

***Case No COMP/M.5496 -
VATTENFALL / NUON
ENERGY***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)b
in conjunction with Art 6(2)

Date: 22/06/2009

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22/06/2009
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5496 – VATTENFALL/ NUON ENERGY
Notification of 28.04.2009 pursuant to Article 4 of Council Regulation
No 139/2004¹**

- (1) On 28 April 2009, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which Vattenfall AB ("Vattenfall", Sweden), wholly owned by the Swedish State, acquires within the meaning of Article 3(1)(b) of the Council Regulation sole control of the whole of N.V. Nuon Energy (former n.v. Nuon PBL Holding² - "Nuon Energy", the Netherlands), currently controlled by local and regional authorities in the Netherlands ("the sellers") by way of purchase of shares.

¹ OJ L 24, 29.1.2004 p. 1.

² Nuon Energy is currently a wholly owned subsidiary of n.v. Nuon. Hence, since 1 July 2008 n.v. Nuon has carried out a functional and organisational separation by transferring its production, supply and trading activities on the one hand and its grid operation activities on the other hand to two separate companies. As a result, the grid operation activities will remain with n.v. Nuon, whereas Nuon Energy (comprising, amongst others, the production, supply and wholesale activities) will be split off by way of a legal demerger. [Details of the legal demerger].

1. THE PARTIES

- (2) **Vattenfall** has different activities in the electricity sector namely (i) generation and wholesale supply, (ii) transmission³, (iii) retail supply and (iv) financial trading of electricity. Its main business operations are in Sweden, Germany, Finland, Denmark and Poland. Further, Vattenfall operates in the (i) production, (ii) distribution and (iii) supply of heat and has a negligible presence in the gas sector.
- (3) **Nuon Energy** is active across the entire energy chain, that is to say in (i) generation and wholesale supply of electricity, (ii) retail supply of electricity, (iii) financial trading of electricity, (iv) exploration and production of gas, (v) retail supply of gas and (vi) supply of heat and cooling. Nuon Energy is mainly present in the Netherlands but has also activities in Belgium and Germany.

2. THE OPERATION

- (4) The envisaged operation involves the acquisition of sole control by Vattenfall over Nuon Energy by means of a Share purchase Agreement according to which, Vattenfall will acquire 49% of shares in Nuon Energy in a first stage and the remaining shares in three subsequent tranches over a time period of six years⁴.
- (5) Furthermore, although Vattenfall will initially hold only 49% shares in Nuon Energy, under the contractual arrangements stating the terms of the share purchase agreement, it will have exclusive operational control of Nuon Energy since the acquisition of the first tranche of shares due, amongst other reasons, to its casting vote within the supervisory board⁵.
- (6) As a result, Vattenfall will have sole control over Nuon Energy from the purchase of the first tranche of shares.

³ Vattenfall, through its subsidiary Vattenfall Europe Transmission, is active in transmission in Germany. However, it aims to sell its transmission network.

⁴ Two tranches of 15% after two and four years from the acquisition of the first stake of 49% and the third tranche of 21% after six years.

⁵ Vattenfall will be entitled to appoint four out of the eight members of the supervisory board, including the chairman, having a casting vote. As a consequence, since decisions will be passed by simple majority Vattenfall will have the majority of voting rights within the supervisory board even in the event of a tied vote. [Details of corporate governance post-transaction.] Vattenfall will also appoint a representative within the management board together with the current CEO and CFO of Nuon Energy at the completion of the envisaged transaction. However, since all managing directors will be subsequently appointed by the supervisory board, Vattenfall will be able to indirectly appoint them by virtue of its majority of voting rights at the board level.

3. COMMUNITY DIMENSION

- (7) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁶ (EUR 21 984 million). Each of them have a Community-wide turnover in excess of EUR 250 million (Nuon Energy: EUR [...], Vattenfall: EUR [...]), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

4. RELEVANT MARKETS

- (8) The envisaged transaction relates to the following markets where the parties' activities overlap horizontally: (i) generation and wholesale supply of electricity in the Netherlands, Germany and the UK; (ii) retail supply of electricity to large/medium and small customers in Germany; (iii) financial electricity trading; (iv) trading of CO₂ emission rights; and finally (v) wholesale supply of natural gas and (vi) retail supply of gas to small and large customers, each of them based in Germany.
- (9) In previous decisions the Commission has defined the following product markets as separate markets: (i) generation and wholesale supply of electricity, usually considered nation-wide; (ii) retail supply of electricity, usually considered nation-wide; (iii) financial electricity trading and in addition (iv) trading for CO₂ emission rights, these last two usually considered broader than national.⁷ With respect to gas, Commission precedents have already defined separate markets for (v) wholesale supply and (vi) retail supply of gas further segmented between (a) large customers, including power plants and (b) small customers, each of them usually considered national in scope.⁸ With the exception of the market for the retail supply of electricity, there are no special circumstances that would necessitate the Commission to review these market definitions for the present case. Furthermore, given that under any envisageable market definition, the joint market shares of the parties do not approach 15%, therefore, these markets – with the exception of the market for the retail supply of electricity – are not considered to be affected markets and will not be dealt with further in the present decision.
- (10) The present decision will thus focus on the market for retail supply of electricity in Germany.

⁶ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, page 25).

⁷ See cases COMP/M.3440 – EDP / ENI / GDP, COMP/M.5224 – EDF / British Energy, COMP/39389 and COMP/M.3868 – DONG / Elsam / Energi E2.

⁸ See cases COMP/M.3007 – E.ON / TXU Europe Group, COMP/M.4110 – E.ON / Endesa, COMP/M.4672 – E.ON / Endesa Europa / Viesgo, COMP/M.1383 – ExxonMobil / BEB, COMP/M.3230 – Statoil / BP / Sonatrach / In Salah JV, IV/M.1383 – Exxon / Mobil.

4.1. Retail supply of electricity in Germany

4.1.1. Relevant product market

- (11) The German electricity sector is marked by the particularly strong presence of the four incumbents: E.ON, RWE, Vattenfall and EnBW.⁹ These companies control the overwhelming part of the generation as well as the largest territorial retail supply companies. In addition, they control the transmission system operators¹⁰ as well as the distribution system operators in their supply areas. Finally, it should also be mentioned that among them the four large vertically integrated energy companies (and in particular RWE and E.ON) hold a very large number of participations¹¹ in German municipal utilities, *Stadtwerke*.
- (12) The Commission has already defined in previous decisions the market for retail supply of electricity as a separate market encompassing the sale of electricity to final consumers¹². Further distinctions have been made between: (i) large half-hourly metered industrial customers often connected to the high voltage grid and (ii) small commercial and domestic (household) customers that are non-half-hourly metered and are connected to the low-voltage grid. The differentiation between the two groups is due to different needs and profiles on the demand side and different services and technologies offered on the supply side¹³.
- (13) The Bundeskartellamt, the German Federal Cartel Office ("FCO"), has chosen a distinction between (i) load measured (*leistungsgemessene*) customers and (ii) non-load measured or standard load profile (*nicht-leistungsgemessene* or *standardlastprofil*) customers based on similar considerations to those of the Commission in its precedents¹⁴.
- (14) The notifying party agrees with such a distinction between (i) large/industrial (load-measured) customers and (ii) household/small commercial (non-load measured)

⁹ This has also been confirmed, in particular the collective joint dominance of at least E.ON and RWE in COMP/39388 – (E.ON) German electricity wholesale market decision of 26 November 2008.

¹⁰ As a commitment to the Commission antitrust case COMP/39389 - German electricity balancing market, E.ON has agreed to divest its German transmission network, a process which it has already begun. Vattenfall has separately also put forward plans for the sale of its transmission business.

¹¹ Both controlling and non-controlling shareholdings

¹² See cases COMP/M.5224 – EDF / British Energy, COMP/M.3440 – EDP / ENI / GDP, COMP/M.4180 – Gaz de France / Suez, COMP/M.3868 – Dong / Elsam / Energi E2, COMP/M.3696 – E.ON / MOL.

¹³ See cases COMP/M.3440 – EDP / ENI / GDP, COMP/M.5224 – EDF / British Energy, COMP/M.4180 – Gaz de France / Suez.

¹⁴ FCO, B8-62/06, RWE Energy / SaarFerngas, decision of 12 March 2007, page 32 et seq. See also FCO's merger decisions B 8-93/07, RWE / Stadtwerke Krefeld-Neuss of 23 October 2007 and B 8-123/07, E.ON / Wasser und Energieversorgungs mbH Salzgitter of 19 December 2007. In particular the FCO argues that load measured customers have greater price elasticity, a structured demand profile due to their need of differentiated products and as a consequence different buying power and behaviour as opposed to non-load measured customers, which instead require simple products and uniform tariffs.

customers. As the market investigation has broadly confirmed this market definition¹⁵, the Commission considers that, for the purpose of this decision, these two submarkets constitute the relevant product markets without the need for any further sub-division.

4.1.2. Relevant geographic market

- (15) The Commission has generally defined the markets for retail supply of electricity, including those for small customers, as national in scope, provided that these are fully liberalised¹⁶.
- (16) The market investigation clearly confirmed that the market for supply of electricity to large industrial customers is indeed national in scope¹⁷.
- (17) The notifying party considers that a national market definition holds true also for the small customers supply market, given that in Germany liberalisation of the electricity market started already in 1998 enabling customers to freely choose their suppliers. In particular, the second amendment of the German Energy Act (*Energiewirtschaftsgesetz*, "EnWG") in 2005 led to significant improvements in grid access to suppliers¹⁸. Consequently, suppliers received equal access to the grid which enabled them to serve their customers under the same statutory requirements through standardised contracts with all the distribution system operators ("DSOs").
- (18) Based on the above and in line with the Commission practice, the notifying party argues that the German electricity retail market for small customers is national in scope. In supporting this view, the notifying party also underlines (i) the significant increase of end-customers switching rates in the last years¹⁹; (ii) the numerous entries into the German retail market on a German-wide scale; (iii) German-wide pricing and marketing strategies used by suppliers; (iv) the presence of cooperation agreements among the municipal public utilities (*Stadtwerke*), historically entrusted with the exclusive retail supply of electricity²⁰ to their municipal area, aiming to consolidate their market position beyond their home areas²¹. Finally, it submits that, as the top 40

¹⁵ Replies to question 4 of the Commission's article 11 letter of 6 May 2009 to competitors.

¹⁶ See cases COMP/M.5224 – EDF / British Energy, COMP/M.4180 – Gaz de France / Suez and COMP/M.3696 – E.ON / MOL.

¹⁷ Replies to question 2 of the Commission's article 11 letter of 13 May 2009 to large customers.

¹⁸ Contracts with the grid operators have been standardised and are subject to the same statutory requirements for each supplier. Moreover, access costs are equal to all suppliers.

¹⁹ The Parties estimate that the overall switching rate for 2008 amounts to approximately [0-5]% to [10-20]% overall in Germany. (The Commission's analysis shows significantly lower numbers as will be shown in recital (24). In the largest cities, the Parties estimate that the switching rate is significantly higher, around [10-20]% to [10-20]%, whilst in the rural areas it is on average still lower, between [5-10]% and [10-20]%. The actual figures relating to the two largest cities (Berlin and Hamburg) for 2008 are in marked contrast to this as will be shown in footnote 59.)

²⁰ *Stadtwerke* in Germany also often operate the electricity (and in most cases also gas) distribution networks within the city perimeters as well as take care of other communal tasks such as water supply, public transport and waste management.

DSOs cover 65% of all German households, suppliers are able to reach a large part of the customers by contracting with a limited number of DSOs and, consequently, the costs induced by this contracting prerequisite to the commercialization does not constitute a barrier to enter or expand²².

- (19) Notwithstanding the above, the FCO considers instead the existence of local markets²³ based on the following arguments: (i) the continuing dominance of the *Stadtwerke* in their municipal area; (ii) overall low and regionally different customer switching rates across Germany; (iii) local marketing strategies focusing on the territorial incumbent; and (iv) different local pricing policy according to the targeted DSO area.
- (20) Consistent with the notifying party' view, most of the respondents to the market investigation stated that competitive conditions of the German electricity market are homogeneous at national level with respect to access to the network and the regulatory framework²⁴. Despite this, one-third of the respondents replied that such homogeneity was still lacking. Nevertheless, overall, retailers seem to face no or very low legal and institutional barriers to geographic expansion or entry. As a consequence, all market players are able to supply electricity anywhere in Germany whilst each customer can freely choose amongst providers which have a commercial offer in a given location.
- (21) As explained above, *Stadtwerke*, control the physical electricity distribution network and still exert significant influence on the electricity retail supply to small customers in their network area. There are currently over 800 such municipal utilities active in the electricity, gas or both sectors, far more than in any other Member State. The notifying party has nevertheless provided information showing that even though there are many DSOs, 37% of all German households are covered by the top 10 DSOs only, and the top 100 DSOs already provide access to 81% of all German households.
- (22) Even if contracting with a subset of DSOs might suffice to get access to a significant share of German households, the contractual burden still remains significantly higher than in other Member States. Moreover, it is undisputed that *Stadtwerke* have preserved their strong market presence. Even ten years after liberalization, on average around 80% of the households are still supplied by *Stadtwerke* or regional suppliers, of which half are still through the universal supplier tariffs²⁵, demonstrating that *Stadtwerke* still benefit from high confidence rating of customers²⁶. As a

²¹ Form CO, pages 51-53.

²² Annex 13 to the Form CO, page 56.

²³ See Footnote 14.

²⁴ Replies to question 5 of the Commission's article 11 letter of 6 May 2009 to competitors.

²⁵ Customers that are supplied under the universal supplier tariff (Grundversorgungstarif) have not exercised their right to switch either to a different tariff structure at the universal supplier or outright to a different supplier.

²⁶ Annex 24(c) to the Form CO: [Market research information].

consequence, players willing to enter a certain area (or groups thereof) tend often to compete against the local incumbent on price and communication strategies and, in any event, monitor prices of the most competitive local suppliers within each DSO area²⁷. For example, E-two Energy GmbH confirms that *Stadtwerke* still have a dominant position in their network areas and for this reason alternative suppliers often adjust their tariffs according to the incumbents' tariffs²⁸.

- (23) Finally, while cooperation agreements between *Stadtwerke* is indeed increasing, which is in line with the notifying party's arguments that competition also develops through the expansion of local incumbents, the market investigation clearly confirms that their sales and marketing activities are still locally focused.²⁹
- (24) The analysis of the switching rates of small customers also provides guidance on the development of the market. Switching rates of small customers have increased, on average, from 1.8 % in 2006 to 3.8% in 2007 and ca. 5.2% in 2008³⁰. Furthermore, according to Verivox³¹ data, the overall number of suppliers as well as the number of suppliers for a given zip code in the period 2006-2009 have also been increasing, giving indications that competition, though having started from a low level, is increasing³².
- (25) On the other hand, data submitted by Verivox, as displayed in Figure 1 below,³³ indicate that some areas, intensely coloured, experienced "high" switching rates in 2008 while customers located in other, lightly coloured, areas have not switched much electricity suppliers. Thus, this body of evidence points towards broad variations of switching rates among different DSO areas therefore indicating that switching patterns of end-customers are not homogeneous nation-wide.

²⁷ Replies to questions 10 (a), 10 (b) and 19 of the Commission's article 11 letter of 6 May 2009 to competitors.

²⁸ Replies to question 19 of the Commission's article 11 letter of 6 May 2009 to competitors.

²⁹ Replies to question 11, 13 and 16 of the Commission's article 11 letter of 6 May 2009 to competitors.

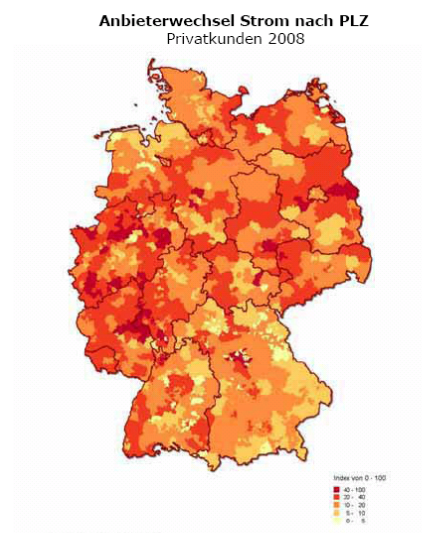
³⁰ Figures for 2006 and 2007 are based on the BNetzA's Monitoring Report 2007 and 2008. Based on the most recent, *preliminary* data from the BNetzA's 2009 monitoring exercise, covering only the top 70 DSOs provided by the BNetzA (Cf. submission of 9 June 2009), the switching rate has increased by 1.4 percentage points and amounts to ca. 5.2% in 2008.

³¹ Verivox is an independent consumer portal for energy and telecommunications products and services. Its website enables consumers to compare all available tariff offers and switch directly to their best-suited supplier. See <http://www.verivox.de> (accessed on 17 June 2009).

³² Replies to the Commission's article 11 letter of 15 May 2009 to Verivox.

³³ Figure extracted from a report by Verivox. See Annex 20 to the Form CO.

Figure 1: Switching rates across Germany for household, in 2008



Source: [Verivox, Energiemarktbericht 2008]

Note: The intensity of the colour indicates a range of switching rates (not percentage of consumers having switched) that go from 0 (no switching) to 100 (high switching rate): 100-40 (full red), 40-20, 20-10, 10-5, 5-0 (yellow).

- (26) For the market to be national, conditions of competitions would have to be rather homogeneous across all German DSOs. This would then constrain suppliers' ability to set prices of their commercial offers in different DSOs. Electricity prices in Germany are made up of different components³⁴, such as network fees and taxes as well as a pure energy price or margin. The market investigation has shown there are marked differences between network fees from one DSO area to another³⁵. Nevertheless, this is not in itself indicative of those network areas being separate markets. A more appropriate indicator are the different price levels established by the suppliers in different network areas. The determinant of the price levels offered by suppliers in any network area is the energy component of price offers, the "energy fee", making up about 1/3 of the final electricity tariff, and the only component of the electricity tariff that each supplier eventually decides upon itself. Indeed, when setting their commercial offers for each network area, electricity suppliers can only decide upon the energy fee, as other elements such as the network tariffs or the statutory fees and

³⁴ The different components are: (i) network fees (*Durchschnittliches Nettonetzentgelt inklusive Abrechnung*); (ii) meter reading fees (*Durchschnittliches Entgelt für Messung*); (iii) meter operation fees (*Durchschnittliches Entgelt für Messstellenbetrieb*); (iv) concession payments (*Durchschnittliche Konzessionsabgabe*); (v) statutory fee in conjunction to the German renewable electricity promotion scheme (*Derzeitige Umlage nach EEG*); (vi) statutory fee in conjunction with combined heat and power production promotion scheme (*Derzeitige Umlage nach KWKG*); (vii) average energy-related and other taxes (*Durchschnittliche Steuern, Strom- und Umsatzsteuer*); (viii) energy-related component (*Durchschnittlicher Preisbestandteil für Energiebeschaffung und Vertrieb*).

³⁵ In 2008, the average network tariff was 5.2 ct/kWh with a range from 3.9 ct/kWh to 7.3 ct/kWh and a standard deviation of 0.69. This data is based on the most recent, *preliminary* data from the BNetzA's 2009 monitoring exercise, covering only the top 70 DSOs provided by the BNetzA (Cf. submission of 9 June 2009).

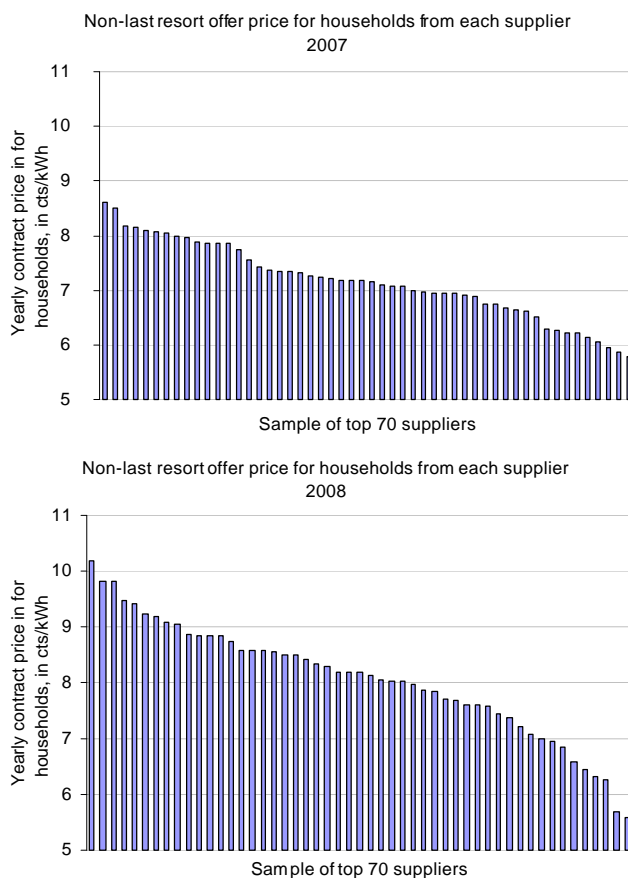
taxes are pre-determined and thus "supplier-neutral". Given that the price of electricity is among the most important selection criteria for customers³⁶, the different tariffs that result (in a DSO area) from different energy fees are an important factor of the final price faced by customers.

- (27) Consequently, the Commission has conducted an analysis of universal suppliers' prices for energy (excluding network tariffs and tax) based on data³⁷ from the energy market monitoring exercise of the German energy market regulator (Bundesnetzagentur – "BNetzA"). The results show that energy fees charged to households differed significantly across Germany in 2007 and 2008 as is shown in Figure 2 below. For 2008, the energy fees vary by 45% across the top 70 suppliers, between 5.6 ct/kWh and 10.2 ct/kWh.

³⁶ ESMT report submitted by the parties on 26 May 2009[...].

³⁷ Submissions of the BNetzA of 7 May 2009 and 9 June 2009. The data includes the top 70 anonymized universal suppliers from the BNetzA monitoring database. Data from 2008 is based on the most recent, *preliminary* data from the BNetzA's 2009 monitoring exercise.

Figure 2: Energy fees of "competitive" (non-universal supply) offers for households by universal suppliers in Germany, in 2007 and 2008



Source: Data from BNetzA; computation by the Commission.

Note: Scales have been truncated. This graphs contains only non-universal supply "competitive" offers of universal supplier in Germany in the suppliers' own DSO area. 2008 data based on the most recent, *preliminary* data from the BNetzA's 2009 monitoring exercise.

- (28) Such differential pricing policies between regions and network areas was also confirmed by the vast majority of the electricity retailers consulted by the Commission during the market investigation. Suppliers explain this differential pricing policy by grid fee levels and by the intensity of competition which broadly changes across the national territory³⁸. Moreover, even among those suppliers applying a single nationwide pricing policy, certain ones, such as Lichtblick, perceive the electricity retail market for small customers as local in scope³⁹.
- (29) The notifying party has also submitted an economic analysis based on Verivox data to suggest that the market for the retail supply to small customers is national in scope.⁴⁰

³⁸ Replies to question 10 of the Commission's article 11 letter of 6 May 2009 to competitors.

³⁹ Replies to question 5 of the Commission's article 11 letter of 6 May 2009 to competitors.

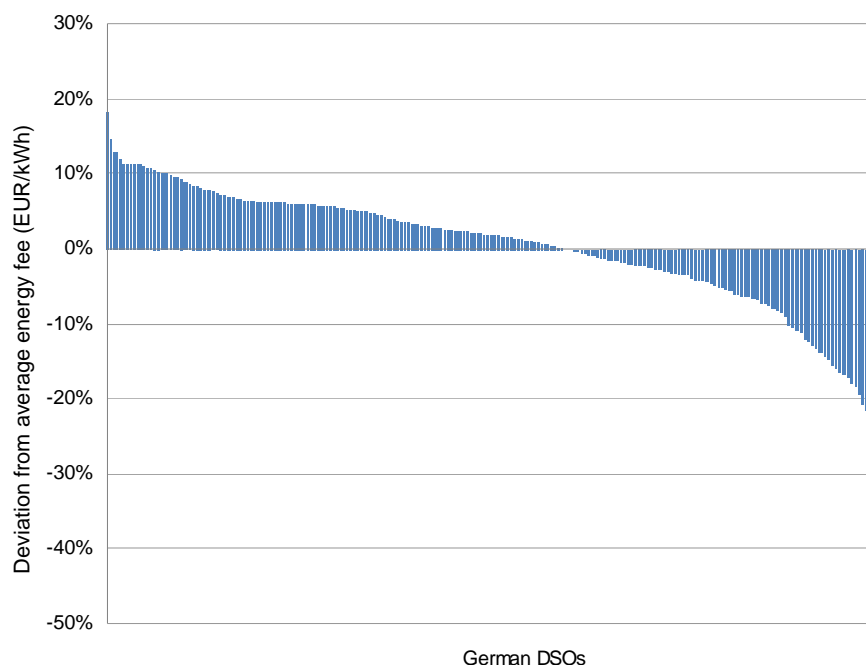
⁴⁰ This report has been submitted at the end of the first phase market investigation and due to the level of complexity no holistic analysis could be undertaken in conjunction with it.

It argues that the average spread of $\pm 6\%$ from the average on the energy fee as calculated using the top 40 DSO areas and the top 50 tariffs within a DSO area is indicative of a low dispersion of energy fees across Germany and, thus, points towards the market being national in scope.

- (30) While agreeing that this type of analysis could, in principle, be informative with regards to the definition of the relevant geographic market, the Commission came to the view that the analysis submitted has taken several methodological decisions that limit its value for the assessment.
- (31) Firstly, the truncation of the data set to include only 40 of the over 800 DSOs is a case in point. Furthermore, for each DSO, the report extracts the top 50 tariffs amongst those listed on Verivox and computes the corresponding energy fee average. Such computation is problematic as many of these tariffs are not exerting any significant competitive constraint. Indeed, only few network areas actually have at least 50 suppliers that actively market their commercial offers and that, as a result, have indeed acquired non-marginal numbers of customers in those areas. In the case of most DSOs, there is a significant number of tariffs listed on the e.g. the Verivox web site that have no palpable market presence in a DSO area, despite having concluded the necessary network access agreements. As a consequence, not all prices offers used in the computed average are reflective of actual competitive constraints. It cannot be excluded that averaging all leads to an uniformization of the resulting averages.
- (32) In particular, the Commission performed a similar analysis comparing energy fees – based on the best offer (lowest overall tariff) per DSO area – to the average energy fee in all German DSOs.⁴¹ As shown in Figure 3 below, the results indicate a spread of ca. $+20\%/-40\%$, pointing towards significant differences between competitive conditions in the different DSOs. Consequently, the Commission is of the view that the evidence put forward by the notifying party rather shows that there are significant local differences in pricing from one German network area to another.

⁴¹ Best offer excluding pre-paid tariffs. The spread is even larger when pre-paid tariffs are included in the calculation.

Figure 3: Comparison of energy fees between DSO areas on the basis of the best competitive offer within a DSO area, March 2009



Source: Verivox.

Note: Includes the best competitive offer prices per zip code for 4 000 kWh per year, non-prepaid tariff, energy only price, excluding taxes, excluding all zip codes that overlap within DSOs.

- (33) [Information on Vattenfall's and Nuon's pricing]⁴² [Information on Vattenfall's and Nuon's pricing]⁴³[Information on Vattenfall's and Nuon's pricing]⁴⁴ [Information on Vattenfall's and Nuon's pricing]⁴⁵.
- (34) Data provided by the BNetzA and respondents to the market investigation indicate the existence of barriers to entry and expansion due to the cost of acquiring customers. In practice, even though nothing prevents suppliers from quoting prices for a significant number of DSOs, which they often do, they nevertheless tend to focus their supply activities only to a limited number of DSO areas where they are more likely to recover the fix costs incurred and maximise profit. In this regards, the majority of retailers argue to undertake local marketing campaigns to gain a sustainable customers' base in few areas (often geographically close to one another to develop synergies) instead of undergoing national promotional campaigns⁴⁶. This

⁴² Form CO, pages 57-58, and Annex 11(b) to the Form CO: [Title of the document].

⁴³ See footnote 29.

⁴⁴ Form CO, page 57 and Annex 21(a) to the Form CO: [Title of the document].

⁴⁵ Reply by Vattenfall and Nuon to question 4 of the Commission's article 11 letter of 6 May 2009.

⁴⁶ Replies to question 11(f) of the Commission's article 11 letter of 6 May 2009 to competitors.

predominant local focus of the retailers' activity, as it results from the replies to the market investigation is also linked by respondents to the existence of still significant economic barriers to enter the retail electricity markets in Germany. In particular, suppliers pointed out the difficulty to develop customers' awareness and to acquire a sufficiently large customer's base nation-wide, therefore some of them consider advantageous to have comparatively more customers in few areas⁴⁷.

- (35) [Information on internal Nuon documents concerning Nuon's marketing strategy]⁴⁸.
- (36) [Information from internal Nuon documents concerning Nuon's marketing strategy]⁴⁹
[Information from internal Nuon documents concerning Nuon's marketing strategy]⁵⁰[Information from internal Nuon documents concerning Nuon's marketing strategy].
- (37) [Information from internal Vattenfall documents concerning Vattenfall's marketing strategy].⁵¹ [Information from internal Vattenfall documents concerning Vattenfall's marketing strategy].
- (38) Notwithstanding the above, the market investigation equally showed the presence of brands which can be considered "national" such as E wie einfach (E.ON), Eprimo (RWE) and Yello (EnBW) or NuonEnergy. Nevertheless, some of them still tie their market presence and strategies to the competitive dynamics at the DSO level⁵². This is for example confirmed by Yello which argues to adapt its marketing strategy to the features of the targeted city⁵³. Consequently, the Commission is of the view that the mere existence of "national" brands and suppliers active across a wide range of network areas (in most cases with very differing intensities) does not contradict a selective and differentiated (regional) market presence.
- (39) In the light of the foregoing, although recognising that competition in Germany is progressively expanding and that this could likely lead to broadening the geographic scope of the market for retail supply of electricity to small customers in the future, there are still strong indications pointing to local electricity retail markets to small customers approximately corresponding to each DSO area in Germany.

Conclusion

⁴⁷ Replies to question 18(h) of the Commission's article 11 letter of 6 May 2009 to competitors.

⁴⁸ Annexes 11(a) and 11(d) to the Form CO: [Information on internal Nuon documents concerning Nuon's marketing strategy].

⁴⁹ Annex 11(e) to the Form CO: [Information from internal Nuon documents concerning Nuon's marketing strategy].

⁵⁰ Annex 11(f) to the Form CO: [Title of the document].

⁵¹ Annex 21(a) to the Form CO: [Title of the document].

⁵² Replies to question 8 (a), 8 (b), 9 (b), 11, 12 and 18 of the Commission's article 11 letter of 6 May 2009 to competitors.

⁵³ Reply to question 11 of the Commission's article 11 letter of 6 May 2009 to competitors.

- (40) It follows from the above that, in the context of a decision under Article 6 (1) of the Merger Regulation, there are strong indications that the relevant geographic market is narrower than national and thus on the level of each distribution network area. However, for the purpose of this decision, since the transaction as modified by the commitments entered into by the notifying party, would under any alternative geographic market definition not raise serious doubts as to the compatibility with the common market, there is no need to come to a final determination of the relevant geographic market.
- (41) As a consequence, the Commission will also assess the effect of the transaction for retail supply of electricity to small customers in Berlin and Hamburg, which are the only local areas where the parties' activities significantly overlap.
- (42) In this regards, even defining such markets as local, they would be, consistently with the Commission practice, a substantial part of the common market based on both geographic and economic considerations⁵⁴. Berlin and Hamburg are the most populated and largest cities in Germany (the biggest Member State), and they also have an indisputable economic relevance within the whole territory as also demonstrated by the sizable electricity consumption in both cities which are bigger than those of some Member States⁵⁵.

5. COMPETITIVE ASSESSMENT

- (43) Apart from the retail supply of electricity to small customers in Berlin and Hamburg, the horizontal overlaps between the parties' activities in the electricity and gas markets are well below 15% under any alternative product and geographic market definition. Thus, the competitive assessment of the effects of the transaction will focus only on the retail supply of electricity to small customers in Berlin and Hamburg.

5.1. Retail supply of electricity to small customers in Berlin and Hamburg

- (44) As indicated in Table 1, the parties' combined market share in the market for retail supply of electricity would be respectively [80-90%] ([70-80%] Vattenfall and [5-10%] Nuon Energy) in Berlin and [80-90%] ([80-90%] Vattenfall and [0-5%] Nuon Energy) in Hamburg which are much higher as compared to those of the second competitor in both cities.

⁵⁴ Cases C-179/90 – *Merci Convenzionali Porto di Genova* [1991] ECR I-5889, COMP/M.1628 – *TotalFina / Elf*, COMP/M.3943 – *Saint-Gobain / BPB* and C-475/99 – *Ambulanz Glöckner*.

⁵⁵ Population in Berlin grid area: 3 426 000; Number of low voltage connections in Berlin grid area: [2-3 million]. Population in Hamburg grid area: 1 770 283; Number of low voltage connections in Hamburg grid area: [0.5 – 1.5 million]. In this respect it results that this number of connections is much higher than in Malta amounting to 130 000. In addition, even considering the households' consumption of electricity respectively in Berlin (5.63 TWh) and Hamburg (3.93 TWh), in both cases it is much higher than in Luxembourg where the total electricity consumption by households is 840 GWh.

Table 1: Estimated market shares by suppliers, for 2008, in Berlin and Hamburg, in the retail supply of electricity to small customers

	Berlin	Hamburg
Vattenfall	[70-80%]	[80-90%]
Nuon Energy	[5-10%]	[0-5%]
<i>Vattenfall + Nuon</i>	[80-90%]	[80-90%]
Yello	[5-10%]	[5-10%]
Teldafax	[0-5%]	[0-5%]
Lichtblick	[0-5%]	--
Flexstrom	[0-5%]	[0-5%]
Eprimo	[0-5%]	[0-5%]
E WIE EINFACH	[0-5%]	[0-5%]
Bonus Strom	[0-5%]	[0-5%]

Source: Form CO, pages 65 and 67.

Note: Market shares are parties' estimates.

- (45) The notifying party submits that the envisaged transaction would not lead to a significant impediment of effective competition in Berlin and Hamburg.
- (46) In this regard, it maintains that in these two cities there is a large number of nationwide active electricity suppliers (for example E WIE EINFACH⁵⁶, Eprimo⁵⁷, Yello⁵⁸, Lichtblick, Flexstrom, TelDaFax and Bonusstrom) exerting increasing competitive pressure on the parties and to which small customers would easily switch if a price increase would occur. To reinforce this argument, it also points out that population of larger cities is on average younger and as a consequence more price-sensitive and willing to change supplier as shown by the significant customer switching rates in Berlin and Hamburg⁵⁹. Finally, the notifying party stresses that the quick market penetration experienced by Nuon Energy in those two cities where Vattenfall is the incumbent shows that inhabitants of Berlin and Hamburg are eager to change electricity supplier based on price considerations. In this respect, it also estimates that the share of customers willing to switch in those cities amount to approximately [30-40%] of the total customers.

⁵⁶ E WIE EINFACH is the "nationwide" retail brand of E.ON.

⁵⁷ Eprimo is the nationwide retail brand of RWE.

⁵⁸ Yello is the nationwide retail brand of EnBW.

⁵⁹ The parties estimate that in 2008 the overall switching rate by non-load measured customers was respectively [0-5%] in Berlin and [0-5%] in Hamburg in 2008, [5-10%] and [5-10%] in 2007, [0-5%] and [0-5%] in 2006. The figures for 2007 indeed seem to be outliers that are consequence of stronger than usual switching behaviour prompted by incidents in Vattenfall's nuclear power plants and significant price rises instigated by Vattenfall at the same time. Undoubtedly Nuon was the best placed player and therefore the main beneficiary of the switching away from Vattenfall.

- (47) [Information from internal Vattenfall documents assessing the acquisition of Nuon].⁶⁰
- (48) In the course of the market investigation, the Commission has requested both parties to the concentration to provide switching data in order to complement its assessment of the strength of the constraint exerted by each party on the other one⁶¹. The switching data to and from Vattenfall confirm that Nuon Energy is [...] competitor in Berlin and Hamburg. The strength of Nuon Energy's constraint on Vattenfall is also broadly confirmed by the respondents to the market investigation⁶². [Information from Vattenfall's own internal analysis of customer losses and gains in Berlin and Hamburg].⁶³
- (49) Finally, Nuon Energy's capacity to achieve in a limited time frame (2006-2009) a sizable market presence in those two cities as well as, to smaller degrees, in several others [...] ⁶⁴ results from its aggressive pricing policy against local incumbents as well as from an efficient, tailored marketing strategy. To this end, Nuon Energy started the Berlin marketing campaign to sell electricity in January 2006 and, within five months, Nuon Deutschland acquired more than [...] electricity customers in Berlin.⁶⁵ The number of customers in Berlin has since climbed to [...] and in Hamburg to [...].
- (50) Based on the above, most of the respondents to the market investigation do not consider the envisaged transaction as threatening effective competition at national level or in all large metropolitan areas, but instead express concerns as to its impact on the electricity retail markets of Berlin and Hamburg. In this regard, respondents point out the merger is likely to lead to (i) a further reinforcement of Vattenfall's dominant position in Berlin and Hamburg, where it is already the incumbent; (ii) the consequent elimination of an actual competitor; and (iii) the subsequent risk of higher prices⁶⁶. Moreover, the broad majority of suppliers argued not having any plan to enter or expand their market presence in the above cities due to, among other reasons, the regional focus of their activity in other DSO areas and the high customer acquisition costs⁶⁷.

⁶⁰ Annex 9(a) to the Form CO: [Title of the document].

⁶¹ Data provided by the parties in reply to the Commission's article 11 request for information of 6 May 2009.

⁶² Replies to question 21(b) of the Commission's article 11 letter of 6 May 2009 to competitors.

⁶³ Annex 17(a) to the Form CO: [Title of the document] and Annex 23(c) to the Form CO: [Title of the document].

⁶⁴ Nuon Energy gained [50,000 – 100,000] contracts in Germany in 2006, [200,000 - 250,000] in 2007 and [250,000 – 300,000] in June 2008. See Annex 9(d) to the Form CO: [Title of the document].

⁶⁵ Annex 11(a) to the Form CO.

⁶⁶ Replies to questions 22(a), 22(b), 22(c) and 23 of the Commission's article 11 letter of 6 May 2009 to competitors.

⁶⁷ Replies to question 24 of the Commission's article 11 letter of 6 May 2009 to competitors.

- (51) In the light of the above, Nuon Energy appears to be a vigorous source of competition in Berlin and Hamburg where it exerts a significant competitive constraint on Vattenfall. This is confirmed in the **Figure 4** below which shows the developments of the amount of customers supplied by Nuon Energy and Vattenfall.

Figure 4: Monthly development of the number of customers supplied by Nuon Energy and Vattenfall, January 2006 – March 2009

[Graph 1: Berlin].

[Graph 2: Hamburg].

- (52) Moreover, [...] as well as the market investigation provide several indications that Nuon Energy is an important and in many extents unique player in the German energy market. After its first entry into the German market in 2003, with a strategy of supplying industrial and commercial customers in industrial parks, Nuon Energy changed its strategy at the end of 2005 and successfully focused on supplying small customers in the German electricity retail and subsequently gas retail markets. [Information on Nuon's business strategy].⁶⁸ [Information on Nuon's business strategy].
- (53) Nuon Energy's plan also aimed at [Information on Nuon's business strategy]⁶⁹ and internal documents from 2007 show that [Information on Nuon's business strategy]. Nuon Energy's role as a strong entrant on German retail markets is also witnessed by various positive ratings delivered by industry observers such as Verivox. Hence, Verivox attributed to Nuon Energy the highest score in Verivox's top 100 electricity supplier evaluation in Germany in "service quality" and "customer friendly contractual conditions". In addition, Focus Money⁷⁰ ranked Nuon Energy first in category "value for money" supplier without pre-payment obligation.⁷¹
- (54) Nuon Energy's achievements are also confirmed by the market investigation. A majority of suppliers perceive Nuon Energy as a key entrant in the electricity retail market from a German-wide perspective. These suppliers consider that Nuon Energy is one of the most active competitors to the 4 best placed German players (RWE, E.ON, EnBW and Vattenfall) mainly because of (i) its aggressive marketing policy, (ii) its highly competitive prices and (iii) its strategic focus on the largest German cities, in turn resulting as key areas to acquire a sustainable customers' base⁷².

⁶⁸ [Information on Nuon's business strategy].

⁶⁹ Annex 11(d) to the Form CO: [Title of the document]

⁷⁰ Focus Money is a business magazine.

⁷¹ Annex 9(d) to the Form CO: [Title of the document].

⁷² Replies to question 21(a) of the Commission's article 11 letter of 6 May 2009 to competitors. See Annex 11(d) to the Form CO: [Title of the document].

- (55) In addition, Nuon Energy, in its own assessment, [Information on Nuon's business strategy]⁷³. Further, its experience in the gas sector in the Benelux region has enabled it to become one of the first non-incumbent retail suppliers to gain a significant amount of small customers for its gas product and has had corresponding success with its dual-fuel strategy especially in Berlin and Hamburg.⁷⁴
- (56) At the same time, the Commission also notes that [Information on Nuon's business strategy].⁷⁵ It has since 2006 gained a total of [270.000 – 350.000] customer nationwide, of which [50%-75%] are still in Berlin and Hamburg. [Data on Nuon's customer portfolio].⁷⁶
- (57) In the light of the above, Nuon Energy appears to be a vigorous source of competition in Berlin and Hamburg being so far one of the few viable independent competitors which successfully rolled out its business model to supply retail customers in certain geographic regions of Germany. In addition, its know-how in the energy sector (both in electricity and gas) and its plans to invest in production capacity in Germany confer it a unique market position. Consistently, MVV Energie, an actor in this market,⁷⁷ considers that there is no other player which could equally constrain Vattenfall⁷⁸ as well as Nuon Energy⁷⁹.
- (58) Although some respondents to the market investigation believe that certain players (such as Lichtblick, Bonus Strom and Flextrom) could serve as a competitive constraint to Vattenfall, others consider that only the three biggest players and their national brands (RWE with Eprimo, E.ON with E WIE EINFACH and EnBW with Yello) could exert a sufficient competitive pressure on Vattenfall post-transaction. To illustrate the problems smaller competitors might face, *Stadtwerke Chemnitz* points out the difficulty often experienced by small undertakings in supplying large volumes of customers and affording the high marketing costs needed to sponsor their offers.

⁷³ Nuon Energy has projected one power plant in Griesheim, which is scheduled to become operational [Information on two additional power plant projects]. Nuon Energy is also investigating the potential development of two additional [Information on two additional power plant projects] in Meppen and Düren. However, these considerations are in a very early feasibility testing stage and final investment decisions for these projects are planned for [Information on power plant projects]. See Annex 12(a) to the Form CO: [Title of the document].

⁷⁴ Replies to question 21(a) of the Commission's article 11 letter of 6 May 2009 to competitors.

⁷⁵ [Data on Nuon's customer portfolio].

⁷⁶ [...].

⁷⁷ MVV Energie is active in Berlin and Hamburg through its subsidiary SECURA Energie GmbH which sells gas and electricity to small customers nation-wide.

⁷⁸ It has to be noted that Vattenfall is incumbent only in Berlin and Hamburg and with its national brand "Easy" has so far since the beginning of 2008 acquired [50.000 -100.000] customers. See Annex 23 (b) to the Form CO: [Title of the document].

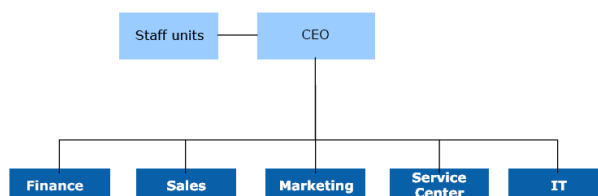
⁷⁹ Reply to question 23(b) of the Commission's article 11 letter of 6 May 2009 to competitors.

- (59) Therefore, Nuon Energy appears as the first independent player who managed to gain significant ground in the market area of Vattenfall. In Vattenfall's own words, [...].⁸⁰
- (60) As a consequence, the removal of Nuon Energy following its acquisition by Vattenfall would raise serious doubts as to the compatibility of the envisaged transaction with the common market with respect to the markets for retail supply of electricity to small customers in Berlin and Hamburg.

6. PROPOSED REMEDIES

- (61) In order to render the concentration compatible with the common market, the undertakings concerned have proposed Commitments, that are attached as an Annex to this Decision.
- (62) Specifically they have offered to divest Nuon Deutschland GmbH (see Figure 5) consisting of (i) all shares of Nuon Energy in the former, (ii) the premises, (iii) facilities and staff in Hamburg, Berlin and Heinsberg⁸¹, (iv) the IT-platform and (v) the slogan/tariff names used by Nuon Deutschland, e.g. "lekker Strom", "geniale Strom" and "wakker gas". As a consequence, the Divestment Business will be able to supply all (load and non-load measured) customers of electricity and gas in Berlin and Hamburg as well as in fact all over Germany.
- (63) To this end, Nuon Deutschland GmbH will retain its key personnel, relevant business functions (General management, Finance, Sales, Procurement, Marketing, Service Centre and IT) and the current retail supply contracts for gas⁸² and electricity (including dual-fuel offers) to end-customers based in Hamburg and Berlin⁸³.

Figure 5: Schematic structure of Nuon Deutschland GmbH



⁸⁰ Annex 23(c) to the Form CO: [Title of the document].

⁸¹ The facility in Heinsberg is Nuon Energy's German call-centre.

⁸² Although not raising a competition issue, the divestiture of gas was offered by the parties as carving out the gas contracts from the electricity contracts appears too complex in the Berlin and Hamburg area, in particular for dual fuel customers.

⁸³ The divestment business would at least include the following customer contracts: i) all (load and non-load measured) electricity customer contracts in Berlin (approximately [100.000 – 200.000] customers); ii) all (load and non-load measured) electricity customer contracts in Hamburg (approximately [30.000-80.000] customers); iii) all small and large gas customer contracts in Berlin (approximately [15.000-25000]); vi) all small and large gas customer contracts in Hamburg (approximately [10.000-20.000]).

Note: Nuon Deutschland GmbH has at present approximately 235 employees in Berlin, Hamburg and Heinsberg

- (64) Only the following subsidiaries and customer contracts of Nuon Deutschland GmbH will be carved out at the discretion of Vattenfall:
- all contracts not relating to the retail supply of electricity and gas to end customers in Berlin and Hamburg (except for those customers served with both gas and electricity in Berlin and Hamburg on a dual-fuel offer basis which belong to the Divestment Business);
 - Nuon Power and Gas Assets GmbH and Nuon Energie und Service GmbH (together the "Retained Subsidiaries"), the first entity being essentially a shelf company therefore not active and the second managing the two industrial parks in Heinsberg and Düren.
- (65) Importantly, the parties agree to grant the future purchaser of Nuon Deutschland GmbH a license to use the brand "Nuon" for the retail supply of electricity and gas in Berlin and Hamburg for a transitional period of [...] months after the divestiture of the Divestment Business. At the end of this term, the rebranding will be done by the purchaser. Moreover, Vattenfall commits not to using the brand "Nuon" in the retail supply of electricity and gas in Germany for a term of [...] years after the expiry of a [...] months period following the divestiture of the Divestment Business. Finally, in relation to the energy sourcing, the parties offer to transfer the existing sourcing agreements to the Divestment Business and, if desired by Nuon Deutschland GmbH or its future purchaser, to continue supplying energy at wholesale market prices.
- (66) The divestiture of the Divestment Business would be implemented by adopting a two-step approach. In a first step the carve-out of the assets indicated above would take place and in a second step, the shares in Nuon Deutschland GmbH would be sold and transferred to a suitable purchaser.

7. ASSESSMENT OF THE PROPOSED REMEDIES

- (67) The proposed remedies completely eliminate the horizontal overlap between the parties' activities created by the transaction on the affected markets for retail supply of electricity to small customers in Berlin and Hamburg. In this respect, respondents to the market test confirmed that the proposed commitment is sufficiently clear cut to remove the identified serious doubts and that the Divestment Business is provided with all the necessary tangible and intangible assets to operate in a commercially viable way⁸⁴.
- (68) Notwithstanding the above, some competitors contended that the scope of the commitment should be extended⁸⁵. However, their suggestions in this regard (such as the divestment of the whole Nuon Deutschland GmbH without any carve-out, the

⁸⁴ Replies to questions 1, 3 and 4 of the request for information for the assessment of commitments of 9 June 2009.

⁸⁵ Replies to question 2 of the request for information for the assessment of commitments of 9 June 2009.

divestment of shares in Vattenfall or the divestment of Nuon Energy's gas business) would be disproportionate as compared to the identified serious doubts.

- (69) A valid concern widely raised by the respondents to the market test relates instead to the initial [...] months term proposed by Vattenfall during which the purchaser of the Divestment Business could use the brand "Nuon" in Berlin and Hamburg. Hence, the parties' competitors deemed this period too short considering in particular the time needed to rebrand the Divestment Business which would take from a minimum time of [...] months to a maximum of [...] years⁸⁶. However, the notifying party's commitment to extend this term up to [...] months offsets the above concern.
- (70) Finally, the broad majority of suppliers consider Vattenfall's commitment not to use the brand "Nuon" for [...] years after a reciprocal [...] months phase-out period as an appropriate step to enable the Divestment Business to viably compete with the former in Berlin and Hamburg. The same conclusion was drawn in relation to the transfer of the existing sourcing agreements (electricity and gas) to the Divestment Business⁸⁷.
- (71) In the light of the above, the Commission considers that the commitment entered into by the parties is sufficient to eliminate the serious doubts as to the compatibility of the transaction with the common market.

8. CONDITIONS AND OBLIGATIONS

- (72) The commitment in section B and D of the attached Commitments constitute conditions attached to this decision, as only through full compliance therewith can the structural changes in the relevant markets be achieved. The other commitments set out in sections C and E of the attached Commitments constitute obligations, as they concern the implementing steps which are necessary to achieve the modifications sought in a manner compatible with the common market.

9. CONCLUSION

- (73) For the above reasons, the Commission has decided not to oppose the notified operation as modified by the commitments submitted by the notifying party and to declare it compatible with the common market and with the functioning of the EEA Agreement, subject to full compliance with the conditions in section B and D of the commitments annexed to the present decision and with the obligations in sections C and E of the said commitments. This decision is adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004.

For the Commission

⁸⁶ Replies to questions 5 and 8 of the request for information for the assessment of commitments of 9 June 2009.

⁸⁷ Replies to questions 9 and 12 of the request for information for the assessment of commitments of 9 June 2009.

(signed)
Neelie KROES
Member of the Commission

Non-Confidential Version

Vattenfall AB
and
N.V. Nuon Energy

**CASE NO COMP/M. 5496 - Acquisition of sole control
by Vattenfall AB of N.V. Nuon Energy**

Commitments to the European Commission

Submitted by

Vattenfall AB

On

29 May 2009

As amended on 12 June 2009

Linklaters

Linklaters LLP
Königsallee 49-51
40212 Düsseldorf

Telephone +49 211 22977-301
Facsimile +49 211 22977-89302

Commitments to the European Commission

Pursuant to Article 6(2), of Council Regulation (EC) No. 139/2004 (the “**Merger Regulation**”), Vattenfall AB (“**Vattenfall**”; hereafter also including Vattenfall Group)

hereby provides the following Commitments (the “**Commitments**”) in order to enable the European Commission (the “**Commission**”) to declare the acquisition of sole control by Vattenfall of N.V. Nuon Energy (former n.v. Nuon PLB Holding – “**Nuon Energy**”); Vattenfall and Nuon Energy together are the “**Parties**”) 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 the light of the Merger Regulation, and by reference to the Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004.

Section A. Definitions

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

Affiliated Undertakings: undertakings controlled by the Parties and/or by the ultimate parents of the Parties, whereby the notion of control shall be interpreted pursuant to Article 3 Merger Regulation and in the light of the Commission’s Consolidated Jurisdictional Notice adopted July 2007.

Closing: the transfer of the legal title of the Divestment Business to the Purchaser.

Divestment Business: the business or businesses as defined in Section B and the Form RM, submitted in Case No. COMP/M. 5496 – Vattenfall AB/N.V. Nuon Energy (the “**Form RM**”), that the Parties commit to divest.

Divestiture Trustee: one or more natural or legal person(s), independent from the Parties, who is approved by the Commission and appointed by Vattenfall and who has received from Vattenfall the exclusive Trustee Mandate to sell the Divestment Business to a Purchaser at no minimum price.

Effective Date: the date of adoption of the Decision.

First Divestiture Period: *[Confidential]*

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

Key Personnel: all personnel necessary to maintain the viability and competitiveness of the Divestment Business, as listed in the Form RM.

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

Personnel: all personnel currently employed by the Divestment Business, including Key Personnel, staff seconded to the Divestment Business, shared personnel and the additional personnel listed in the Form RM.

Purchaser: the entity approved by the Commission as acquirer of the Divestment Business in accordance with the criteria set out in Section D.

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

Trustee Divestiture Period: the period of 3 months from the end of the First Divestiture Period.

Vattenfall: Vattenfall AB, incorporated under the laws of Sweden, with its registered office at 162 87 Stockholm, Sweden.

Section B. The Divestment Business

Commitment to divest

1. In order to restore effective competition, Vattenfall commits to divest, or procure the divestiture of the Divestment Business by the end of the 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 0. To carry out the divestiture, Vattenfall commits to find a purchaser and to enter into a final binding sale and purchase agreement for the sale of the Divestment Business within the First Divestiture Period. If Vattenfall has not entered into such an agreement at the end of the First Divestiture Period, Vattenfall shall grant the Divestiture Trustee an exclusive mandate to sell the Divestment Business in accordance with the procedure described in paragraph 0 in the Trustee Divestiture Period.
2. Vattenfall shall be deemed to have complied with this commitment if, (i) by the end of the Trustee Divestiture Period, Vattenfall has entered into a final binding sale and purchase agreement, (ii) the Commission approves the Purchaser and the terms in accordance with the procedure described in paragraph 0 and (iii) closing for the sale of the Divestment Business takes place within a period not exceeding 3 months after the approval of the purchaser and the terms of sale by the Commission.
3. In order to maintain the structural effect of the Commitments, the Parties shall, for a period of 10 years after the Effective Date, not acquire direct or indirect influence over the whole or part of the Divestment Business, unless the Commission has previously found that the structure of the market has changed to such an extent that the absence of influence over the Divestment Business is no longer necessary to render the proposed concentration compatible with the common market.
4. In any event, the sale of the Divestment Business must only occur if the Acquisition of Nuon Energy has been closed.

Structure and definition of the Divestment Business

5. The Divestment Business consists of all shares in Nuon Deutschland GmbH ("**Nuon Deutschland**"), having its business seat at Egellsstr. 21, 13507 Berlin, Germany, registered

at the local court of Charlottenburg (docket no. HRB 88569 B) including the premises, facilities and staff in Hamburg, Berlin and Heinsberg, the IT-platform and the slogan/tariff names used by Nuon Deutschland, e.g. "lekker Strom", "geniaale Strom" and "wakker gas". If requested by the purchaser, for a transition period of [... months] after the divestiture of the Divestment Business, a license of use of the Nuon brand and name for the retail supply of electricity and gas in Berlin and Hamburg will be granted.

- Nuon Deutschland has approximately 235 employees situated in Berlin, Hamburg and Heinsberg. It comprises all business functions, along which it is currently organised: General management, Finance, Sales, Procurement, Marketing, Service Center and IT.
- Also after the divestiture, Nuon Deutschland will continue to be a functional viable company, which can supply all (load and non-load measured) customers of electricity and gas in Berlin and Hamburg as well as in fact all over Germany.
- Only the following subsidiaries and customer contracts may at the discretion of Vattenfall be carved-out prior to the divestiture of Nuon Deutschland (the "**Carve Out**"), whereas this will effect in no way the viability of the Divestment Business:
 - (i) All contracts for retail supply with electricity and/or gas to end customers which are supplied outside of Berlin and Hamburg (for the avoidance of doubt, this does not include dual-fuel customers supplied in Berlin and Hamburg) ("**Retained Customer Contracts**").and/or
 - (ii) Nuon Power and Gas Assets GmbH and Nuon Energie und Service GmbH (together the "**Retained Subsidiaries**"). The first entity being essentially a shelf company and not active, the second managing the two industrial parks in Heinsberg and Düren.
- Before its divestiture Nuon Deutschland will be renamed to such effect that the new company name would no longer contain the word "Nuon".

The present legal and functional structure of the Divestment Businesses as operated to date is described in the Schedule.

Section C. Related commitments

Preservation of Viability, Marketability and Competitiveness

6. From the Effective Date until Closing, Vattenfall shall preserve the economic viability, marketability and competitiveness of the Divestment Business, in accordance with good business practice, and shall minimise as far as possible any risk of loss of competitive potential of the Divestment Business. In particular Vattenfall 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 the Divestment Business or that might alter the nature and scope of activity, or the industrial or commercial strategy or the investment policy of the Divestment Business;

- (b) to make available sufficient resources for the development of the Divestment Business, on the basis and continuation of the existing business plans;
- (c) to take all reasonable steps, including appropriate incentive schemes (based on industry practice), to encourage all Key Personnel to remain with the Divestment Business.

Hold-separate obligations of Parties

- 7. Vattenfall commits, from the Effective Date until Closing, to keep the Divestment Business separate from the businesses it is retaining and to ensure that Key Employees of the Divestment Business – including the Hold Separate Manager – have no involvement in any business retained and vice versa. Vattenfall shall also ensure that the Personnel does not report to any individual outside the Divestment Business.
- 8. Until Closing, Vattenfall shall assist the Monitoring Trustee in ensuring that the Divestment Business is managed as a distinct and saleable entity separate from the businesses retained by the Parties. Vattenfall shall appoint a Hold Separate Manager who shall be responsible for the management of the Divestment Business, under the supervision of the Monitoring Trustee. The Hold Separate Manager shall manage the Divestment Business independently and in the best interest of the business with a view to ensuring its continued economic viability, marketability and competitiveness and its independence from the businesses retained by the Parties.

Ring-fencing

- 9. Vattenfall shall implement all necessary measures to ensure that it does not after the Effective Date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business. In particular, the participation of the Divestment Business in a central information technology network shall be severed to the extent possible, without compromising the viability of the Divestment Business. Vattenfall may obtain information relating to the Divestment Business which is reasonably necessary for the divestiture of the Divestment Business or whose disclosure to Vattenfall is required by law.

Non-solicitation clause

- 10. Vattenfall undertakes, subject to customary limitations, not to solicit, and to procure that Affiliated Undertakings do not solicit the Key Personnel transferred with the Divestment Business for a period of two years after Closing.

Due Diligence

- 11. In order to enable potential purchasers to carry out a reasonable due diligence of the Divestment Business, Vattenfall shall, subject to customary confidentiality assurances and dependent on the stage of the divestiture process:
 - (a) provide to potential purchasers sufficient information as regards the Divestment Business;

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

Reporting

- 12. Vattenfall shall submit written reports in English on potential purchasers of the Divestment Business 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).
- 13. To the extent that this will occur after the Effective Date, the Parties 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 D. The Purchaser

- 14. In order to ensure the immediate restoration of effective competition, the Purchaser, in order to be approved by the Commission, must:
 - (a) be independent of and unconnected to the Parties;
 - (b) have the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties 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 the Divestment Business (the before-mentioned criteria for the purchaser hereafter the “**Purchaser Requirements**”).
- 15. The final binding sale and purchase agreement shall be conditional on the Commission's approval. When Vattenfall 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. Vattenfall must be able to demonstrate to the Commission that the purchaser meets the Purchaser Requirements and that the Divestment Business 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 the Divestment Business is being sold in a manner consistent with the Commitments. The Commission may approve the sale of the Divestment Business without one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Business after the sale, taking account of the proposed purchaser.

Section E. Trustee

I. Appointment Procedure

16. Vattenfall shall appoint a Monitoring Trustee to carry out the functions specified in the Commitments for a Monitoring Trustee. If Vattenfall has not entered into a binding sales and purchase agreement one month before the end of the First Divestiture Period or if the Commission has rejected a purchaser proposed by Vattenfall at that time or thereafter, Vattenfall 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 Extended Divestment Period.
17. 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 fulfilment of its mandate. In particular, where the remuneration package of a Divestiture Trustee includes a success premium linked to the final sale value of the Divestment Business, the fee shall also be linked to a divestiture within the Trustee Divestiture Period.

Proposal by the Parties

18. No later than one week after the Effective Date, Vattenfall shall submit a list of one or more persons whom Vattenfall proposes to appoint as the Monitoring Trustee to the Commission for approval. No later than one month before the end of the First Divestiture Period, Vattenfall shall submit a list of one or more persons whom Vattenfall 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 0 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

19. 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, Vattenfall 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, Vattenfall 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 the Parties

20. If all the proposed Trustees are rejected, Vattenfall 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 0 and 0.

Trustee nominated by the Commission

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

II. Functions of the Trustee

22. 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 Vattenfall, 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

23. The Monitoring Trustee shall:
- (i) 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.
 - (ii) oversee the on-going management of the Divestment Business with a view to ensuring its continued economic viability, marketability and competitiveness and monitor compliance by Vattenfall with the conditions and obligations attached to the Decision. To that end the Monitoring Trustee shall:
 - (a) monitor the preservation of the economic viability, marketability and competitiveness of the Divestment Business, and the keeping separate of the Divestment Business from the business retained by the Parties, in accordance with paragraphs 0 and 0 of the Commitments;
 - (b) supervise the management of the Divestment Business as a distinct and saleable entity, in accordance with paragraph 0 of the Commitments;
 - (c) (i) in consultation with Vattenfall, determine all necessary measures to ensure that Vattenfall does not after the effective date obtain any business secrets, know-how, commercial information, or any other information of a confidential or proprietary nature relating to the Divestment Business, in particular strive for the severing of the Divestment Business' participation in a central information technology network to the extent possible, without compromising the viability of the Divestment Business, and (ii) decide whether such information may be disclosed to Vattenfall as the disclosure is reasonably necessary to

allow Vattenfall to carry out the divestiture or as the disclosure is required by law;

- (d) monitor the splitting of assets and the allocation of Personnel between the Divestment Business and Vattenfall or Affiliated Undertakings;
- (iii) assume the other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the Decision;
- (iv) propose to Vattenfall such measures as the Monitoring Trustee considers necessary to ensure Vattenfall's compliance with the conditions and obligations attached to the Decision, in particular the maintenance of the full economic viability, marketability or competitiveness of the Divestment Business, the holding separate of the Divestment Business and the non-disclosure of competitively sensitive information;
- (v) 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 the Divestment Business and the 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 Personnel;
- (vi) provide to the Commission, sending Vattenfall 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 the Divestment Business so that the Commission can assess whether the business 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 Vattenfall a non-confidential copy at the same time, if it concludes on reasonable grounds that Vattenfall is failing to comply with these Commitments;
- (vii) within one week after receipt of the documented proposal referred to in paragraph 0, submit to the Commission a reasoned opinion as to the suitability and independence of the proposed purchaser and the viability of the Divestment Business after the Sale and as to whether the Divestment Business is sold in a manner consistent with the conditions and obligations attached to the Decision, in particular, if relevant, whether the Sale of the Divestment Business without one or more Assets or not all of the Personnel affects the viability of the Divestment Business after the sale, taking account of the proposed purchaser.

Duties and obligations of the Divestiture Trustee

24. Within the Trustee Divestiture Period, the Divestiture Trustee shall sell at no minimum price the Divestment Business 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 0. 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 reasonable required to effect the sale. The Divestiture Trustee shall protect the legitimate financial interests of Vattenfall, subject to the Parties' unconditional obligation to divest at no minimum price in the trustee Divestiture Period.

25. 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 the Parties.

III. Duties and obligations of the Parties

26. Vattenfall shall provide and shall cause its advisors to provide the Trustee with all such co-operation, assistance and information as the Trustee may reasonably require to perform its tasks. The Trustee shall have full and complete access to any of Vattenfall's or the Divestment Business' books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties under the Commitments and Vattenfall and the Divestment Business shall provide the Trustee upon request with copies of any document. Vattenfall and the Divestment Business 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.
27. Vattenfall shall provide the Monitoring Trustee with all managerial and administrative support that it may reasonably request on behalf of the management of the Divestment Business. This shall include all administrative support functions relating to the Divestment Business which are currently carried out at headquarters level. Vattenfall 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. Vattenfall 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.
28. Vattenfall shall grant or procure Affiliated Undertakings to grant comprehensive powers of attorney, duly executed, to the Divestiture Trustee to effect the sale, the Closing and all actions and declarations which the Divestiture Trustee considers necessary or appropriate to achieve the sale and the Closing, including the appointment of advisors to assist with the sale process. Upon request of the Divestiture Trustee, Vattenfall shall cause the documents required for effecting the sale and the Closing to be duly executed.
29. Vattenfall 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 Vattenfall 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 wilful default, recklessness, gross negligence or bad faith of the Trustee, its employees, agents or advisors.
30. At the expense of Vattenfall, the Trustee may appoint advisors (in particular for corporate finance or legal advice), subject to Vattenfall'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 Vattenfall refuse to approve the advisors proposed by the Trustee the Commission may approve the appointment of such advisors instead, after having heard Vattenfall. Only the Trustee shall be entitled to issue instructions to the advisors. Paragraph

0 shall apply mutatis mutandis. In the Trustee Divestiture period, the Divestiture Trustee may use advisors who served Vattenfall during the Divestiture Period if the Divestiture Trustee considers this in the best interest of an expedient Sale.

IV. Replacement, discharge and reappointment of the Trustee

31. 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 Vattenfall to replace the Trustee; or
 - (b) Vattenfall, with the prior approval of the Commission, may replace the Trustee.
32. If the Trustee is removed according to paragraph 0, 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 0 – 0.
33. Beside the removal according to paragraph 0, 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 F. The Review Clause

34. The Commission may, where appropriate, in response to a request from Vattenfall showing good cause and accompanied by a report from the Monitoring Trustee:
 - (i) Grant an extension of the time periods foreseen in the Commitments, or
 - (ii) Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.

Where Vattenfall 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 Vattenfall be entitled to request an extension within the last month of any period.

SIGNED by

Dr. Daniela Seeliger on behalf of Vattenfall (see Extended Power of Attorney attached)

Düsseldorf, 29 May 2009

Dr. Daniela Seeliger
Rechtsanwältin

SCHEDULE

This Schedule mirrors Section 5 of the Form RM.

SECTION 5

Information on a business to be divested

- 1** Where the commitments offered consist in the divestiture of a business, provide the following information and documents.

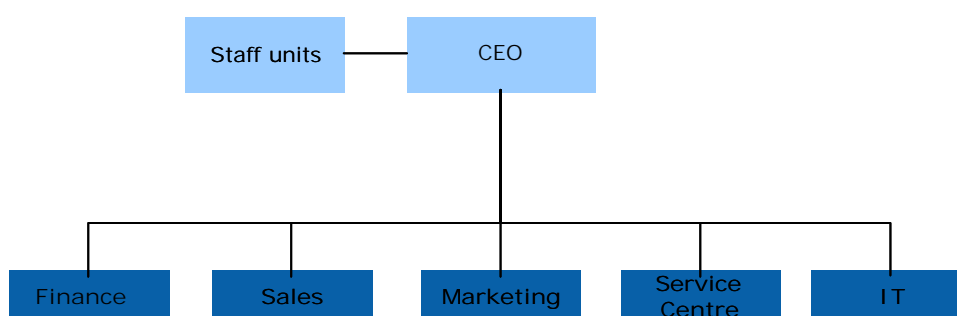
General information on the business to be divested

The following information should be provided as to the current operation of the business to be divested and changes already planned for the future:

- 1.1** Describe the business to be divested generally, including the entities belonging to it, their registered place of business and place of management, other locations for production or provisions of services, the general organisational structure and any other relevant information relating to the administrative structure of the business to be divested.

1.1.1 Nuon Deutschland

35. The Divestment Business consists of all shares in Nuon Deutschland, having its business seat at Egellsstr. 21, 13507 Berlin, Germany, registered at the local court of Charlottenburg (docket no. HRB 88569 B).
36. Before its divestiture Nuon Deutschland will be renamed to such effect that the new company name would no longer contain the word "Nuon".
37. Nuon Deutschland has approximately 235 employees situated in Berlin, Hamburg and Heinsberg. It comprises all business functions, along which it is currently organised: General management, Finance, Sales, Marketing, Service Centre and IT as follows.



- General management is located in Berlin and is responsible for all Nuon Deutschland's activities throughout Germany. Subject to the business decisions of the purchaser, it will continue to be responsible for all current activities in Berlin and Hamburg and any future activities.

- Sales is **[Confidential]**.
- Energy Management: **[Confidential]**.
- Marketing: Communication and Marketing for Berlin and Hamburg and in fact overall strategy.
- Finance: A unit that provides all legally and group wise required services such as accounting, tax services, payroll administration, reporting and legal support.
- Service centre: **[Confidential]** This service centre would also entirely remain with Nuon Deutschland.
- IT: **[Confidential]**.
- A more detailed organisational chart also setting out the number of employees in each function can be found below:

[Confidential]

38. After the divestiture, as before Nuon Deutschland will continue to be a functional viable company, which can supply all (load and non-load measured) customers with electricity and gas in Berlin and Hamburg as well as in fact all over Germany.
39. Only the following subsidiaries and customer contracts may at the discretion of Vattenfall be carved-out prior to the divestiture of Nuon Deutschland (the “**Carve Out**”):
 - (i) All contracts for retail supply with electricity and/or gas to end customers which are supplied outside of Berlin and Hamburg (for the avoidance of doubt, this does not include dual-fuel customers supplied in Berlin and Hamburg) (“**Retained Customer Contracts**”).

and/or

- (ii) Nuon Power and Gas Assets GmbH and Nuon Energie und Service GmbH (together the “**Retained Subsidiaries**”). The first entity being essentially a shelf company and not active, the second managing the two industrial parks in Heinsberg and Düren. For more details please see **Confidential Annex 1**.

1.1.2 Details on the divestment process

40. The divestiture of the Divestment Business would, in principle, consist in the sale and transfer of all shares in Nuon Deutschland to a suitable purchaser by way of a share deal.
[Confidential]
41. In case Vattenfall opts for the Carve Out, the divestiture of the Divestment Business would, in principle, be implemented by adopting a two-step approach, which as well should not take longer than the First Divestiture Period as defined in the Commitments to the European Commission dated 29 May 2009.
 - (i) In a first step the Carve Out would be implemented in order to separate both the Retained Subsidiaries and the Retained Customer Contracts from Nuon Deutschland:
 - The separation of the Retained Subsidiaries and the Retained Customer Contracts from Nuon Deutschland would be implemented by way of a spin-off or demerger (*Spaltung*) according to the German Conversion Act (*Umwandlungsgesetz*). **[Confidential]** The transfer of the Retained Customer

Contracts by way of spin-off or demerger does not require the consent of any relevant customers.

- After the separation of the Retained Subsidiaries and the Retained Customer Contracts from Nuon Deutschland, Nuon Energy as the sole shareholder would pass a shareholder's resolution to change the company name of Nuon Deutschland to such effect that the new company name would no longer contain the word "Nuon".

(ii) In a second step the shares in Nuon Deutschland would be sold and transferred to a suitable purchaser by way of a respective share deal, as described in para. 0.

1.2 State whether there are and describe any legal obstacles for the transfer of the business to be divested or the assets, including third party rights and administrative approvals required.

42. There are no legal obstacles for the transfer of the Divestment Business, including third party rights and administrative approvals.

1.3 List and describe the products manufactured or services provided, in particular their technical and other characteristics, the brands involved, the turnover generated with each of these products or services, and any innovations or new products or services planned.

1.3.1 Products manufactured or services provided

43. The Divestment Business would at least include the following customer contracts:

- All (load and non-load measured) electricity customer contracts in Berlin. **[Confidential]**
- All (load and non-load measured) electricity customer contracts in Hamburg. **[Confidential]**
- All small and large gas customer contracts in Berlin. **[Confidential]**
- All small and large gas customer contracts in Hamburg. **[Confidential]**
- For the sake of clarity, this includes all end customer contracts served in Berlin and Hamburg with both gas and electricity on a dual-fuel offer basis.

1.3.2 Brands involved

44. Only the following brands for services provided to small customers will be transferred to the purchaser ("**Divested Brands**"):

Brand	Services provided
SME Segment	
dekkel Strom	Supply of electricity: All-in product, for SME customers, with a fixed 1, 2 or 3 year contract term. When prices fall the customers have the chance to prolong the contract profiting from the lower price level.
Retail Segment	
lekker Strom	Supply of electricity: All-in product, with the possibility of a monthly termination and a 12 months price guarantee and an environmentally friendly fuel mix. It is Nuon Deutschland's most sold product.
geniaale Strom	Supply of electricity: Recently launched, all-in product, with the possibility of a monthly termination and a 12 months price guarantee, 100% renewable sources, which comes together with energy savings equipment (the latter under the brand name of "Sparmatik").
Sparmatik	Energy saving equipment
wakker Gas	Supply of gas: All-in product, with the possibility of a monthly termination and a 12 months price guarantee.

45. For the sake of clarity, the Nuon brand and name as such will not be transferred to avoid the risks associated with a split of the brand. However, if requested by the purchaser, for a transition period of [... months] after the divestiture of the Divestment Business, a license of use of the Nuon brand and name for the retail supply of electricity and gas in Berlin and Hamburg will be granted. This to allow for a marketing campaign to change the Nuon brand and name into a new brand and name. The rebranding will be done by the purchaser.
46. Vattenfall itself will resist from using the Nuon brand and name in any active manner in the retail supply for electricity and gas in Germany for a term of [... years] after the expiry of a transition period of [... months] following the divestiture of the Divestment Business, but reserves the right to use the Nuon brand and name afterwards in order to maintain the trademark registration (requirement of use) for preventing third parties from usurping the brand and name for their purposes. For obvious reasons, it is crucial that the use of the Nuon brand will not be split among different countries and competitors, because otherwise the trademark would irreparably be damaged.

1.3.3 Generated turnover

47. The complete turnover of Nuon Deutschland (including its subsidiaries) in 2008 was approx. **[Confidential]** (most of which, in case of a Carve Out, can be attributed to the Divestment Business).

1.3.4 Planned innovations or new products or services

48. The following innovations, new products and services are planned for the Divestment Business.

– **[Confidential]** ;

– **[Confidential]** .

1.4 Describe the level on which the essential functions of the business to be divested are operated if they are not operated on the level of the business to be divested itself, including such functions as research and development, production, marketing and sales, logistics, relations with customers, relations with suppliers, IT systems, etc. The description should contain the role performed by those other levels, the relations with the business to be divested and the resources (personnel, assets, financial resources, etc) involved in the function.

1.4.1 The Divestment Business covers all functions necessary

49. The relevant business functions are executed by the Divestment Business itself. This relates in particular to marketing and sales, procurement, logistics, and relations with customers, relations with suppliers, etc.

50. With respect to the management of the industry parks, all relevant functions are directly covered by the responsible subsidiary of Nuon Deutschland, Nuon Energie und Service GmbH.

51. The divestment of Divestment Business will not affect the execution of any of these functions.

1.4.2 Sourcing of energy through central trading division of Nuon Energy

52. The Divestment Business itself is sourcing its energy for the retail supply to end customers based on market prices **[Confidential]** from Nuon Energy's subsidiary Nuon ET&W. **[Confidential]**.

[Confidential]

Generally, as Nuon Deutschland procures its electricity from Nuon ET&W on market based prices the purchaser can easily buy the electricity for the Divestment Business at same prices from other service providers which have as well direct access to the wholesale market. So, the Divestment Business can easily substitute Nuon ET&W.

Existing sourcing agreements will automatically be transferred with the Divestment Business and continue to run for their regular contract term (without any automatic extension). If desired by Nuon Deutschland or the purchaser of Nuon Deutschland, Vattenfall would be willing to offer continued supply of energy at wholesale market prices.

1.4.3 IT-system

53. [Confidential] .

1.5 Describe in detail the links between the business to be divested and other undertakings controlled by the notifying parties (irrespective of the direction of the link), such as:

- **supply, production, distribution, service or other contracts;**
- **shared tangible or intangible assets;**

- **shared or seconded personnel;**
- **shared IT systems or other systems; and**
- **shared customers.**

54. The Divestment Business is a stand-alone business. Therefore, except for the following business relationships, there are no further links between Divestment Business and other undertakings controlled by the notifying parties:

- The business relationship between Nuon Deutschland and Nuon ET&W as described in more detail on para. 0 et seq. As set out above: Existing sourcing agreements will automatically be transferred with the Divestment Business and continue to run for their regular contract term (without any automatic extension). If desired by Nuon Deutschland or the purchaser of Nuon Deutschland, Vattenfall would be willing to offer continued supply of energy at wholesale market prices.
- **[Confidential]**
- **[Confidential]**
- The standardised DSO contracts with Vattenfall as DSO in Berlin and Hamburg. Due to the standardised procedure, every purchaser could easily step into these contracts.

1.6 Describe in general terms all relevant tangible and intangible assets used and/or owned by the business to be divested, including, in any case, IP rights and brands.

55. The Divestment Business as such is a viable stand alone business. That means it has the tangible and intangible assets that are required to operate its business on its own. Generally, these assets include all real estate, staff, IT, etc., as well as all customer relations and databases. Further, it comprises all administrative and managerial resources as well as relevant intellectual property rights (owned or licensed).

1.6.1 Tangible Assets

56. The Divestment Business includes in particular the following tangible assets:

- All real estate relating to the Divestment Business, together with all facilities, supplies, raw materials, inventory and other tangible personal property located on site.
- The following main contracts, agreements, leases, commitments and understandings:
The lease agreement for a total of 7,000 m² of office space in several buildings in a commercial building complex, located at Egellsstrasse 21 in Berlin.
- All applications in Germany such as **[Confidential]** .
- All books and records for the Divestment Business.
- Two customer centres ("*Energiewinkel*") in Wandsbeker Marktstraße 20-22, 22401 Hamburg, Germany, and Markt 24, 52525 Heinsberg, Germany, including all relevant staff, facilities and contracts.

1.6.2 Intangible Assets

57. As for intangible assets, subject to the commitment with respect to the Nuon brand and name as set out in para. 0 and 0, the Divestment Business includes all intellectual property and technology rights relating to the Divested Brands (para. 0).

1.7 Submit an organisational chart identifying the number of personnel currently working in each of the functions of the business to be divested and a list of those employees who are indispensable for the operation of the business to be divested, describing their functions.

58. Please find below an organisational chart identifying the number of personnel (number of FTE's) currently working in each of the functions of the Divestment Business. Nuon Germany currently has 235 employees (FTE's). **[Confidential]**

[Confidential]

59. The personnel of Nuon Deutschland **[Confidential incl. Confidential Annex 2)**.

1.8 Describe the customers of the business to be divested, including a list of customers, a description of the corresponding records available, and provide the total turnover generated by the business to be divested with each of these customers (in EUR and as percentage of the total turnover of business to be divested).

60. The Divestment Business would include at least the following customer contracts:

- All (load and non-load measured) electricity customer contracts in Berlin. **[Confidential]**
- All (load and non-load measured) electricity customer contracts in Hamburg. **[Confidential]**
- All small and large gas customer contracts in Berlin. **[Confidential]**
- All small and large gas customer contracts in Hamburg. **[Confidential]**
- For the sake of clarity, this includes all end customer contracts served in Berlin and Hamburg with both gas and electricity on a dual-fuel offer basis.

61. In view of the high number of customers involved with respect to the Divestment Business, the Parties would like to request a waiver in this regard since it is impossible to list all these customers and the respective turnover individually. Also, such a list would not contribute additional value for a competitive assessment of the Divestment Business as such.

1.9 Provide financial data for the business to be divested, including the turnover and the EBITDA achieved in the last two years, and the forecast for the next two years.

62. The table below provides an overview of the turnover, EBITDA and EBIT of Nuon Deutschland:

Nuon Deutschland				
€ million	2007	2008	2009	2010
	Actual	Actual	Latest Est.	Bus. Plan
Turnover	<i>[Confidential]</i>	<i>[Confidential]</i>	<i>[Confidential]</i>	<i>[Confidential]</i>
EBITDA	<i>[Confidential]</i>	<i>[Confidential]</i>	<i>[Confidential]</i>	<i>[Confidential]</i>
EBIT	<i>[Confidential]</i>	<i>[Confidential]</i>	<i>[Confidential]</i>	<i>[Confidential]</i>

63. In addition, the annual accounts for Nuon Deutschland and its subsidiaries are available for the business year 2007 and attached as **Annexes 3a - f.**⁸⁸

64. For Nuon Deutschland's business plan 2009 – 2012, please refer to **Confidential Annex 4.**

1.10 Identify and describe any changes that have occurred in the last two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

65. In the last two years the Divestment Business has primarily seen changes in its business activities. For more details please refer to Annex 11a to the Form CO.

66. In addition, there were two changes:

– *[Confidential]*

– *[Confidential]*

1.11 Identify and describe any changes, planned for the next two years, in the organisation of the business to be divested or in the links with other undertakings controlled by the notifying parties.

67. Generally, subject to business decisions of the purchaser, the nature and scope of the Divestment Business will effectively be the same as it is today. Overall it is clear that the Divestment Business is a viable independent business for the supply of energy.

68. There are no changes planned in the organisation of the Divestment Business or in the links with other undertakings controlled by the notifying parties for the next two years. Existing sourcing agreements will automatically be transferred with the Divestment Business and continue to run for their regular contract term (without any automatic extension). Generally, we assume that the Divestment Business would either directly source on the wholesale market or replace existing sourcing with the purchaser's sourcing strategy. Still, if desired by Nuon Deutschland or the purchaser of Nuon Deutschland, Vattenfall would be willing to offer continued supply of energy at wholesale market prices.

General information on the business to be divested as described in the commitments.

⁸⁸ Please note that this annual account relates to Nuon Deutschland and all its subsidiaries in 2007.
[Confidential]

1.12 Describe any areas where the business to be divested as set out in the commitments offered differs from the nature and scope of the business as currently operated.

69. The Divestment Business differs in no way from the nature and scope of its current business operations.

Acquisition by a suitable purchaser.

1.13 Explain the reasons why, in your view, the business will be acquired by a suitable purchaser in the time-frame proposed in the commitments offered.

70. The Divestment Business includes at least major parts of the retail supply business of Nuon Deutschland. The Divestment Business thus offers every new entrant as well as established players an option to gain or strengthen a viable business presence in Germany.
71. Therefore, the Parties believe that there will be many players who will wish to acquire the Divestment Business. There exist numerous potential third parties, which should be interested in acquiring Nuon Deutschland such as [**Confidential**].