



EUROPEAN COMMISSION

Brussels, 01.VI.2005

C(2005)1482 fin

Subject: **State aid N 57/2005 – United Kingdom
Regional Innovative Broadband Support in Wales**

Sir,

I. PROCEDURE

1. By letter registered on 9 February 2005, pursuant to Article 88 (3) of the EC Treaty, the authorities of the United Kingdom (hereafter “UK”) notified a planned Regional Innovative Broadband Support aid scheme (hereafter “the measure”) promoting the rollout of broadband services in Wales. By letter of 4 March 2005, the Commission requested additional information on the proposed measure to which the UK authorities replied by letter registered on 4 April 2005.

II. CONTEXT

2. Implementing the eEurope Action Plan 2005, most Member States have put comprehensive national broadband strategies in place¹. The notified measure is part of the UK National Broadband Strategy which aims at boosting investments in broadband access to improve the availability of connectivity for end users at adequate prices and to bridge the digital divide between communities and businesses that can get broadband access and those who cannot.
3. In July 2002, the Welsh Assembly Government developed a Broadband Wales Programme² (hereafter “Programme”) that outlines a vision on where Wales needs to go in order to address the current gaps in broadband delivery and to fully exploit the benefits of broadband technologies. The program aims to provide accessible and affordable broadband by March 2007 through demand promotion,

¹ Commission Communication COM(2004) 369 of 12.05.2004, “Connecting Europe at High Speed – National Broadband Strategies”

² http://www.cymruarlein.wales.gov.uk/fe_irc/index.asp

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supply improvements, encouragement of local initiatives, specific procurements and public sector demand aggregation. As part of the Programme, a Broadband Action Plan was developed to identify a number of areas where public sector intervention is needed to boost broadband deployment and use.

4. Wales has witnessed a considerable progress in the roll-out of mass-market broadband services. The percentage of population with broadband access (capability to connect to broadband service on request) was 76% in March 2004 compared to 36% in 2002. However, Wales still lags behind some other parts of the country with overall 87% of the UK's population having access to broadband.³ This figure also indicates how much further broadband coverage is likely to extend in Wales in the short and medium term revealing a remaining digital divide.
5. In April 2004, a Strategic Review of the Programme took place to take into account the technological and market developments of the fast moving telecommunications environment in Wales and realign priorities accordingly. This review found that there were still several broadband "blackspots" in Wales that currently have no broadband access and have no prospects in receiving the service in the near term.
6. British Telecommunication (BT) announced in April 2004 that all but 35 exchanges in Wales would be upgraded to enable ADSL⁴ broadband access by 2005.⁵ According the authorities, the 35 exchange areas⁶ left out of BT's roll-out program are neither included in the coverage plan of other existing providers.⁷ In addition, even where exchanges have been enabled to provide ADSL, there will still be a sizeable part of the population that will not be able to access broadband services due to the existence of aluminium and/or poor condition of copper in the last mile of the existing telecom network and the long distance between the customer site and the exchange. Wireless technology has the potential to address some of these technical constrains. However, in many areas hills, trees and buildings interfere with the line of sight between a mast or base station and the customer site. Wales is made up of largely rural mountainous countryside with 25% of the land above an altitude of 305 meters.
7. Satellite technology has the ability to provide coverage to 99% of Wales, however the cost of receiving a satellite service today is prohibitive to many users, especially the consumer market.⁸ Satellite also suffers from some latency

³ UK Department of Trade and Industry: UK Broadband Status Report, 2004

⁴ Asymmetric Digital Subscriber Line

⁵ Prior to this announcement, BT operated a demand trigger level campaign whereby demand had to be registered and reach a certain level before an exchange was to be ADSL enabled by the incumbent.

⁶ Exchange area is defined as the geographic area within which sites are connected via the local loop (i.e. telephone cables that run to homes and businesses) to the serving exchange.

⁷ During the demand trigger level campaign organised by BT some small regional telecommunications companies, using various technologies (DSL, wireless, Wimax ready and satellite), expressed an interest in upgrading some exchanges even prior to the trigger level being reached. The level of interest from smaller companies has however slowed down since BT's announcement. Moreover, in the 35 exchange areas left out by BT, the costs of upgrading continue to be prohibitive to smaller companies. The authorities have held recent consultations with providers that indicate that these areas do not figure on their near term coverage plans.

⁸ Monthly subscription for satellite broadband for businesses is GBP 60-200 and for residential users GBP 60 according to the Broadband Wales Observatory: Evaluation of Broadband Wales Programme Objectives, 2004

issues due to adverse weather conditions in some parts of Wales. Broadband “blackspots” could also be served by leased lines, but most consumers do not need the fully dedicated service, the rental costs of which are very high for most small business and residential users.

8. The cost of providing the infrastructure to these areas at affordable prices and the number of people who would benefit from this service is not considered to be cost-effective and commercially feasible by licensed telecommunications companies. Without intervention, broadband would not be supplied to these “blackspot” areas.

III. DESCRIPTION OF THE MEASURE

9. *General objective:* The envisaged aid scheme aims at supporting the provision of first generation broadband services⁹, at conditions and prices similar to urban areas, in the so called “blackspot” areas of Wales which are currently not served and where there are no plans for coverage in the near future.
10. *Legal basis:* The measure will be implemented under Section 126 of the Housing Grants, Construction and Regeneration Act of 1996. The project will be administered at a devolved regional level since the Welsh Assembly Government has statutory powers to further economic development in Wales and, as such, aims to ensure adequate provision of broadband in Wales.
11. *Beneficiaries:* Direct recipients of the aid will be a single, or a consortium of, provider(s) of electronic communications services, in particular licensed telecommunications operators, service providers and system integrators. Indirect recipients will be households and businesses in Wales that cannot currently access broadband via commercial telecommunications companies, as well as third party providers who may gain access to a wholesale service.
12. *Retail service definition:* The selected service provider is required to roll-out a first generation retail broadband service in the concerned areas to connect end-users. For the purposes of the project, first generation is defined as asymmetric broadband of at least 512kbps downstream and 256kbps upstream speed with a maximum contention ratio¹⁰ of 50:1. The principle of “price equity” will apply. i.e. the service provider will be allowed to charge comparable tariffs to those offered on commercial terms within existing broadband enabled urban areas of Wales and the rest of the United Kingdom. The retail product benchmark used is “BT Basic” service and service providers are expected to provide broadband services to end-users of at least the same scope, content and quality.
13. *Wholesale offer:* The tender specifications stipulate that the selected providers will have to offer wholesale access on a non-discriminatory basis to other operators and service providers wishing to connect customers. The selected provider should have the technical infrastructure to meet all reasonable demands, as well as be able to establish and maintain points of connection reasonably required (in terms of sufficient capacity and numbers) to enable the conveying of

⁹ Asymmetric broadband at about 512kbps to 2Mbps downstream and 256kbps to 512kbps upstream speed.

¹⁰ The contention ratio indicates how many users may share a specific connection at the local telephone exchange at the same time. In this case, it would be up to 50 users.

data between third party internet service providers and their customers. The opportunity to enter into a wholesale agreement shall be offered promptly and without delay of any kind. The selected provider is expected to respect the principle of “price equity” in terms of wholesale tariffs as well. It can charge wholesale prices comparable to those offered within existing broadband enabled urban areas of the United Kingdom. The wholesale benchmark price will be the rate offered by BT Wholesale for a comparable service. A post-termination clause will be included requiring the continuing provision of wholesale services, at the same terms as the wholesale services provided under the project, to third party internet service providers even after the project has ended. The authorities will seek in the tender documentation a post-termination clause that would apply for an unlimited amount of time.

14. *Technology and infrastructure:* The project aims at service provision and does not prescribe any technology. It is up to the service providers to build, buy or lease the infrastructure necessary and to provide the necessary equipment to provide the required service. The funding authorities do not seek to procure or take ownership of any infrastructure or telecommunications equipment.
15. *Funding instruments:* The service provider will be given a grant. All payments will be subject to a Broadband Service Agreement between the selected service provider and the Welsh Assembly Government. In addition, a rebate mechanism will be incorporated into the Broadband Service Agreement that foresees quarterly contract payments to the service provider to be abated by a percentage of the income earned in the preceding year.¹¹ The service provider’s internal rate of return (IRR) will be capped at an agreed threshold and discounted cash flow methodology will be used to see whether the achieved IRR exceeds the pre-agreed threshold, which would trigger a repayment sufficient to reduce the IRR to the pre-agreed threshold. The authorities will make reference to this rebate mechanism and the methodology used, including the process for determining the threshold IRR, in the tender documentation.
16. *Budget and aid intensity:* The project will cover both Objective 1 areas under the structural funds and other rural and remote areas of Wales.
 - In Objective 1 areas, [...] million will be financed from the Welsh Assembly’s resources and [...] million from the European Regional Development Fund. The selected service provider is expected to match the state and EU financing by funding 50% of the capital costs up to a maximum of [...], as well as all of the operating costs.
 - In other “blackspot” areas of Wales, the measure will be funded through a separate [...] budget of the Welsh Assembly Government, which will fund up to 50% of the total capital costs of the project. Thus the selected service provider is expected to contribute up to [...] in those areas plus the operating costs.
17. *Procurement:* The selection of the service providers will be conducted in accordance with EU procurement rules¹². The advertisement will be published in

¹¹ At the end of the contract a further rebate of a percentage of income earned in the final year would be made.

* Business secret

¹² Council Directive 92/50/EEC of 18 June 1992

the Official Journal of the European Union. Grants will be awarded to the economically most advantageous tender, following a number of well-defined outlined criteria. Selection will take place under the negotiated procedure due to the technically complex nature of the project and the trade-offs involved in terms of service coverage, quality and costs. However, certain criteria will be mandatory for pre-selection, such as the post-termination clause requiring the continuance of open access even after the project has ended.

18. *Eligible costs*: Eligible capital costs such as investments in communications networks and equipment necessary to provide the requested broadband services have to be directly attributable to the projects and incurred during the period of the Broadband Service Agreement. No operating costs will be financed.
19. *Duration of the scheme*: The Broadband Service Agreement will require services to be provided for a period of three years, subject to a possible extension of up to two years.
20. *Monitoring*: The fees payable to the selected service provider will be subject to an annual internal review by the authorities for the purpose of reconciliation of the fees payable in light of demands reached in respect of broadband services provided. In addition, the payments to be made will be reviewed on a quarterly basis against performance of the services in accordance to the requirements set out in the Broadband Service Agreement.

IV. ASSESSMENT OF THE MEASURE: PRESENCE OF AID

21. *According to the EC Treaty and consolidated case-law there is State aid within the meaning of Article 87(1) when:*
 - there is an intervention by the State or through State resources;
 - it confers an advantage on the recipient;
 - it distorts or threatens to distort competition;
 - the intervention is liable to affect trade between Member States;

State resources

22. *The measure is partly funded by structural funds and partly by resources of the Welsh Assembly Government. The latter are to be considered as State resources.*

Advantage

23. *Selected service provider*: A tender tends to minimise potential advantages to the service provider in terms of excessive returns. However, even if a service provider would not receive an excessive return on its overall investment, it receives financial support which provides the possibility of entering the market and establishing its business on conditions not otherwise available on the market. In addition, the subsidy will allow the service provider to offer the services at lower prices than it would have been able to offer had it had to bear all the costs itself and, as a consequence, such a service provider will be able to attract more customers than under normal conditions.
24. *As a result of the State contribution, the selected providers are likely to build or upgrade new or additional infrastructure and communications equipment*

necessary to offer the services. The providers will be in a position to exploit this infrastructure and equipment as well as customer relationships partly acquired with State funds even after the lifetime of the project. Hence, it may benefit from continuing residual advantages from the project.

25. *End users*: The objective of the State subsidy is to provide broadband services to residential users and businesses at conditions which are currently not available in the areas eligible for funding. Whereas residential users are not subject to State aid rules, businesses in the targeted geography will benefit from service coverage beyond and prices below what would be provided purely on a commercial basis (like, in some areas, currently offered leased line offers or satellite connections). Considering the number of users to be connected to the service, it seems that the advantage for each individual end-user beneficiary will be below the “de minimis” threshold. However, the UK authorities did not provide any assurance relating to the respect of Article 3(1) of the “de minimis” Regulation regarding cumulation and monitoring. Therefore it cannot be excluded that aid granted to end-users could exceed the limits set out in the aforementioned “de minimis” Regulation.¹³
26. *Resellers*: In addition, third party providers of broadband services could also be expected to benefit from the *State* resources, given the wholesale access requirement. They, just like the SMEs, will be customers of the service provider, in this case of a wholesale service. In some of the areas covered by the project, there is no broadband infrastructure and therefore no wholesale offer at all, preventing market entry of third parties such as resellers without their own infrastructures.
27. The scheme is also selective in that it is addressed to undertakings active in certain regions or in certain markets for electronic communications services that provide broadband connectivity. The scheme therefore provides a selective advantage.

Distortion of competition

28. The intervention of the State alters the existing market conditions by allowing the provision of broadband services by the selected service providers and, potentially, third party providers. A number of SMEs may be subscribing to the services provided by the selected suppliers instead of more expensive market-based solutions (for instance satellite or leased line offerings). Therefore, the fact that a new broadband service becomes available at a much lower price than existing albeit expensive solutions has the effect of distorting competition.
29. In addition, while the local government authorities involved decided to intervene precisely in view of the lack of private initiatives in the concerned areas, it cannot be excluded that market initiatives could become viable in some areas in the medium term. By securing this project, the chosen service providers will be capable of establishing their business and developing their customer base, enjoying a first mover advantage over prospective competitors.

Effect on trade

¹³ Commission Regulation (EC) No. 69/2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid, OJ L 10, 13.01.2001, p.30-32

30. Insofar as the intervention is liable to affect providers of electronic communications services and service providers from other Member States, the measure has an effect on trade. The markets for electronic communications services are more and more open to competition between operators and service providers, which generally engage in activities that are subject to trade between Member States. There may also be an effect on trade between the businesses using the broadband services enabled by the measure and their competitors in other Member States, although the importance of that effect will probably be low.

Conclusion

31. In view of the above, the Commission considers that the notified measure grants an economic advantage to the selected service provider(s), SMEs and residential users and third party service providers. The project is publicly funded, distorts competition and has an effect on trade between Member States. Therefore the Commission regards the notified measure as constituting State aid within the meaning of Article 87 (1) of the EC Treaty.
32. Having established that the project involves aid within the meaning of Article 87(1) of the EC Treaty to the selected service providers, third party providers using the open access provision and to businesses, it is necessary to consider whether the measure can be found to be compatible with the common market.

V. ASSESSMENT OF THE MEASURE: COMPATIBILITY

33. The Commission notes that the project aims to ensure the widespread availability and use of high-speed broadband services in currently unserved areas with no prospect for coverage on commercial terms in the near and medium term and, as such, does not fall under one of the existing frameworks and guidelines. It should be noted that some areas covered by the project are located within Objective 1 areas under the ERDF rules, as well as Art. 87 (3) (a) assisted areas within the meaning of the Regional Aid Guidelines.¹⁴ However, other areas are outside these assisted regions and hence the measure cannot be assessed under the Regional Aid Guidelines. Moreover, while the aid to be granted under the scheme may in some cases qualify as aid for initial investment within the meaning of those guidelines in so far as it benefits the service providers, the same cannot be said in respect of its impact on the end users and resellers, for whom the benefit is not linked to any initial investment.
34. The Commission therefore considers that the assessment of the compatibility of the measure with the common market needs to be based directly on Article 87(3)(c) of the EC Treaty¹⁵ that states that:

“aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to

¹⁴ OJ 1998 C 74, p.9.

¹⁵ See also: State aid decisions for the UK: N282/03 Cumbria Broadband – Project Access” of 10.12.2003, N126/04 “Broadband for SMEs in Lincolnshire” of 14.12.2004, N199/04 “Broadband business fund” of 16.11.2004, N307/04 “Broadband in Scotland – remote and rural areas” of 16.11.2004 and for Spain: N583/04 Broadband in rural and remote areas” of 06.04.2005 (See: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/).

an extent contrary to the common interest” may be considered to be compatible with the common market.

Necessity of the measure

35. Broadband access is seen as a necessary step for the modernisation of the EU society and economy and is a crucial aspect of the Lisbon agenda. It is a prerequisite for the development of e-Business, e-Government, e-Learning and e-Health projects. Implementing the *eEurope Action Plan 2005*¹⁶, the EU15 Member States have put comprehensive national broadband strategies in place. This process is now extended to all 25 EU Members¹⁷.
36. The notified measure is part of the Wales Broadband Strategy that feeds into the UK National Broadband Strategy which was communicated to the Commission. By means of this strategy, the UK government intends to enhance the investments in broadband access via a variety of networks and technologies to improve the availability of connectivity for the end users at adequate prices. The strategy also aims at satisfying existing demand which may be unserved and to achieve a significant leap in broadband access in a very short time.
37. Broadband connectivity is a type of service that by its nature is capable of positively affecting the productivity and growth of a large number of sectors and activities. Regional economic development benefits resulting from greater broadband deployment can include job creation and retention, more industrial growth, improved education and health systems and even reduced traffic congestion¹⁸. Finally, the social and economic case for broadband takes on added significance for rural and remote communities, where improved communications can address a variety of challenges posed by distance¹⁹.
38. Lack of broadband coverage is due, among others, to some of the typical economic problems associated with networks industries. Broadband networks are generally much more cost effective to roll-out, and hence available at cheaper terms, where potential demand is higher and concentrated, i.e. in densely populated areas. Because of high fixed costs, unit costs escalate dramatically as population densities drop. Remoteness also plays a role, requiring bridging longer distances in the backhaul and in the last mile. In other cases it has been estimated that approximately 65-70% of the costs associated with the deployment of broadband in the access network is related to civil infrastructure.²⁰ In addition, although equipment costs have fallen as volumes increase, they remain a significant cost and major barrier to roll-out. In areas where demand is not very developed and coverage of cost is uncertain, private operators might find it difficult to find a source of funding for infrastructure projects, which have a long life and amortisation period.

¹⁶ COM(2002) 263

¹⁷ Commission Communication COM(2004) 369 of 12.05.2004, “Connecting Europe at High Speed – National Broadband Strategies”

¹⁸ US Department of Commerce, Office of Technology Policy, “Understanding Broadband Demand”, September 2002

¹⁹ OECD “Broadband Driving Growth: Policy Responses”, October 2003

²⁰ Broadband Stakeholders Group “Broadband in Rural Areas”, 2003.

39. The present project concerns areas with low population density and/or with difficult topology which act(s) as a significant disincentive to the private sector development of infrastructure necessary for the provision of broadband. Many of the targeted areas are located in Objective 1 areas under the structural funds. The Commission has recognised the need to encourage the deployment of broadband infrastructure in less favoured areas, where geographical isolation and/or low density of population can make the cost of upgrading the existing infrastructure unsustainable.²¹
40. Public sector intervention is thus needed to support broadband rollout in some areas, providing seed money to jumpstart private investment in areas otherwise underserved. With the increasing public support for broadband initiatives, there is growing evidence that public intervention may accelerate the establishment of broadband networks in less profitable areas, whilst ensuring, by means of open access requirements, that competition is preserved in the future.
41. The notified measure will offset a geographical and commercial handicap and is objectively justified to address the lack of provision of a service due to the insufficient density of potential and actual subscribers to make delivering broadband services economically viable on a purely market-driven basis. The target group of the scheme includes both local businesses and citizens who will benefit from the availability of broadband services in both their day-to-day business activity and in the quality of life benefits that access affords to citizens.

Proportionality

42. In order for the aid measure to be compatible with Article 87(3)(c) of the EC Treaty, it must be proportionate to the objective and must not distort competition to an extent contrary to the common interest. The trade-off between the advantages – in terms of promoting the knowledge society and local economic development – and the disadvantages – in terms of distortion of competition and possible disincentives to private investment – has to be assessed. The extent of the measure in terms of service definition, as well as project design features, should also be evaluated to ensure that the least distorting model, which would nevertheless produce the required results, is adopted.
43. Concerning the measure at hand, the Commission notes the following positive elements:
 - (a) *Tender*: An advertisement will be published in the Official Journal of the European Union and the selection of the service providers will be made through a procedure that is in accordance with EC rules and principles on public procurement, minimising the advantage to the selected operators.
 - (b) *Technology neutrality*: The project is technologically neutral, i.e. it does not favour a priori any given technology.
 - (c) *Open access provision*: The selected service providers will be obliged to provide access to service providers on a transparent and non-discriminatory basis. The open access provision will be applicable even

²¹ Commission staff working paper, Guidelines on criteria and modalities of implementation of structural funds in support of electronic communications, 28.7.2003, SEC(2003) 895.

after the end of the project through a post-termination clause requirement. The pricing of this access is expected to be in line with market terms in urban areas of Wales and the rest of the UK.

- (d) *Use of existing infrastructure:* The freedom for the service providers to choose the most efficient way of procuring the necessary infrastructure, either by building, buying or leasing it from third parties minimises duplication and enhances economic efficiency. Since leasing facilities is expected to be more cost effective than building new infrastructure, existing operators have the possibility to contribute their infrastructure to the project, which limits the economic impact of the project for operators that may already have some infrastructure in place.
- (e) *Limited aid amounts:* As a result of the open call for proposals, only the most competitive proposals will be selected. The selected providers are expected to contribute a sizeable amount of the total project costs, including 50% of the capital and all the operating costs. Moreover, a rebate mechanism, under which a progressive reimbursement of the public funding is expected to take place as demand for services picks up, ensures that only the minimum necessary public funds are used. Given the size of the project and the number of enterprises concerned, the aid amount potentially reaching resellers and end-users is limited.
- (f) *Cost allocation transparency:* The specifications of the tender and the grant fund agreement will ensure that only eligible and attributable costs are allocated to projects implemented under the measure.
- (g) *Duration:* Whilst the measure will ensure sustainable solutions, the funding will be provided only for the duration of the project: three years, with possibility to extend it for two additional years.
- (h) *Monitoring:* The project will be able to provide annual reports about the implementation of the fund to the Commission. Reporting shall provide enough details to monitor whether the project distorts competition to an extent contrary to common interest. Moreover, the reports will provide sufficient detail to ensure that the criteria of open tender, technology neutrality and open access provision are fully respected.
- (i) *Minimisation of price distortion:* The appropriate pricing of the services is important to ensure that business end-users and third party service providers benefiting from the aid are not put in a position more favourable than their competitors located in regions where the same broadband services are available on market terms. For this purpose, the tariffs are benchmarked with tariffs offered by service providers in areas which do not benefit from aid.

The Commission took notice of the fact that the tender to select the service providers will set a price cap for the level of retail and wholesale access tariffs charged for the subsidized services. As noted in the Commission's decision "*Cumbria Broadband – Project Access*"²², appropriate pricing of the services is especially important to ensure that

²² In "Project Access" the UK authorities provided a benchmark rate equal to the cheapest available rates for the specific broadband service being offered on a retail basis to a majority of users at a national level. Commission decision N282/08 of 10/12/03 published OJ C16 22/01/04.

commercial end-users benefiting from the aid are not put in a position more favourable than their competitors located in regions where the same advanced broadband services are already available on pure market terms.

Moreover, disproportionately low prices may necessitate more aid than the minimum necessary to address the undersupply of the service in certain areas. However, the criteria which will be spelled out in the call for proposals together with the funding mechanism and the monitoring will provide safeguards that the prices offered to end users will be comparable with tariffs offered by service providers in other areas of the UK with no aid scheme in place. Therefore potential discrimination between customers being provided with the relevant services within the designated project area and users in other areas will be minimized.

44. In view of the above, the Commission considers that the public intervention in the notified measure will only be provided to the extent necessary to develop the use of broadband services in the designated areas. The intervention is designed in a way that does not distort competition to an extent contrary to the common interest.

Conclusion

45. In the light of the above, the Commission has come to the conclusion that the aid involved in the “Regional Innovative Broadband Support in Wales” is compatible with Article 87(3)(c) of the EC Treaty.

VI. DECISION

On the basis of the foregoing assessment, the Commission has accordingly decided that the aid scheme “Regional Innovative Broadband Support in Wales” is compatible with Article 87(3)(c) of the EC Treaty.

If this letter contains confidential information which should not be disclosed to third parties, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site:http://europa.eu.int/comm/secretariat_general/sgb/state_aids/.

Your request should be sent by registered letter or fax to:

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Yours faithfully,

For the Commission

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Member of the Commission