grid connection agreements it holds in relation to Hinkley Point.

153. The Commission has assessed the improved remedy package and has concluded that it is sufficient to remove the identified serious doubts. The Commission therefore concludes that the remedy package, as revised on 18 December 2008, is sufficient to remove the competition doubts brought about by the proposed transaction.

B. Description of the revised remedy package

i) Withholding

154. As offered on 3 December 2008, and again in the revised commitments on 18 December, EdF undertakes to divest BE's coal-fired plant at Eggborough**.** This is subject to the Eggborough Banks' option to take ownership of the Eggborough power station on […]. Should the Eggborough Banks decline to take this option, EdF has undertaken to divest the plant to an independent third party within a specified time frame. The Eggborough Banks can also sell on this option to a third party, subject to a pre-emption right in favour of BE, which EdF has undertaken not to exercise.

155. Respondents to the market test have found that the divestiture of Eggborough would not be sufficient to address competitive concerns in relation to the existence of a significant incentive for the combined entity to withhold capacity. In addition to the divestment of Eggborough, EdF has thus offered to divest the Sutton Bridge power plant fully within the next […] years. A longer period than usual is required for the

75 [0-10], [5-15], [5-15], [0-10].

divestiture of that plant in order to address the specific situation of the plant. Prior to this divestiture and within […] months of completion of the transaction, EdF undertakes to enter into a Capacity Tolling Agreement, giving access to the unhedged future output of Sutton Bridge power station to a third party until the plant is divested and thus preventing potential serious doubts in relation to withholding by the combined entity in such a period. Such a tolling agreement […] it is foreseen to last […] years, a period after which the plant will have been transferred to a third party (divestiture).

ii) Impact on liquidity: effects in the wholesale and supply markets

156. Many respondents to the market test for the initial proposal for an auction of [0-5] TWh per year also found that an auction would distort trading. EdF has accordingly proposed an alternative mechanism whereby the amounts would be assigned to a separate trading book under the supervision of a trustee. This would make sure that the corresponding amounts of energy would be handled in a similar way as any other amounts on the market, thereby contributing simply to liquidity. The trustee would also make sure that these amounts are not directly or indirectly traded intentionally with the merger entity thereby circumventing the objective to avoid vertical integration.

iii) Access to nuclear new build sites.

157. As originally proposed, EdF offers a commitment to enter into a sale and purchase agreement by […] for the sale of either the Dungeness Land or the Heysham Land, together with any grid connection rights to an independent operator on terms of sale approved by the Commission.

iv) Grid connections overlap at Hinkley

158. As originally proposed, EdF offers a commitment to terminate one of the three bilateral connection agreements between National Grid Electricity Transmission plc (NGET) on the one hand and EdF or BE on the other hand, in relation to connections to NGET's transmission network at Hinkley Point. Alternatively EdF has offered to surrender such rights as EdF or BE may have under one such agreement. To this end, EdF shall procure that EdF or BE will notify this termination to NGET in writing no later than […].

C. Assessment of the remedy package

1. Introduction

159. As set out in the Commission Notice on Remedies, the Commission assesses the compatibility of a notified concentration with the Common Market in line with the terms of the Merger Regulation. Where a concentration raises serious doubts which could lead to a significant impediment to effective competition, the parties may seek to modify the concentration so as to resolve the serious doubts identified by the Commission with a view to having the merger cleared. In assessing whether or not the remedy will restore effective competition, the Commission considers the type, scale and scope of the remedies by reference to the structure and the particular characteristics of the market in which these serious doubts arise.

160. As concerns the different types of remedy, the most effective way to maintain effective competition is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture by the merging parties.

161. The divested activities must consist of a viable business, which if operated by a suitable purchaser, can compete effectively with the merged entity on a lasting basis and which is divested as a going concern. Furthermore, in order to maintain the structural effect of a remedy, the commitments have to foresee that the merged entity cannot subsequently acquire influence over the whole or parts of the divested business, unless the Commission subsequently finds that the structure of the market has changed to such an extent that the absence of influence over the divested business is no longer necessary to render the concentration compatible with the Common Market.

162. In line with the relevant notice, the Commission may also examine other types of non-divestiture remedies, such as behavioural promises, only exceptionally in specific circumstances.

163. The Commission's assessment has concluded that the proposed remedy package as revised by EdF on 18 December 2008, addresses all serious doubts identified during the course of the procedure and adequately deals with concerns identified by market participants in response to the first remedy package. As such, the Commission has concluded that the proposed remedy package is effective in removing the serious doubts brought about by the transaction in the relevant markets.

2. Independence, viability and competitiveness

164. In line with the information at its disposal, the Commission is satisfied that the Eggborough and Sutton Bridge power stations would constitute independent, viable and competitive businesses.

165. Further to the terms of BE's restructuring in 2005, Eggborough has a capacity and tolling agreement with BE Trading and Sales whereby the latter undertakes to meet all operational costs and procures all fuel supply arrangements in return for

determining the station dispatch and receiving all the output from the Eggborough Power Station. Further to the commitments made by EdF in relation to the Eggborough plant, EdF has submitted hold separate obligations and ring-fencing measures […]. As Eggborough is BE's only coal fired station, it retains most of the essential functions required for independent operation. It has an asset management team and procures additional support from external suppliers and contractors as required.

166. Sutton Bridge has a capacity and tolling agreement with EdF whereby the latter undertakes to meet all operational costs and procure all fuel supply arrangements in return for determining the station dispatch and receiving all the output from the Sutton Bridge Station. Further to the commitments made by EdF in relation to the Sutton Bridge plant, EdF has submitted hold separate obligations and ring-fencing measures […]. As Sutton Bridge is EdF's only gas-fired station, it retains most of the essential functions required for independent operation.

3. Effectiveness of the remedies in removing the identified serious doubts as to the compatibility of the transaction, as initially notified, with the common market.

167. The revised remedy package addresses the serious doubts identified by the Commission in relation to a) withholding, b) liquidity reduction, c) access to nuclear new build sites and d) potential barriers to entry caused by the holding of grid connections.

A) Withholding

168. In order to address the serious doubts established by the Commission regarding withholding of production by the merged entity, the parties proposed to divest BE's Eggborough coal plant. The results of the market test on the proposed remedy clearly indicated that, although the proposed divestment would decrease the ability and incentive for the merged entity to withhold production, it would be insufficient to fully address the concern established by the Commission. Following the market test of the initially proposed remedies, the parties subsequently added EdF's Sutton Bridge gas power plant to the divestment package (Sutton Bridge will be subject to a tolling agreement before being sold to a third party,[76] as detailed in section VI. B).

169. The revised remedies reduce the number of flexible plants owned by the merged entity from four to two. Pre-merger, EdF owned two coal plants (Cottam and West Burton) and one gas plant (Sutton Bridge), while BE owned one coal plant (Eggborough) in addition to its nuclear portfolio. Post-merger, the merged entity will own, in addition to BE's nuclear capacity, two coal plants (Cottam and West Burton), which is only one more coal plant than BE owned pre-merger.

[76] Under a tolling agreement, a third party, and not the merged entity, would make the decision of when to produce electricity with Sutton Bridge. This implies that Sutton Bridge could not be withheld by the merged entity in order to increase the prices it receives on its infra-marginal production

170. The divestment of Sutton Bridge is an important addition to the initially proposed remedy package. Indeed, Sutton Bridge is a gas plant with a higher marginal cost than the parties' other flexible plants, which are all coal plants. It would thus have been less costly for the merged entity to withhold Sutton Bridge than other flexible plants in order to increase prices, in particular during peak hours when withholding is more likely.

171. Considering the revised remedy package, there will only be a relatively limited increment (one coal plant) in flexible technology for the merged entity compared to BE's pre-merger portfolio. Furthermore, there is no material change in the marginal cost of the available flexible plants that could be used in a withholding strategy, since both the merged entity and BE's pre-merger only have coal plants to withhold. Finally, the baseload production that would mostly benefit from a price associated with a withholding strategy is unaffected by the merger. On this basis, and on the basis of the calculations carried out by the Commission,[77] it follows that the merger, considered with the revised remedy package, does not bring any significant additional scope for withholding.

172. In light of the above, it is concluded that the revised remedy package constitutes a clear cut remedy that directly and fully addresses the withholding concern identified by the Commission.

B) Liquidity Reduction

173. The results of the market test of the first Commitments proposal were in general rather negative. Given that the proposal had a two-fold effect on liquidity (divestiture/ commitment not no purchase-back BE's Eggborough plant and the auction of [0-5] TWh per year), both proposals were tested.

174. With respect to BE's Eggborough plant, negative comments were raised with respect to the limitations of this plant. In particular, it was submitted that the proposed plant has 4 generation units, each with a capacity of 500 MW (2 GW in total), but only 2 of them have Flue Gas Desulphurisation (FGD) equipment to which limits the emissions of SO_2 and NOx. This lack of FGD is likely to limit the output of Eggborough in the future. Moreover, this generation output is likely to decrease over time due to emissions restrictions.

175. With respect to the auction proposed by the parties, two main areas of concern were identified: (i) the potential negative impact that the proposed auction mechanism may have on the wholesale market, and (ii) insufficient volumes involved in the auction.

176. Most of the respondents considered that the proposed auction process (even including the volumes released by Eggborough) would not be likely to remove the risk of reduction of liquidity. It has been claimed that the auction process would add complexity to the wholesale market, and that measures such as the liquidity test or the reserve price included in the proposal may have negative effects as they may allow

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[77] In particular, the model discussed in the section on the competitive assessment with regard to withholding indicates that the incentive to withhold and any price impact of withholding are very significantly reduced with the revised divestment package.

the manipulation of both the wholesale market and the auction itself, for example by forcing closing prices (base for the reserve price) to go up or down, disrupting the normal functioning of the wholesale market.

177. It has also been raised that, since the merged entity would be long, the volumes of the auction would have been made available to the wholesale market anyway: basically the auction would change the normal route through which these volumes would have been sold. Moreover, the period of 4 years was considered in general as insufficient by many respondents, and that it should last until 2020 or be indefinite. The Commission considers however that the offered period appears to be adequate as it covers the period in which the merged entity would be physically in a position to internalise the additional generation output of BE.

178. The market test confirmed however that the products to be offered in the auction were adequate (base load for summer and winter), although an even split between summer and winter would be desirable.

179. With respect to the volumes involved in the auction, the market test considered them as insufficient. The range of volumes proposed ranged from 8 TWh up to 35 TWh..

Modified remedies offered by the parties

180. With the modified Commitments, the parties commit to sell through OTC trades and/or through structured trades agreements, being the two main routes to market in GB and in line with BE's current approach, the following volumes across the period 2012 to 2015:

2012 (TWh)	2013 (TWh)	2014 (TWh)	2015 (TWh)
[0-10]	[5-15]	[5-15]	[0-10]

181. The sales will be made directly by the merged entity, therefore eliminating the negative effects identified in the market test that an auction may have on the wholesale market. In addition, the Commitments include provisions to ensure that the volumes are effectively sold into the market and not purchased-back by the merged entity at a later stage.

182. With respect to the volumes offered, they represent twice the original proposal ([25-35] TWh versus [10-20] TWh) over the period of 4 years in which the Commission has identified serious doubts. Even if the proposed volumes are far from some of the proposals made during the market test by market respondents, the Commission considers that they are appropriate for the following reasons.

183. The remedy has to be seen in conjunction with the divestitures of the power plants of Eggborough and Sutton Bridge. These plants, once divested, will significantly reduce the level of vertical integration of the combined entity and therefore the scope for internalisation. In fact, deducting from the "Net Position" of the combined entity firstly the volumes corresponding to commitments (Sutton Bridge and Eggborough generation output as well as the volumes to be sold into the wholesale market) and

secondly the approximately […] TWh that EdF is not internalising (balance between the demand of its nHH customers and its generation output) in order to only take account of the effect of the merger, the new net position, would be as follows:

Combined Entity Generation/Supply Balance	2007 TWh	2008 TWh	2009 TWh	2010 TWh	2011 TWh	2012 TWh	2013 TWh	2014 TWh	2015 TWh	2016 TWh	2017 TWh
Net Position (excl. EdF I&C HH demand) – pre-Commitment	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
Net Position (excl. EdF I&C HH demand) – post-Commitment	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
If only the effect of the merger is considered	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]
EdF I&C HH demand	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]	[…]

184. As the data above shows, the scope for internalisation is not totally, but very significantly removed by the proposed remedy. By limiting the ability of the merged entity to such an extent, also the possible impact on liquidity is significantly reduced.

185. It has to be taken into account that the identified problem relates to a limited period of time so that it would not be proportionate to request the sale of the committed volumes for a longer period. This is because, on the basis of the current plants to shut-down certain plants as of 2015, the problem is restricted to the period 2011-2016. Beyond this period of time, any (uncertain) extension of the life of the generation plants to be closed would in any case contribute no increase, and to diminish, the overall liquidity in the market.

186. In the light of the foregoing, the Commission considers that the proposed commitment to market certain volumes in the wholesale market in conjunction with the proposed divestiture of the generation plants in Eggborough and Sutton Bridge are sufficient to remove the serious doubts identified by the Commission with respect to the impact of the transaction on liquidity.

C) Access to nuclear new build sites.

187. In order to address the serious doubts established by the Commission regarding access to nuclear sites most likely to be used for a first wave of nuclear new build, EdF has offered a specific commitment in relation to the disposal of the Dungeness Land or the Heysham Land.

188. In sum, EdF has offered to commit to enter into a sale and purchase agreement for the sale of either the Dungeness Land or the Heysham Land, together with any grid connection rights to an independent operator on terms of sale approved by the Commission by […]. The Land Purchaser must elect which land to acquire within 18 months from the date of the conclusion of the sale and purchase agreement or from […]. According to EdF both sites could potentially be suitable for first wave new nuclear build. The commitment offer for the unconditional release of either Heysham or Dungeness, does not affect the obligations of EdF to sell certain sites, subject to certain conditions, following the Sites Undertaking and the Simultaneous Marketing Agreement with the UK Government, which the Commission has taken into account

for the purpose of its assessment. Following the satisfaction of the relevant conditions the land of EdF at Wylfa (Lots I & II), BE's land at Bradwell and any land acquired by the merged entity at the NDA land Bradwell auction can also be made available to competitors.

189. The Commission considers that Heysham and Dungeness can be considered as viable options for new nuclear build. Both sites were identified in the Jackson Report[78] as two of the most likely candidate sites suitable for the first wave new nuclear build. […] the UK Government […] has chosen them for inclusion in the Sites Undertaking to enable the emergence of competition in the first wave of new nuclear build. Finally, in the course of the market investigation the Commission has asked interested parties to rank the suitability of the various potential sites for new nuclear, including Heysham and Dungeness. The majority of the respondents to the Commission's questions regarding the level of suitability of nuclear sites have ranked both Heysham and Dungeness as sites with medium suitability. It can in no case therefore be concluded from the market investigation that Heysham and/or Dungeness can be considered as poor sites.

190. Moreover, the Commission considers that the envisaged ability of the successful purchaser to elect which land to acquire within a defined period of time as part of this commitment brings a significant advantage. The existence of this election period can allow the successful bidder to undertake the necessary verifications and inspections before deciding which of the two sites it will finally acquire. This ability to elect in the course of the divestment process can be considered as being highly advantageous given the lack of absolute certainty for developing any site potentially suitable for new nuclear build in GB considering the inherent planning consent and other risks and factors associated with the development and authorisation of a nuclear power plant.

191. In the course of the market test of the proposed remedy some interested third parties have expressed concerns with the fact that EdF, following its commitment offer, is not committing to release the land it owns at Wylfa and thus they have claimed that the alleged existence of the uncertainty regarding the sale of EdF's land at Wylfa cannot remove the Commission's serious doubts regarding access to nuclear sites. In particular, it was noted that land owned by EdF at Wylfa (at the so called Wylfa I and Wylfa II locations) is being held by EdF only to prevent competitors from developing the NDA Wylfa site which will be tendered in due course. In that respect it was stressed by third parties that EdF cannot develop its land at Wylfa in view of the fact that it is not entitled (following the agreements with the UK Government) to bid for the NDA Wylfa site.

192. The Commission does not share these views and considers that the commitment offered by EdF for an unconditional divestiture of either Heysham or Dungeness ensures that at least one of the merged entity's sites is to be divested unconditionally. This commitment can therefore be considered as sufficient in removing the identified

78 A report conducted by Jackson Consulting for HM Government to assess the siting of new nuclear power stations.

serious doubts, despite the existence of the conditions regarding the divestment of EdF's Wylfa land as envisaged in the SMA/Sites Undertaking.

193. Nevertheless, the Commission notes […] that the conditions regarding the release of EdF's Wylfa land are likely to be met in early 2010[79]. Under the SMA all land owned by EdF and NDA at Wylfa will be included in the auction under lot 1 and lot 2 along with an agreed plan with respect to the marketing of the sites. The sales process is already underway, with indicative bids sought by 19 January 2009. At the same time, the Commission also notes the submissions of EdF to the effect that the conditions currently applicable for the release of its land at Wylfa are not designed to delay access by competitors and that the access to the site granted to potential auction bidders under the terms of the SMA avoids delays for the development of new nuclear build by competitors should the site become available. Moreover, EdF submits that its land at Wylfa […] is a credible alternative […].

194. In light of the above, it is concluded that commitment offered by EdF regarding sites for a first wave of new nuclear build constitutes a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission with regard to potential delays and uncertainty as to the timing, and the actual scope, of the release of sites to competitors of the merged entity.

D. *Commitments to terminate one grid connection agreement at HinkleyPoint*

195. EdF has also offered a commitment to terminate one of the three bilateral connection agreements between National Grid Electricity Transmission plc (NGET) on the one hand and EdFor BE on the other hand, in relation to connections to NGET's transmission network at Hinkley Point. Alternatively EdF has offered to surrender such rights as EdF or BE may have under one such agreement. EdF shall select which agreement to terminate or otherwise surrender in its absolute discretion, at Hinkley Point. To this end, EdF shall procure that EdF or BE will notify this termination to NGET in writing no later than […].

196. The Commission considers that this commitment removes any overlaps identified regarding connection agreements in the hands of the merged entity. This commitment was welcomed during the market test. Third parties and NGET have not provided to the Commission information which demonstrates that there exists another location where there would be an overlap in the connections held by BE and EdF respectively.

197. In light of the above, it is concluded that commitment offered by EdF to terminate one connection agreement at Hinkley point constitutes a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission in this regard.

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[79] Although the successful bidder will not be able to complete the acquisition of EdF's land at Wylfa until the "Wylfa" conditions are met, site investigations can proceed on the site before that date and a site specific planning application (regarding all potential nuclear new build sites) could not in any case be submitted before the new planning regime is operational. According to the UK Government, the new regime is expected to be operational in April 2010.

4. Conclusion

198. The assessment of the proposed remedy package carried out by the Commission shows that the Eggborough and Sutton Bridge facilities to be divested together with related assets constitute stand alone and viable businesses capable of competing with the combined entity on the market for the generation and supply of electricity. The facilities to be divested accounted for [10-20] TWh of electricity in 2007, which substantially reduces the parties' ability and incentive to strategically withdraw electricity in order to game the market and increase market prices. Secondly, the parties' undertaking to sell [25-35] TWh through OTC trades or structured agreements between 2012 and 2015 together with the divestiture of the plants at Eggborough and Sutton Bridge address market concerns and the serious doubts in relation to a potential reduction of liquidity. Thirdly, the parties have committed to an unconditional divestment of one of either sites at Heysham or Dungeness. Taking into account all existing arrangements on other sites, which are factual elements taken into account in this process, this is considered to be sufficient to address any issues raised in relation to the dominance of sites most likely to be considered suitable for a first wave of nuclear new build, given that it is also complementary to the existing agreements in place between the parties and the British Government. Finally, the termination of one of three National Grid connection agreements it holds in relation to Hinkley Point constitutes a clear cut remedy that directly and fully addresses the serious doubts identified by the Commission in this regard.

D. Conditions and Obligations

199. Under the first sentence of the second subparagraph of Article 6(2) of the Merger Regulation, the Commission may attach to its decision conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market.

200. It is appropriate in this case to qualify as conditions those measures that are intended to achieve a structural change in the market and to qualify as obligations the implementing or accompanying steps which are necessary to achieve this result, as well as behavioural remedies.

201. This decision is subject to full compliance with the conditions set out in Sections B.1, C.1, C.3, D, and F of the commitments submitted by the notifying party and with the obligations set out in Sections B.2, C.2, E.1, E.3 and G of the same commitments. The entire text of the commitments is attached in the Annex of this decision. These commitments form an integral part of this decision.

VI. CONCLUSION

202. For the reasons set out above, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement, subject to full compliance with the commitments submitted by the notifying party. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission, signed,
Vladimir ŠPIDLA
Member of the Commission

Paris, December 18th, 2008

European Commission

DG Competition

Rue Joseph II 70 Jozef-II straat

B-1000 Brussels

CASE COMP/M.5224 – EDF/BRITISH ENERGY

COMMITMENTS TO THE EUROPEAN COMMISSION

Pursuant to Article 6(2) of Council Regulation (EC) N° 139/2004 as amended (the ***"Merger Regulation"***), EDF S.A. (***"EDF"***) hereby provides the following Commitments (the ***"Commitments"***) in order to enable the European Commission (the ***"Commission"***) to declare the acquisition of British Energy plc (***"British Energy"***) compatible with the common market and the EEA Agreement by its decision pursuant to Article 6(1)(b) of the Merger Regulation (the ***"Decision"***).

The Commitments shall take effect upon the date of adoption of the Decision.

This text shall be interpreted in the light of the Decision to the extent that the Commitments are attached as conditions and obligations, in the general framework of Community law, in particular in light of the Merger Regulation, and by reference to the Commission notice on remedies acceptable under Council Regulation (EC) N° 139/2004 and under Commission Regulation (EC) N° 802/2004.

SECTION A DEFINITIONS

For the purpose of the Commitments, the following terms shall have the following meaning:

Affiliated Undertaking(s): undertaking(s) controlled by EDF and/or British Energy, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in the light of the Commission's Consolidated Jurisdictional Notice.

BEGL: British Energy Generation Limited, a subsidiary of British Energy whose registered office is at Barnett Way, Barnwood, Gloucester, GL4 3RS (company registered 03076445).

BE T&S: British Energy's Trading and Sales Limited, a subsidiary of British Energy which is responsible for the sale of British Energy's electricity output from its power stations including Eggborough.

BE Existing Nuclear Fleet: such of the nuclear power stations owned by BEGL as at the date of EDF's public bid for British Energy at Dungeness, Hartlepool, Heysham, Hinkley Point, Hunterston, Sizewell and Torness as are still in operation at the relevant date.

Bonds: […]

Credible Nuclear Operator: is an entity, independent of and unconnected to EDF, British Energy and their Affiliated Undertakings and which:

(A) (i) currently operates a nuclear plant anywhere in the world; and

(ii) either:

(a) currently operates an electricity generating station subject to UK health and safety and environmental regulation; or

(b) which has made a public commitment to become an operator of an electrical generating station (with a capacity in excess of 50MW) by 2025 in a market subject to UK health and safety and environmental regulation

(B) any other corporate entity proposed by EDF which could reasonably be expected to become a credible nuclear operator in the UK in the future.

Divestiture Period: means each of the Initial Period, the First Eggborough Divestiture Period, the Second Eggborough Divestiture Period and the Sutton Bridge Divestiture Period as appropriate.

Divestiture Trustee: one or more natural or legal person(s), independent from EDF, British Energy and Affiliated Undertakings, who/which is/are approved by the Commission and appointed by EDF and who/which has/have received from EDF the exclusive Trustee Mandate to sell Eggborough and/or Sutton Bridge and/or the Dungeness or Heysham Land.

Divestment Asset: each of Eggborough, Sutton Bridge, and the Dungeness or Heysham Land as appropriate.

Divestment Asset Closing: each of Eggborough Closing, Sutton Bridge Closing and Land Closing as appropriate.

Dungeness Land: the land owned by British Energy (or an affiliate of British Energy) at Dungeness, Kent, the extent of which is shown hatched red on the plan annexed to the Sites Undertaking marked "Plan 3 – Dungeness".

EDFDCL: EDF Development Company Limited, a subsidiary of EDF whose registered office is at 40, Grosvenor Place, London SW1 7EN (company registered 6222043).

EDF UK: EDF Energy Plc, a subsidiary of EDF whose registered office is at 40, Grosvenor Place, London SW1 7EN (company registered 02366852).

Effective Date: […]

Eggborough: the coal-fired power plant operated by Eggborough Power Ltd at Eggborough, Goole, East Yorkshire DN14 OBS, further details of which are provided in Schedule 1, that EDF commits to divest.

Eggborough Banks: lenders to the refinancing of British Energy's Eggborough coal power plant under a project finance loan and which own a call option over the assets or shares of Eggborough Power Ltd to be exercised at any time on or before […] and with the transfer of ownership to take place on or before […] (and including, as appropriate, any relevant successor entities or nominees).

Eggborough Closing: the transfer of the legal title of Eggborough or the issued share capital of EPL to the Eggborough Purchaser.

Eggborough CTA: the Capacity and Tolling Agreement between Eggborough Power Ltd and British Energy Trading and Sales dated 30 September 2004 […]

Eggborough Hold Separate Manager: the person appointed by EDF for Eggborough to manage the day-to-day business under the supervision of the Monitoring Trustee.

Eggborough Key Personnel: all Eggborough Personnel necessary to maintain the viability and competitiveness of Eggborough, as listed in Schedule 1.

Eggborough Personnel: all personnel employed by Eggborough Power Ltd from time to time from the Effective Date until the date the Eggborough Banks acquire control over Eggborough or until Eggborough Closing (as applicable).

Eggborough Purchaser: the entity approved by the European Commission as acquirer of Eggborough in accordance with the criteria set out in section D (and including, as appropriate, any relevant successor entities).

Eggborough Trustee Divestiture Period: […]

Eligible Nuclear Output: for a given year, the sum of the total actual net metered output, in TWh, at each station gate, of the Existing British Energy Nuclear Fleet in respect of that calendar year

EPHL: Eggborough Power (Holdings) Ltd, British Energy's subsidiary which is the holding company for EPL.

EPL: Eggborough Power Ltd, the British Energy subsidiary which owns and operates Eggborough.

First Eggborough Divestiture Period: […]

GB: Great Britain.

Heysham Land: the land owned by British Energy (or an affiliate of British Energy) at Heysham, Lancashire, the extent of which is shown hatched red on the plan annexed to the Sites Undertaking marked “Plan 4 – Heysham”.

Heren: the Heren Energy European Daily Electricity Markets publication under the heading "UK OTC power price assessments".

Hinkley Point: any land comprised in title number ST127567 and any adjoining land which is owned by EDF, British Energy or any of their Affiliated Undertakings.

Initial Period: […]

Initial Trustee Divestiture Period: […]

Land Closing: the transfer of the legal title of the Dungeness Land or Heysham Land to the Land Purchaser.

Land Purchaser: the Credible Nuclear Operator approved by the Commission as acquirer of the Dungeness Land or the Heysham Land in accordance with section F.2.

Monitoring Trustee: one or more natural or legal person(s), independent from the Parties, who/which is/are approved by the Commission and appointed by EDF, and who/which has/have the duty to monitor EDF’s compliance with the conditions and obligations attached to the Decision.

MW: Megawatt, unit of power: 10^6 Watts.

MWh: Megawatt hour.

NDA: Nuclear Decommissioning Authority.

NGET: National Grid Electricity Transmission plc.

OTC Trades: "Over the Counter" trades – trades made in respect of standard products sold through broker screens where the bids and the offers are made anonymously.

Second Eggborough Divestiture Period: […]

Second Eggborough Trustee Divestiture Period: […]

Simultaneous Marketing Agreement: the agreement of that name between EDF SA, EDF Development Company Limited and the Nuclear Decommissioning Authority dated 11 November 2008.

Sites Undertaking: Undertaking entered into between EDF and HM Government on 24 September 2008 requiring EDF to dispose of certain sites subsequent to the offer for British Energy being declared wholly unconditional.

Structured Trades: bespoke bilateral agreements between two counterparties (including, without limitation, generators, suppliers, large customers, banks or other trading institutions), for the sale and/or purchase of electricity, which may include specifically tailored terms with respect to, inter alia, volume, shape, pricing mechanism or duration.

Sutton Bridge: The gas-fired power station owned by Sutton Bridge Power at Centenary Way Sutton Bridge, Spalding, Lincolnshire PE12 9TF, further details of which are provided in Schedule 2, which EDF commits to divest.

Sutton Bridge Bondholders: the holders of the Bonds from time to time.

Sutton Bridge Closing: the transfer of the legal title of Sutton Bridge to the Sutton Bridge Purchaser.

Sutton Bridge CTA: […]

Sutton Bridge Divestiture Period: […]

Sutton Bridge Hold Separate Manager: the person appointed by EDF to manage the day-to-day business of Sutton Bridge under the supervision of the Monitoring Trustee.

Sutton Bridge Key Personnel: all Sutton Bridge Personnel necessary to maintain the viability and competitiveness of Sutton Bridge, as listed in Schedule 2.

Sutton Bridge Personnel: all personnel employed by Sutton Bridge Power from time to time from the Effective Date until Sutton Bridge Closing.

Sutton Bridge Power: EDF Energy (Sutton Bridge Power) Limited, the EDF subsidiary which owns Sutton Bridge.

Sutton Bridge Purchaser: the entity approved by the European Commission as acquirer of Sutton Bridge in accordance with the criteria set out in section D.

Sutton Bridge Toller: the entity approved by the European Commission as toller under the Sutton Bridge Tolling Agreement in accordance with the criteria set out in Section C.3.

Sutton Bridge Tolling Agreement: has the meaning given to that term in paragraph 32.

Sutton Bridge Trustee Divestiture Period: […]

Trustee(s): the Monitoring Trustee and the Divestiture Trustee.

Trustee Divestiture Period: each of the Eggborough Trustee Divestiture Period, the Second Eggborough Trustee Divestiture Period, Initial Trustee Divestiture Period, and the Sutton Bridge Divestiture Period, as appropriate.

TWh: Terawatt hour (10^6 MWh).

SECTION B COMMITMENT TO DIVEST EGGBOROUGH POWER PLANT

B.1 Commitment to divest

1. If the Eggborough Banks do not exercise their call option over the shares of EPL or the assets of Eggborough, EDF commits to divest, or procure the divestiture of Eggborough by the end of the Eggborough Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 37. To carry out the divestiture, EDF commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of Eggborough within the First Eggborough Divestiture Period. If EDF has not entered into such an agreement at the end of the First Eggborough Divestiture Period, EDF shall grant the Divestiture Trustee an exclusive mandate to sell Eggborough within the Eggborough Trustee Divestiture Period in accordance with the procedure described in paragraph 66.
2. If the Eggborough Banks exercise their call option over the shares of EPL or the assets of Eggborough but do not take ownership of Eggborough on or before […] and the Eggborough Banks no longer have the right to take control/ownership of Eggborough, EDF commits to divest, or procure the divestiture of Eggborough by the end of the Second Eggborough Trustee Divestiture Period as a going concern to a purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 37. To carry out the divestiture, EDF commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of Eggborough within the Second Eggborough Divestiture Period. If EDF has not entered into such an agreement at the end of the Second Eggborough Divestiture Period, EDF shall grant the Divestiture Trustee an exclusive mandate to sell Eggborough within the Second Eggborough Trustee Divestiture Period in accordance with the procedure described in paragraph 66.
3. EDF shall be deemed to have complied with this commitment if, by the end of the Eggborough Trustee Divestiture Period or the Second Eggborough Trustee Divestiture Period (as appropriate), EDF has entered into a final binding sale and purchase agreement, if the Commission approves the purchaser and the terms in accordance with the procedure described in paragraph 37 and if Eggborough Closing takes place within a period not exceeding 3 months after the approval of the purchaser and the terms of sale by the Commission.
4. If the Eggborough Banks decide to sell their call options over the assets or shares of EPL prior to the exercise of those options then EDF commits not to exercise its pre-emption rights in respect of the options.
5. In order to maintain the structural effect of the Commitments, EDF shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of Eggborough, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over Eggborough is no longer necessary to render the proposed concentration compatible with the common market. However, EDF shall not be precluded from trading with (including buying electricity from and/or selling electricity to) any acquirer of Eggborough, including for the avoidance of doubt the Eggborough Banks and the Eggborough Purchaser.

Structure and definition of Eggborough

6. Eggborough consists of British Energy's Eggborough power plant, described in more detail in Schedule 1, and which includes:

   (a) all tangible and intangible assets (including intellectual property rights), which contribute to the current operation or are necessary to ensure the viability and competitiveness of Eggborough, but only including such coal as may be agreed with the Eggborough Purchaser;

   (b) all site-/facility-related licences, permits and authorizations (including the relevant greenhouse gas emission rights save insofar as these are owned by British Energy or any Affiliated Undertaking of British Energy apart from EPL or EPHL) issued by any governmental organization for the benefit of Eggborough;

   (c) all contracts, leases, commitments, credit and other records of Eggborough (which for the avoidance of doubt excludes the Eggborough CTA)

   (items referred to under (a)-(c) hereinafter collectively referred to as "***Eggborough Assets***"); and

   (d) the Eggborough Personnel.

B.2 <u>Related Commitments</u>

Preservation of Viability, Marketability and Competitiveness

7. From the Effective Date until (i) the date the Eggborough Banks acquire control over Eggborough following the exercise of their options or (ii) if they do not acquire control until Eggborough Closing, EDF shall preserve the economic viability, marketability and competitiveness of Eggborough, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of Eggborough. In particular EDF undertakes:

   (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of Eggborough or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of Eggborough;

   (b) to make available sufficient resources for the operation of Eggborough; and

   (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Eggborough Key Personnel to remain with Eggborough.

Hold-separate obligations

8. […]. EDF commits, as soon as practicable but no later than three months from the Effective Date until (i) the date the Eggborough Banks acquire control over Eggborough following the exercise of their options or (ii) if they do not acquire control until Eggborough Closing, to keep Eggborough firewalled from the power plants EDF is retaining and to ensure that the Eggborough Personnel (and any employees of British Energy or its Affiliated Undertakings seconded to Eggborough) – and the Eggborough Hold Separate Manager - save pursuant to […] Paragraphs 9 and 11 of the Commitments, have no involvement in any other power plant of EDF or vice versa. EDF, shall ensure that the Eggborough Personnel (and any employees of British Energy or its Affiliated Undertakings seconded to Eggborough) do not report to any individual outside Eggborough other than the Eggborough Hold Separate Manager, […].

9. Until (i) the date the Eggborough Banks acquire control over Eggborough following the exercise of their options or (ii) if they do not acquire control until Eggborough Closing, EDF shall assist the Monitoring Trustee in ensuring that Eggborough is managed as a distinct and saleable entity separate from the power plants retained by EDF. As soon as practicable but no later than three months from the Effective Date, EDF shall appoint a hold separate manager who shall be responsible for the management of Eggborough, under the supervision of the Monitoring Trustee (the ***"Eggborough Hold Separate Manager"***). The Eggborough Hold Separate Manager shall manage Eggborough independently […] with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the power plants retained by EDF. […]

   (a) […]

   (b) […]

   (c) […]

   (d) […].

10. Nothing in Section B.1 and B.2 shall impose any obligation or requirement upon British Energy or any of its Affiliated Undertakings (including EPL or EPHL) to breach or otherwise act in contravention of any requirement or obligation owed by some or all of them, to the Eggborough Banks, bondholders or any other contractual counterparties.

Ring-fencing

11. EDF shall as soon as practicable but no later than three months from the Effective Date otherwise implement all necessary measures to ensure that it does not obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to Eggborough save for the purpose of managing the financial and risk exposures. In particular, the participation of Eggborough itself and EPL in a central information technology network shall be severed to the extent possible, without compromising the viability of Eggborough. EDF will as soon as reasonably practicable install appropriate firewalls within BE

T&S to isolate and protect the Eggborough Hold Separate Manager and any additional team members, […]. But EDF may obtain information relating to Eggborough which is reasonably necessary for the orderly running and the optimisation of the value of Eggborough […] the divestment of Eggborough or whose disclosure to EDF is required by law.

12. Notwithstanding any other provision of these Commitments, EDF shall be entitled to receive information concerning Eggborough to fulfil its obligations under Paragraphs 14, 15 and 16 of these Commitments.

Non-solicitation clause

13. EDF undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Eggborough Key Personnel transferred with Eggborough for a period of […] after Eggborough Closing.

Due Diligence

14. To the extent that the Eggborough Banks do not exercise the options or exercise their options but no longer have the right to take ownership/control of Eggborough on […] for any reason, in order to enable potential purchasers to carry out a reasonable due diligence of Eggborough, EDF shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

(a) provide to potential purchasers sufficient information as regards Eggborough;

(b) provide to potential purchasers sufficient information relating to the Eggborough Personnel and allow them reasonable access to the Eggborough Personnel (and any employees of British Energy or its Affiliated Undertakings seconded to Eggborough).

Reporting

15. EDF shall submit written reports in English on potential purchasers of Eggborough and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following:

(a) […] in the event that the Eggborough Banks do not exercise their options on or before […]; and

(b) […] in the event that Eggborough Banks exercise their options but no longer have the right to take ownership/control of Eggborough on […] for any reason;

(or otherwise at the Commission's request).

16. EDF shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

SECTION C COMMITMENT TO DIVEST SUTTON BRIDGE POWER STATION

C.1 Commitment to divest

17. EDF commits to divest, or procure the divestiture of, Sutton Bridge by the end of the Sutton Bridge Trustee Divestiture Period to the Sutton Bridge Purchaser and on terms of sale approved by the Commission in accordance with the procedure described in paragraph 37. To carry out the divestiture, EDF commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of Sutton Bridge within the Sutton Bridge Divestiture Period. If EDF has not entered into such an agreement at the end of the Sutton Bridge Divestiture Period, EDF shall grant the Divestiture Trustee an exclusive mandate to sell Sutton Bridge in accordance with the procedure described in paragraph 66 in the Sutton Bridge Trustee Divestiture Period.

18. EDF shall be deemed to have complied with this commitment if, by the end of the Sutton Bridge Trustee Divestiture Period, EDF has entered into a final binding sale and purchase agreement, if the Commission approves the Sutton Bridge Purchaser and the terms in accordance with the procedure described in paragraph 37 and if the closing of the sale of Sutton Bridge takes place within a period not exceeding 3 months after the approval of the purchaser and the terms of sale by the Commission.

19. In order to maintain the structural effect of the Commitments, EDF shall, for a period of 10 years from the Effective Date, not acquire direct or indirect influence over the whole or part of Sutton Bridge, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over Sutton Bridge is no longer necessary to render the proposed concentration compatible with the common market.

Structure and definition of Sutton Bridge

20. Sutton Bridge consists of EDF's Sutton Bridge gas-fired power station, described in more detail in Schedule 2, and which includes:

(a) all tangible and intangible assets (including intellectual property rights), which contribute to the current operation or are necessary to ensure the viability and competitiveness of Sutton Bridge (which for the avoidance of doubt shall only include the land identified pursuant to the plan attached as an Appendix to Schedule 2 which is the land necessary for the operation of Sutton Bridge);

(b) all licences, permits and authorisations issued by any governmental organisation for the benefit of Sutton Bridge;

(c) all contracts, leases, commitments and customer orders of Sutton Bridge; all customer, credit and other records of Sutton Bridge (items referred to under (a)-(c) hereinafter collectively referred to as "***Sutton Bridge Assets***"); and

(d) the Sutton Bridge Personnel.

21. […]

C.2 Related Commitments

Preservation of Viability, Marketability and Competitiveness

22. From the Effective Date until Sutton Bridge Closing, EDF shall preserve the economic viability, marketability and competitiveness of Sutton Bridge, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of Sutton Bridge. In particular EDF undertakes:

    (a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, management or competitiveness of Sutton Bridge or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of Sutton Bridge;

    (b) to make available sufficient resources for the operation of Sutton Bridge;

    (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Sutton Bridge Key Personnel to remain with Sutton Bridge.

Hold-separate obligations of Parties

23. […]. EDF commits, as soon as practicable but no later than three months from the Effective Date until Sutton Bridge Closing, to keep Sutton Bridge firewalled from the power plants EDF is retaining and to ensure that the Sutton Bridge Personnel – and the Sutton Bridge Hold Separate Manager - save pursuant to […] Paragraphs 24 and 26 of the Commitments, have no involvement in any other power plant of EDF or vice versa. EDF, shall ensure that the Sutton Bridge Personnel do not report to any individual outside Sutton Bridge other than the Sutton Bridge Hold Separate Manager […].

24. EDF shall assist the Monitoring Trustee in ensuring that Sutton Bridge is managed as a distinct and saleable entity separate from the power plants retained by EDF. As soon as practicable but no later than three months from the Effective Date, EDF shall appoint a hold separate manager who shall be responsible for the management of Sutton Bridge, under the supervision of the Monitoring Trustee (the "Sutton Bridge Hold Separate Manager"). The Sutton Bridge Hold Separate Manager shall manage Sutton Bridge […] with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the power plants retained by EDF.

25. Nothing in these Commitments shall impose any obligation or requirement upon EDF or any of its Affiliated Undertakings to breach or otherwise act in contravention of any requirement or obligation owed by EDF or any Affiliated Undertaking, to the Sutton Bridge Bondholders or any other contractual counterparties.

Ring-fencing

26. EDF shall as soon as practicable but no later than three months from the Effective Date otherwise implement all necessary measures to ensure that it does not obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to Sutton Bridge. In particular, the participation of Sutton Bridge in a central information technology network shall be severed to the extent possible, without compromising the viability of Sutton Bridge. But EDF may obtain information relating to Sutton Bridge which is reasonably necessary for the orderly running and the optimisation of the value of Sutton Bridge, […].

27. Notwithstanding any other provision of these Commitments, EDF shall be entitled to receive information concerning Sutton Bridge to fulfil its obligations under Paragraphs 29, 30 and 31 of these Commitments.

Non-solicitation clause

28. EDF undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit, the Sutton Bridge Key Personnel transferred with Sutton Bridge for a period of […] after Sutton Bridge Closing.

Due Diligence

29. In order to enable potential purchasers to carry out a reasonable due diligence of Sutton Bridge, EDF shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:

(a) provide to potential purchasers sufficient information as regards Sutton Bridge; and

(b) provide to potential purchasers sufficient information relating to the Sutton Bridge Personnel and allow them reasonable access to the Sutton Bridge Personnel.

Reporting

30. EDF shall submit written reports in English on potential purchasers of Sutton Bridge and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following […] (or otherwise at the Commission's request).

31. EDF shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

C.3 <u>Tolling Agreement</u>

32. EDF UK will, within the Initial Period, enter into one or several tolling agreement(s) for the entire capacity of Sutton Bridge (less an amount to represent the volumes of electricity that EDF UK has already, in effect, committed to sell in respect of that plant

as at […]), on terms and conditions and with counterparties approved by the Commission in accordance with the procedure described in Paragraph 35 (the "Sutton Bridge Tolling Agreement"). […]. If EDF has not entered into such agreement(s) at the end of the Initial Period, EDF shall grant the Divestiture Trustee an exclusive mandate to enter into a tolling agreement within the Initial Trustee Divestiture Period in accordance with the procedure described in paragraph 68.

33. The Sutton Bridge Tolling Agreement(s) shall cover the entire capacity of Sutton Bridge (less an amount to represent the volumes of electricity that EDF UK has already, in effect, committed to sell in respect of that plant as at […]) for a period starting not later than the end of the Initial Period or the Initial Trustee Divestiture Period (as applicable) and ending not earlier than Sutton Bridge Closing and shall, […]. The Toller will pay a capacity fee which will be determined through a competitive tender and a reasonable variable operating fee. […]

The Toller

34. The Toller must:

   (a) be independent of and unconnected to EDF and its Affiliated Undertakings; and

   (b) have the financial resources, proven expertise and incentive to act as an independent supplier of electricity operating on the GB market;

   (the before-mentioned criteria for the Toller hereafter the "***Toller Requirements***").

35. The final binding agreement shall be conditional on the Commission's approval. When EDF or the relevant Affiliated Undertaking has reached an agreement with a counterparty, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement, to the Commission and the Monitoring Trustee. EDF must be able to demonstrate to the Commission that the counterparty meets the Toller Requirements and that the proposed agreement is consistent with the Commitments. For the approval, the Commission shall verify that the counterparty fulfils the Toller Requirements and that the proposed agreement is consistent with the Commitments.

SECTION D THE PURCHASERS

36. In order to meet the competition concerns identified by the Commission and in order to be approved by the Commission each of the Eggborough Purchaser and the Sutton Bridge Purchaser must:

   (a) be independent of and unconnected to EDF and its Affiliated Undertakings by the time of Eggborough Closing/Sutton Bridge Closing (as applicable);

   (b) have the financial resources, proven expertise and incentive to maintain and develop Eggborough or Sutton Bridge (as applicable) as a viable and active competitive force in competition with EDF and its Affiliated Undertakings and other competitors;

   (c) neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of Eggborough or Sutton Bridge (as applicable).

(the before-mentioned criteria for the purchaser hereafter the "***Purchaser Requirements***").

37. The final binding sale and purchase agreement for each of Eggborough and Sutton Bridge shall be conditional on the Commission's approval. When EDF or the relevant Affiliated Undertaking has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. EDF must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that Eggborough or Sutton Bridge (as applicable) is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the Purchaser Requirements and that Eggborough or Sutton Bridge (as applicable) is being sold in a manner consistent with the Commitments. The Commission may approve the sale of Eggborough or Sutton Bridge (as applicable) without one or more Assets or not all of the Eggborough or Sutton Bridge Personnel (as applicable), if this does not affect the viability and competitiveness of Eggborough or Sutton Bridge (as applicable) after the sale, taking account of the proposed purchaser.

SECTION E COMMITMENT TO SELL ELECTRICITY IN THE GB WHOLESALE MARKET

E.1 Commitment to sell

38. EDF commits to sell or procure the sale of electricity, for delivery between 2012 and 2015, through Structured Trades and/or OTC Trades of the following volumes:

Year	Volume to be sold (TWh)
2012	[0-10]
2013	[5-15]
2014	[5-15]
2015	[0-10]

39. The OTC Trades will be transacted through broker screens with authorised counterparties under GTMA industry standard terms (or their equivalent) including appropriate credit support provisions.

40. EDF will negotiate Structured Trades on an individual bespoke basis.

41. Single trades (whether Structured Trades or OTC Trades) may cover committed volume requirements for more than one year.

42. So as not to undermine the effectiveness of this commitment, EDF's Affiliated Undertakings and undertakings in which EDF holds more than 10% of the shares or votes will be precluded from purchasing the specified output.

E.2 Duration/Market Developments

43. In the event of:

(i) a substantial change in the GB electricity market; and/or

(ii) a change in relation to regulatory requirements/arrangements (including without limitation measures arising out of the Ofgem energy supply probe and/or any subsequent investigation by the Competition Commission); and/or

(iii) the development of a power exchange in GB; and/or

(iv) any event affecting the generation output of the BE Existing Nuclear Fleet (including unplanned outages) as a consequence of which the yearly actual or anticipated Eligible Nuclear Output is […]% below EDF's current forecast […] for the yearly generation output of the BE Existing Nuclear Fleet for that year […];

then EDF may at any time submit a reasoned request to the Commission to terminate or modify the duration and/or scope of this commitment.

E.3 EDF Obligations

44. In order to facilitate the monitoring of this commitment, EDF undertakes to maintain a separate trading book which will contain details of the OTC Trades made pursuant to this commitment. EDF will make available to the Monitoring Trustee, at his request, the separate trading book which contains details of the OTC Trades made pursuant to this commitment.

45. EDF will also maintain a separate list of Structured Trades containing details of all Structured Trades made pursuant to this Commitment. Structured Trades made pursuant to the Commitment shall be added to the above list no later than five working days after they have been entered into. EDF will make available to the Monitoring Trustee, at his request, all Structured Trades that have been entered into pursuant to this commitment for each relevant period.

46. In addition, EDF will make available to the Monitoring Trustee, at his request, all Structured Trades for the purchase of electricity for each relevant period that EDF has entered into with counterparties to whom EDF has sold electricity pursuant to this commitment. This is so that the Monitoring Trustee can verify that EDF has not, within a reasonable time period before and after the date on which EDF entered into a

structured trade for the sale of electricity with a counterparty pursuant to this commitment, entered into a reverse structured trade on the same terms and with the same counterparty under which EDF would buy back the products originally sold.

47. EDF shall provide the Monitoring Trustee with an annual report not later than two months after the end of each calendar year containing sufficient information for the Monitoring Trustee to confirm that EDF is complying with this commitment and in addition, on the request of the Monitoring Trustee, provide the Monitoring Trustee with a copy of any structured trade agreements made pursuant to this commitment and the separate trading book which contains details of the OTC Trades made pursuant to this commitment in respect of the relevant year at the same time.

SECTION F COMMITMENTS RELATING TO NEW NUCLEAR BUILD SITES

F.1 Unconditional Disposal of Dungeness or Heysham

Divestment Commitment

48. EDF commits to enter into a sale and purchase agreement for the sale of the Dungeness Land or the Heysham Land together with any grid connection rights to a Credible Nuclear Operator (the "Land Purchaser") on terms of sale approved by the Commission by the end of the Initial Trustee Divestiture Period. If EDF has not entered into such an agreement at the end of the Initial Period, EDF shall grant the Divestiture Trustee an exclusive mandate to effect the disposal of one of the sites in the Initial Trustee Divestiture Period in accordance with terms set out in Paragraph 66 below.

49. Pursuant to the sale and purchase agreement the Land Purchaser will have an option to acquire, at its sole discretion, either the Dungeness Land or the Heysham Land. The Land Purchaser must elect which land to acquire by the earlier of 18 months from the date of the conclusion of the sale and purchase agreement or from the end of the Initial Trustee Divestiture Period (the "Election Period"). In the event that no election is made during the Election Period then EDF shall nominate, at its sole discretion, the site to be acquired by the Land Purchaser. During the Election Period EDF shall grant the Land Purchaser access to the Heysham Land and/or the Dungeness Land on reasonable terms and subject to appropriate indemnities from the Land Purchaser so that the Land Purchaser can carry out all studies, investigations, surveys, assessments or other such enquiries as would reasonably be necessary to enable the Land Purchaser to elect which of the two sites it will acquire. EDF shall transfer ownership of the relevant land no later than […] from the earlier of the Land Purchaser's election or the end of the Election Period (the "Land Closing").

50. From the Effective Date until the Land Closing, EDF shall preserve the economic viability, value and marketability of each of the Dungeness and Heysham Land, in accordance with good business practice. In particular EDF undertakes:

(a) not to carry out any act upon its own authority that might have a significant adverse impact on the value, of each of the Dungeness and Heysham Land; and

(b) that it will take reasonable action to enable and not knowingly do anything to prejudice each of the Heysham Land and the Dungeness Land receiving planning consent under section 36 of the Electricity Act 1989 (or any other applicable statutory provision providing for the issue or deemed issue of consent for the construction of a civil nuclear powered electricity generation station) for nuclear new build as soon reasonably practicable.

Due Diligence

51. In order to enable any potential Land Purchaser to carry out a reasonable due diligence of the Heysham Land and/or the Dungeness Land, EDF undertakes from the Effective Date, subject to customary confidentiality assurances and dependent on the stage of the sale process to:

(i) allow any potential Land Purchaser access to the Heysham Land and/or the Dungeness Land on reasonable terms and subject to appropriate indemnities from the potential Land Purchaser so that the potential Land Purchaser can carry out all studies, investigations, surveys, assessments or other such enquiries as would reasonably be necessary with a view to carrying out new nuclear operations on such site; and

(ii) provide any potential Land Purchaser with such information relating to the Heysham Land and/or the Dungeness Land as the potential Land Purchaser may reasonably require.

Reporting

52. EDF shall submit written reports in English on potential purchasers of the Dungeness and/or Heysham Land and developments in the negotiations with such potential purchasers to the Commission and the Monitoring Trustee no later than 10 days after the end of every month following the Effective Date (or otherwise at the Commission's request).

53. EDF shall inform the Commission and the Monitoring Trustee on the preparation of the data room documentation and the due diligence procedure and shall submit a copy of an information memorandum to the Commission and the Monitoring Trustee before sending the memorandum out to potential purchasers.

F.2 <u>Land Purchaser</u>

54. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When EDF or the relevant Affiliated Undertaking has reached an agreement with a purchaser, it shall submit a fully documented and reasoned proposal, including a copy of the final agreement(s), to the Commission and the Monitoring Trustee. EDF must be able to demonstrate to the Commission that the purchaser is a Credible Nuclear Operator and that the Dungeness or Heysham Land is being sold in a manner consistent with the Commitments. For the approval, the Commission shall verify that the purchaser fulfils the criteria to be a Credible Nuclear Operator and that the Dungeness or Heysham Land is being sold in a manner consistent with the Commitments.

F.3 Termination of one grid connection agreement at Hinkley Point

55. Currently EDFDCL has one bilateral connection agreement with NGET and BEGL has two bilateral connection agreements with NGET for connection to NGET's transmission network at Hinkley Point suitable for nuclear new build.

56. EDF commits to procure that EDFDCL or BEGL terminates one of these bilateral connection agreements between NGET and EDFDCL and BEGL or otherwise surrender such rights as EDFDCL or BEGL may have under one such agreement. EDF shall select which agreement to terminate or otherwise surrender in its absolute discretion.

57. To this end, EDF shall procure that EDFDCL or BEGL will notify this termination to NGET in writing no later than the end of the Initial Period and shall inform the Commission and the Monitoring Trustee on the notification of this termination no later than 14 days after this notification.

SECTION G TRUSTEE

G.1 Appointment Procedure

58. EDF shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If EDF has not entered into a binding sale and purchase agreement one month before the end of the Divestiture Period or if the Commission has rejected a purchaser of Eggborough, Sutton Bridge or the Dungeness Land or the Heysham Land proposed by EDF at that time or thereafter, EDF shall appoint a Divestiture Trustee to carry out the functions specified in the Commitments for a Divestiture Trustee. The appointment of the Divestiture Trustee shall take effect upon the commencement of the Divestiture Period.

59. The Trustee shall be independent of the Parties, possess the necessary qualifications to carry out its mandate, for example as an investment bank or consultant or auditor, and shall neither have nor become exposed to a conflict of interest. The Trustee shall be remunerated by the Parties in a way that does not impede the independent and effective fulfillment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of Eggborough, Sutton Bridge and/or the Dungeness Land/Heysham Land, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by EDF

60. No later than one week after the Effective Date, EDF shall submit a list of one or more persons whom EDF proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the Divestiture Period, EDF shall submit a list of one or more persons whom EDF proposes to appoint as Divestiture Trustee to the Commission for approval. The proposal shall contain sufficient information for the Commission to verify that the proposed Trustee fulfils the requirements set out in paragraph 59 and shall include:

(a) the full terms of the proposed mandate, which shall include all provisions necessary to enable the Trustee to fulfil its duties under these Commitments;

(b) the outline of a work plan which describes how the Trustee intends to carry out its assigned tasks;

(c) an indication whether the proposed Trustee is to act as both Monitoring Trustee and Divestiture Trustee or whether different trustees are proposed for the two functions.

Approval or rejection by the Commission

61. The Commission shall have the discretion to approve or reject the proposed Trustee(s) and to approve the proposed mandate subject to any modifications it deems necessary for the Trustee to fulfil its obligations. If only one name is approved, EDF shall appoint or cause to be appointed, the individual or institution concerned as Trustee, in accordance with the mandate approved by the Commission. If more than one name is approved, EDF shall be free to choose the Trustee to be appointed from among the names approved. The Trustee shall be appointed within one week of the Commission's approval, in accordance with the mandate approved by the Commission.

New proposal by EDF

62. If all the proposed Trustees are rejected, EDF shall submit the names of at least two more individuals or institutions within one week of being informed of the rejection, in accordance with the requirements and the procedure set out in paragraphs 58 and 61.

Trustee nominated by the Commission

63. If all further proposed Trustees are rejected by the Commission, the Commission shall nominate a Trustee, whom EDF shall appoint, or cause to be appointed, in accordance with a trustee mandate approved by the Commission.

G.2 <u>Functions of the Trustee</u>

64. The Trustee shall assume its specified duties in order to ensure compliance with the Commitments. The Commission may, on its own initiative or at the request of the Trustee or EDF, give any orders or instructions to the Trustee in order to ensure compliance with the conditions and obligations attached to the Decision.

Duties and obligations of the Monitoring Trustee

65. The Monitoring Trustee shall:

(a) propose in its first report to the Commission a detailed work plan describing how it intends to monitor compliance with the obligations and conditions attached to the Decision.

(b) oversee the on-going management of Eggborough with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by EDF with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:

(i) monitor the preservation of the economic viability, marketability and competitiveness of Eggborough, and the keeping separate of Eggborough from the business retained by the Parties, in accordance with paragraphs 7-10 of the Commitments;

(ii) supervise the management of Eggborough as a distinct and saleable entity, in accordance with paragraph 11 of the Commitments;

(iii) (1) in consultation with EDF, determine all necessary measures to ensure that EDF does not after the Effective Date obtain any business secrets, knowhow, commercial information, or any other information of a confidential or proprietary nature relating to Eggborough, in particular strive for the severing of Eggborough' participation in a central information technology network to the extent possible, without compromising the viability of Eggborough and subject to the necessary requirements pursuant to the Eggborough CTA, and (2) decide whether such information may be disclosed to EDF as the disclosure is reasonably necessary for the orderly running and the optimisation of the value of Eggborough, to allow EDF to carry out the divestiture, to manage the financial and risk exposure of the activities conducted by the Eggborough Hold Separate Manager through the Eggborough CTA or as the disclosure is required by law;

(iv) monitor the splitting of assets and the allocation of Personnel between Eggborough and EDF or Affiliated Undertakings;

(c) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;

(d) propose to EDF such measures as the Monitoring Trustee considers necessary to ensure EDF's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of Eggborough, the holding separate of Eggborough and the non-disclosure of competitively sensitive information;

(e) review and assess potential purchasers as well as the progress of the divestiture process and verify that, dependent on the stage of the divestiture process, (a) potential purchasers receive sufficient information relating to Eggborough and the Eggborough Personnel in particular by reviewing, if available, the data room documentation, the information memorandum and the due diligence process, and (b) potential purchasers are granted reasonable access to the Eggborough Personnel (and any employees of British Energy or its Affiliated Undertakings seconded to Eggborough);

(f) provide to the Commission, sending EDF a non-confidential copy at the same time, a written report within 15 days after the end of every month. The report shall cover the operation and management of Eggborough so that the Commission can assess whether Eggborough is held in a manner consistent with the Commitments and the progress of the divestiture process as well as potential purchasers. In addition to these reports, the Monitoring Trustee shall promptly report in writing to the Commission, sending EDF a non-confidential copy at the same time, if it concludes on reasonable grounds that EDF is failing to comply with these Commitments;

(g) within one week after receipt of the documented proposal referred to in paragraph 37, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of Eggborough after the sale and as to whether Eggborough is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the sale of Eggborough without one or more Assets or not all of the Eggborough Personnel affects the viability of Eggborough after the sale, taking account of the proposed purchaser.

(h) To the extent that they are relevant and applicable, the provisions in (a) to (g) shall apply mutatis mutandis to the divestment Sutton Bridge and of the Dungeness Land or Heysham Land.

Duties and obligations of the Divestiture Trustee

<u>Duties and Obligations in respect of Divestments</u>

66. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Asset to a purchaser, provided that the Commission has approved both the purchaser and the final binding sale and purchase agreement in accordance with the procedure laid down in paragraph 37 or paragraph 54 (as applicable). The Divestiture Trustee shall include in the sale and purchase agreement such terms and conditions as it considers appropriate for an expedient sale in the Trustee Divestiture Period. In particular, the Divestiture Trustee may include in the sale and purchase agreement such customary representations and warranties and indemnities as are reasonably required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of EDF, subject to EDF's unconditional obligation to divest at no minimum price in the Trustee Divestiture Period.

67. In the Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the divestiture process. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to EDF.

<u>Duties and obligations in respect of the Sutton Bridge Tolling Agreement</u>

68. Within the Initial Trustee Divestiture Period, the Divestiture Trustee shall enter into a binding tolling agreement with a counterparty in accordance with the procedure laid down in paragraph 35. The Divestiture Trustee shall include in the tolling agreement such terms and conditions as it considers appropriate. The Divestiture Trustee shall protect the legitimate financial interests of EDF, subject to EDF's unconditional obligation to enter into a binding tolling agreement in the Initial Trustee Divestiture Period.

69. In the Initial Trustee Divestiture Period (or otherwise at the Commission's request), the Divestiture Trustee shall provide the Commission with a comprehensive monthly report written in English on the progress of the negotiations in respect of the tolling agreement. Such reports shall be submitted within 15 days after the end of every month with a simultaneous copy to the Monitoring Trustee and a non-confidential copy to EDF.

G.3 Duties and obligations of EDF

70. EDF shall provide and shall cause its advisors to provide the Trustee with all such cooperation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of EDF's, Eggborough's or Sutton Bridge's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and EDF, Eggborough and Sutton Bridge shall provide the Trustee upon request with copies of any necessary document. EDF, Eggborough and Sutton Bridge shall make available to the Trustee one or more offices on their premises and shall be available for meetings in order to provide the Trustee with all information necessary for the performance of its tasks.

71. EDF shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of Eggborough and/or Sutton Bridge. This shall include all administrative support functions relating to Eggborough and/or Sutton Bridge which are currently carried out at headquarters level. EDF shall provide and shall cause its advisors to provide the Monitoring Trustee, on request, with the information submitted to potential purchasers, in particular give the Monitoring Trustee access to the data room documentation and all other information granted to potential purchasers in the due diligence procedure. EDF shall inform the Monitoring Trustee on possible purchasers, submit a list of potential purchasers, and keep the Monitoring Trustee informed of all developments in the divestiture process. For the avoidance of doubt this provision shall apply mutatis mutandis to the Dungeness Land or Heysham Land divestment.

72. EDF shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale of each of the Divestment Assets and the Divestment Asset Closings and entering into the Sutton Bridge Tolling Agreement and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale of each of the Divestment Assets and the Divestment Asset Closings including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, EDF shall cause the documents required for effecting any sale or any Divestment Asset Closing or the Sutton Bridge Tolling Agreement to be duly executed.

73. EDF shall indemnify the Trustee and its employees and agents (each an "Indemnified Party") and hold each Indemnified Party harmless against, and hereby agrees that an Indemnified Party shall have no liability to EDF for any liabilities arising out of the performance of the Trustee's duties under the Commitments, except to the extent that such liabilities result from the willful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.

74. At the expense of EDF, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to EDF's approval (this approval not to be

unreasonably withheld or delayed) if the Trustee considers the appointment of such advisors necessary or appropriate for the performance of its duties and obligations under the Mandate, provided that any fees and other expenses incurred by the Trustee are reasonable. Should EDF refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard EDF. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph 73 shall apply mutatis mutandis. In the Trustee Divestiture Period, the Divestiture Trustee may use advisors who served EDF during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient sale.

G.4 Replacement, discharge and reappointment of the Trustee

75. If the Trustee ceases to perform its functions under the Commitments or for any other good cause, including the exposure of the Trustee to a conflict of interest:

    (a) the Commission may, after hearing the Trustee, require EDF to replace the Trustee; or

    (b) EDF, with the prior approval of the Commission, may replace the Trustee.

76. If the Trustee is removed according to paragraph 75, the Trustee may be required to continue in its function until a new Trustee is in place to whom the Trustee has effected a full hand over of all relevant information. The new Trustee shall be appointed in accordance with the procedure referred to in paragraphs 58-63.

77. Beside the removal according to paragraph 75, the Trustee shall cease to act as Trustee only after the Commission has discharged it from its duties after all the Commitments with which the Trustee has been entrusted have been implemented. However, the Commission may at any time require the reappointment of the Monitoring Trustee if it subsequently appears that the relevant remedies might not have been fully and properly implemented.

SECTION H REVIEW CLAUSE

78. The Commission may, where appropriate, in response to a request from EDF showing good cause and accompanied by a report from the Monitoring Trustee:

    (a) Grant an extension of the time periods foreseen in the Commitments, or

    (b) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

79. Where EDF seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall EDF be entitled to request an extension within the last month of any period.

Paris,

Duly authorized for and on behalf of EDF,

Marianne Laigneau

General Secretary and Legal Director

SCHEDULE 1

DESCRIPTION OF EGGBOROUGH

1. General information

1.1 Name of the Power Plant: Eggborough Power Station

1.2 Location: Eggborough, Goole, East Yorkshire DN14 OBS,
Grid reference: OS SE 576242

1.3 Type / Primary Energy Source: coal

a. Total installed capacity: 1960 MWe
b. Plant Operator: Eggborough Power Ltd
c. Planned lifespan: Commissioned in 1966, first generation 1967 with a design life of 40 years. There is no scheduled closure date at present. Its closure will depend on its ability to operate safely and economically within relevant environmental legislation.

2. Legal Structure of Plant Operator

2.1 Eggborough Power Ltd is effectively a wholly owned subsidiary of British Energy Group PLC.

3. Main Assets

3.1 Relevant lots of land: Details as set out in the Appendix to this Schedule.

3.2 Generators, turbines, grid connection: 4 x 500Mwe coal fired units each comprising a single boiler and single shaft steam turbine. Two of the four units have flue gas de-sulphurisation (FGD) equipment fitted.

Eggborough has a connection to the National Grid with a maximum export capacity of 1960Mwe.

3.3 Type/Primary Energy Source: Coal but has been using bio-mass as part of an ongoing series of trials.

4. Main Contracts

4.1 Fuel supply contracts:

Eggborough Power Limited has no coal or biomass supply contracts of its own.

4.2 Long-term key service / maintenance contracts:

None.

5. Key Personnel

[…]

Schedule 1 – Appendix

Eggborough Land

[…]

SCHEDULE 2

DESCRIPTION OF SUTTON BRIDGE

1. General information

1.1 Name of the Power Plant: Sutton Bridge Power Station

1.2 Location: Sutton Bridge, Lincolnshire, England

1.3 Type / Primary Energy Source: gas

d. Total installed capacity: 803 MWe (Registered Grid Capacity)

e. Plant Owner: EDF Energy (Sutton Bridge Power) Limited

f. Planned lifespan: Commissioned in 1999, with a design life of 30 years. There is no scheduled closure date at present. Its closure will depend on its ability to operate safely and economically within relevant environmental legislation.

2. Legal Structure of Plant Owner

2.1 EDF Energy (Sutton Bridge Power) is effectively a wholly owned subsidiary of EDF Energy plc

3. Main Assets

3.1 Relevant lots of land: Details are set out in the Appendix to this Schedule

3.2 Generators, turbines, grid connection: The station includes two PG9351FA gas turbines with power generating capacity of approximately 260 MW each, both of which feed steam to one GE steam turbine generator with power generating capacity of approximately 270 MW, gas pipeline and the 400kV transmission line

3.3 Type/Primary Energy Source: Gas

3.4 Other assets (if any): None

4. Main Contracts

4.1 Fuel supply contracts: Sutton Bridge Power has no gas supply contracts of its own i.e. gas fuel is purchased from the wholesale market

4.2 Long-term key service / maintenance contracts:

[…]

[…]

5. Key Personnel

[…]

Schedule 2 – Appendix

Sutton Bridge Land

The area edged green within the red circle is the land on which the Sutton Bridge power plant operates and outlines the property to be sold

[…]