

BEFORE THE COMPETITION AND MARKETS AUTHORITY

IN THE MATTER OF AN APPEAL UNDER SECTION 11C OF THE ELECTRICITY ACT 1989

B E T W E E N :

BRITISH GAS TRADING LIMITED

Appellant

and

THE GAS AND ELECTRICITY MARKETS AUTHORITY

Respondent

SUBMISSION BY

ELECTRICITY NORTH WEST LIMITED

1 Introduction

- 1.1 Electricity North West Limited (**ENWL**) is the electricity distribution network operator (**DNO**) for the North West of England and holds a distribution licence under section 6(1)(c) of the Electricity Act 1989 (the **Act**). It is the only single licence DNO ownership group in Great Britain.
- 1.2 ENWL makes this submission to the Competition and Markets Authority (**CMA**)¹ in response to the appeal brought by British Gas Trading Limited (**BGT**) under section 11C of the Act against the decision of the Gas and Electricity Markets Authority (the **Authority**) to make certain modifications to the electricity distribution licences of ENWL, Northern Powergrid, UK Power Networks, SP Distribution plc and SP Manweb plc, and Scottish and Southern Energy Power Distribution, together the slow-track distribution network operators (the **DNOs**), as published on 3 February 2015 (the **Decision**).
- 1.3 ENWL has participated with the other DNOs in producing joint submissions in response to BGT's grounds of appeal (the **Joint Submissions**).² ENWL is confident that these submissions demonstrate that the Authority has not erred in reaching its Decision and certainly not in the manner alleged by BGT.
- 1.4 The grounds of the BGT Notice of Appeal address key issues that the Authority has considered carefully in making a determination that protects consumers' interests and that ENWL relied upon in resolving that the determination was financeable and, therefore, acceptable. This demonstrates that the Authority has wisely exercised its judgment and expertise in reaching conclusions on these issues in the case of ENWL.
- 1.5 The objective of the BGT appeal is to reduce the cumulative revenues allowable during the RII0-ED1 period by £1.4 billion, as quantified in the AlixPartners report.³ It is clear that the effects of the appeal, if allowed, would be very significant for all of the DNOs. It is also the case that certain DNOs will be more seriously affected than others should BGT's appeal succeed. ENWL is particularly vulnerable in the event of any successful challenge to the Decision because of a very demanding financial settlement agreed with the Authority and the underlying circumstances of its financial position.
- 1.6 In this supplemental submission ENWL responds to certain issues raised by BGT in its Notice of Appeal []. For obvious reasons, these representations do not appropriately belong in the Joint Submissions.
- 1.7 In **summary**, ENWL's submissions are:
- (a) The correct legal interpretation of the Authority's "financeability" duty⁴ is that it requires that the Authority, when deciding how best to further its primary duty to protect the interests of consumers, to "secure" that the licensee can finance its activities. (**Section 2**)

¹ Pursuant to CMA Energy Licence Modification Appeal Rules, rule 10.1.

² Where this submission refers to materials submitted by BGT in support of its appeal, those materials will be identified by using the referencing system employed in BGT's Notice of Appeal.

³ BGT Notice of Appeal, paragraph 4.7.

⁴ BGT Notice of Appeal, paragraphs 1.9(a), 1.9(d) and 2.6.

- (b) In considering the BGT appeal it is important that the CMA understands the strength of ENWL’s business plan for consumers, the challenges it faced given the Authority’s new approach to financeability and how it sought to address those challenges in the plan. (**Section 3**)
- (c) ENWL was incentivised by the prospect of the information quality incentive (IQI) reward to reveal future efficiencies. The strength of ENWL’s business plan benefits consumers in the North West and across Great Britain.⁵ (**Section 4**)
- (d) The issues raised by BGT in its Notice of Appeal were key aspects underlying ENWL’s conclusion that the Decision is financeable and, therefore, was acceptable. (**Section 5**)
- (e) The Authority did not err in its approach to considering the issue of financeability. The Authority’s conclusions were well informed, justified by evidence and well within the bounds of its regulatory discretion. (**Section 6**)
- (f) The Authority’s consultation process for RIIO-ED1 was perfectly adequate. Both the Authority and the DNOs provided numerous opportunities for stakeholders including BGT to contribute to the process. (**Section 7**)

1.8 ENWL requests that the CMA has regard to its individual submission in addition to the Joint Submissions by the DNOs in conducting its assessment of BGT’s appeal. ENWL considers that its submission should assist the CMA in reaching the conclusion that the Authority was correct in reaching its Decision and that consequently BGT should be denied the relief sought in its Notice of Appeal.

2 The Authority’s “financeability” duty correctly interpreted

2.1 BGT’s claim that “[the Authority has] given inappropriate and unsupported weight to subsidiary considerations of financeability”⁶ rests upon a misunderstanding of the statutory regime. In the summary of its grounds of relief it is stated that:⁷

“...when considering the weight to be given to the principal objective under s3A of the EA89 and the Authority’s other statutory duties, the following points must be borne in mind:

- a. The structure of s.3A requires that priority be given to the protection of the consumer interest. The DNOs’ need to ensure finance (to which the Authority makes frequent reference in the Decision) is a subsidiary consideration, which arises only insofar as it is shown to be of relevance to the consumer interest. There is no independent duty to enable DNOs to finance their activities.*
- b. In order for any weight to be given to considerations of financeability, it is necessary to show in concrete terms how they affect the consumer interest. Vague and unsupported references to financeability concerns are insufficient*

⁵ This section supplements – but does not repeat – the sections of the Joint Submissions on the incentive properties of the IQI with some additional ENWL-specific information in response to BGT’s assertions on this point.

⁶ BGT Notice of Appeal, paragraph 4.21(c).

⁷ BGT Notice of Appeal, paragraph 2.22.

to justify departing from the immediate interest of current consumers in lower prices; and should be afforded no weight by the CMA.”

- 2.2 Almost all of the above statements are wrong in law:
- (a) Financeability is not a “subsidiary” consideration (or subsidiary duty) that arises only where relevant to the consumer interest, requiring additional “*cogent*” justification by reference to the principal duty before the Authority can properly consider finance. This is the wrong legal interpretation.
 - (b) The Act requires the Authority always to act in furtherance of the consumer interest and requires, as an essential statutory and inherent element of this, that it should “*secure*” that the licensee can finance its activities, in the same way as the Authority must secure adequate electricity is generated. Otherwise the consumer interest is not being furthered.
 - (c) It is therefore wrong to see financeability and securing adequate electricity supply as counterweights to furthering the consumer interest, as if they were competing interests to be weighed up by the Authority. There is no weighing up exercise: the consumer interest demands adequate electricity supply and adequate funds to finance the relevant activities of the licensee.
- 2.3 Section 3A of the EA89 sets out the principal objective and general duties of the Authority and states that “*the principal objective in carrying out its functions under [this Part] is to protect the interests of consumers in relation to electricity ...*”. “Consumers” means both existing and future consumers and it is the protection of their interests “*taken as a whole*” which is the guiding principle underlying the Authority’s actions: section 3A(1) and (1A).
- 2.4 That is *what* the Authority must do. *How* it should do this is set out in section 3A(2)-(5). These are not in any sense subsidiary duties. Their inclusion is designed to guide the Authority as to the considerations which it must have regard to in seeking to protect the interests of consumers.
- 2.5 In particular, section 3A(2) emphasises that the nature of this provision is to offer the Authority guidance as to how it will discharge its duty under section 3A(1B) and (1C): the Authority must carry out its functions in a manner which is best calculated to further the principal objective, namely the protection of the interests of consumers. However, in doing so it must have regard to the need to “*secure*” that all reasonable demands for electricity are met and the need to “*secure*” that licence holders are able to finance the activities which are the subject of obligations imposed by this Part of the Act.
- 2.6 Two points are significant:
- (a) The Authority has considerable discretion as to how it will discharge its functions generally under section 3A(1): the Act specifies the manner should be that which “*... it considers is best calculated to further the principal objective*”, which offers a degree of subjective discretion that an appeal court would not normally upset.
 - (b) The Authority *must* have regard in both cases to “*... the need to secure*” the matters set out above. BGT completely ignores the word “*secure*” but its significance cannot be airbrushed out of the Act. This should be read as an obligation to protect the interests of consumers in a manner which secures that licence holders are able to finance their relevant activities. Financeability is neither a subsidiary nor primary

obligation, or one which any weight can be placed upon other than the ordinary and natural meaning of the word “*secure*”.

- 2.7 It is for the Authority to protect the interests of consumers in the two ways which are highlighted in the Act. First, by ensuring that all reasonable demands for electricity are met and, second, by ensuring that licence holders are able to finance their relevant activities. If the undertaking were unable, through the Authority’s actions, to meet all reasonable demand or finance its functions, the Authority would be in breach of its principal objective duty in section 3A(1). The former situation is obvious: consumers are harmed by inadequate service. The latter situation is equally obvious: if the licensees cannot finance its activities, the activities will cease or services deteriorate, or both.
- 2.8 The Authority was therefore bound to secure the financeability of licensees under its primary consumer duty. In doing so the Authority was perfectly entitled to select the manner in which it would secure financeability from a range of alternatives which would have secured the same object. The Authority was obliged to consider the effects of alternative options on the financial position of the DNOs in order not to compromise the interests of existing and future consumers if the DNOs were not able to raise finance to make the investments necessary to provide electricity distribution services.

3 Financeability in the context of the development of ENWL’s plan under the RIIO framework

- 3.1 ENWL invested considerable time and resources to develop its business plan for RIIO-ED1 recognising and balancing the needs of its customers, shareholders and network. The company spent three years working with stakeholders and the Authority to determine the right business plan that will deliver reliable, affordable and sustainable DNO services to the customers of the North West of England, at a price that was robustly tested against customers’ willingness to pay. ENWL developed its plan in response to the highly-incentivised RIIO framework. The benefits to consumers of its efficient plan are described in **Section 4**.
- 3.2 As explained in the First Witness Statement of Stephen Johnson (**SJ1**) (attached at **Annex 1**), the result was the submission of a business plan that radically changed the way ENWL provides services, with commitments to significant business change and the use of innovative solutions. Significantly, the plan delivers the biggest price cut to consumers of all of the DNOs and ENWL is ranked as the most efficient DNO group in the Authority’s cost efficiency analysis. At the same time, the plan delivers a 20 per cent increase in quality of supply and improved customer service as well as a sustainable network that advances the move to a smart grid future, contributing to the achievement of the UK’s carbon targets. The proposed package transfers risks to shareholders compensated by rewards that customers have accepted as offering good value. As explained in the First Witness Statement of Robert O’Malley (**ROM1**) (attached at **Annex 2**), the business plan ENWL developed assumed very tight financial parameters and was based on certain key assumptions which BGT now wishes to upset.
- 3.3 The Authority’s approach to assessing financeability, as considered below in **Section 6**, can only be understood properly in the context of the new approach it adopted to price regulation as a result of the RPI-X@20 review. This new approach presented network companies with significant challenges given the resulting RIIO Principles and resulted in a greater weight being placed on the issue of financeability during RIIO-ED1 as compared with previous price controls due in particular to the new approaches to asset lives and cost of debt indexation. DNOs were required to address these issues in their

business plans for RIIO-ED1, for the first time. The background to the development of the RIIO regime and support for the proposition that this has increased pressure on financeability for DNOs is provided in Section 5 of the First Report by KPMG which analyses the Authority's approach to financeability under the RIIO-ED1 price control (**KPMG1**) (attached at **Annex 3**).

- 3.4 The key point is that the Authority decided to adopt a new asset life policy and an indexation mechanism for the cost of debt allowance for the RIIO price reviews as a result of decisions taken after the RPI-X@20 review. As explained in ROM1, the combined effect of these two changes was to reduce DNO revenues in the short term and restrict cash flows. The decisions therefore contributed to an environment in which the financeability of DNOs would become a more prevalent consideration in the Authority's decision-making.
- 3.5 The challenges for DNOs introduced by the RPI-X@20 review and the subsequent RIIO price controls were compounded by unprecedented changes in capital markets following the global financial crisis, in particular reduced access to capital (debt and equity), greater stringent testing by rating agencies and more onerous lending criteria.
- 3.6 It was critical that the Authority carefully consider ENWL's particular financeability position. This is substantially due to the misalignment between ENWL's actual debt portfolio and the assumptions implicit in the index selected by the Authority to determine the cost of debt. ENWL had a finely balanced financeability position which prompted extensive engagement with the Authority. This is explained in detail in ROM1 and **Section 5**.
- 3.7 Cognisant of these challenges, ENWL opted to improve financeability by implementing a single period transition to 45 year asset lives, bringing forward price reductions for consumers into the DPCR5 period and deferring that revenue into the RIIO-ED1 period. It also planned to use the incentive rewards associated with the fast-track incentive mechanism to resolve its financeability issues resulting from the application of the RIIO financing principles.

4 The Authority's approach to the IQI incentivised ENWL to reveal future efficiencies, benefitting consumers across Great Britain

- 4.1 As explained in the Joint Submissions, BGT has misunderstood the Authority's approach to the IQI. ENWL does not repeat those arguments here.
- 4.2 Instead, ENWL provides additional evidence in response to BGT's assertion that "*the Authority's change to the IQI cannot advance the purpose of the IQI, which is to encourage DNOs to produce good business plans*".⁸ On the contrary, ENWL was indeed incentivised by the prospect of IQI reward to reveal future efficiencies and this was directly relevant to the financeability of its business plan. ENWL proposed a very stretching business plan that included assumptions about a number of future cost-saving initiatives. The details of many aspects of the business plan would not have been available to the Authority through analysis of data relating to current cost performance of the other DNOs, because these were innovative approaches to produce efficient outcomes. ENWL was awarded additional income of £20 million across the price control period (2015 to 2023) by the Authority through the IQI incentive.

⁸ BGT's Notice of Appeal, paragraph 4.56.

- 4.3 As set out below, this award for information revelation is good value for consumers in the context of the expenditure savings that ENWL's plan offered for consumers both in the North West and across Great Britain. To provide some examples of the benefits derived from the ENWL plan (limited to three examples in the interests of brevity):
- (a) ENWL set out to propose a plan that included efficient volumes of work that were costed at efficient unit costs. This is evidenced by the fact that ENWL was deemed to have a plan that was more efficient than the Authority's benchmarks in both its totex and bottom-up cost assessment models. At the conclusion of the Authority's cost assessment process, ENWL was assessed as being the most efficient DNO. If ENWL had proposed a less challenging plan, the benchmark costs applied by the Authority to all licensees would have been correspondingly higher, increasing costs across Great Britain.
 - (b) ENWL proposed a frontier shift (on-going efficiency assumption) of 1 per cent per year, applied to all aspects of its plan. This was greater than assumptions used by the Authority in other price controls, for example it proposed a frontier shift of just 0.7 per cent for capex aspects of the plans of Gas Distribution Networks. In setting its cost benchmarks, the Authority made no change to the DNOs' proposed frontier shift assumptions.⁹ The direct or indirect evidence available to the Authority from other sources would not have supported a decision to apply such a stretching frontier shift assumption.¹⁰ If ENWL had not proposed such a stringent assumption, and instead used the assumption set by the Authority for Gas Distribution Networks for the capex elements of its plan, its plan would have been £22 million higher across the price control period.
 - (c) As explained in SJ1, ENWL set out challenging assumptions about how new technologies could be used to secure "smart grid discounts", which are aimed to meet the challenges of a move to a low carbon economy at a lower cost for consumers. ENWL was pleased that the Authority acknowledged its leading position in this area. However, the Authority's tough approach in this aspect of the price control, by setting targets based on the leading DNO's performance, resulted in no credit being given to best performers in benchmark costs. The proposals that ENWL included in its business plan therefore resulted in cost savings for consumers across Great Britain. For example, the Authority's use of ENWL's forecast to set the benchmark for many aspects of "smart grid savings" directly resulted in savings to investment plans in Great Britain of £119 million across the price control period (2015 to 2023).

4.4 The importance of IQI rewards to ENWL's business plan is explained in **Section 5** below.

5 Each of the issues raised by BGT in its Notice of Appeal were key to maintaining ENWL's financeability

5.1 The company was disappointed that its plan (narrowly) missed being accepted for fast-track and had to modify its business plan package to compensate for the loss of the fast-track incentive financeability solution. This involved the continuation of the transition to 45 year asset lives and use of a modified cost of debt index (a precursor to the

⁹ Final Determination – Business Plan Expenditure Assessment, paragraph 12.50 [BGT2/35B].

¹⁰ Attached at **Annex 4** is a reported prepared by Oxera ("Frontier Shift in Electricity Distribution") which was attached to ENWL's slow-track business plan ("Well Justified Business Plan 2015-2023"), March 2014.

Authority's trombone mechanism) to deliver a balanced package for all of its stakeholders. This is explained in detail in more detail in ROM1.

- 5.2 Both of these mechanisms are specifically challenged by BGT in the Notice of Appeal where BGT contends that their impact on financeability has been given undue weight.¹¹ For ENWL, the approach taken by the Authority is entirely appropriate, for the reasons set out in the Joint Submissions.
- 5.3 The Authority also carefully considered these issues in making the Final Determination. The Authority decided not to implement the form of the trombone mechanism proposed by ENWL. Instead, to maintain financeability, the Authority elected to utilise the NPV-neutral approach of reducing capitalisation.
- 5.4 ENWL reviewed the Authority's Final Determination and assessed the viability of the package. This assessment looked at the risks associated with the modified package and the opportunities available for outperformance. ENWL concluded that there are sufficient incentive outperformance opportunities to maintain the company's short and medium term financeability. These incentive revenues can be earned through the IQI mechanism, the Interruptions Incentive Scheme (IIS) and the Broad Measure of Customer Satisfaction (BMCS). These mechanisms are specifically challenged by BGT in the Notice of Appeal which contend that the targets are unduly generous.¹² For ENWL, as explained above, the ability to earn such incentive rewards is critical to maintaining financeability. Accordingly, the decision not to appeal the Authority's licence modifications represents a considerable increase in risk for shareholders.
- 5.5 An analysis of the financeability of ENWL's business plan, as amended by the Authority and as reflected in the Authority's Final Determination for RIIO-ED1, is provided in the Second Report by KPMG which analyses the financeability of ENWL under the RIIO-ED1 price control (**KPMG2**) (attached at **Annex 3**).
- 5.6 ENWL decided not to appeal the Decision associated with the challenging Final Determination package. However – should BGT succeed in its appeal on the grounds listed in the Notice of Appeal – this will impose new cash-flow issues by extinguishing valid incentive opportunities and reducing ENWL's allowable revenue across the price control. [

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6 The Authority was correct in its approach to considering financeability

- 6.1 The BGT Notice of Appeal makes specific reference to financeability in its first, fourth and fifth grounds of appeal,¹³ concerning double-recovery, asset life and debt indexation issues respectively. BGT variously claims that the Authority has "*erred [...] and has [...] given inappropriate and unsupported weight to subsidiary considerations of financeability*".¹⁴
- 6.2 The substantive arguments concerning the double-recovery, asset life and debt indexation issues are addressed in the Joint Submissions. ENWL endorses those

¹¹ BGT Notice of Appeal, paragraphs 1.9(d)-(e), 4.66-4.90, and 4.94-4.114.

¹² BGT Notice of Appeal, paragraphs 1.9(b)-(c), 4.24-4.27, and 4.51-4.62.

¹³ As described in BGT Notice of Appeal, paragraph 1.9.

¹⁴ BGT Notice of Appeal, paragraphs 1.9(a), 1.9(d), 2.22(b), 4.21(c), and 4.91(b).

submissions but does not repeat them here. Instead, ENWL provides additional evidence of the Authority's approach to assessing financeability, set out in KPMG1.

The Authority's approach to financeability generally

- 6.3 BGT is wrong to assert that the Authority gave inappropriate and unsupported weight to financeability. The Authority gave full and proper regard to secure that the DNOs, including ENWL, can finance their activities, in furtherance of its primary objective to protect the interests of consumers. It did so in a manner consistent with the considerations regarding the specific financeability challenges of network industries that a regulator would be expected to take into account, and the tests and benchmarks it applied to the DNOs' business cases were appropriate and reasonable for its task of ensuring financeability and meeting its related duties. This is explained in Sections 4 and 6 of KPMG1.
- 6.4 Specifically, and as set out in more detail in KPMG1, the Authority took account of the relevant considerations in its financeability assessment and set out clearly how it proposed to address certain key drivers of financeability, including the nature of the test to be carried out, the benchmarks to be employed in assessing whether a business plan "passes" the financeability assessment and the implications of failure and potential mitigating actions. Importantly, the Authority also tested the resilience of the credit metrics under the Final Determination to plausible downside shocks and ensured that the DNOs had an appropriate financial headroom to enable them to target a certain level of financial risk, ensuring financeability of equity as well as financeability of debt, and hence ensuring that the DNOs can access financing in a sustainable way in the future.

The Authority's assessment of ENWL's individual financial position

- 6.5 As was appropriate, the Authority considered the financeability of each DNO in the context of its individual circumstances.
- 6.6 According to the Authority, the sensitivity of ENWL's financial position was the most pronounced of all of the DNOs.¹⁵ The financeability challenges that ENWL faces have been independently assessed by KPMG who also evaluate the potential impact of the appeal raised by BGT.
- 6.7 As explained in KPMG2, [

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- 6.8 The Authority was therefore correct to give the weight to financeability that it did in the Decision concerning ENWL's financial position. The final price control settlement

¹⁵ Draft Determination – Financial Issues, paragraph 3.30 [BG3/30C]; Draft Determinations – Overview, paragraphs 5.34-5.35 [BG3/30A].

reached by the Authority was finely balanced from ENWL's financeability perspective. Had the Authority paid less regard to ENWL's financeability, it could have significantly compromised ENWL's financial interests. For the reasons described in **Section 2** above, this failure to secure that the licensee can finance its activities would have been contrary to the Authority's primary objective to further the consumer interest (including balancing the claims of current against future consumers), rather than supporting it as BGT asserts.

7 The Authority's approach to consultation was perfectly adequate

- 7.1 BGT is wrong when it alleges that the Authority's Final Determination and the preceding consultation process suffered from procedural defects and that the Authority repeatedly failed to set out sufficient reasons to justify its conclusions or allow effective engagement with stakeholders.¹⁶
- 7.2 ENWL submits that the approach to consultation for RIIO-ED1 was perfectly adequate. Not only did the Authority set out a RIIO-ED1 timetable that provided numerous opportunities for stakeholders such as BGT to contribute to the decision-making process but so did the DNOs in the preparation of their business plans. BGT has made it clear on the numerous occasions afforded to it by the Authority's open and transparent process that it does not agree with all of the details of the Authority's decisions. Evidence in support of ENWL's submission is set out in the First Witness Statement of Paul Royce Bircham (**PRB1**) (attached at **Annex 5**). The fact that BGT did not succeed in its representations does not equate to an error of law on the Authority's part or on any other ground under section 11C of the Act.
- 7.3 The Authority is required to consider all stakeholders' views including "opposing" views.¹⁷ To do this it must ensure that stakeholders have sufficient opportunity to contribute to the process and that all views expressed are considered as part of the decision-making process. It is clear that the Authority satisfied these obligations, as explained in PRB1. Importantly, the Authority has demonstrated in each instance that, having properly analysed the facts during the RIIO-ED1 process, it has reasonable grounds to take a differing view from BGT in each instance.
- 7.4 In particular, the Authority entered into a considered and well-informed debate with ENWL and the other DNOs on the issues of financeability. This process is explained in detail in ROM1. The key point here is that the Authority's extensive consultation enabled the Authority, deploying its considerable expertise and experience, to reach a decision entirely consistent with its statutory duties, which the CMA is asked to endorse. The publications made by the Authority throughout the RIIO-ED1 process show that the Authority acted in a transparent and accountable manner. The Authority set out its evolving thinking and reasons for its decisions at various stages through this process, in particular in its Strategy Decision Document,¹⁸ Draft Determination,¹⁹ and Final Determination.²⁰ The degree of precision with which BGT can frame specific complaints regarding the small details of the Authority's approach is itself testament to the transparency of the price control calculations.

¹⁶ BGT Notice of Appeal, paragraph 1.8.

¹⁷ Strategy Decision, paragraphs 3.1-3.3 [BG2/10A].

¹⁸ Strategy Decision, paragraphs 3.2-3.8 [BG2/10A].

¹⁹ Draft Determinations, Appendices 1-2 [BG2/30A].

²⁰ Final Determinations, Appendix 1 [BG2/35A].

- 7.5 In explaining its reasoning throughout the process the Authority inevitably had to balance transparency with its obligations in respect of maintaining commercial confidentiality concerning the very sensitive nature of information submitted by the DNOs. For obvious reasons of commercial confidentiality about ENWL's projected financial profile – it has listed public bonds in issuance – the section of the business plan covering financial ratio projections was redacted and ENWL requested that the Authority treat the calculations of potential financial ratios as confidential. The Authority accepted the confidentiality of this information and refrained from disclosing information in its consultation process.
- 7.6 In summary therefore BGT cannot complain about the lack of consultation and transparency to the extent that it did not avail itself of all the opportunities to engage with the Authority and the DNOs. ENWL cannot comment on the extent of engagement by BGT with other DNOs but notes that it invited BGT to participate and contribute to its stakeholder engagement process on several occasions. However, BGT did not participate meaningfully in any part of the process, as evidenced in PRB1. The fact that BGT has only now decided to comment on specific issues is unfortunate in timing, but its omission to engage properly at the appropriate time cannot be a factor in its favour in the CMA's consideration of its appeal.

8 Conclusion

- 8.1 The Authority has applied, considered and exercised its “financeability” duty in a manner that is entirely consistent with the correct legal interpretation of the words set out in the Act. Financeability is not a “subsidiary” consideration (or subsidiary duty) that is somehow subordinate to the consumer interest. The consumer interest can be furthered in many ways but whatever is decided it must secure adequate finance to discharge ENWL's obligations. BGT's approach falls at the first fence in that if adopted it would fail to secure the funds required by ENWL to discharge its obligations. The Authority took a view that the interests of consumers, both present and future, would be furthered by the Decision, and ENWL asks the CMA to ratify that the Decision.
- 8.2 As such, the BGT appeal should be dismissed and the relief sought in the Notice of Appeal denied. Should the CMA reach a provisional conclusion to allow any of the grounds of the appeal, given the effect on ENWL's financeability, ENWL would wish to make additional representations on any action proposed to correct any such errors provisionally determined.

Norton Rose Fulbright LLP

20 April 2015

STATEMENT OF TRUTH

I, Paul Royce Bircham, believe that the facts and information stated in this submission are true.

SIGNED

Paul Royce Bircham

Regulation Director of Electricity North West Limited

DATED20/04/15.....