

# SUBMISSION ON INTERIM GENERATION LICENCES

## AIRTRICTY

### General

This Submission covers the subject matter of the draft Generic Generation Licence (hereafter referred to as **Generic draft**) and the draft ESB Power Generation Licence (hereafter referred to as the **ESB draft**) which will apply from Go-Active date to Go-Live date. We have looked at the proposals in isolation and have also compared the two proposals with a view to determining whether generic generators and ESB are being treated in an equal manner. This submission looks at the proposals under three headings:

1. Common provisions in both drafts,
2. Unique Features in the ESB draft, and
3. Unique features in the Generic draft.

In addition to a number of substantive and procedural issues, we have identified a number of inconsistencies and formatting errors.

Unless otherwise specified, comments pertain to the Generic draft text.

### 1. COMMON PROVISIONS

#### Part 1

The first paragraph of Part 1 is different in both documents. Paragraph 1 of Part 1 of the ESB draft provides:

*“the Commission for Energy Regulation, in exercise of the powers conferred by Section 14(1) (a) of the Electricity Regulation Act, 1999 (herein referred to as the (“Act”), as amended by Regulation 16(e) of the European Communities (Internal Markets in Electricity) Regulations 2005 (hereinafter referred to as the “SI 60 of 2005”...”*

In contrast, Paragraph 1 of Part 1 of the Generic draft is silent on the fact that the Act has been amended (italics). This should be updated in line with the ESB draft.

Paragraph 3 of Part 1 differs in both drafts. The ESB draft provides that the licence shall continue in full force and effect until the coming into force of any subsequent licence. However, the Generic draft leaves the generating parties subject to the risk of being given notice to end their licences, subject to the licences being in force for a minimum of 15 years. The ESB draft does not provide for a minimum duration of the Licence. In order to ensure fair treatment, we suggest harmonising both provisions.

#### Part II

##### Interpretation and construction

Reference: Condition 1 of Generic draft  
Condition 1 of ESB draft

Firstly, formatting is inconsistent in that upper and lower cases are used for the definitions. Examples include, inter alia, “Distribution Code” and “distribution system” (Generic draft). This should be remedied for ease of reference and consistency.

In terms of substantive issues, the ESB draft defines more terms than the Generic draft.

### ***Terms not defined by the Generic draft***

In comparison to the ESB draft, the Generic draft does not contain definitions of “Act”, “Business”, “Distribution Business”, “Final Customer”, “Participating Interest”, “Protocol”, “Public Electricity Supply Business”, “Regulated Business” and “Transmission Systems Owner’s Business”. These definitions are equally important for the Generic draft and should be included.

### ***Terms not defined by the ESB draft***

The ESB draft, in contrast to the Generic draft, neglects to define “Distribution System”, “Distribution System Operator” and “Generator”. This inconsistency should be removed.

### ***Terms not defined in either draft***

Neither draft defines Cross Subsidy, Dominant Position, or Geographic and Product Markets. These terms appear throughout the drafts and should be defined to aid interpretation of the Licence, and provide greater clarity and certainty to Licensees regarding their rights and obligations.

### ***Terms included in both drafts***

“Affiliate”, “Auditors”, “Holding Company”, and “Subsidiary”: the ESB draft refers to the companies Acts, 1963 – 2001, whereas the Generic draft refers to the Companies Acts, 1963 – 1999. The former is correct and the General draft should be amended to reflect this. We are concerned that this simple error appears throughout the conditions of the Generic draft.

“Distribution Systems Operator”: as defined in the ESB draft refers to the Licence *“pursuant to the Section 14(1)(g) of the Act”*, whereas the Generic draft does not include this reference. Both definitions should be identical.

“Electricity Undertaking”: the ESB draft makes reference to Section 37 of the Electricity (Supply) Act 1927, whereas the generic draft only refers to Section 37 of the “Principal Act”. There should be no difference and both drafts should define the terms in the exact same manner, with the utmost precision.

“Generation Business”: is defined in the Generic draft as *“the licensed business of the Licensee and any affiliate or related undertaking of the Licensee”*. The ESB draft leaves out the latter part in italics, which is discriminatory.

“Generation Licence”: is defined in the ESB draft as *“a licence granted under Section 14(1) (a) of the Act, as amended by Regulation 16(e) of SI 60 of 2005”*. Again, the Generic draft fails to incorporate a reference to the words in italics.

“Interconnector”: The ESB draft provides a much shorter and clearer definition than the Generic draft. Both drafts should use this definition. More precision needs to be applied to the Generic draft.

“Modification”: the word “deletion” is used in the ESB draft and “omission” is used in the Generic draft. Both definitions should use identical words in order to rule out any possible misconstruction.

“Related Undertaking”: in this case, the Regulation is specified in the General draft and not in the ESB draft.

“Supplier”: the ESB draft is more specific in terms of specifying the Section of The Act. The Generic draft is silent on this and should be amended to reflect the precision of the ESB draft.

“Transmission System Owner”: again, the ESB draft is more particular than the Generic draft.

Drafting should apply the same level of precision and attention when legislating for both the Generic Licensees and ESB. Discrimination, even in the form of inattention to detail, should be avoided.

## **Separate accounts for the Generation Business**

Reference: Condition 2 of Generic draft  
Condition 2 of ESB draft

We consider Condition 2 of the Generic Licence to be overly cumbersome; particularly those obligations imposed on Generic Licensees.

The effect of this provision is that Generic generators, irrespective of size, will be required to prepare accounting records for both its Licence's financial year and for the period governed by annual account requirements. The provision goes too far in requiring all Generic Licensees to provide separate accounts for the Generation business. In an effort to ease the effect of this Condition, we recommend that inclusion of a company size threshold, for example, only companies who have more than x% market share should be obliged to comply with this requirement.

In particular we consider that the imposition of regulatory accounting periods in addition to licensee's financial accounting period goes far beyond any Directive requirement and is unjustifiably burdensome to generators operating in a competitive market sector without any possibility of exercising dominance.

Paragraph 5 (c) of the Generic draft obliges Licensees to publish the accounting statements for the Licensee's financial year with its annual accounts. This would mean that Generators would have to highlight the different revenue and financial particulars for their generation business, as distinct from their supply business and would require provision of commercially sensitive information to competitors. This obligation cannot be justified in a competitive market sector, unless it is subject to a dominance threshold limit.

In addition to the obligation imposed on Licensees by Paragraph 3(b) (i) to prepare accounting records, Paragraph 6 provides the Commission with a wide discretion to notify the Generic Licensee of guidelines in accordance with which it must prepare accounting statements. The wording of paragraph 6 and 7 imposes a mandatory obligation on Licensees to conform to such guidelines. Paragraph 7 may also require significant changes to a licensee's accounting arrangements and potentially require introduction of dual accounting systems, which is an unreasonable imposition on the Licensee compared with any assessment of material benefit to orderly conduct of the market. This is an unfair condition that is not included in the ESB draft. Paragraph 3 of the ESB draft provides that ESB shall draw up guidelines in consultation with the Commission. Generic Licensees should have the same rights. The Commission must ensure that such discriminatory treatment is avoided.

From the perspective of regulation as a corrective mechanism to address market failure, any obligation on Generic Licensees to accord with imposed guidelines should be proportionate to the size and ability of the Licensee to exercise market power.

Having regard to public policy, consumer interest and above all the size and market share of ESB, the Commission is justified in imposing Condition 2 on ESB, but the scope of the equivalent Condition in the Generic Licence is excessive

## **Prohibition of Cross Subsidies and of Discrimination**

Reference: Condition 3 of Generic draft  
Condition 6 of ESB draft

In the Generic draft, the words "and discrimination" should be removed from the title, as this aspect of the Condition has sensibly been removed from the earlier draft text.

Cross subsidy is an outcome of market failure and can only ever be delivered by a party having control of monopoly assets, from which it can extract excess economic rent to undermine other, competitive, areas of the market; this is the context of the Directive's ban on cross subsidy. In the context of Generic Generation Licensees, their market is competitive and their counterparty is the Pool. Even if a generic Licensee were operating a competitive business within the generation sector and a competitive business within the supply sector, it would still not have the ability to cross subsidise and hence could not affect customers. There is no possibility of an independent generator obtaining

super-normal profit in a competitive market and we therefore believe that a prohibition on Cross Subsidy is not relevant to the Generic Licence.

In any event, should the Commission be minded to retain a prohibition, we would propose a number of changes:

- Having regard to the wide scope of this condition, it should not provide for the Commission to decide with hindsight what constitutes a Dominant Position, Commercially Sensitive Information, Cross Subsidy and a Market for the Generation of Electricity. For the sake of transparency, all of these terms need to be defined in advance, in the Licence, using definitions from Irish Competition Law. As a minimum, criteria should be specified, or an illustrative list of prohibited behaviour should be included. Generic Licensees need certainty when deciding on courses of action and the Licence should provide such transparency and certainty. As it stands, Condition 3 confers too wide a discretion on the Commission.
- In the interests of certainty and fairness, we would also advocate inclusion of a provision that would enable Licensees to seek approval from the Commission in advance of activity; such approval being accepted as confirmation of compliance. This would be mutually beneficial to the Commission and Licensees as it would prevent rather than punish prohibited activities.
- Paragraph 3 prohibits the disclosure of commercially sensitive information to any other business of the Licensee or of an affiliate or related undertaking of the Licensee. In general this is completely unworkable where the Licensee is one of a number of SPVs whose commercial arrangements and accounting services are carried out by a single staff team. At the very least, this paragraph should be subject to the qualification that, "except insofar as the Licensee may be entitled to do by Law or in accordance with arrangements or agreements approved by the Commission". This reflects the wording of paragraph 5 of Condition 6 of the ESB draft, which covers the same issue. Generic Licensees should be afforded the same treatment as ESB.

In order to avoid doubt, paragraph 3 of condition 6 of the ESB draft should be incorporated into Condition 3 of the Generic draft.

Condition 6 of the ESB draft which covers cross subsidies should also prohibit discrimination. The ESB draft should be amended to empower the Commission to conduct random checks on ESB to determine the actual level of compliance.

### **Ancillary services**

Reference: Condition 8 of Generic Licence  
Condition 12 of ESB draft

Condition 8 obliges Generic Licensees, if requested by the TSO, to provide terms for the provision of ancillary services. Paragraph 2 places a very broad, onerous and above all invasive obligation on Licensees to provide a report of prices, costs and explanations. In the case of a dispute, the Commission also has the power to enforce terms on the Licensee. This is only subject to a test of reasonableness. Unless the Commission believes that there is market failure for the provision of ancillary services and therefore intends to regulate prices in this area, it should only be able to change the Licensee's terms if they are "manifestly inappropriate". At the very minimum, we advocate amending the provision to provide an appeal mechanism, to balance the Licensee's obligation to accept the Commission's ruling.

### **Connection to and use of the Licensee's system – requirement to offer terms**

Reference: Condition 10 of Generic draft  
Condition 13 of ESB draft

Whilst we do not object to this Condition in the Generic Licence in principle, we do not see how it can be implemented within the current retail and wholesale market arrangements. It is not clear if the Licensee is being required to act as a system operator, or is allowed to discharge its obligations by appointing the ESB. The retail

market design does not allow for independent data collectors, so the Licensee would again be dependent on the ESB for data collection and processing. As exact matching of energy and losses between injection and delivery point is unlikely to occur in every half hour (including exposure by the Licensee to reactive power charges), provision would need to be made for the Licensee to act as a trading entity, to manage the connecting entity's imbalances.

Paragraph 6 appears to negate the entire Condition, inasmuch as Licensees are unlikely to build grid connections with significant amounts of spare capacity. Further though needs to be given to the purpose of this Condition, particularly in the case of independent generators and whether it actually offers material benefit to the operation of the market.

if this condition is retained, we advocate changing the words "manifestly inappropriate" in paragraph 3 (a) (vi) to "unreasonable". Also, since the Licensee can be compelled to provide connection to and use of its system, paragraph 4 should be amended to ensure that Generic Licensees can recoup a financially attractive rate of return, commensurate with its earnings on existing capital investment. The Commission must also have regard to factors affecting the Licensee, such as distraction from core business activities and implementation of other more financially attractive opportunities. Licensees should be allowed to include the cost of enforcement of connection conditions.

Paragraph 5 is unreasonable in that Licensees may be prevented from recouping full costs for carrying out works based on a potential prospective benefit, which is by no means a certainty.

Paragraphs 6 and 7 provide that the Licensee is not obliged to provide the services in a number of circumstances. We advocate a broadening of Paragraph 6 so as to include situations where the provision of such services would be unattractive having regard to the commercial reality of the situation, or that would adversely affect the ability of the Licensee to export from its grid connection or where the transport of the connector's energy would adversely affect the Licensee's TLAF as calculated by the ESB.

### **Connection to and use of the Licensee's system – functions of the Commission**

Reference: Condition 11 of Generic draft  
Condition 14 of ESB draft

Paragraph 1 of the Generic draft should be amended so as to reflect the argument advanced above, i.e. a reasonable rate of return should ensure that the commercial reality of the situation is taken into account.

Paragraph 2; if the Commission settles a dispute, the Licensee is obliged to "forthwith enter into and implement such agreement". This is unfair. The Licensee should, at the very least, have a right to be heard after the Commission's opinion is expressed and a route for appeal provided for. This is a matter of basic procedural fairness and the Licence should incorporate this safeguard. The same right to be heard should apply in respect of paragraph 3, although if the terms of the agreement between Licensee and connector provide for an alternative dispute resolution arrangement, then the right of regulatory determination should be extinguished.

### **Provision of information to the Commission**

Reference: Condition 12 of Generic draft  
Condition 15 of ESB draft

This Condition provides the Commission with excessively wide discretion in light of the fact that its scope is not limited to generators with market power. In particular, paragraph 2 goes too far in providing the Commission with effectively unlimited power to seek more extensive accounting information than specified under Condition 2. This would be too onerous on Licensees who are purely price takers. Any data provision requirement must be proportionate to the value delivered.

If the Commission deems such a wide-ranging condition to be absolutely necessary, we strongly believe that a qualification should be added to Condition 12 (Generic Licence) to require that the level of information sought must be commensurate with the scale of the Licensee's business.

As it stands, this Condition is justified in the case of the ESB, given its dominant market position; it acts as an essential balance to that organisation's dominant position. However the ESB draft contains one condition that should also be reflected in the Generic Licence; the latter part of ESB draft paragraph 6.

The Generic draft should be amended to confirm an obligation on the Commission to preserve the confidentiality of information provided to it by the Licensee.

## **Environment**

Reference: Condition 15 of Generic draft  
Condition 18 of ESB draft

In principle, we welcome this condition. Nevertheless, the scale of effort involved in preparing the written policy should be commensurate with the size of the business and paragraph 2 should be qualified to reflect this.

As drafted, paragraph 3 of the Generic Licence should be clarified and extended, to include a commitment by the Commission that the form and frequency of reporting should also reflect the scale of the Licensee's business. For most renewable generators we believe that only one account should be required per annum.

## **Assignment of Licence and transfer of Generation Business**

Reference: Condition 17 of Generic draft  
Condition 21 of ESB draft

Paragraph 3 of both drafts should be amended and be made subject to the qualification that, "The Consent of the Commission shall not be unreasonably withheld". A test of reasonableness is a desirable safeguard of the Commercial interests of Licensees.

## **Schedule 1**

For the purpose of clarity, we would advocate harmonising the formatting approach of schedules in both the Generic and ESB Licenses. A table, corresponding to the one used in the ESB draft should be used in the Generic draft.

## **Schedule 2**

Paragraph 1 (b) provides for time limits of 30 days and 14 days. We believe the second time limit should also be increased to 30 days.

The seventh line of paragraph 1 (c) provides, "or such other period as the Commission may determine". We believe this wording should be amended to indicate that 3 months would be the minimum, whereas the Commission's discretion would be exercised to reflect to scale of effort required by a reasonable and prudent undertaking, to remedy the breach.

Paragraph 1 (f) (ii) should be qualified by inserting the words "using its best endeavours", after the words "Commission is satisfied".

Paragraph 1 (h) should be amended to exclude the Commission having sole discretion. In the interests of procedural fairness, the Licensee should be consulted.

Paragraph 2 (a) should be clarified. The ESB and Generic drafts each refer to different currencies. Paragraph 2(b) should also define control. It is not clear whether the company law definition (shareholding of more than 51%) applies within the context of this provision.

## **2. UNIQUE PROVISIONS OF THE ESB DRAFT**

### **Directed Contracts**

Reference: Condition 3 of ESB draft

In the interests of transparency, consultation with Generic Licensees would reflect previous practice and be beneficial to the overall process; particularly in determining whether the directed contract products to be offered are of benefit to conduct of the market.. We propose the incorporation of this provision into Paragraph 2.

Paragraph 7 appears to have omitted the definition of “Directed Contract”.

### **Prohibition of anti-competitive behaviour**

Reference: Condition 5 of ESB draft

Dominant position should be set out in advance and paragraph 3 should be deleted. Moreover, a provision should be included to ensure that a complaints procedure is set up. Parties, such as Generic Licensees and consumers, should be able to make complaints that the Commission will undertake to investigate.

### **Separation of Generation Business**

Reference: Condition 7 of ESB draft

We would contend that this Condition does not go far enough to ensure complete separation. The Commission has the power, pursuant Internal Market Regulations, to enforce complete separation. We put forward that the Commission redrafts this Condition to ensure, in the strongest of terms, that all areas are completely separated, and include, inter alia, terms for transfer of staff between affiliated businesses, separation of complaint management procedures, decision making, annual reporting, branding, compliance and systems. This is justified on competition grounds. Current arrangements, that permit all businesses of the ESB to operate with the same logo and vehicle livery, cause confusion to customers and give the impression that affiliation with the wires business provides additional security of supply.

## **3. UNIQUE PROVISIONS OF THE GENERIC DRAFT**

### **Appointment of Operator**

Reference: Condition 9 of the Generic draft.

The definition of “operator” is too vague; it could mean anything from the person who manages the maintenance team to the one who submits commercial offer data to the Pool. It could also refer to the corporate entity that owns the plant. Clarity is required.

Depending on the interpretation, this condition could deprive the Generic Licensee of full autonomy to make a commercial decision in relation to the selection of an appropriate operator, based on skill and technical capability. Since this decision is subject to the Commission’s approval, which involves time, and cost, we would regard this Condition as being needlessly bureaucratic and having limited obvious value.

If retained, paragraph 2 should be amended to provide the Generic Licensee with greater protection. Firstly, it must set out the criteria to be used when determining whether an operator is “competent” and secondly, the wording should be changed to ensure that the Commission’s approval will not be “unreasonably withheld”..

In the interests of equity and creation of a level playing field, the same obligation should also be imposed on ESB.

# SUBMISSION ON GENERATION LICENCES

## SEM/07/063 and SEM/07/067

### AIRTRICTY

#### General

This Submission covers the subject matter of the draft Generic Generation Licence (hereafter referred to as **Generic draft**) and the draft ESB Power Generation Licence (hereafter referred to as the **ESB draft**) that will apply from SEM market Go-Live. We have looked at the proposals in isolation and have also compared the two proposals with a view to determining whether generic generators and ESB are being treated in an equal manner. This submission looks at the proposals under three headings:

4. Common provisions in both drafts,
5. Unique Features in the ESB draft, and
6. Unique features in the Generic draft.

In addition to a number of substantive and procedural issues, we have identified a number of inconsistencies and formatting errors.

Unless otherwise specified, comments pertain to the Generic draft text.

#### 1. COMMON PROVISIONS

##### Part 1

The first paragraph of Part 1 is different in both documents. Paragraph 1 of Part 1 of the ESB draft provides:

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##### Part II

##### Condition 1

##### Interpretation and construction

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“Supplier”: the ESB draft is more specific in terms of specifying the Section of The Act. The Generic draft is silent on this and should be amended to reflect the precision of the ESB draft.

“Transmission System Owner”: again, the ESB draft is more particular than the Generic draft.

Drafting should apply the same level of precision and attention when legislating for both the Generic Licensees and ESB. Discrimination, even in the form of inattention to detail, should be avoided.

### **Condition 1 -Separate accounts for the Generation Business**

Reference: Condition 2 of Generic draft  
Condition 2 of ESB draft

We consider Condition 2 of the Generic Licence to be overly cumbersome; particularly those obligations imposed on Generic Licensees.

The effect of this provision is that Generic generators, irrespective of size, will be required to prepare accounting records for both its Licence's financial year and for the period governed by annual account requirements. The provision goes too far in requiring all Generic Licensees to provide separate accounts for the Generation business. In an effort to ease the effect of this Condition, we recommend that inclusion of a company size threshold, for example, only companies who have more than x% market share should be obliged to comply with this requirement.

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Having regard to public policy, consumer interest and above all the size and market share of ESB, the Commission is justified in imposing Condition 2 on ESB, but the scope of the equivalent Condition in the Generic Licence is excessive.

### **Prohibition of Cross Subsidies and of Discrimination**

Reference: Condition 3 of Generic draft  
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In the Generic draft, the words "and discrimination" should be removed from the title, as this aspect of the Condition has sensibly been removed from the earlier draft text.

Cross subsidy is an outcome of market failure and can only ever be delivered by a party having control of monopoly assets, from which it can extract excess economic rent to undermine other, competitive, areas of the market; this is the context of the Directive's ban on cross subsidy. In the context of Generic Generation Licensees, their market is competitive and their counterparty is the Pool. Even if a generic Licensee were operating a competitive business within the generation sector and a competitive business within the supply sector, it would still not have the ability to cross subsidise and hence could not affect customers. There is no possibility of an independent generator obtaining

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- In the interests of certainty and fairness, we would also advocate inclusion of a provision that would enable Licensees to seek approval from the Commission in advance of activity; such approval being accepted as confirmation of compliance. This would be mutually beneficial to the Commission and Licensees as it would prevent rather than punish prohibited activities.
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- In order to avoid doubt, paragraph 3 of condition 6 of the ESB draft should be incorporated into Condition 3 of the Generic draft.

Condition 6 of the ESB draft, which covers cross subsidies should prohibit discrimination (as in the previous paragraphs 4 and 5 that have now been removed from the Generic draft). The ESB draft should be amended to empower the Commission to conduct random checks on ESB to determine the actual level of compliance.

### **Central dispatch**

Reference: Condition 7 of Generic Licence  
Condition 10 of ESB draft

What is meant by requiring the Licensee to “submit all available ... interconnector transfers to central dispatch”? Is an available interconnector transfer a capacity holding, a BETTA wholesale contract or what? We would strongly oppose any licence obligation to enter into trading agreements in BETTA on the basis of having purchased the right to interconnector capacity. We assume this is intended to require any intended interconnector imports to be notified for central dispatch, in which case the Licence wording should reflect this meaning.

### **Ancillary services**

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Condition 11 of ESB draft

Condition 8 obliges Generic Licensees, if requested by the TSO, to provide terms for the provision of ancillary services. Paragraph 2 places a very broad, onerous and above all invasive obligation on Licensees to provide a report of prices, costs and explanations. In the case of a dispute, the Commission also has the power to enforce terms on the Licensee. This is only subject to a test of reasonableness. Unless the Commission believes that there is market failure for the provision of ancillary services and therefore intends to regulate prices in this area, it should only be able to change the Licensee’s terms if they are “manifestly inappropriate”. At the very minimum, we advocate

amending the provision to provide an appeal mechanism, to balance the Licensee's obligation to accept the Commission's ruling.

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Whilst we do not object to this Condition in the Generic Licence in principle, we do not see how it can be implemented within the current retail and wholesale market arrangements. It is not clear if the Licensee is being required to act as a system operator, or is allowed to discharge its obligations by appointing the ESB. The retail market design does not allow for independent data collectors, so the Licensee would again be dependent on the ESB for data collection and processing. As exact matching of energy and losses between injection and delivery point is unlikely to occur in every half hour (including exposure by the Licensee to reactive power charges), provision would need to be made for the Licensee to act as a trading entity, to manage the connecting entity's imbalances.

Paragraph 6 appears to negate the entire Condition, inasmuch as Licensees are unlikely to build grid connections with significant amounts of spare capacity. Further though needs to be given to the purpose of this Condition, particularly in the case of independent generators and whether it actually offers material benefit to the operation of the market.

if this condition is retained, we advocate changing the words "manifestly inappropriate" in paragraph 3 (a) (vi) to "unreasonable". Also, since the Licensee can be compelled to provide connection to and use of its system, paragraph 4 should be amended to ensure that Generic Licensees can recoup a financially attractive rate of return, commensurate with its earnings on existing capital investment. The Commission must also have regard to factors affecting the Licensee, such as distraction from core business activities and implementation of other more financially attractive opportunities. Licensees should be allowed to include the cost of for enforcement of connection conditions.

Paragraph 5 is unreasonable in that Licensees may be prevented from recouping full costs for carrying out works based on a potential prospective benefit, which is by no means a certainty.

Paragraphs 6 and 7 provide that the Licensee is not obliged to provide the services in a number of circumstances. We advocate a broadening of Paragraph 6 so as to include situations where the provision of such services would be unattractive having regard to the commercial reality of the situation, or that would adversely affect the ability of the Licensee to export from its grid connection or where the transport of the connector's energy would adversely affect the Licensee's TLAF as calculated by the ESB.

### **Connection to and use of the Licensee's system – functions of the Commission**

Reference: Condition 11 of Generic draft  
Condition 14 of ESB draft

Paragraph 1 of the Generic draft should be amended so as to reflect the argument advanced above, i.e. a reasonable rate of return should ensure that the commercial reality of the situation is taken into account.

Paragraph 2; if the Commission settles a dispute, the Licensee is obliged to "forthwith enter into and implement such agreement". This is unfair. The Licensee should, at the very least, have a right to be heard after the Commission's opinion is expressed and a route for appeal provided for. This is a matter of basic procedural fairness and the Licence should incorporate this safeguard. The same right to be heard should apply in respect of paragraph 3, although if the terms of the agreement between Licensee and connector provide for an alternative dispute resolution arrangement, then the right of regulatory determination should be extinguished.

### **Provision of information to the Commission**

Reference: Condition 12 of Generic draft  
Condition 15 of ESB draft

This Condition provides the Commission with excessively wide discretion in light of the fact that its scope is not limited to generators with market power. In particular, paragraph 2 goes too far in providing the Commission with effectively unlimited power to seek more extensive accounting information than specified under Condition 2. This would be too onerous on Licensees who are purely price takers. Any data provision requirement must be proportionate to the value delivered.

If the Commission deems such a wide-ranging condition to be absolutely necessary, we strongly believe that a qualification should be added to Condition 12 (Generic Licence) to require that the level of information sought must be commensurate with the scale of the Licensee's business.

As it stands, this Condition is justified in the case of the ESB, given its dominant market position; it acts as an essential balance to that organisation's dominant position. However the ESB draft contains one condition that should also be reflected in the Generic Licence; the latter part of ESB draft paragraph 6.

The Generic draft should be amended to confirm an obligation on the Commission to preserve the confidentiality of information provided to it by the Licensee.

### **Cost-reflective bidding**

Reference: Condition 15 of Generic draft  
Condition 17 of ESB draft

The Licences go much further along the road of bidding definition than would be expected if they were intended only to represent bidding principles. To avoid the need for frequent Licence update/amendment and the potential for uncertainty as to interaction and priority between the Licences and the Bidding Code of Practice, we believe it would be more appropriate for the Licences to contain only the requirement that Licensees comply with the Code of Practice as amended from time to time. In particular, we believe that the Licence attempt, in paragraph 3, to define short run marginal cost is too brief to be effective in addressing the complexity of the issue.

For example, if a significant plant component fails during a Trading Day, there has been a major marginal cost to the Licensee, since the component would not have failed if the plant had not run and is therefore, by definition, part of SRMC. However, if the plant cannot run because of component failure, how can the cost be recovered? On the other hand should wear and tear on large plant components be excluded from the variable O&M aspect of SRMC because it represents part of the general ownership cost of generation plant? Complex issues of this nature should be addressed in detail in the Code of Practice, rather than a partial definition being attempted in the Licences.

### **Environment**

Reference: Condition 16 of Generic draft  
Condition 18 of ESB draft

In principle, we welcome this condition. Nevertheless, the scale of effort involved in preparing the written policy should be commensurate with the size of the business and paragraph 2 should be qualified to reflect this.

As drafted, paragraph 3 of the Generic Licence should be clarified and extended, to include a commitment by the Commission that the form and frequency of reporting should also reflect the scale of the Licensee's business. For most renewable generators we believe that only one account should be required per annum.

### **Assignment of Licence and transfer of Generation Business**

Reference: Condition 18 of Generic draft  
Condition 21 of ESB draft

Paragraph 3 of both drafts should be amended and be made subject to the qualification that, "The Consent of the Commission shall not be unreasonably withheld". A test of reasonableness is a desirable safeguard of the Commercial interests of Licensees.

### **Schedule 1**

For the purpose of clarity, we would advocate harmonising the formatting approach of schedules in both the Generic and ESB Licenses. A table, corresponding to the one used in the ESB draft should be used in the Generic draft.

## **Schedule 2**

Paragraph 1 (b) provides for time limits of 30 days and 14 days. We believe the second time limit should also be increased to 30 days.

The seventh line of paragraph 1 (c) provides, “or such other period as the Commission may determine”. We believe this wording should be amended to indicate that 3 months would be the minimum, whereas the Commission’s discretion would be exercised to reflect to scale of effort required by a reasonable and prudent undertaking, to remedy the breach.

Paragraph 1 (f) (ii) should be qualified by inserting the words “using its best endeavours”, after the words “Commission is satisfied”.

Paragraph 1 (h) should be amended to exclude the Commission having sole discretion. In the interests of procedural fairness, the Licensee should be consulted.

Paragraph 2 (a) should be clarified. The ESB and Generic drafts each refer to different currencies. Paragraph 2(b) should also define control. It is not clear whether the company law definition (shareholding of more than 51%) applies within the context of this provision. This paragraph should also be amended to confirm that the Licence will not be terminated in circumstances where the Commission has consented to the Licence Condition relating to Assignment of Licence and Transfer of Generation Business

## **2. UNIQUE PROVISIONS OF THE ESB DRAFT**

### **Directed Contracts**

Reference: Condition 3 of ESB draft

In the interests of transparency, consultation with Generic Licensees would reflect previous practice and be beneficial to the overall process; particularly in determining whether the directed contract products to be offered are of benefit to conduct of the market.. We propose the incorporation of this provision into Paragraph 2.

Paragraph 7 appears to have omitted the definition of “Directed Contract”.

### **Prohibition of anti-competitive behaviour**

Reference: Condition 5 of ESB draft

Dominant position should be set out in advance and paragraph 3 should be deleted. Moreover, a provision should be included to ensure that a complaints procedure is set up. Parties, such as Generic Licensees and consumers, should be able to make complaints that the Commission will undertake to investigate.

### **Separation of Generation Business**

Reference: Condition 6 of ESB draft

We would contend that this Condition does not go far enough to ensure complete separation. The Commission has the power, pursuant Internal Market Regulations, to enforce complete separation. We put forward that the Commission redrafts this Condition to ensure, in the strongest of terms, that all areas are completely separated, and include, inter alia, terms for transfer of staff between affiliated businesses, separation of complaint management procedures, decision making, annual reporting, branding, compliance and systems. This is justified on competition grounds. Current arrangements, that permit all businesses of the ESB to operate with the same logo and vehicle livery, cause confusion to customers and give the impression that affiliation with the wires business provides additional security of supply.

### **3. UNIQUE PROVISIONS OF THE GENERIC DRAFT**

#### **Appointment of Operator**

Reference: Condition 9 of the Generic draft.

The definition of “operator” is too vague; it could mean anything from the person who manages the maintenance team to the one who submits commercial offer data to the Pool. It could also refer to the corporate entity that owns the plant. Clarity is required.

Depending on the interpretation, this condition could deprive the Generic Licensee of full autonomy to make a commercial decision in relation to the selection of an appropriate operator, based on skill and technical capability. Since this decision is subject to the Commission’s approval, which involves time, and cost, we would regard this Condition as being needlessly bureaucratic and having limited obvious value.

If retained, paragraph 2 should be amended to provide the Generic Licensee with greater protection. Firstly, it must set out the criteria to be used when determining whether an operator is “competent” and secondly, the wording should be changed to ensure that the Commission’s approval will not be “unreasonably withheld”..

In the interests of equity and creation of a level playing field, the same obligation should also be imposed on ESB.